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LAW AND POLICY FOR FOREIGN DIRECT INVESTMENT IN NIGERIA'S OIL AND GAS INDUSTRY.

BY

KELECHI AMASIKE

SUBMITTED TO

THE GOLDEN GATE UNIVERSITY SCHOOL OF LAW, DEPARTMENT OF INTERNATIONAL LEGAL STUDIES, IN FULFILMENT OF THE REQUIREMENT FOR THE CONFERMENT OF THE DEGREE OF SCIENTIAE JURIDICAL DOCTOR (S.J.D)

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LAW AND POLICY FOR FOREIGN DIRECT INVESTMENT IN NIGERIA'S OIL AND GAS INDUSTRY.

BY

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DEDICATION

I wish to dedicate this project to Almighty God, my strength and sustenance. I give all glory to God for His grace and mercies from the start to the finish of this work. And to Mary Mother of God my eternal intercessor.

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Kelechi Amasike Esq

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CHAPTER 1: INTRODUCTION AND BACKGROUND TO THE ECONOMY OF NIGERIA

"We want to refocus Nigeria to make sure that basic infrastructure is provided. The environment is created for private investment, both within and direct foreign investment, so jobs will be created. That is my dream for Nigeria"[1]

1.1 INTRODUCTION

To provide a contextual overview for this thesis, this chapter will provide a background to the geographical entity, Nigeria, analysing its socio-political and economic history. This subject has in fact been the focus of a good number of scholarly works. And the background of this scholarly work will further provide a detailed analysis of the history of Nigeria and highlight its broad linkages to foreign direct investment.

1.2 BACKGROUND HISTORY OF NIGERIA

The political history of the entity known as Nigeria may be divided into three significant periods- pre-colonial, colonial and postcolonial.

1.2.1 Pre - Colonial Nigeria

Precolonial Nigeria is often described as the period between the discovery of archaeological artefacts in the Late Stone Age to the colonization of West Africa by the Europeans traders in the late nineteenth and early twentieth centuries.[2] The history of this time do not bear must relation to the political state, Nigeria as it exists today ,especially in terms of geographical

[1]Goodluck Jonathan, served as the 14th President of Nigeria from 2010- 2015.
[2] See Toyin Falola & Heaton M. Matthew, History of Nigeria 17 (Cambridge University Press, 2008)

boundaries, as that was a design of the British colonial administration,[3] however it may be significant for the purpose of tracing the eventual emergence of the Nigerian state.

The precolonial period was characterised by different forms of state systems and societies. There existed both a centralised and a decentralised state system. which developed between 1000- 1100 millennium CE. This centralised state system was practised by the Hausas, the Yorubas((Ile-Ife), the Kanuris, the Edo and Jukun people.[4] In centralised systems generally, there is a single ruler, who is the sole authority. This ruler often attained this position through religious arrangements, hierarchical or due to their economic influence. At the apex of the centralised system are the Kings[5] and their councils.[6] The monarchical system as practised in Ile-Ife-the birthplace of the Yorubas was typically hierarchical however affluent members of the society could rise to occupy such a position. The centralized system practised here allowed the rapid growth of Ile-Ife because of which it attained regional dominance. It became a major centre for trade and saw the influx of several craftsmen to market their goods. The political structure of Ile-Ife is of great significance because it was the first known centralized state in the region and as such served as a cultural and political model for other Yoruba states. To the east of the Yoruba societies was the kingdom of Benin. This was the central authority in Edoland which comprised Edo and Delta states of precolonial Nigeria. The political system of Ile-Ife and the Benin kingdom were very similar. Like their counterparts in Ile-Ife the Benin Kingdom was a centre of trade housing several artisans such as sculptors, carpenters, and tailors. It also provided an easy access to markets for

[3] Falola and Mattew supra note 2 at p.17 (asserting that: to speak of pre-colonial Nigeria is anachronistic, as over the course of history, different groups of people have migrated in and out of the region, now known as Nigeria. Many societies, vast empires have risen and fallen and none of them have had any direct correlation to Nigeria as it exists today. "

[4] ATANDA, J. A, Government of Yorubaland in the pre-colonial period. 4(2), 1-12 (*Tarikh*, 1971)

[5] Referred to as the Ooni in Yorubaland

[6] IWERIEBOR, E.E, State systems in pre-colonial, colonial and post-colonial Nigeria: An overview 507-513, (*Africa: Rivista trimestrale di studi e documentazione dell'Istituto italiano per l'Africa e l'Oriente*,1982)

neighbouring agricultural communities as such making the kingdom affluent. The emergence of imperial wars promoted slave trade in the

Benin Kingdom and served as a resource which fuelled trade with the Europeans and further increased the wealth and influence of the Benin Territory.

Like the Ife and Benin Kingdom, the Kanem-Borno empire in the Sahel zone was the largest centralized state in the North. It was located northeast of Lake Chad. This city was very wealthy because of its agricultural activities and its distinct location as one of the central routes for the trans-Saharan trade. At the head of the political structure was the *Mai*, a hereditary monarch and his titled officers charged with the responsibility of carrying out his orders. There was also an army for enforcing orders of the Mai in the surrounding cities. This city became a full empire having extended its rule to other areas of the North by the thirteenth century. However, a decline occurred in the authority of the Kanem-Borno empire in the thirteenth century and an emergence of other smaller independent Hausa states in the fifteenth and sixteenth century. [7]

This centralised state structure evolved over time as society progressed. Its dynamism is best exemplified by the evolution of the Hausa empire. There was already the centralized state system by autochthonous Hausa kings in place by the end of the 13th century in the Hausa empire. The spread of Islam in the second millennium also contributed to the development of centralized states. However, after the Jihad by Usman dan Fodio, a different type of centralized state system was put in place based on Islamic principles of government. With the spread of Islam, came a spread in trading activities across the Sahel and savanna. Islam united the traders and helped them identify with one another. The trans-Saharan trade which existed from the time of the Kanem-Borno empire continued to boom and was a significant contributor to the economies of the states in the Sahel and Savanna till the twentieth century.

[7] Falola and Mattew, supra

On the other side of the divide, there was the non-centralized state system or stateless system[8] which lacked formal structures and specific duties.[9] As observed by Falola and Mattew the term “stateless” may be misleading as it implied an absolute lack of any form of political authority and the existence of anarchy which was not the situation in these decentralised states.[10]

This type of political system was typically found in the Eastern and Middle Belt regions of Nigeria among the Igbos, the Idomas and the Ibibios. In this system, sole authority did not lie in a single ruler. These societies were described as acephalous. A distinct feature of these decentralised societies is that decisions were made by an assembly of the entire community. They were also smaller in comparison to communities practising the centralised state system. These stateless societies were viewed as inferior and undeveloped fractions of the centralised societies which were considered the logical extent of political structures. However, sociologists have pointed out that such stateless societies constituted a unique form of societal organisation, and many scholars even described them as more democratic than centralised states.

The economic development of these states occurred alongside its political development. In terms of economics, Animal husbandry was practised among the people of the Lake Chad Region of the Sahel in the Northern area of Nigeria between 3000 and 2000 BCE as evidenced from archaeological findings. Agricultural cultivation started around the second millennium BCE in the Sahel and Savanna regions of Nigeria and involved the growth of cereals. In the Forest and middle belt regions on the other hand, agricultural activity was centred on the growing of yam tubers and oil palm products.[11]

[8] Earlier Scholars referred to them as stateless structures.
[9] Horton. R, a Stateless Societies in the history of West Africa, in J. F. A. Ajayi & Crowder, History of West Africa, (Vol.1, Longman, 1976)
[10] Falola and Mattew, at p.21
[11] Falola and Mattew supra, at p.19

The rise of agricultural activity led to development of permanent settlements and encouraged economic diversification.[12]. During this period, large, centralized states harnessed their agricultural resources generating surplus for regional and international exports. Economic diversification was seen with the international trade in slavery, especially in the South. Slave trade at this period served as an important source of revenue and enhanced access to guns and European luxury goods which promoted the consolidation of political power and wealth.[13] Iron smelting activities at this time encouraged the growth of local economic trade and blacksmiths and other individuals skilled in metal work soon rose to a place of prominence.

1.2.2 Colonial Nigeria

By 1900, colonial rule was firmly established in Nigeria and in January 1914, Lord Lugard[14], the Governor General at that time, fused the administration of the Northern and the Southern region together, a situation which was termed "the Amalgamation.". Several reasons were advanced by Lord Lugard as necessitating the Amalgamation. They include; The financial viability of the Southern region over the Northern region, while the latter accrued substantial revenue from the sale of goods and taxes, the Northern region was still dependent on the British colony for annual aids.[15] As expressed then by Lord Lugard, ' Nigeria's aggregate revenue was equal to its needs but the 'arbitrary line of latitude' that divided the country into two created economic and financial

[12] This economic diversification can be seen in the development of iron tools in many parts of Nigeria in the first millennium e.g., in Taruga in Abuja, centre of the Nok culture, and Opi in the Southeast

[13] Falola and Mattew supra note 11 at p.41.

[14] Fredrick Donald Lugard born on 22 January 1858 was the High Commissioner of Northern Nigeria from 1900 to 1906; Governor of Northern and Southern Nigeria from 1912 to 1914 and Governor-General of Nigeria from 1914 to 1918. He died on 11 April 1945.

[15] Ojo. O. E, Nigeria, 1914-2014: From Creation to cremation? In Journal of The Historical Society of Nigeria, 2014, 69 (pp. 67-91 Vol. 23, 2014)

imbalance and anomaly. The removal of this 'arbitrary [financial] line of latitude' was the major aim of the amalgamation.''[16] Another reason was the conflicting control of infrastructure.

The political structure at this time was made up of two tiers of government, at the central level and the regional level. At the central level was a single colonial authority for the entire country. This comprised the Governor, a legislative council, an advisory council, the legislature, the judiciary, the police and a military force. The second tier of government existed at the regional level. It comprised the Governor, a judiciary council for the region, and "local" police. This system of administration at the regional level was referred to as indirect rule because the colonial masters purported to exercise authority over the communities through the political and leaders' institutions already in place. "With the imposition of colonial domination, the colonial power's state system, structure and its values were imposed on Nigeria."[17] Thus, in theory, colonialism established Nigeria, a liberal democratic state. However, in practise, an ideal democracy could not thrive[18] As argued by Professor Claude Ake in his controversial book[19]

> "*One could not be a coloniser and a democrat simultaneously. If the coloniser allowed popular participation in the government, that would bring an end to colonialism. Irrespective of how much the coloniser promoted democracy - the main objective of his politics was the exclusion of the subject population from government".*

[16]Report by Sir F. D. Lugard on the Amalgamation of Northern and Southern Nigeria and Administration, 1912-1919 (1920)', 7. File RG/L4, National Archives Ibadan (NAI). This Report was presented to the British Parliament in December in Ojo O. E, Nigeria, 1914-2014: From Creation to cremation? In Journal of the Historical Society of Nigeria, 2014, 70 (pp. 67-91 Vol. 23, 2014)

[17] Iweriebor supra

[18] This was partially because of racism, and partially due to the economically exploitative motive of colonialism. Several restrictions were in place that restricted the administration of a full-fledged democracy such as grant of franchise to certain persons and areas, absence of universal adult suffrage, nonexistence of formal rights.

[19]Ake. C, Revolutionary pressures in Africa, 86 (Zed Press,1978)

All administrative structures and policies during the periods were aimed at full exploitation of the natural and mineral resources of Nigeria. This exploitation was carried out by the colonial masters and a minute class of emergent Nigerian merchants. The state structure in place lacked any form of legitimacy as such exercise of power was based on control of the instruments of violence such as the police and the military. A significant feature of this period was also the emergence of various constitutions. There was the Richard Constitution of 1946 which formalised the devolution of the administrative structure and gave broad political powers to each unit. This was followed by the Macpherson Constitution of 1951 which created regional legislative bodies, introduced the concurrent legislative list and established an executive council for the central government. This constitution was replaced by the Lyttleton Constitution which provided for separate institutions of government at all levels.

1.2.3 Post-Colonial Nigeria

This period of Nigeria's history can be divided into two phases, that is, the periods of democratic rule from 1st October 1960-14th January 1966: 1st October 1979 - 31st December 1983 and 29th May 1999 to date. And the periods of military dictatorship from 15th January 1966 - 30th September 1979 and 31 December 1983 - 28 May 1999.[20]

On October 1, 1960, Nigeria became an independent nation by an act of the British Parliament. The socio-economic policies administered during the colonial rule caused the emergence of wide social classes. These classes included the comprador bourgeoisie, the bureaucratic bourgeoisie, and the working class. State power was concentrated in the hands of the emergent bourgeois class. The emergent bourgeois class included owners of property, doctors, merchants, lawyers,

[20] Ojo, supra

businessmen, etc. These emergent bourgeois classes benefited from the colonial administrative policies and socio-political order and as such, efforts were made by these classes to maintain the status quo. At the departure of the colonial masters, the emergent bourgeois class in collusion with the departing party fashioned a detailed constitution modelled after the British Westminster system. This Independence Constitution of 1960 conferred full independence on the entire federation and remained in force until 1 October 1963 when the country became a republic.[21] The Independence Constitution of 1960 and the Republican Constitution of 1963 were similar with minor differences.[22] Both constitutions maintained a parliamentary democratic system of government both at the central and regional levels. In terms of structure at the central level, the independence constitution provided for a ceremonial Head of State-to be a constitutional monarch, that is the Queen of England to be represented by a Governor-General,[23] a Head of Government (President) who exercised executive powers, Prime Minister, a Federal Executive Council to be headed by the Prime Minister and a cabinet of Ministers. At the regional level, the Head of State and the Head of Government were the Governor and Premier respectively. However, under the 1963 Constitution, the Head of State is a constitutionally elected president. The Independence constitution made provision for a bicameral legislature-comprising the House of Representatives and the Senate- and an independent judiciary to carry out a sound interpretation of the constitution and adjudication of cases. Theoretically, the constitution provided for the citizens as the custodians of all sovereign power who exercised this power through their elected representatives in executive and legislative positions.[24] However, in practice

[21] Gberevbie.D. E, Post Colonial Nigeria: Power and Politics in The First Republic, 1960-1966. In: Understanding Government and Politics in Nigeria. pp 53-74. (2014)
[22] Osaghae, E. E, Nigeria since independence: Crippled giant. (*London: Hurst & Company*, 1998)
[23] See Section 79 of 1960 and 1963 Nigerian Constitutions
[24] This provision is similar to section 14(2) of the 1999 Constitution as amended.

the political elite used state power to advance their class interests with no regard for the citizens from whom they derived power.

The 1963 Republican constitution replaced the 1960 Independence Constitution and ushered the First Republic between 1963 - 1966. This constitution was introduced to erase the remaining traces of colonialism in Nigeria, however, it appeared only to do so in theory.[25]The First Republic was fraught with several structural and institutional contradictions. First, the constitution provided for a parliamentary democratic government. However, the political institutions in place were relics of the colonial period and as such were authoritarian in theory and practice. The inconsistencies between these two systems resulted in political and social instability, economic strife and mismanagement, tribalism and ethnic conflicts all of which culminated in the failure of the purported parliamentary democratic rule. Several other features worthy of note characterised this First Republic. They include.

1. The formation of ethnic based and regionally inclined political parties which promoted regionalism with dire consequences for national unity and political stability.[26]
2. Marriage of convenience between political parties: Akinsanya (as cited in Gberevbie, 2014) described the coalition of the NPC and the NCNC[27] at the federal level as an anomaly which necessitated the cooperation of two political parties whose ideologies were diametrically opposed. While the NPC was regionalist, aristocratic, gradualist, and traditionalist, the NCNC was populist, radical, nationalist, and egalitarian and populist.[28] Asia (as cited in Gberevbie,

[25] Gberevbie, supra note at 20.
[26] Asia. G. O, *Nigeria: In search of balance*. (Vantage Publishers, 2001)
[27] The Northern People's Congress (NPC) was the dominant party in the North. The National Council of Nigeria and the Cameroons were the leading party in the Eastern and Midwestern Region
[28] Akinsanya. A, The Inevitability of Instability in Nigeria. In A. A. AKINSANYA, AND AYOADE, JOHN A (Eds.) Readings in Nigerian Government and Politics pp. 20-85 (ljebu-Ode: Gratia Associates International,2005.)

2014) however noted that despite this unstable union, the NPC and NCNC nevertheless asserted itself as the ruling coalition party.

3. Political Intolerance: The political scene in the First Republic reflected great political intolerance both at the federal and regional levels. Several individuals who stood in opposition to the government such as Joseph Taka of the United Middle Belt Congress and Dr Chike Obi of the Dynamic Party (DP) were summarily tried and convicted of treason and sedition respectively.[29] Other instances exist[30] where several unfounded charges were brought against individuals who opposed the government. These convictions were viewed by members of other opposition from the Middle Belt, West and Midwest as vindictive and heightened notions of discredit towards the political and judicial system of the government.
4. Disunity within the AG and the Western Region Crisis: Constant disagreement on administration of the Western region and relations at the Federal level within the Action Group culminated in political unrest with the Western region. Osaghae(as cited in Gberevbie,2014) stated that while Chief Obafemi Awolowo espoused the ideology of social democracy and sought to make the party more influential by aligning it with other regions, the Regional Premier, Chief Samuel Akintola on the other hand advocated for a coalition of all the parties at the Federal level and a cordial rather than an opposition relationship with the National government.[31] Inability to reconcile these ideologies and several other clashes[32] between the personalities contributed to the crisis within the Western Region and the eventual collapse of the First Republic.

[29] Asia, supra note at 25.

[30] Chief Obafemi Awolowo and a supporter, Chief Anthony Enahoro were accused of smuggling arms with the intent to overthrow the coalition government. They were tried on charges of treasonable felony, convicted and imprisoned for 10 years.

[31] Osaghae. E, Nigeria Since Independence: Crippled Giant (John Archers Publishers Limited Ibadan, 2002.)

[32] As leader of the Action Group (AG), Chief Obafemi Awolowo expected that he should be consulted on policy changes and major political appointments within the region. Akintola, as Premier did not appreciate these limitations.

5. Minority fears and agitations for more states: the dominance of the majority ethnic groups over the minority ones caused bitterness, raised minority fears and led to the agitations for the creation of more states and regional boundaries. Minority political groups such as the Middle -Belt Zone League, Calabar-Ogaja-Rivers Movement and the Midwest State Movement were created to advocate for the creation of more states. Elaigwu (As cited in Gberevbie,2014). Due to the agitations of these groups, a bill for the creation of three more states was presented before the Federal Parliament. However, only the creation of the Mid-Western Region saw the light of day. [33]

6. The Census Crisis of 1962: The population distribution in the First Republic remained a pertinent issue as population was a basis for allocation of seats in the federal parliament[34], revenue and resource allocation, a measure of political strength, and priority for the development of infrastructure and social amenities.[35] As control of political power was based on population, it was easy for the Northern Region to dominate the First Republic political scene. Oyediran[36] opined that the NCNC and the leaders of the Southern Region viewed the 1962 census as an opportunity to correct the uneven population distribution and prevent the continued dominance of the North. The results of the census showed higher results for the Eastern and Southern Region, however the Northern Region alleged foul play and protested. According to Adigwe[37], “the result of this was that the census figures were never published and the whole census had to be cancelled on account of harsh criticism”. Another census was organised in 1963. This census put the

[33]See Adigwe F, Essentials of Government for West Africa. (University Press Limited, Ibadan,1985), Osaghae. E, Nigeria Since Independence: Crippled Giant (John Archers Publishers Limited Ibadan, 2002.)

[34] Based on the figures obtained in the 1952/1953 census, 174 out of the 314 seats were allocated to the Northern Region, 73 to the Eastern Region, 62 to the Western region, and 2 seats to Lagos.

[35] Oyediran, 0. Background to Military Rule. In O. Oyediran (Ed.), Nigerian Government and Politics Under Military Rule 1966-1979 pp. 1-24, (London: Macmillan Press Ltd, 1979)

[36] KING. M, LOCALISM AND NATION BUILDING (Spectrum Books Limited Ibadan,1988.)

[37] Adigwe, supra

country's population at 55,653,821. The breakdown put the population of the Northern Region at 29,777,986; the Eastern Region at 12,388,646; the Western Region at 10,278,500, Mid-Western Region at 2,533,337; and Lagos at 675,352[38]. This result was rejected by the NCNC led Eastern regional government, who alleged fraud by the Northern Government and challenged the results in court. These results were however declared valid by the Prime Minister and caused further political division.

7. Formation of Alliances and Realignments of Political parties: The federal parliamentary election of December 1964 was scheduled to be the first general elections in Nigeria post-independence. This election saw the alignment and realignment of political parties to create a stronghold for the election. At this time, the imprisonment of Chief Obafemi Awolowo of the AG, weakened their political strength as an opposition party at the federal level and caused political realignments. The Nigerian National Democratic party (NNDP) led by Akintola who spearheaded political activities in the Western region aimed at continuous alignment with the NPC/NCNC led national government. The NCNC on the other hand felt underrepresented in the government and sought alliances with other parties. This breed distrust between the NCNC and the NPC and resulted in the two parties parting ways.[39] These realignments of parties created two alliances as contenders for the December 1964 election. One alliance was the Nigerian National Alliance (NNA), which comprised the Nigerian National Democratic Party (NNDP), the Northern People's Congress (NPC), the Midwest Democratic Front (MDF), Nigeria Party (DP), and the Midwest Democratic Front (MDF). The second alliance was the United Progressive Grand Alliance (UPGA) which comprised the NCNC, AG and the Northern Progressive Front (NPF). Osaghue[40] observed that

[38] Adigwe, supra
[39] Asia, supra
[40] Osaghae, supra note at 30; Lkelegbe.A, Issues and Problems of Nigerian Politics (Lagos: Imprint Services, 2004)

despite the cross-regional outlook of these alliances, their character showed a North versus South group.

8. The Federal Elections of 1964: The contenders in the election were the two political parties formed from the realignments and alliances, namely the Nigerian National Alliance (NNA) and the United Progressive Grand Alliance (UPGA). This electoral process was fraught with great violence, harassment, assassination of opponents, and widespread allegations of plots to rig the election.[41] This led to the eventual suspension of the election exercise. When it was eventually conducted, it was largely characterised by harassment that necessitated the involvement of the armed forces in the electoral process as the Federal Electoral Commission had lost its integrity.[42] As a result of the corrupt electoral practices, the UPGA boycotted the election by urging its members who were part of the Federal Electoral Commission to resign in protest of the unlawful prosecution, harassment and killing of its members. Despite this, the elections were still conducted. The results of the election were an overwhelming win for the NNA as most of their candidates were declared unopposed. The NPC retained control of the National government and the Northern Region, and the NCNC had control of the Eastern and Mid-Western Region. The Tafewa Balewa NPC led government invited Dr Nnamdi Azikiwe to serve as Prime Minister, a position which he declined, leading to a constitutional stalemate. This situation was however resolved after several negotiations which saw a reconstitution of a new government by Dr Nnamdi Azikiwe and Tafawa Balewa.[43]

This First Republic was however short-lived as the military junta on January 15, 1966, seized political power and ushered in the military government. The Western Election Crisis of 1965

[41] Metz. H. C, Nigeria; A Country Study (Washington: GPO Library of Congress, 1991)
[42] Dudley. B, Instability and Political Order: Politics and Crisis in Nigeria (University Press Ibadan 1982)
[43] Dudley, supra

cemented the series of events that resulted in the eventual collapse of the First Republic. This election was characterised by the same sort of violence and irregularities experienced in the Federal Parliamentary elections of 1965. This resulted in a complete breakdown of law and order beyond the curtailment of the government and saw the eventual collapse of the First Republic.[44] The entrance of the military marked the beginning of the second regime after independence. This regime lacked political and social legitimacy. This incursion was justified on allegations of misappropriation by the civilian government and the need to ensure peace, order and equitable development. However, as a matter of fact, this easy access to power was due to their monopoly of the state instrument of coercion. In line with their agenda to right the wrongs of the civilian government, the military peddled an inane reformist ideology. However, as products of colonialism they were unable to rise above their unique origin and the state and undertake this progressive ideology of development. They administered the state in collusion with the corrupt leaders and bureaucrats they deposed. In the opinion of Ehiedu[45] The regular threats of countercoups and countercoups suggests that the reformist ideology of the military was an inadequate ground for the seizure of power. The military government with its traditional hierarchical structure imposed on Nigeria a highly centralised state structure. At the Central level, this structure comprised the Head of State, the Supreme Military Council (SMC), the Federal Executive Council (FEC) which comprised both commissioners who were members of the Armed Forces and Civilians. The commissioners oversaw ministers which executed the policies of the military government. The various states were headed by military governors responsible for appointing their cabinet. In October 1979, there was a transfer of power from the

[44] Gberivihe, supra note at 24.
[45] Ehiedu. E.G. Iweriebor, State Systems in pre-colonial, colonial and post-colonial Nigeria: An overview in Africa: Rivista Trimestrale Di Studi E Documentazione Dell'istituto Italiano Per L'africa E L'oriente. No. 4, pp. 507-513, p. 12 (Istituto Italiano per l'Africa e l'Oriente, 1982)

military to the civilian government and the emergence of a new constitution.[46] This constitution provided for an executive president to administer the entire nation. It also provided for three tiers of government namely the executive, a bicameral legislature and the judiciary. The executive comprised the President, the Vice President, his cabinet and the Armed Forces. The bicameral legislature comprised the House of Representatives and the Senate while the judiciary comprised judges appointed by the executive. At the state levels, the executive and judicial structures were maintained with a unicameral legislature. [47]

Following the takeover of the military, there were increased agitations for the creation of more states. This led to the division of Nigeria into twelve states in May 1967. In the heat of Ethnic hostilities from the coup and counter coups of 1966 which resulted in the mass killings of Igbos in Northern Nigerian, the civil war started in 1967. After several months of war and strife between Biafra and the Federal Republic of Nigeria, the civil war ended on 15th January 1970. Post civil war in 1970, it was apparent that the country faced a very huge problem of national unity. The civil war had caused political displacements in the Midwest and Eastern states. To carry on as a nation, trust had to be established and social gaps closed.[48]

1.2.4 Geography of Nigeria

The Federal Republic of Nigeria is situated along the coast of West Africa, Africa. It is located between Latitude 4°N and 15°N and Longitudes 4ºE and 15ºE. The Country's southerly border is north of the equator, while her northerly border is roughly 14º N. On the other hand, Nigeria's westerly border runs along the line of longitude 15º E and her eastern border falls along a point to the southwest of the estuary

[46] Audu M., and Oshewolo. R, Nigeria up to 1914: Some Emerging Political and Economic Issues. In: Ajayi R., Fashagba J.Y (eds) Nigerian Politics. Advances in African Economic, Social and Political Development, page 25-35 (Springer, Cham, 2021)

[47] Ehiedu, supra

[48] Ekundare. R. O, Nigeria's second national development plan as a weapon of social change in AFRICAN AFFAIRS VOL. 70, No. 279, pp. 146-158 (Oxford University Press, 1971)

of the Cross River to northwards almost longitude 15° E. The country possesses proximity with the great curve created in the west by the continent of Africa. She has a total land area of 923,768.00 sq. kilometres.[49] The country is bordered by the Atlantic Ocean to the south and Niger Republic to the north. Meanwhile, on the west Nigeria is bordered by the Benin Republic to and belted by Chad and Cameroon by the East.[50] The country is endowed with many rivers, having two prominent ones, Rivers Niger and Benue.

Nigeria is divided into two physical zones, the south, the forest zone, being endowed with tropical forests and tall grass derived savannah and the north, the grassland zone, possessing a natural savannah and an almost desert condition sub-zone.[51] She comprises seven relief zones, which along with the Gulf of Guinea proximity, leads to multiple changes in the climate varying from humid tropical obtainable in the south to the arid semi-desert obtainable in the north.[52]

The climatic conditions of the country are of tropical (or equatorial and semi-equatorial) nature, thus the country experiences dry and wet seasons.[53] The rainy season is usually between April to October, while the dry season lasts between November to March of each year. The former is characterised by high humidity and a large amount of rainfall, although in recent years due to factors such as climate change there has been drastic changes. The rainy season is usually more intense in the south when compared to the North and a reverse situation is obtained with the dry season. It decreases form about 4000mm in the Niger Delta, southern Nigeria, to about 250mm in the extreme northeast.[54] Thus, the dry season is less

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[49] Federal Ministry of Environment (2019), Federal Republic of Nigeria; Natural Forest Reference Emission Level (FREL) For the Federal Republic of Nigeria; Retrieved on December 23, 2021. 2019_submission_frel_nigeria.pdf (unfccc.int)

[50] Ifemesia C.C. (1982), Nigeria: The Country of The Niger Area, In Boniface I. Obichere (Ed.), Studies in Southern Nigerian History, Frank Cass Publishers, London.

[51] Darden B. & Udogu E. (2011) *Nationhood Preclude to the Nigerian Civil war,1960-1967, G.N. Uzoigwe.* Africa Today. Vol.58 No.1 P. 129-133

[52] Falola Toyin (2001) Culture and Customs of Nigeria (ed.1) Greenwood Publishing Group

[53] Njoku O, *Economic History of Nigeria, 19th and 20th Centuries*, (6th ed.), (*Magnet* Business Enterprises, Enugu, Nigeria, 2001).

[54] Ologe K. (2017) Lecture: The Geography of Nigeria. Retrieved from Nigerian Open University at https://portal.nou.edu.ng/sites/default/files/2017-03/CSS%20134%20GEOGRAPHY%20NIGERIA.pdf

than three months in southern Nigeria but more than nine months long in the extreme part of the North. The distribution of rainfall along with other little factors[55] usually impact the quality of vegetation in the above areas.

Asides, its large land mass, Nigeria is commonly referred to as the giant of Africa, consisting of the largest population within Africa. The country's total population of 206,140,000 million people as of December 2020[56], makes it the largest country with blacks in the world.[57] The country is a multiethnic nation having over 250 ethnic groups, each with its distinct culture and language.[58] The major ethnic groups are the Hausa mainly living in the north, the Yoruba living mainly in the south-west and the Igbo which are situated mainly in the south-east.

With minor changes in the origin of the territory referred to as Nigeria in modern day, the territory's origin is traceable to the year 1900. The year signified the formal proclamation of the colonial imposition of the territory carved out as and referred to as current day Nigeria. This was subsequently followed by the amalgamation of the southern protectorate and northern protectorate comprising of the present Nigeria in the year 1914, under the amalgamation of Governor Frederick Lugard.[59]

However, this should not be misconceived as the start of communication amongst the human societies occupying this territory. This is because prior to the imposition of the British Colonial rule, historical documents record the existence of established forms of trade, religious, political and social association between communities occupying modern day Nigeria.[60] These communities merely existed

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[55] The topography of the ground and the groundwater usually impacts.

[56] Demographics of Nigeria Retrieved on 22 December, 2021 from https://www.statista.com/topics/6477/demographics-of-nigeria/

[57] Ibid

[58] Ibid

[59] Ibid

[60] E.O. Erim, "Pre-Colonial Antecedents of the Foundation of the Nigerian Federation: Theoretical Consideration", in J.I. Elaigu and E.O. Erim (eds.), Foundations of Nigerian Federalism: Pre-Colonial Antecedents (Abuja: National Council on Intergovernmental Relations, 1996), pp. 11-18.

independently relating for several forms of mutual benefits.[61] Subsequently, upon colonization of the region referred to as Nigeria, there were several mergers of these communities for various purposes, particularly ease of political administration. Subsequent activities increased national cohesion and development of the state. More so, an endowment of diverse natural resources in the several geographical regions within the country, promoted economic activities, inter-state and international trade. Thus, to gain a proper understanding of the impact of Nigeria's geography and population on its economy, an analysis of the several geographical zones of the country and their unique contributions to the national economy is essential.

1.2.4.1 The Nigerian Geographical Regions

Nigeria is known for its diversity in both its physical environment and culture. History shows that the physical geography of the country has been vital in the shaping of the culture, religion, political administration, policies and laws. The country consists of different physiographic features which affect its natural endowments. There are several coastal areas, extensive plateau surfaces such as the Udi Plateau, the Jos Plateau and the north central high plains. The north is characterised by plains, the south by lowlands and the central belt by plateaus and hills.

The different geographical areas of Nigeria include the coastlines of Guinea, The Middle Belt and The Nigerian Sudan and the Eastern Borderlands.[62] The coastlines of Guinea consist of the Lagos metropolitan area, the creeks and lagoons of Southwestern Nigeria, The cocoa belt of Yorubaland, the Benin lowlands and the lower Niger Valleys. The middle belt on the other hand comprises of the middle Niger region, the Grass plain of Southwestern Nigeria, the Jos plateau, the dissected uplands of Afenmai, Ekiti and western Kabba, the Cross River Basin, the Benue valley, the Bauchi and Gongola plains and

[61] Ehiabhi, S. O. A Discourse on Nigerian Pre-Colonial History. Retrieved on December 29, 2021 at Microsoft Word - A History of Pre-Colonial Nigerian History (sau.edu.ng)
[62] Ibid

the central high plain of Northern Nigeria. Lastly, The Nigerian Sudan and the Eastern borderlands consists of the Sokoto and the Rima Basin, the Kano region, Borno and the Chad depression and the Eastern borderlands.[63]

1.2.4.2 The Coastlines of Guinea

The coastal zone of Nigeria comprises a large sparse area of land, approximately 853km, four geomorphic units and has a 210,900km^2 exclusive economic zone. It covers the southern part of Nigeria. It is known as the area with the richest biodiversity and mineral resources, possessing the longest geomorphic unit (450 km).[64] One of its areas, the Niger Delta possesses the largest expanse of mangroves, however degraded due to little conservation. The coastal region possesses a rich wildlife which is unfortunately exploited, threatening endangered species. A major cause, being a poorly regulated process, is the massive oil exploration in the Niger Delta area. Report shows an estimated 37.4 billion barrels of crude oil and 187 TCF of natural gas reserves in the Niger Delta. This is because of the heavy economic dependence on oil, accounting for over 90% of Nigeria's foreign exchange earnings.[65] Other factors causing this exploitation include unregulated sand mining, deforestation, untreated effluent discharges and invasive species.[66]

According to the United Nations Conference on the Law of the Sea, Nigeria has jurisdiction over its coastline region which extends to about 320 km of the Atlantic Ocean.[67] Consequently, this vests in Nigeria sovereign rights over the mineral resources located in the seabed as well as all the wildlife.

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[63] Reuben UDO (1970) GEOGRAPHICAL AREAS OF NIGERIA (1st ed.) University of California Press.
[64] NENIBARINI Z. & BOLAJI BABATUNDE (2019) WORLD SEAS: AN ENVIRONMENTAL EVALUATION, VOLUME 1: EUROPE, THE AMERICAS AND WEST AFRICA (2nd ed.) Academic Press
[65] ODULARU G. (2008) CRUDE OIL AND THE NIGERIAN ECONOMIC PERFORMANCE. Oil and Gas Business. Retrieved on 23 December,2021 from https://www.researchgate.net/publication/228627073_Crude_Oil_and_the_Nigerian_Economic_Performance
[66] Ibid
[67] Egede Edwin *The Nigerian Territorial Waters Legislation and the 1982 Law of the Sea Convention,* The International Journal of Marine and Coastal Law *Vol.* 2004

1.2.4.3 The Middle Belt

This area is in the central part of Nigeria, it is the belt of the south of northern Nigeria and the north of southern Nigeria.[68]possessing a big and diverse multi-ethnic religious geographical area. The middle belt is not as densely populated as the south and the north, however it covers about two-fifths of Nigeria's land area.[69] Although, there have been arguments as to the certain definition of the middle belt composition, certain scholars have proposed their various studies. The area comprises the following states Abuja (the capital of Nigeria), Benue, Plateau, Kwara, Southern Kaduna, Kogi and parts of Adamawa, Niger and Taraba States.[70] Some of the ethnic groups found in the area include Tiv, Idoma, Birom, Bassa, Hausa, Fulani and several others. In Nigeria, the region is classified as the least developed in diverse sectors such as its security, infrastructures and employment. Consequently, the region is experiencing a serious economic decline.

1.2.4.4 The Nigerian Sudan and Eastern Borderlands

The Nigerian Sudan and Eastern borderlands represent the area marked as Northern Nigeria. Northern Nigeria is located between Longitudes 3° E and 15° E and Latitudes. This is the largest region in the giant of Africa, Nigeria, making over 70% of the land mass. This region contains salient physiographic features distinguishing it from other parts of the country. The plateau of Bauchi which rises to a height of over 4000 feet above sea level is situated at the centre of the region, it is marked off from the lower plains by precipitous walls on the north and the south.[71] The region is blessed with several mineral resources such as crude oil and tin.

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[68] Emmanuel J. & Vahyala A., *The Myth and Reality of Middle Belt Geo-Politics in Nigeria: A Discourse,* Journal of Culture, Society and Development Vol.10 2015

[69] Ibid

[70] Ochonu Micheal (2014) Colonialism by Proxy: Hausa Imperial Agents and Middle Belt Consciousness. (1st ed.) Bloomington: Indiana University Press

[71] Falconer J. *The Origin of the major features of the Geography of Northern Nigeria.* The Geographical Journal Vol.37 No.2 Pp. 180-185. (1911)

An overview of the geography of Nigeria helps in providing a clearer contextual background of our project study. The diversity of her physiographic features has contributed to its economic growth. However, the government's major focus on the oil and gas sector has brought about both benefits and challenges to Nigeria's economy. This section has provided some of the areas with which exploration of crude oil is undergone.

1.3 The Economy of Nigeria from Colonial Periods till Date Inclusive of The GDP And GNP

Before the introduction of cross border trading activities and the influx of the Europeans, Nigerians were actively involved in subsistence economic activities such as the production of food crops for the sustenance of the community. They were also in place, the trade-by-barter system, the practice of exchanging goods for goods. The people were also actively involved in hunting, and the making of crafts such as metal smelting, basket and cloth weaving. Illegitimate trading of slaves was also prominent in the pre-colonial periods, leading up to the coming of the British colonial masters. No definitive boundaries existed between the economic and socio-political history of Nigeria. Economic power was somehow linked to political power both in the case of centralised states or decentralised states. Claude Ake in his controversial piece of work[72], defining the relationship between the African bourgeoisie and proletariat viewed it as a patron-client relationship characterised by strategic alignments between economic and political power.

The economy of Nigeria during the colonial period can be described as disarticulated,[73] it was merely an extension of the colonial state. Despite this however, large funds were expended on the construction of roads, building of amenities and power generation. This construction carried out by the colonial administrators was to facilitate the exportation of raw materials to Britain. The main aim of the British government was the nationalisation, of the economy. This began when control of trade was taken from

[72] Ake, supra note at 18.
[73] An economy that is disarticulated has parts of sectors that are not complementary.

the Royal Niger Company. The economic policies of Lord Fredrick Lugard were aimed at replacing locally produced goods with imports. This involved the imposition of taxes on native manufacturers and the exemption of European manufacturers from taxation, which discouraged the growth of local industries. A uniform currency system was also introduced across British West Africa to promote the growth of trade. The levying of taxes by the colonial government created wage labour and encouraged increased production of export crops. Thus, the economy of Nigeria transitioned quickly from a subsistence agricultural system to an export-based agricultural economy. In this export-based economy, the farmers were compelled to market their products through statutory marketing boards. These marketing boards included Nigerian Cocoa Marketing Board (1947), the Nigerian Oil Palm Produce Marketing Board (1949), the Nigerian Groundnut Marketing Board (1949), and the Nigerian Cotton Marketing Board (1949). The objective of these boards was to ensure uniform prices of cash crops; they were however unfavourable to the farmers. And led to several objections from Nigerians. Thus in 1954, the national marketing boards were replaced with regional marketing boards. Despite these, the colonial government still exercised substantial control over the export of these cash crops. They also enacted unfavourable ordinances aimed at ensuring that the mineral exploitation and land utilisation were the rights of the colonial state. These ordinances include the Public Land Acquisition Ordinance, the Mineral Ordinance, the Crown Lands (Amendment) Ordinance and the Appointment and Disposition of Chiefs (Amendment) Ordinance.[74] The sole aim of the colonial administration mineral ordinance was to extinguish pre-colonial mining activities and to exclude both foreign and domestic investors from exploiting these resources. Thus, they sought to develop the Oil and Gas/Mining industry but without the participation of Nigerians. In the agricultural space, they restricted any form of foreign capital investment.[75]

[74] Aiguosatile Otoghile, The Evolution of The Nigerian State: An Overview

[75] In 1911 and 1920 specifically, the Governor General rejected offers by foreign investors to establish agricultural plantations in parts of the country.

Participation of Nigerians in business and economic development were often given out as political favours making the economic administration very ineffective. The implication of this was that the oil boom in the 1960s did not have any significant impact on the economy of Nigeria or standard of living of its populace, but instead fuelled strife among the elite, who wanted the funds for their personal purposes[76]. The colonial administration maintained the traditional system of land ownership thus restricting the free movement of people from one place to another. Thus, people who migrated from one area to another in search of greener pastures were unable to own land in their new location. In addition to this, there were two contradictory land ownership policies in place in the North and the South. While there was a system of individual land tenure in the South, non-Northerns and non-Nigerians were prevented from acquiring land. The colonial state in totality discouraged any form of private enterprise thus fully nationalising the Nigerian Economy. During this period, there was no deliberate policy of development between 1900-1910. There were also no records of internal production figures, however there were several indications of growth of internal and external trade such as imports, exports, public revenue, public expenditure, electricity generated, and development of road and rail systems that were monitored to determine progress.[77] The social and economic policies of Britain at this time were simply the efficient administration of Nigeria, maintenance of peace and the expansion of trade. All resources expended towards these causes were sourced within the colonies. The first attempt at a deliberate economic policy was the Colonial Development and Welfare Act of 1929, however the great depression, and deflation hindered any substantial aid to the colonies. The second attempt, the Colonial Development and Welfare Act of 1940 was designed to enlarge aspects of assistance to the colonies in terms of loans and grants financing for business. However, like the first Act, the implementation of this policy did not

[76] Papaioannou And Dalrymple-Smith, Political Order in Nigeria in The Economics of Peace and Security Journal p. 50 Vol. 10, No. 1 (2015)

[77] See Wolfgang Stolper, Economic Development in Nigeria in THE JOURNAL OF ECONOMIC HISTORY, Vol. 23, No. 4, pp. 391-41 at page 398 (Cambridge University Press, 1963)

see the light of day. Another Act was introduced in April 1945, this Act required all colonies to present a 10-year development plan. The plan from Nigeria amounted to £55 million of which £23 million was to be generated from revenue derived under the Colonial Development and Welfare Act. This plan was criticised on the ground that it did not contain any definite objectives of national growth and Nigerians, its beneficiaries, did not participate in its formulation.[78] Building on the criticisms and failures of the 10-year plan development strategy, a revision was carried out for the years 1951- 1956.[79] The International Bank for Reconstruction and Development was tasked with the duty of carrying out an economic survey in 1953[80]. Recommendations of the report included that the government give priority to agricultural research, extension, survey and demonstration. To promote industrialisation, credit facilities, technical and management assistance should be given to small businesses. The Mission's report also called for a review of development boards to ensure they contribute more effectively to the economy.[81] This led to the development of four governmental programs for the years 1955-1960. This programme was modified in 1958 and extended to 1962 in view of the independence and to make it a truly national policy, one designed by Nigerians for Nigeria.[82] However only the Western Region developed a second five-year plan in 1960.[83] In terms of Gross Domestic Product (GDP), the economy grew at an average rate of about 4 percent per year between 1950 and 1960. The GDP in 1950 was estimated at £699.3 million and increased to £1,023 million in 1960. There was also an increase in consumer spending from £609.4 million to £870million, indicating an increase in the standard of living. A substantial increase also occurred in Gross fixed domestic investments from 7 percent to over 15 percent within the same period.

[78] Ekundare, supra at 47

[79] A Revised Plan of Development and Welfare for Nigeria, 1951-1956 (Lagos: Government Printing Office, 1951)

[80] International Bank for Reconstruction and Development, The economic development of Nigeria: Report of a mission (Federal Government Printer Lagos, 1954)

[81] See Ekundare, supra note 51 at 148.

[82] See Wolfgang, supra 50 at p.400.

[83] No new program was issued by the Federal Government or by the Northern Region Government, beyond the annual capital budgets. The Eastern Region produced a Development Programme 1958-62 (Enugu, 1958). The Western Region Development Plan 1960-65 was published as Sessional Paper No. 17 of 1959 (Ibadan, 1959).

All these indicators were considered good when viewed by the standards of underdeveloped countries. Several other parameters used in measuring development such as exports, imports and road systems showed a substantial increase in economic development. [84] The years of development and increase were however marred by certain factors such as a change from export surplus to import surplus, a drop in sterling assets and a growth in GDP at a falling rate.

1.3.1 Economy of Nigeria Post -Independence / First National Development Plan

At independence, Nigeria was economically a vigorous going concern.[85] The First National Development plan was formulated in 1962 for

> "'the achievement and maintenance of the highest rate of increase in the standard of living and the creation of the necessary conditions to this end".

This plan coincided with the First Republic after independence (1963-1966). It noted that "

> "Deliberate effort had to be put in place to speed up economic and social development. Governments everywhere play a vigorous role in shaping the design of a nation's economic development"[86]

The estimated annual GDP for this period was projected at four percent per annum at a population growth rate of two to two and a half percent per annum. Economic growth and development of the country occurred majorly at the regional level. The list of programmes for each region under this plan were similar with no plan at the centre for a central development.[87] The regional government explored the resource potentials of their regions. Regions with great agricultural potentials produced cash crops that were exported through the Produce Marketing Boards.[88] A significant point to be note was the presence

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[84] See Wolfgang, supra note 55 at p. 401.
[85] See Wolfgang, supra note at 57 at p.392.
[86] National Development Plan 1962-8, p. 2.
[87] See Osifo-W. O, "Economic Planning/ Management: Top Speed in The Slow Lane" (pp. 32-33 Newswatch 1087)
[88]See Osaghae, MC Cormick. J, Comparative Politics in Transition (4th edition. Australia: Thomson Wadsworth, 2004)

of leaders[89] held in high esteem by the people who prudently managed the resources and revenue for the development of their respective regions. These leaders set up regional development agencies to embark on massive industrialization with the revenue derived from these trades. In the Northern Region, the Nigerian Development Corporations established the Northern Flour Mills and Bank of the North. While in the Western region, there was the Oodua Investment Corporation. Internally generated revenue from the regions were dispensed for the provision of healthcare, education, and other social amenities.

However, this plan was disrupted by a number of political and social disturbances that occurred at this time such as the population census crisis of 1962, the Western Region Crisis of 1965 and the Federal parliamentary election crisis in 1964. All these crises and discord culminated in the eventual takeover of the military in 1966. This was followed by the civil war in 1967 which lasted until 15 January 1970. Several economic strategies were put in place during the civil war to ensure a good balance of payments position of the country, ensure the supply of capital goods necessary for economic development and arms needed to fight the war. The performance of the Nigerian economy under the First National Development plan period can be described as one of "unsteady expansion.". [90]

Output and Investment 1962-8

Year	Gross Domestic Product		Investment		Investment as percentage of G.D. P
	Amount £m.	Percentage Change	Amount £m.	Percentage Change	

[89] Chief Obafemi Awolowo of the West, Sir Ahmadu Bello of the North and Dr. Nnamdi Azikiwe of the East
[90] See Ekundare, supra.

1962	1,315.4	-	159.9	-	12.2
1963	1,403.2	6.7	177.0	10.6	12.6
1964	1,457.0	3.8	195.0	10.2	13.4
1965	1,540.3	5.7	234.1	20.0	15.18
1966	1,605.0	4.2	242.4	3.7	15.14
1967	-	-	222.4	8.2	-

Figures from the table show that the growth rate was 6. 7 percent in 1963- 1964, however it dropped to between 3.8 percent in the period 1964-1965. There was a short-lived rise of 5.7 percent between 1965-1966, and a drop to 4.2 percent in 1966-1967. There was also a significant shortfall in the expected average level of 197.2 million Euros for total annual fixed investment in the first two years, then a rise above the targets. The growth rate of the gross domestic product saw a decline with the several crises and turned negative by 1967 due to the exclusion of the three states in the East.[91] The economy under the First national development plan saw an uneven growth in the sectors. Agriculture was the mainstay of the economy and accounted for about sixty-five and sixty-three percent of the GDP in 1962-1963 and 1966-1967 respectively. This was followed by a decline in the contribution of agriculture occasioned by the imposition of a unitary form of government by the military and a faster growth of non- agricultural

[91] Mike Obadan and Samson Edo, Nigeria's Economic Governance Structure and Growth Performance in perspective in the Nigerian Journal of Economic and Social Studies, p. 104 (2008)

sectors such as the oil and mining sector. In fact, the mining sector contributed 1.9 and 3.4 percent to the GDP in 1962-1963 and 1966-1967 respectively. Several economic policies of the government at this time were also geared towards industrialization and import substitution. As such, import restrictions were put in place to encourage the growth of local industries. The contribution of industrial production to the GDP during the National development Plan period rose from 5.3 per cent in 1962-1963 to 7 per cent in 1966-1967.[92]

Several major economic projects which opened doors for industrial growth in the country were executed successfully under this National Development Plan. These included The Port Harcourt Oil Refinery, The Jebba Paper Mill, The Bacita Sugar mill, The Niger Dam, The Nigerian Smelting and Minting plant, The Niger Bridge, and The Bacita Sugar Mill.[93] In terms of meeting its main objectives and set targets, the First National Development Plan can be relatively judged to be a success. The national economy could have a great potential for growth beyond the four percent annual growth rate projected at the launch of the development plan. The political turbulence and crisis during the period of this plan also tested the resilience of the economy[94] with growth in GDP being negative during the period of the war. The civil war brought both political as well as economic destruction to the Midwest and Eastern States. [95]

1.3.2 The Second National Development Plan, 1970-1974

Following the economic downturns associated with the war and the overriding need for national unity, the Federal Military Government of Nigeria initiated the Second National Development Plan termed "a

[92] Ekundare, supra at 51 at p150
[93] Odanaogun Folorunso. G, Development Plan in Nigeria: The Economic Recovery and Growth Plan (ERGP) 6 (Academia, 2020)
[94] Second National Development Plan 1970-4, p14
[95] Ekundare, supra at 65 at p150

plan for Reconciliation, Reconstruction and Rehabilitation (3R)'[96] In some quarters, it was described as 'a deliberate weapon of social change '.[97] and the oil-boom development plan as it coincided with the period that Nigeria made high earnings from the exploration and sales of crude oil and other petroleum products. [98] Several strategic attempts were made by this plan to remedy the shortcomings of the First National development Plan. As such, the launch of the plan was presided by a national conference on economic development and reconstruction to garner opinions from all ministries, and relevant agencies like the National Manpower Board and Federal Office of Statistics. The coordination of preparation of the plan was spearheaded by the Ministry of Economic Development, which was to be duly approved by the Supreme Military Council.[99]

The Second national development plan had as its objectives to establish Nigeria firmly as

(i) a united, strong and self-reliant nation.

(ii) a great and dynamic economy.

(iii) a just and egalitarian society.

(iv) a land of bright and full opportunities for all citizens; and

(v) a free and democratic society.[100]

The objectives of this plan were considered so significant that they were included in the 1979 constitution. However as noted by Abasili, this inclusion did not translate to implementation as they were considered directives that were fundamental but non-justiciable.[101] As an agenda, this plan

[96] Uche Emmanuel, Development Plans and Policies in Nigeria: Observed Impediments and Practical Best Alternatives in International Journal of Research and Scientific Innovation (IJRSI) Volume VI, Issue VII, | ISSN 2321–2705 page 30 (July 2019)

[97] Ekundare, supra at 65 at p.151

[98] Deedam Dorka.G, Akpe Churchill.I, and Juliana Ozimonu.E, Nigeria development plans and its challenges: the way forward in International Journal of Advanced Academic Research, Social and Management Sciences. Vol. 5, Issue 12 Page 5 (December 2019)

[99] Odanaogun, supra at 66 at p 7

[100] Second National Development Plan p.32

[101] See Chapter II of the 1979 Constitution: Fundamental Objectives and Directive principles of State policy; same as Chapter 2 of the II of the 1999 Constitution as amended.

recognised the need for political and social stability as an essential criterion for economic development. It stated that.

> "The war-time experience of Nigeria has demonstrated the need for a sustained social will be geared towards a common social goal as a basis for national survival and greatness. Post-war conditions, rather than remove this necessity, indeed underline its undiminished importance .... For planning purposes, a set of national objectives must deal simultaneously with the community's standard as well as quality of life"[102]

This second development plan involved the capital expenditure of 4.9 billion naira and an expected estimated growth rate of 6.6% per annum. 68.4 percent was to be contributed by the public sector while the private sector was to contribute the balance of 31.6 per cent. [103] The oil boom at this time however caused an increase in the initial budget from N3.2B to N5.3B. This period witnessed the enactment of the Nigerian Enterprises Promotion Decree in April 1972. This decree was aimed at increasing the ownership and participation of Nigerians in certain companies from 40 to 60%.[104] There was also a review of the Indigenization Decree of 1972 and a consolidation with Decree 3 of 1977. The government took a step further and bought shares in major financial institutions discouraging full foreign investment. This plan was an opportunity for the country to begin the crucially important process of establishing a capitalist class that would reduce foreign dominance and lead the transformation of the country's political economy through the construction of a developmental state.[105]

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[102] Second development Plan page 31

[103] Nigeria's Economic Governance Structure and Growth Performance p. 105

[104] OKOLI. F.C, THEORY AND PRACTISE OF PUBLIC ORGANIZATIONS (Classical Publishers Limited, Onitsha, 2004)

[105] Adekunle Amuwo, Constructing the Democratic Developmental State in Africa: A Case Study of Nigeria (Institute for Global Dialogue, 2008)

However, due to mismanagement of finances and resources, incompetent management and planning inadequacies, a country which embarked on indigenizing enterprises in 1972 till 1977, had to commence privatization and commercialization of those enterprises in less than twenty years.

The implementation of this plan seemed cumbersome for the planners as such it was extended by a year to 1975.[106] Some of the difficulties with the successful implementation of the Second National Development Plan stemmed from a lack of political will, corruption, inadequate funds, and overreliance of the economy on oil. Despite these difficulties, the Second National Development plan recorded significant progress in the areas of transport, health, communication, social welfare, manufacturing, education and mining. As pointed out by Awoseyila,[107] The successes recorded from this plan were because of the huge, unprecedented inflow of revenue from crude oil resources rather than the inherent viability of the plan. This revenue flow also caused an increase in GDP in real terms from the projected 6.6 percent to 8.2 percent. [108]

1.3.3 The Third National Development Plan 1975-1980

This plan was the largest and unprecedentedly ambitious of all the plans launched.[109] It also conceded with the oil boom period, and this was one of the factors that led to difficulties in its implementation. The primary objectives of this plan were like that of the Second National Development Plan as these plans were long term in nature. In addition to the objectives of its counterpart, this plan provided specific short-term objectives which sought to diversify the economy, increase the supply of high-level

[106]Deedam Dorka G, Akpe Churchill. I, And Juliana Ozimonu. E, Nigeria development plans and its challenges: the way forward In International Journal of Advanced Academic Research, Social and Management Sciences. Vol. 5, Issue 12 Page 5 (December 2019)

[107] Awoseyila. A.P, National Economic Development Planning: A Review of Nigeria's Performance and Future Prospects (1996)

[108] Mike Obadan And Samson Edo, Nigeria's Economic Governance Structure and Growth Performance in The Nigerian Journal of Economic and Social Studies. page 105 (March 2008)

[109]U.M. Ozughalu and U.C. Nwogwugwu, Impact of fixed Medium-Term National Development Plans and Structural Adjustment Program on Aggregate Economic Activity in Nigeria in EUROPEAN JOURNAL OF BUSINESS AND MANAGEMENT ISSN 2222-1905 (Paper) ISSN 2222-2839 (Online) Vol 4, No.18, (2012)

manpower, increase per capita income, reduce the level of unemployment and ensure a balanced development and indigenization of the economy. [110] The total expenditure under this plan was estimated at N30 billion which was later increased to N53.63 billion, a very high rise, compared to the past two national plans. The annual GDP growth rate was projected at 9 percent per annum. Of the total proposed investment, the public sector was to contribute 80.8 percent while the private sector was to contribute the remaining 19.2 percent[111] The success occurring from the exploration of oil had elicited a great deal of confidence that the implementation of the plan would not be hindered as a result of domestic savings and foreign exchange constraints.[112] The major strategy of this plan was to utilise revenue proceeds from crude oil to develop the productive aspects of the economy that would eventually result in an improvement in the standard of living of the people. [113]An appraisal of the plan's objectives showed that it prioritised projects and programs that could have direct adequate impact on the rural dwellers, however, the meagre allocations to areas that could have a direct impact on the improvement of the wellbeing of the people did not sufficiently reflect such commitment. As pointed out by Okigbo,[114]

> "Agriculture and social development schemes (education, housing, health, welfare among others) that have direct bearing on the living condition of the rural population (constituting 70% of Nigerian population), received only 5 Percent and 11.5% respectively of the financial allocation contained in the plan". This lack of proper allocation of finances to priority areas of the economy showed a lack of focus on the part of the leadership.[115]

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[110] Deedam et al supra at p 5
[111] Obadan and Edo supra
[112] Amuwo supra
[113] Emmanuel supra
[114] Okigbo. P, National Development Plan in Nigeria 1900-1907. (Fourth Dimension Publishers Ltd Enugu, 1989)
[115] F.O. Onah, MANAGING PUBLIC PROGRAMMES AND PROJECTS (Great A, P, Express Publishers Ltd Nsukka, 2006)

The Third National Development Plan suffered several setbacks during implementation. Barely three months after the launch of the plan in March 1975, an economic downturn set in and saw a significant drop in oil prices and revenue. Several of the intended projects that were anticipated to set a foundation for dynamic growth of the economy were rescheduled, scaled down, or even cancelled as projected revenues based on oil earnings proved too optimistic. Examples include the Bonny Liquefied Natural Gas (LNG) Plant, Ajaokuta Iron and Steel Complex, Oku- Iboku Newsprint Paper Mill and The Eleme Petrochemical Complex.[116] This unexpected development disrupted the expected inflow of revenue and necessitated massive external borrowing by the government. [117] despite all the setbacks, the Third National Development Plan achieved the following:

1. A rapid growth rate in the manufacturing sector at an average of 18.1% per annum
2. Building and construction grew at 13.9%.
3. A growth in GDP at an average of 5% per annum.
4. Government services rose to 17.7% [118]

1.3.4 The Fourth National Development Plan (1981-1985)

This was the first National Development plan prepared and launched by a civilian government since the incursion of the military into the political scene in 1966. This plan tailed the way of the previous plans in terms of its targets and objectives. This development plan was a reaffirmation of the long-term objectives of the Third National Development Plan. The objectives of the plan included:

1. Increasing real income for all citizens
2. Diversification of the economy
3. Reducing the rate of unemployment and underdevelopment

[116] Emmanuel, supra note at 87 at p.6.
[117] Ozughalu and Nwogwugwu, supra note at 83.
[118] Deedam et al supra note 84 at p.6.

4. Development of high technological skills
5. Even distribution of income among social groups
6. Increase in power generation and supply.
7. Development and promotion of export-based industries
8. Development of small and medium scale enterprises to ensure local value creation[119]

The projected expenditure on this plan was N82 billions of which N70.5 billion would be generated from the public sector and N11.5 billion from the private sector, however only 41 percent of the total planned investment was achieved. The growth in annual GDP was projected at 7.2%. As opined in several quarters. This fourth plan was the most ambitious in the aspect of projected investment but turned out to have the most dismal record of performance.[120]

The fourth development plan was fraught with huge debt servicing, arising from various loans accrued in the previous years, deficit in balance of payments, high rate of inflation and loss of anticipated revenue following the crude oil supply glut in the world market which resulted in a sharp fall in oil prices. As observed by Okigbo[121] out of the N79.449 million projected to be realised from petroleum export between 1980–84; only N52.78 million was realised. An economic appraisal of the plan showed a decline in growth in major sectors of the economy in 1985. The annual growth rate of Gross Domestic Product (GDP) dropped significantly to 1.25 percent compared to 5.5, 13.2 and 4.6 percent under the previous National Development plans. This plan also saw a rise in the rate of unemployment and cost of living leading to a reduction in the standard of living of the citizens. The plan period (1981- 1985) was considered the most dismal period in the economic history of Nigeria. [122] Despite the inadequacies and

[119] Emmanuel, supra note at 90 at p.31.
[120] Ozughalu and Nwogwugwu, supra note at 91.
[121] Okigbo supra note at 88.
[122] Ozughalu and Nwogwugwu, supra note at 91 at page 213.

challenges associated with this plan, it was unique in the sense that it involved participation of all the levels of government. Some of the successes recorded under this plan included the implementation of the Agricultural Development Programme (ADP) in 17 out of the 19 states of the Federation, the commissioning of the Egbin Power Station and the Oku Iboku Newspaper project, the Akure Airport, increased educational enrolment at all levels, improved health care delivery and facilities, construction of several federal highway and state roads, Dry Dock Project at Snake Island among several others. [123]

1.3.5 The Fifth National Development Plan

Due to the dismal performance of the Fourth National Development Plan, mechanisms were put in place for the preparation and formulation of a Fifth National Development Plan. In November 1984, a conference was held at the University of Ibadan, the purpose of which was to deliberate on strategies for the Fifth National Development Plan. At this conference, several suggestions were made which served as the foundation for the polities incorporated in the Fifth National Development Plan.

The primary objective of this plan was to remedy the structural defects in the economy and promote self-reliance of the economy. Thus, the economy was expected to be restructured to boost the production sector especially that of agriculture and manufacturing. Despite the laudable objectives of this plan to diversify the economy and prevent over-reliance on oil, it did not come to fruition. At the end of 1985, it became apparent that the strict budgetary measures alone could not resolve Nigeria's long-standing economic problem., a state of economic emergency was proclaimed and efforts to formulate a Fifth national development Plan were suspended. The objectives of this plan were later incorporated into the Structural Adjustment Programme (SAP).[124]

[123]Deedam et al supra note 121 at p.6.
[124]E.N. Iheanacho, National Development Planning in Nigeria: An Endless Search for Appropriate Development Strategy in International Journal of Economic Development and Investment Vol. 5, No. 2; ISSN: 2141-6729 p.55 (August 2014)

1.3.6 The Structural Adjustment Programme (SAP): 1986 – 1993

When it became glaring that the country could no longer rely on the fixed term plans because of the huge shortfalls in projected earnings from crude oil which tremendously affected the performance of the fourth plan, the government decided to approach the economic issues by adopting a policy plan – the Structural Adjustment Programme (SAP).[125]The Structural Adjustment Program (SAP) was initiated in 1986 with a goal of reducing expenditure, removing several areas of administrative controls and creating a free market oriented economy that would encourage private sector participation via commercialisation and privatization of government owned- entities. It was informed by the policies of the World bank and International Monetary Fund aimed at restoring external sector balances through exchange rate management and balance of payment support.[126]According to Williamson,[127] The Structural Adjustment program was aimed at transforming and redirecting the economy from an import substitution strategy to an export promotion strategy.

This program was recognised as the most comprehensive programme ever introduced to reform the Nigerian economy[128]and it constituted the most controversial package of economic policies ever instituted in the country.[129] The key objectives of the SAP included: (i) to lay the basis for sustainable non-inflationary growth; (ii) to achieve fiscal and balance of payment viability in the short to medium term; (iii) improve the efficiency of the public and private sectors.

To achieve its objectives, the SAP implemented a market-oriented development strategy with great emphasis on private sector - led development, efficient resource allocation and market determination of prices. This strategy adopted also involved overhauling the administrative structure, cut in extra-

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[125] See Ubi-Abai Itoro, Vision 20:2020 and Economic Development in Nigeria: Gleaning from Past National Development Plans in International Journal of Development in Humanities, Management and Social Sciences Vol.6 No. 2 P.205 (November 2016)

[126]B.C Ogbonna, Structural Adjustment Program (SAP) In Nigeria: An Empirical Assessment in Journal of Banking, Vol 6, Number 1, June 2012, 19-40: ISSN 1597 - 2569 Page 21

[127] Williamson1995

[128] V.A. Odozi, The Nigerian Experience of Structural Adjustment Programme - A Central Bank Perspective. p.27

[129]Obadan and Edo, supra note 104 at p106.

budgetary spending, privatisation of public enterprises. These policies entailed the liberalisation of trade and tax systems to ensure stabilisation of the economy and eliminate macroeconomic distortions and ensure adequate supply responses. [130] The SAP was designed to promote export in non-oil sectors, ensure macroeconomic stability, restructure the consumption and production pattern, reduce dependence on crude oil and curtail the importation of consumer goods. To achieve the objectives of SAP, several rural development initiatives were put in place. Such initiatives include, National Accelerated Food Production Programme, Civil Service Reforms, SAP Relief Package, the Community Banks etc. However, as noted by Obadan,[131]the SAP distorted the economy and failed to address most of these fundamental economic problems during the period as external debts kept accruing the fiscal gap widening and the objectives of price stability, economic growth, diversification of the economy, full employment and good balance of payment became an illusion.[132] The policy measures of the SAP resulted in mass retrenchment as both the private and public sector had to restructure their business to cope with the policies of the SAP and as opined by Annah[133]In spite of the existence of abundant revenue from crude oil and several development plans, Nigeria could not be described as an egalitarian society as the gap between the rich and the poor continued to widen. [134]Several reasons were outlined for the failure of the SAP. including: (i) Application of the structural reforms proposed by the IMF and World Bank without consideration of the import-dependent nature of Nigeria's industrial sector. (ii) Poor vision and unfounded expectation of policy makers that the perennial economic problems of Nigeria would be remedied within two years (iii) Contractionary fiscal and monetary policies (iv) weak private sector.[135]

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[130] Ozughalu and Nwogwugwu, supra note at 95 at p. 214.
[131] Obadan and Edo, supra note 133 at p107.
[132] Ogbonna, supra note 101 at 32.
[133] C.I. Annah, Who Benefits? The Political Economy of the National Development Plans in Nigeria in JOURNAL OF ALTERNATIVE PERSPECTIVES IN THE SOCIAL SCIENCES, 6 (1) P100-115 (2004)
[134] Itoro, supra note 100 at p.206.
[135] Obadan and Edo, supra note 106 at p 108.

Despite the gloomy outlook, some strides were achieved by the Structural Adjustment Program. This program (i) enhanced efficiency in resource allocation (ii) enhanced competitiveness of exports (iii) increased local value creation (iv) fostered a maintenance culture and ensured the evolution of local technology. (v)reversed the negative economic trend of the early 1980s (vi) improved Nigeria's credit worthiness. [136] There was also a significant reduction in the importation of consumer goods, and an increase in the import of capital goods. These fixed medium-term plans were followed by the perspective and the rolling plans.

1.3.7 The Perspective Plan and Rolling Plans (1990-1998)

The Babangida administration jettisoned the fixed five-year development plans and, in its place, initiated two types of national plans: perspective plan which is supposed to span a period of 15-20 years. And provide an opportunity to proffer long term assessment of the perennial economic problems of the country; and the rolling plan spanning for a period of three years subject to be reviewed annually to determine whether progress is being made or not. The prospective plan intended to start in 1990, simultaneously with the rolling plans did not commence until 1996 when Abacha set-up the Vision 2010 Committee. The recommendations of the committee submitted in 1997, amongst other things proposed that the Vision provide the focus of all plans including annual, perspective and rolling plans.

The vision 2010 document provided a blueprint for guiding the country toward an economically prosperous, politically stable and socially harmonious system in the long-term. This blueprint was to be implemented using annual budgets and rolling plans and was expected to cover the period 1997 – 2010. Thus, the Vision 2010 became the first perspective plan for the country. However, it was short-lived as it was jettisoned by the new democratic government in 1999 in favour of ad hoc market-based approaches and later the National Economic Empowerment and Development Strategy (NEEDS).[137] The three-year

[136] Odozi, supra note at 103 at p. 28.
[137] Obadan and Edo, supra note 110 at p 109.

rolling plan commenced in 1990 with the introduction of the First National Rolling Plan in 1990-1992. The central purpose of the rolling plan was to afford the country a chance to revise the economic plans in the "midst of increasing socio-political and economic uncertainties". [138] Its specific objectives included (i) attaining self-sufficiency in the production of food and raw materials (ii) development of a market-oriented economy (iii) creation of employment opportunities. The total investment made was N144.2 billion, with the public sector contributing 65.3 percent and private sector 34.7 per cent.

A major fault of this program was that it lacked adequate coordination and orientation. As opined by Yesufu, it was developed to mask several uncompleted public sector projects. Other problems associated with the problem include (i) resource constraints (ii) Cost overruns (iii) execution of unplanned projects. After its launch in 1990, the rolling plans were rolled over annually. After about twelve rolling plans which ended in 2003, the economy was still plagued with the same issues it faced during the periods of the fixed medium-term plans.[139]

A comparative analysis carried out by Kayode and Akume [140]show a very wide gap between planned implementation and actual development targets. It showed that compared to the economies of the east Asian Tigers which recorded a 7-8% GDP growth rate, the current rate of investment in the Nigerian economy was too low to generate any substantial economic growth. The problems facing the Nigerian economy were attributed majorly to over dependence on crude oil revenue, weak monetary policies, and deficits in balance of payment.

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[138]Iheanacho, supra note at 99 at p. 55.

[139]Obadan and Edo, supra note 113 at page 108.

[140] Kayode. A, AND Akume. A Vision 20:2020 Realities and Challenges. Online JORIND 10 (2) (2012). Retrieved from www.transcampus.org/Journals. on

1.3.8 The National Economic Empowerment and Development Strategy (NEEDS) (2003-2007):

This development strategy was launched in 2004 by the re-elected Obasanjo administration to provide a comprehensive socio-political and economic reform for the country since the previous plans did not put the Nigerian economy on sound footings. It identified the problems of the country and accordingly prescribed specific strategies for developing various sectors of the economy. The NEEDS framework was a statement of planned policy actions of the federal government. It was to be implemented as the State Economic Empowerment and Development Strategy (SEEDS) at the state level and as the Local Economic Empowerment and Development Strategy (LEEDS) at the local government level. The basic thrust of NEEDS focused on poverty reduction, wealth creation, employment generation and value reorientation. To assess progress on these goals, the NEEDS document set targets for a stipulated period for various sectors of the Nigerian economy. In 2004, the GDP was projected to grow at 5 percent, 6 percent in 2005 and 7 percent in 2007. These projections assumed that this GDP growth rate was the minimum required for an improvement in the average standard of living. External sector reserves were targeted to increase from US$ 7.7 billion in 2004 to US$ 10.7 billion in 2007. In the power sector, power generation was targeted to be 4, 000mw in 2004, 5000mw in 2005, 7,000mw in 2006, and 10,000mw in 2007. Total investment in this strategy was also expected to increase from N2,071.2 billion in 2004 to N4,663.7 billion in 2007, and it was expected that the private sector would make the bulk of this investment.[141]

An analysis of macroeconomic indicators showed an improvement in the Nigerian economy compared to previous plans. An improvement was recorded in the fiscal position of the government in the first two years. Significant growth was also recorded in the educational sector. The number of tertiary institutions majorly owned by the federal and state governments increased from about forty in 1999 to about eighty-nine in 2007, with greater participation of the private sector. The fiscal deficits were reduced in relation

[141]Obadan and Edo, supra note 115 at page110.

to the targets; however, the recurrent expenditures were still higher than the targets. The external sector performed excellently with a sharp increase in external reserves from the target value of US$7.7 billion in 2004 to US$ 28.3 billion in 2005. This successful performance was due to positive developments in the international oil market.

Commenting on the performance of the NEEDS, Marcellus[142] and Iheanacho[143] stated that NEEDS suffered the same inadequacies as most development plans in the country. Most of the objectives set out by this plan were not achieved at any of the levels of government. Within the period of NEEDS 2003-2007, Nigeria's annual budget crossed the threshold of billions into trillions of naira, however this did not positively impact or increase the income per capita of the average Nigerian. The rise in the number of educational institutions did not translate to increased access to education as the cost of these institutions were exorbitant. Although the economy recorded an appreciable growth in GDP, the rate of unemployment remained high as most of the policies adopted by the government to realise this objective remained unfavourable to creation of employment. In the cause of reforming government institutions, several workers were laid off.[144] Not much progress was recorded in the areas of infrastructural development. The generation of electricity which was a main policy objective of the government suffered a severe decline. As observed by Adeboyega. "We have to look beyond Obasanjo's reform package if we want to get out of this power quagmire." Being a medium-term plan, most of the objectives of NEEDS should have been achieved before the expiration However, its four main objectives remained only on paper.

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[142] I.O. Marcellus, Development Planning in Nigeria: Reflections on the National Economic Empowerment and Development strategy (NEEDS) 2003-2007. In JOURNAL OF SOCIAL SCIENCES VOL 20(3) pp 197-210 (2009)

[143] Iheanacho, supra note at 114.

[144] A report of the Central bank of Nigeria showed that it severed the employment of 804 employees through mandatory retirement in 2005.

1.3.9 Vision 20:2020

The Vision 20:2020 plan was a long-term strategic plan which aimed at creating an enabling and catalytic environment to promote broad-based private-sector-led economic growth and development in Nigeria by 2020. It derives its model from the successful experience of countries like China, Brazil and Indonesia, who developed their economies using systematic strategic planning models[145] The broad objective of this plan was to make Nigeria one of the top 20 economies in the world with a GDP of US $900 billion and per capita income of US $4000 per annum. These targets were based on a dynamic comparative analysis of the country's potential growth rate and economic structure vis-à-vis those of other top 20 economies of the world.

The Vision 20:2020 was broken down into three (3) medium term plans:

(i) the First National Implementation Plan from 2010-2013

(ii) the Second National Implementation Plan from 2014-2017 and

(iii) the Third National Implementation Plan from 2017- 2020

These medium-term plans were predicted on three (3) key pillars which include:

To guarantee the productivity and well-being of the people; to optimise the key sources of economic growth; and to foster sustainable social and economic development. This strategy plan involved the transformation of rural areas from poverty zones to urban centres of global standard. The various sectors of the Nigerian economy must undergo such reforms that in 10 years, the country will be comparable to high income OECD nations. However, like previous development plans of the government, the Vision 20:2020 ended up as just plans on paper.

[145]Itoro, supra note at 109 at 208.

1.3.10 7-Points Agenda

On entry into government in 2007, the Yar'Adua administration did not continue with the development strategy of his predecessor. In its stead, the administration introduced the 7-points Agenda. This development plan, as its name implied, was focused on seven core areas of Nigerian society. They include Critical Infrastructure; Food Security; Niger Delta Development; Human Capital Development; Land Tenure and Home Ownership; National Security and Wealth Creation.[146] In the opinion of some authors[147], the seven-point agenda was to be implemented concurrently with the Nigerian program of the Millenium Development Goals (MDGs). These goals included: the eradication of extreme poverty and hunger by 2015; the actualization of universal primary education by 2015; the reduction of child mortality by two-third by 2015; improving maternal health by 2015; combating HIV/AIDS, malaria and other preventable diseases by 2015; ensuring environmental sustainability between 2015 and 2020 and developing a global partnership for development by 2015. However, this policy was ended at the death of Yar'Adua in 2010.

1.3.11 Economic Recovery and Growth Plan (ERGP) 2017 - 2020

The Economic Recovery and Growth Plan (ERGP), 2017- 2020 was a medium-term Plan that succeeded the Strategic Implementation Plan (SIP) aimed at restoring economic growth while leveraging the ingenuity and resilience of the Nigerian people. This plan was designed to take on a new approach and was said to differ from other development plans in that; First, there existed a strong political will to execute. Second, it set bold initiatives to ramp up crude oil production by 2.5mbpd by 2020, revamp local refineries, and reduce crude oil imports by 60 percent in 2018. Third, rather than reinvent it built on existing sectoral strategies such as the Nigeria Integrated Infrastructure Master Plan. Fourth, it fosters

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[146] N.O. Oladayo, Cultivating policy for development in Nigeria: an appraisal of President Goodluck Jonathan's transformation agenda (2011-2014) in INTERNATIONAL RESEARCH JOURNAL OF HUMANITIES, ENGINEERING AND PHARMACEUTICAL SCIENCES Vol-1/Issue-9/Year 5/page 1 (January,2015)

[147] Oke, L., Oluwasuji, C. O., & Simon-Oke, O. O. (2011). Millennium Development Goals {MDGs} and the Yar'adua's Seven Point Agenda in Nigeria: Prospects and Challenges. *African Research Review*, *5*(1).

a close relationship with the private sector encouraging the private sector to become the engine of national growth and development. Fifth, it merged the functions of the Budget and Planning department into one Ministry to ensure that budgets were properly aligned with planning and effective implementation. Finally, it provided for effective collaboration with the states to ensure the Federal and State governments work towards the same goal.[148]

This plan had three broad objectives which included restoring growth, investing in Nigerians and building a globally competitive economy. To achieve these broad objectives, the ERGP focused on stabilizing the macroeconomic environment, achieving agriculture and food security, ensuring energy sufficiency (power and petroleum products), improving transportation infrastructure and driving industrialization focusing on small and medium scale enterprises. [149]

Under this plan, real GDP is targeted to grow by 4.62 per cent on average over the plan period of 2017 – 2020, from an estimated contraction of 1.54 per cent in 2016. This envisioned growth will be driven by increase in oil prices, an increase in oil production, an increase in non-oil federal receipts and non-oil sectors. This plan has been heavily criticised on the ground that it has no enabling law backing it, it sets no clear timelines on policies and programmes to monitor progress, and it lacked a sufficient crisis response mechanism as it was based on the Strategic Implementation Plan (SIP). The plan also failed to address issues such as the foreign exchange crisis, the countries over dependence on exports that led to an economic downturn in the face of a global recession and the low foreign investments.[150]

[148] ECONOMIC RECOVERY & GROWTH PLAN 2017-2020 p. 11

[149] Ibid

[150] Premium Times at Merits, defects of Nigeria's economic recovery, growth plan - Experts | Premium Times Nigeria (premiumtimesng.com) visited 16/01/2022

1.3.12 National Development Plan (NDP) 2021- 2025

No significant pieces of literature abound on this development plan of the Government currently apart from pieces of media articles. This is the first of the proposed medium term Development plans for the implementation of the Nigeria Agenda 2050 and the most recent economic blueprint of the president Muhammadu Buhari regime. The objective of this plan was defined as being to achieve a broad-based real GDP growth rate of 5%, to create 21 million full - time jobs and to lift 25 million people out of poverty. In broad terms, it is aimed at establishing a strong foundation for a diversified economy with robust MSME growth and a more resilient business environment as well as investing in critical, physical, financial, digital and innovation infrastructure. It is envisioned that this plan would be a stepping stone for the actualization of the government's goal of lifting 100 million Nigerians out of poverty in 10 years, under the National Poverty Reduction with Growth Strategy (NPRGS).[151]

The projected investment to achieve targets set out in this plan is ₦348.1 trillion. Of this total investment, ₦ 49.7 trillion is to be provided by the government, while the balance of ₦298.3 trillion will be provided by the private sector. In clear terms, it is apparent that major investments in the economy will be driven by the private sector, as such this plan requires a strong strategic partnership between the private and public sector.

To ensure an effective implementation of this plan, a Development Plan Implementation Unit will be established in the Budget and National Planning arm of the Ministry. This implementation unit will be headed by the Vice President and the Honourable Minister of State, Budget and national Planning as Vice Chair. The purpose of this unit will be to ensure effective coordination with MDAs, Private sector operators and Civil society organisations. It is floated by the administrators of the government that if this plan is properly implemented and sustained it has the potential to accelerate the achievement of several

[151] Vanguard News at Nigeria needs N348.1trn investments to achieve 5-yr National Development Plan- Buhari - Vanguard News (vanguardngr.com) visited 15/1/2022

other regional and global agendas such as the ECOWAS Agenda 2050 and the UN Sustainable Development Goals, 2030. A problem associated with this plan is that the current administration responsible for the initiation of the plan will have to see its execution in less than 30% of the time frame, which is not feasible. Thus, the burden of its performance will be passed to the next government. As always, the problem of developmental plans and policies have not been in their formulation, but in their appropriate execution. Thus, if this plan is to achieve its objectives, there must be a focus on driving investments in key sectors of the economy that facilitate growth, commitment to the 2022 Budget as well as the Medium-Term Expenditure Framework for 2021-2023.[152]

Conclusion

The history of the Nigerian State from pre-colonial times till date show that quite a few political systems have emerged ranging from monarchy, decentralised states, liberal democracy and military rule. Several economic activities were associated with these political systems and state structures from the development of iron tools to the rise of agricultural activity and the discovery and dependence on crude oil. Thus, it is easy to see that with an expansion in the societal structure, there was a consequent expansion of economic activity. The economic structure at the beginning and mid colonial period emphasised a strong focus on agriculture as the main source of revenue and foreign exchange for Nigeria. It also significantly highlighted the economic policies of the Britain government to stifle any form of foreign interests in the Nigerian agricultural sector. Following the discovery of oil at Oloibiri and its emergence as a major export commodity, there was a shift in economic focus from the agricultural sector to the oil and gas sector. However, political instability, upheavals, mismanagement among several other factors have not enabled Nigeria to reap the full benefits of this sector in developing its economy. over-dependence on revenue the sector has not translated to an equal attention in building the sector, as such Nigeria struggles to fund its economy. It is evident that a total restructuring of economic plans is required

152 Vanguard News at Doing justice to Development Plan 2021-2025 - Vanguard News (vanguardngr.com) visited 16/1/2022

to achieve the nation’s economic goals as current economic plans experience the same pitfalls and are bound to suffer a similar fate.

CHAPTER 2: CONCEPT OF FOREIGN DIRECT INVESTMENT

2.1 Introduction

Nigeria is a country blessed with abundant natural resources and human capital, despite this however, its economy cannot identify as one of the thriving economies in the world among other financially buoyant countries. This slow or insignificant economic development has been attributed to several factors such as economic mismanagement, mounting debt crisis, decreased export, overdependence on certain sectors of the economy among many others. Furthermore, this situation has been worsened by corruption, poverty, bad leadership, sectionalism, political instability and several other factors. Practical studies have shown that increased foreign direct investment in Nigeria could be a solution to its perennial economic problems. The importance of foreign direct investment in the growth of any economy cannot be overemphasised.[153] For low income developing countries to achieve their ambitious economic growth, foreign investment is required as loans with servicing schedules will cause a continuous deficit in the balance of payments. As such, this chapter seeks to examine the concept of foreign investment in Nigeria particularly foreign direct investment as distinguished from other forms of investment. It also attempts to appraise the laws and regulations guiding foreign direct investment, discuss their salient provisions as well as how these laws have impacted foreign investments in Nigeria. Foreign investment arose because of interdependence and increased cooperation for economic development among nations through transfer of technology, job creation, and investments in various sectors of the economy. It benefits both the investor and the home country and the global economy.

[153] Okaphor Ejike, An Appraisal of the Legal Framework for Foreign Direct Investments (FDIs) in Nigeria and Implications for Food Security in Journal of International Economic Relations and Development Economics, Vol. 1 No.1 Page 39

2.2 Definition of Terms

2.2.1 Investment

This can be defined in several ways. In economics, it is defined as the acquisition of a physical asset such as equipment, a production plant, an inventory or a new building. To a layman, it may simply mean the act of purchasing stocks, bonds, and not inclusive of acquiring equipment, a building or an inventory. [154] It is also the purchase of an asset for the principal purpose of storing value with the assurance that the value of the asset increases over time. However, in each of these cases, the individual or firm desires a productive asset. According to the Black's Law Dictionary, investment is defined as "an expenditure to acquire property or other assets for the purpose of generating revenue". [155] It can also be explained as the act of setting aside resources with the aim of generating income and value appreciation. Items for investments are usually not for immediate use or consumption but for future wealth creation.[156] Obitayo defines investment as

"The accumulation of real capital goods which yield a future flow of goods and services. It plays a critical role as a catalyst for growth. It enhances the productive capacity of an economy, creates jobs, promotes income generation and improves the standard of living of the people'. Investment can be public or private. Public investment entails government spending on infrastructure and it aids private sector investment. Private sector investment could be further broken down into short-term working capital and medium long-term capital.[157] In the opinion of Eze and Eze, investment could take different forms. It could be stocks, bonds, shares, debentures, loans, futures, derivatives, equity participation in an entity, concessions, management, and joint

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[154] Herbert Mayo, Investments: An Introduction. Page 6

[155] Garner. B.A Black's Law Dictionary: 8th Edition, P.844 (West Publishing Co. Ltd, 2004)

[156] Okaphor, Ejike, An Appraisal of The Legal Framework for Foreign Direct Investments (FDIs) In Nigeria and Implications for Food Security in Journal of International Economic Relations and Development Economics, Vol. 1 No.1

[157] Obitayo, K.M." Image Building and Investment Generation Prospects for Nigeria", In Guobadia, Et Al, Foreign Investment Promotion in Globalised World.P.51 (NIALS) Lagos. 2006

ventures. It could also be taking the form of licences, authorizations, tangible or intangible property, mortgages, pledges and leases[158]

2.2.2 Foreign Direct Investment

According to the International Monetary Fund and the Organisation, Foreign Direct Investment is a process by which a resident entity of an economy (direct investor) obtains a lasting interest in an entity that is resident in another economy (the direct investment enterprise). The term "lasting interest" signifies the existence of a long-term relationship between the direct investor and the direct investment enterprise. Foreign direct investment refers to all investments from the first exchange establishing the relationship between the direct investor and the entity to the subsequent transactions ensuing between them.[159] Alegimelen defines it as "an investment made by an individual or firm in one country into business ventures that has its establishment in another country". It can also be described as the importation of direct capital as the foreign business enterprise participates in the business venture wholly or in partnership with other investors. In the definition of the OECD, it is a commercial act in which an individual or an entity deploys substantial resources from its country to another country for the purpose of acquiring productive assets, establishing commercial activities or gaining significant influence over the management of the company's assets with the aim of obtaining a return on investment.[160] Generally, any form of foreign investment is designed to be long term and offers so many advantages to the recipient country. Foreign investment could be classified as Foreign Direct Investment or Portfolio

[158] Eze, U.G. Et Al. "An Appraisal of The Legal Framework for Foreign Direct Investment in Nigeria and Implication for National Security and Development. Proceedings Of The 50th Conference of The Nigerian Association of Law Teachers (NALT): Law, Security and National Development at Nnamdi Azikiwe University, Awka, Anambra State 11-16 June 2017. P. 579 (2017)

[159] Maitena Duce And Banco De Espana, Definitions of Foreign Direct Investment (FDI): A Methodological Note Page 2

[160] OECD 2008

Investment. This categorization depends on the methodology and flexibility of its pursuits in a country or business venture.[161] However it is defined, foreign direct investment plays a key role in the internationalisation of enterprises. Foreign Direct Investment could be vertical or horizontal. Where an investment is made to an enterprise within the supply chain but not in the same industry, such as where a multinational acquires a business that acts as a distributor or supplier, Foreign Direct Investment is said to be vertical. On the other hand, it is said to be horizontal where a company establishes a similar business model in another country.[162]

2.2.3 Foreign Direct Investor

According to the 5th Edition of the IMF Balance of Payment Manual, a direct investor is the owner of 10% or more of an entity's capital.[163] However, this is not a strict guideline as a smaller percentage may mean a controlling interest and yet a percentage of more than 10% may not equate to substantial control. In the opinion of the International Monetary Fund, it is recommended that this percentage be used as a distinction between direct and portfolio investments in shareholding. Thus, in the instance where a foreigner acquires 10% or more of the shares of an entity, the price of the equity holding acquired and subsequent transactions between the entities would be regarded as direct investment. A direct investor may be an individual, a group of individuals, incorporated or unincorporated entities having a direct investment enterprise operated in a country foreign to the direct investor.

2.2.4 Direct Investment Entity/ Enterprise

A direct investment entity enterprise is an incorporated or unincorporated entity in which a direct investor owns 10% or more of the ordinary shares or voting power in an incorporated or

[161] Ikoni 2004
[162] Okaphor Ejike, An Appraisal of The Legal Framework for Foreign Direct Investments (FDIs) In Nigeria and Implications for Food Security in Journal of International Economic Relations and Development Economics, Vol. 1 No.1 Page 42
[163] Maitena Duce And Banco De Espana, Definitions of Foreign Direct Investment (Fdi): A Methodological Note Page 3

unincorporated enterprise. These entities could be subsidiaries, branches or associates. In a subsidiary, the foreign investor, either directly or indirectly controls over 50% of the voting power. In an associate, the direct investor and its associates' control between 10% and 50% of the voting shares. A branch is an unincorporated enterprise that is wholly or jointly owned. The ease or difficulty of setting up any of these entities primarily depends on the regulations in the host country.

2.3 Nature of Foreign Direct Investment and Investors/Investment

Foreign direct investment could be classified in several ways. They include[164]:

i. Classification based on direction of investment.

ii. Classification based on the investment instrument and

iii. Classification based on the sector.

Where classification is based on direction, it can be analysed from the perspectives of the home and host countries. When analysed from the perspective of the home country, any investment made by the resident parent company to its foreign affiliate will be regarded as foreign direct investment. In contrast, financing by a foreign affiliate to a parent subsidiary will be regarded as a decrease in foreign direct abroad rather than foreign direct investment. From the perspective of the host country, any investment made by the foreign parent companies to their resident subsidiaries, in the country of residence of the affiliated companies, will be classified as foreign direct investment, and the financing extended by resident subsidiaries, to their non-resident parent company would be classified as a decrease in foreign direct investment rather than a direct investment abroad. This principle based on direction of investments will

[164] Maitena Duce and Banco De Espana, Definitions of Foreign Direct Investment (FDI): A Methodological Note Page 5

not hold where the parent company, its associates, subsidiaries and branches own a share capital of more than 10% in each other's holdings.[165]

Where classification is based on the instruments, direct investment capital is made up of capital invested by a direct investor in a direct investment enterprise and the capital/ returns received by a direct investor from a direct investment enterprise. Three essential components make up direct investment capital. They are: (i) Equity capital (ii) Reinvested earnings (iii) Other direct investment capital.

In the classification based on sector, the IMF and the OECD have differing opinions. From the perspective of the IMF, foreign direct investment is classified based on four institutional sectors depending on the sector in which the resident party participates. These institutional sectors are the Monetary Authority, Banks, General Government and other resident sectors. The OECD on the other hand classifies foreign direct investment in terms of sectors of the economy or industry. In terms of this, foreign direct investment could be divided based on nine economic sectors. These economic sectors are (i) Agriculture, hunting, forestry and fishing (ii) Mining and quarrying (iii) Manufacturing (iv) Electricity, gas and water (v) Construction (vi) Wholesale and retail trade and restaurants and hotels (vii) Transport, storage and communications (viii) Financing, real estate and business services (ix) Community, social and personal services Here, the OECD proposes that FDI made by a resident subsidiary company be classified according to the economic sector of the parent company. Under this classification, where the resident subsidiary company is a non-banking subsidiary and the parent company operates in the banking sector, any FDI made by the resident subsidiary will be attributed to the banking sector.

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[165] Maitena Duce and Banco De Espana, Definitions of Foreign Direct Investment (FDI): A Methodological Note, page 5

2.4 Foreign Direct Investment as distinguished from Portfolio Investment

International capital flows have become a common feature with the recent globalization of capital markets. These capital flows occur in both developing and in developed economies and they take two forms: Foreign Portfolio Investment and Foreign Direct Investment. Portfolio investment also referred to as "Indirect Foreign Investment" involves investments in shares, bonds and other securities traded on the securities exchange or other capital trading platform. These securities are usually issued in another country.[166]

This section aims to highlight and discuss broadly the differences between these forms of international equity. Empirical analysis suggests that FDI flows are larger for developing countries than developed countries.[167] Also the net inflows of FPI is more volatile than that of FDI. According to Albuquerque[168]The share of FDI net inflows is higher in developing countries than developed countries due to two main reasons. These reasons arise from the perspective of the investor and the host country. They are: (I) FDI relies majorly on intangible assets, as such it cannot be easily expropriated by the government of the host country government. This offers the investor some manner of security on the assets. (2) The host country often views FDI as a more stable source of financing than other forms of international capital flows. As such it prefers FDI to FPI. In foreign direct investment, the investor commits to a project which has a long-term payoff, whereas in portfolio investments, investors invest in the financial markets which usually has a short-term payoff. [169]

Ownership and Control: In FDI, investors gain both positions of ownership and positions of control in the domestic entities. This makes them managers in the firm, with authority to interfere in the running

[166]Ikoni, U.D," An Overview of The Role of The Investments and Securities Tribunal in Promoting Foreign Investments in Nigeria" In University of Jos Law Journal, 9(2), P. 178 (2014)

[167] World Bank Data, See Albuquerque (2003)

[168] Albuquerque R., 2003, The Composition of International Capital Flows: Risk Sharing Through Foreign Direct Investment. Journal Of International Economics, 61 (2), 353–383.

[169] Yamin Ahmad, Pietro Cova, And Rodrigo Harrisony, "Foreign Direct Investment Versus Portfolio Investment: A Global Games Approach" University of Wisconsin – Whitewater Working Paper 05 - 03 (2004)

of the firm. On the other hand, Foreign Portfolio Investors gain ownership but no positions of control in domestic entities. Thus, they delegate their decision-making powers to managers whose decisions may not always align with that of the foreign investors. This makes them less efficient to manage than direct investment projects.[170] Direct Investors on the other hand are better able to make their investment projects effectively, because they are better informed about the design and activity on the projects since they hold the positions of both managers and owners. This difference serves as a significant advantage of foreign direct investments over foreign portfolio investments. This concept of ownership and control is significant in FDI because it acts as a motivating factor for the transfer of technology and other assets.

Cost: In terms of cost, direct investments usually cost more. Two types of cost arise with direct investments. First, the investor must bear the initial cost of acquiring the expertise to manage the project directly. The second cost is information based. It arises from the prospect that a FDI investor will have to sell their investments before maturity because of liquidity constraints. At this time, the price they will receive will be lower if they are well informed on the economic fundamentals of the investment project. This is because when prospective customers are of the knowledge that the seller has more information, they may suspect that the sale results from bad information on the prospects of the investment and will bargain for a lower price. Therefore, in foreign direct investments, the investors must shoulder the cost of receiving a lower price, when they are pressured to sale before maturity due to liquidity issues. Another perspective shows that investors in FDI are usually multinational corporations, whereas firms subject to liquidity shocks such as investment funds are more aligned to FPI. [171] For an investment to be termed FDI, a minimum of 10 or 25% of the voting shares must be held by a foreign enterprise.

[170] Itay Goldstein And Assaf Razin, "Foreign Direct Investment Vs Foreign Portfolio Investment". Page 2 NBER Working Paper Series (December 2004)
[171] Maitena Duce And Banco De Espana, Definitions of Foreign Direct Investment (FDI): A Methodological Note Page 9

2.5 Benefits of Foreign Direct Investment

Foreign Direct investment is a most important instrument for the globalisation of the world economy. In the opinion of many, it is a major factor in stimulating the economies of both developed and developing economies. [172] As stated by Sjoholm[173], foreign capital inflow in Nigeria is important not only in improving productivity of labour, but also in expanding the labour base.

2.6 Importance of Foreign Direct Investment in The Nigerian Economy

In the opinion of Aremu[174], an increasing interest in FDI research stems from the perceived benefits to the economy of recipient countries to complement domestic investments and foster economic growth. Dunning and Rugman[175] also argue that (1985) Foreign Direct Investment (FDI) is a significant contributor to the gross capital of the recipient nation. It results in a higher growth rate, industrialization, market expansion, improvement in expertise, and technology transfer because of investment. A good number of economic studies[176] have shown that there is a strong correlation between economic growth and foreign direct investment in Nigeria. In a study by Olatunji and Sadiqo [177]Over a period of 40 years from 1970-2010, they posit that there is no long run relationship between FDI and economic growth in Nigeria, there exists only a short-run relationship dynamic relationship. To establish a long-run relationship between FDI and economic growth, there must be a significant change in the business

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[172] Herman, Michelle, Darla Chisholm, And Hadley Leavell. "FDI And the Effects on Society." In *Allied Academies International Conference. Academy For Studies in International Business. Proceedings*, Vol. 4, No. 1, P. 15. (Jordan Whitney Enterprises, Inc, 2004).

[173] Sjoholm 1999 As Cited in Macaulay Egbo," Foreign Direct Investment and The Performance of The Nigerian Economy", In Journal of Educational and Social Research ISSN 2240-0524, Vol. 1 (5) (December 2011)

[174] Aremu 2005

[175] Dunning And Rugman (1985

[176] See Lateef Olatunji and Muhammed Sadiq Shahid, FDI And Economic Growth in Nigeria: A Co-Intergration Analysis in Business and Economic Research 2015, Vol. 5, No. 1
(Macrothink Institute), See Also Onyali Chidiebele and Okafor, Tochukwu." Foreign Direct Investment and The Nigerian Economy: Vision 2020 Mission". In International Journal Of Business And Finance Management Research, Accessed On 17/03/2022 From Onyali And Okafor.Pdf (Bluepenjournals.Org)

[177] Olatunji And Sadiq, Supra

environment by providing the needed infrastructure, security and political stability in the country. In some cases, it is argued that FDI is a very important source of capital and addition to domestic investment, which leads to technology transfer, growth of infrastructure, increased efficiency and utilisation of resources, creation of jobs and in turn development of the society. In the analysis of Blomstrom et. all[178]This positive effect depends on the capacity of the host country to effectively absorb and utilise this investment. Factors which affect the outcome of FDI in a host country include the quality of institutions, the extent of human capital development, and the level of technological development. The impact of FDI on foreign has not been viewed as beneficial in all quarters. In the opinion of Adelegan,[179]he found that FDI is not directed to productive use, rather it is used to support consumption and importation which negatively impacted gross domestic investment. Akinlo also argued that FDI had no little to no significant effect on economic growth in Nigeria. [180]

2.7 Regulatory and Policy Framework Governing Foreign Direct Investment in the Nigerian Oil and Gas Industry

Given the abundant untapped natural resources and large market size, the country presents an attractive investment zone for foreign investors. Several laws exist in Nigeria which guide, regulate and promote foreign investments. The enactment of these laws does not by themselves translate to massive foreign direct investment, thus this section seeks to present an analysis and understanding of the salient provisions of these laws and how they promote or hinder foreign direct investment. Some of these laws

[178] Blomström, M., & Sjöholm, F. Technology Transfer and Spillovers: Does Local Participation with Multinationals Matter? In EUROPEAN ECONOMIC REVIEW, 43(4), 915-923., (1999) Retrieved From Http://Dx.Doi.Org/10.1016/S0014-2921(98)00104-4

[179] Janet Adelagun," Foreign Direct Investment and Economic Growth in Nigeria: A Seemingly Unrelated Model in African Review of Money Finance and Banking, 2000, (2000), Pp 5-25, P.21 (Giordano Dell-Amore Foundation/

[180] Onyali and Okafor, pg. 10.

regulate foreign investment on the grounds of national order and security while others provide for investments. These laws include.

2.7.1 Nigerian Constitution as Amended 1999

The 1999 Constitution as amended is the Supreme Law of the Federal Republic of Nigeria from which all other laws derive their validity. The constitution in Section 16 sets the objectives of the government's economic policy. Irrespective of the fact that this Section is contained under Chapter 2, it is provided within "the context of ideals and objectives for which provisions are made in the Constitution.[181] The section provides that the State of Nigeria shall harness the resources of the nation and promote national prosperity and shall protect the right of every citizen to engage in any economic activity outside the major sectors of the economy.[182]

The Constitution in Sections 43 and 44, provides investment guarantees and protection for both indigenous and foreign investors. Section 43 expressly provides that every citizen of Nigeria has the constitutional right to acquire and own immovable property[183] anywhere in Nigeria. This includes both natural and juristic persons, that is, a body corporate registered under the Companies and Allied Matters Act. In line with this, Section 37 of the CAMA provides that:

> "As from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such others as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an

[181] Section 16(1) Of The 1999 Constitution of The Federal Republic of Nigeria
[182] Oga Sarah Onyeche and Adeyuma Iji Gabriel, Foreign Direct Investment in Nigeria: Examining the Statutory Reach in Global Journal of Politics and Law Research (Vol.7, No.4) Pp.71-84, May 2019
[183] This Refers to Property Such as Land or Anything Attached to Land or Forming Part of Land, Either Above It or In the Subsoil., See B.O. Nwabueze, Nigerian Land Law, Nwamife Publishers, Enugu, Nigeria, 1982, At 5.

incorporated company including the power to hold land and having perpetual succession and a common seal."[184]

In addition to having the right of perpetual succession, The Companies and Allied Matters Act vests a registered entity with the rights and duties of a natural person. Thus, the reference in Section 43 of the Constitution to “a Nigerian Citizen" also includes entities registered in Nigeria, notwithstanding that they have 100 percent foreign equity holdings.[185] Therefore, by implication, the protection against expropriation (unlawful taking of property) applies also to foreign investors whether they are investing directly or through portfolios.[186]

The most important constitutional protection relating to foreign investments is provided for in Section 44 of the 1999 Constitution (as amended). According to Section 44(1) of the Constitution:

> "No moveable or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things:
>
> a) Requires the prompt payment of compensation therefor; and
>
> b) Gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.[187]

The purport of this Section is that individuals and corporate organisations are protected from the compulsory acquisition of their property or interest in any part of Nigeria and where any of such property is acquired by the government, adequate compensation shall be paid to the owner of the property. This

[184] Section 37 of the Companies and Allied Matters Act 2020

[185] Section 17 Of the Nigerian Investment Promotion Commission [Act] Allows Foreign Investors to Invest and Participate in The Operation of An Enterprise in Nigeria

[186] Definition of portfolio investment by NIPCA

[187] Suspension Decree of the Military

security provided by the constitution is imperative to give investors' confidence and must therefore be binding on successive governments. These guarantees are contained under Chapter 4 and form part of the fundamental rights of all citizens. Thus, the continued existence and sustenance of democracy is necessary for the promotion of foreign investments in Nigeria.

In addition to the guarantees provided by these Sections, Section 37 establishes the fundamental right of every citizen to privacy. In Doe v Bolton[188], the court held that "the fundamental right to privacy includes the right to personal autonomy and includes control over the development and expression of one's intellect, interests and personality". Thus, a right to autonomy, entails the freedom of an individual to participate in interests that generate income, a means of survival and fulfilment of purpose without hindrance from anyone. A joint reading of Section 16, 37, 43 and 44 seeks to assure investors of the government support and efforts to encourage investment in the country and establish Nigeria as an investment friendly destination.

While there are constitutional guarantees that protect investments in Nigeria, some provisions of the Constitution may be perceived as creating a hindrance to foreign investment. One of such provisions is found in Section 16(l)(c), which grants exclusive rights to the State to manage major sectors of the economy. In Section 16(4)(a) the term "major sectors of the economy" is explained to mean:

> "... a reference to 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; and 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 this section comes into force, whether directly

[188] 410 U.S. 179 (1973)

or through the agencies of a statutory or other corporation or company, shall be deemed to be major sectors of the economy."[189]

Subsection(4)(b) further describes “economic activities” to include activities directly concerned with the production, distribution and exchange of weather or of goods and services.

These sections tend to encourage the creation of State monopolies in sectors that are considered lucrative. Apart from the institutional corruption established in these agencies, experience has shown that these agencies were fraught with undue bureaucracy, corruption, mismanagement creating more problems rather than solutions. These constitutional provisions might pose problems and reduce investor’s confidence in the Nigerian environment. Another of such provisions is found in Section 16(3) which grants the National Assembly the power to review from time to time, the ownership and control of business enterprises, make recommendations to the President and administer law on the regulation of the ownership and control of such enterprises.[190]

These provisions are necessary for the effective planning and formulation of economic and investment policies. However, they are susceptible to abuse by the government who may lean on these provisions to take ownership of private enterprises. [191] In the opinion of Victor,[192] a country seeking to gain investors’ confidence and promote foreign investment in its economy should avoid the use of such provisions in its laws. The Constitution also defines and provides for the powers and duties of the 3 tiers of government namely the executive, legislature and judiciary. Of paramount importance is the provision of Section 6(6)(b) of the 1999 Constitution which vests judicial powers in the judiciary. It provides thus:

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[189] Section 16(4)(a) of the 1999 Constitution of the FRN
[190] Section 16(3) Of The 1999 Constitution of the FRN
[191] Vincent Akpotaire, The Legal Imperatives for Foreign Investment in Nigeria in The World Investment and Trade Pg 324
[192] Supra

> ‘‘The judicial powers vested in accordance with the foregoing provisions of this section—shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.’’

Pursuant to Section 6(6)(b), Nigerian courts are empowered to entertain and determine disputes between private parties and disputes between a private party and any of the three tiers of government in Nigeria or its agencies. Thus, the judiciary has the power to review policies and action of government to ensure they are in conformity with fundamental human rights under the constitution. Thus, the judiciary has the power to strike down any action of the government with jeopardises the interest of investors doing business in Nigeria. A case in point is where the apex court relying on the provisions of Section 6(6) struck out the Petition of Rights Act (a legislation of colonial heritage) on the ground that certain provisions of the Act restricted the right of individuals and corporate enterprises to institute legal actions in Nigeria against the government and its agencies. According to the provisions of Section 3 of the Petitions of Rights Act

> ‘‘All claims against the Government, or against any governmental department, being of the same nature as claims which may be preferred against the Crown in England by petition, manifestation or plea of right, may, with the consent of the Governor-General be preferred in a Superior Court having original jurisdiction in respect thereof in a suit instituted by the claimant as plaintiff against the Attorney-General of the Federation as defendant, or such other officer as the Governor-General may from time to time designate for that purpose.’’

In addition to these, Section 4 of the Act provided that:

‘‘The claimant shall not issue a writ of summons, but the suit shall be commenced by the filing of a statement of the claim in the court and the delivering of a copy thereof at the office of the Attorney General of the Federation or other officers designated as aforesaid ...’’

The 1999 Constitution also confers on certain non-judicial bodies authority to carry out quasi-judicial functions. These functions must be exercised in line with the principles of natural justice. The Constitution also provides that the decisions of these bodies shall be subject to review by the courts of competent jurisdiction. In this vein, Section 36(2) of the 1999 Constitution provides that:

‘‘Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the determination of a law that affects or may affect the civil rights and obligations of any person if such law— a) provides for an opportunity for the person whose rights and obligations may be affected to make representation to the administering authority before the authority makes the decision affecting that person; and b) contains no provision making the determination of the administering authority final and conclusive.’’[193]

The effect of this provision in respect to the protection and encouragement of foreign investment is that a legislation which provides for the grant and revocation of economic licences must in the case of a breach afford the affected person a fair hearing in line with the principles of natural justice. In this respect, the Petroleum Industry Act, 2021 mandates the FGN to comply with the requirement of due process before a petroleum prospecting licence (‘‘PPL’’) or petroleum mining lease (‘‘PML’’) can be revoked. Section 97 of the Act requires the Commission prior to the revocation of any licence or lease to not only to inform the holder of an PPL or an PML of the contemplated grounds of its revocation, but

[193] Section 36 of the 1999 Constitution of the FRN

also requires him to give the holder a period of remediation of not less than 60 days.[194] Under this Act, the right to revocation does no longer lie within the prerogative of the Minister and is based on the recommendation of the Commission.

According to section 97(1)(b) of the PIA, the Commission is only empowered to revoke the licence or lease, where the holder of the licence or lease offers no remediation for the grounds on which revocation was based. These provisions protect investors in the Oil and Gas sector and enable them seek redress where their licences are arbitrarily revoked. It also enables them to conduct their activities properly to prevent revocation of their licences or leases.

2.7.2 Companies and Allied Matters Act, 2020

The Companies and Allied Matters Act is the principal legislation governing the formation, regulation and operation of business organisations in Nigeria. The Companies and Allied Matters Act 2020 repealed and replaced the Companies and Allied Matters Act[195]. This Act introduced several innovations in the regulatory framework aimed at enhancing ease of operating businesses in Nigeria. It requires any foreign company or individual intending to carry on a business in Nigeria to incorporate a separate company for that purpose. [196]

In this vein, Section 78(1) of the CAMA 2020 provides thus:

> " Subject to sections 80-83 of this Act, every foreign company which before or after the commencement of this Act was incorporated outside Nigeria, and having the intention of carrying on business in Nigeria, shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not carry on

[194] Section 97(1)(b) of the Petroleum Industry Act 2021
[195] Cap C20 LFN 2004
[196] Section 78(1) CAMA 2020

business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under this Act.

Where a foreign company does not comply with this provision, any operation it engages in is regarded as void. However, the operations of a foreign company or its subsidiary in Nigeria will not be regarded as illegal where it is granted exception by the Minister.

An analysis of the requirement of re-incorporation of foreign companies shows that it originated from the Nigerian Companies Act 1968.[197]In the opinion of Ogowewo[198]Post independence, Nigeria sought to gain control from foreign nationals and grow the domestic firms, as such it introduced economic policies aimed at wresting control from foreign powers and Indigenization of the Nigerian economy.[199] Some of these policies include the Indigenization Decree of 1972. However, this Decree has been repealed by the NIPC and efforts geared towards liberalisation of the investment framework and increasing foreign investment in the Nigerian economy. As such the economic requirements requiring re-incorporation as a Nigerian Company seems to have lost its relevance. Ekwueme agrees with this viewpoint, while stating that the requirement of re-incorporation for foreign companies increases their transaction cost thus discouraging investments in Nigeria. The requirement of compulsory incorporation

[197] The provisions of sections 369 and 370 of the Companies Act, 1968 altered the possibility of foreign investment in Nigeria through a branch office. Section 369 provided that every foreign company, which had an established place of business in Nigeria on 1 October 1968 (the commencement date of the Act), would be deemed to be incorporated in Nigeria as a separate entity from November of that year. Furthermore, section 370 mandated foreign companies to seek local incorporation as separate business entities in Nigeria to carry out business activities in the country.

[198] T. Ogowewo, ''A shift to the classical theory of foreign investment: opening the Nigerian market'', (1995) 44 International and Comparative Law Quarterly 924.

[199] Section 192 of the Companies Act, 1968 imposed an obligation on every company incorporated in Nigeria to state clearly in its trade catalogues, notices and correspondences the forenames, initials and surnames of any of its directors who was not a Nigerian. The rationale behind the provisions of section 192 was to accelerate the pace of the Nigerianization of the top management of the companies in the country. See O. Oserheimen, ''Nigerian investment laws and the state's control of multinationals'' (1998) 3(1) ICSID Review–Foreign Investment Law Journal 49

of foreign companies as a modern means of attracting foreign investment is at odds with what obtains globally as many counties permit foreign firms to invest in their domestic economy through their branches. Thus, in the competitive global landscape, Nigeria will not be regarded as a very attractive investment due to all its regulatory hurdles. [200]

However, it provides exemption for certain foreign companies.[201] They include:

(i) foreign companies invited to Nigeria by or with the approval of the Federal Government of Nigeria to execute any specified individual project

(ii) foreign companies in Nigeria to execute a specific individual loan project on behalf of a donor country or international organization.

(iii) foreign governments-owned companies engaged solely in export promotion activities in Nigeria; and

(iv) engineering consultants and technical experts engaged on any individual specialist projects under contract with any of the governments in Nigeria or their agencies, or with any other body or person where such contract has been approved by the Federal Government

The Act established the Corporate Affairs Commission (CAC) as a body corporate with perpetual success and a common seal. The Commission is charged with, amongst other duties, the administration of the Act, including the registration, regulation and supervision of business processes and activities.[202] The Commission houses all details and reports relating to companies registered in Nigeria. All filings in relation to the corporate structure and existence of business entities are to be made to the CAC.

[200]Ekwueme, K. "Nigeria's principal investment laws in the context of international law and practice", Journal of African Law, Vol. 49 No. 2, pp. 177-206 p.184 (2005)
[201] Section 80 CAMA 2020
[202] Section 8(CAMA) 2020

Information required to be produced by companies wishing to be registered in Nigeria include name and address of the company, information on company secretary, shareholding, directorship, and external audits. Companies are also required to file information with respect to changes in share capital, change of name, directors and change in business organisation. Several business and investment friendly innovations introduced by this Act include:

(i) Allows for the formation of a single member or shareholder company.[203]

The CAMA 2020 makes it possible for a single shareholder to form and incorporate a private company with only one (1) member or shareholder. This is unlike CAMA 1990, which requires two or more people to form and incorporate a company. This innovation can also be viewed as an exemption to the rule requiring two or more persons. Thus, whereas the CAMA 2020 retains the requirement that two or more persons may form and incorporate a company[204], it now provides an addition and exception.

(ii) Introduced E-filing, electronic share transfer and E-meetings for private companies: the CAMA 2020 now allows private companies[205], to hold virtual meetings, and carry out electronic filing and transfer of shares. The effect as provided in Section 861 of CAMA 2020 is that certified true copies of electronically filed documents are admissible in evidence and hold the same validity as the original documents. Furthermore, it includes electronic instruments of transfer as instruments that can be used in the transfer of shares[206].

(iii) Replaced Authorized Share Capital with Minimum Share Capital.[207]

[203] Section 18(2) CAMA 2020

[204] Section 18(1) CAMA 2020

[205] Private company is one which is stated in its memorandum of association to be a private company whose membership does not exceed 50.

[206] Section 176(1) CAMA 2020

[207] Section 27 of the CAMA 2020

The implication of this replacement is that promoters of business do not need to pay for shares not required in the immediate term.

(iii) Provision for Virtual Annual General Meeting - The CAMA 2020 provides Annual General Meetings can be held remotely or virtually provided they are conducted in accordance with the Articles of Association of the company. This removes the barrier of participation due to location. This practice is also in tandem with changing times considering the disruptions caused by Covid-19 to the operations of businesses around the world.

(iv) Reduction of Filing Fees for Registration of Charges –The CAMA 2020 also reduced the fees payable to the CAC for the registration of company documents[208]. Under this new Act, the total fees payable is now 0.35% of the value of the charge. This will result in a reduction of over 60% in the total cost payable for incorporation of a company under the Act.

Despite the many innovations championed by the Act, certain provisions of the Act still pose a hindrance to the formation and operation of businesses in Nigeria both for domestic and foreign investors. An example is Section 394 of CAMA, the threshold for the maximum annual turnover for small companies which was previously ₦2 million is now set at ₦120 million. There was also an increase in the Minimum Share Capital for companies. This makes it burdensome for private companies who intend to switch from one line of service to another, as the Act requires that businesses seeking to change services or operations are required to reincorporate the business as a new company rendering such services.[209]

2.7.3 Nigerian Investment Promotion Commission Act Of 1998, As Amended (The "NIPC Act")

This Act was formerly known as the NIPC Decree No 16 of 1995. It is the central Act governing foreign direct investments in Nigeria. It was enacted to promote, coordinate and monitor enterprise establishment

[208] Section 222 (12) of the CAMA 2020
[209] Okaphor Page 47

and operations in Nigeria. In the opinion of Ekwueme,[210] The basic philosophy underpinning the NIPC Act is a "liberal, open-door policy" to investments, and its objective is the promotion of domestic and foreign investments.

The NIPC Act in Section 32 defined ''investment'' as ''investment to acquire an interest in an enterprise operating within or outside the economy of Nigeria. 'Its definition of investment is best understood in the light of the definition of "enterprise" and "capital" under the Act. The same section further defined 'enterprise" as ''an industry, project, undertaking, business to which this Decree applies or an expansion of that industry, undertaking, project or business or any part of that industry, undertaking, project or business and, where there is foreign participation, means such an enterprise duly registered with the Commission.'' Likewise, it defined "capital" as ''all cash contributions, plant machinery, equipment, building, spare parts, raw materials and other financial assets, other than goodwill.''[211] This definition of investment under the Act is of significance in several ways. First, it extends the meaning of investment under the Act to include any economically asset whether tangible or intangible. Secondly, its broad meaning gives it flexibility to accommodate the diversity and evolving forms of investments. The third significance is that it determines whether the investment would be protected by the law.

This Act applies to both Nigerians as well as foreign nationals and companies. Thus, it is a general legislation regulating both domestic and foreign investment rather than an enactment regulating foreign direct investment. Since this law does not provide solely for foreign investment in Nigeria, it is complemented with other laws such as the Foreign Exchange (Monitoring and Miscellaneous) Provisions Decree No. 16 of 1995 (''FEMMP Act'') and other key investment laws.

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[210]Supra 49 at, page 177

[211] Section 32 of the NIPC Act 1998

Prior to its enactment in 1995, the regulation in place was the "Nigerian Enterprises Promotion Decree (NEPD) of 1972" which imposed restrictions on foreign direct investment in Nigeria. This was followed by the "Nigerian Enterprises Promotion Decree of 1977", which increased the restrictions on foreign participation in the Nigerian economy. This Act also repealed the Industrial Development Coordination Committee Decree No. 36 of 1988. The Nigerian Investment Promotion Commission Act opened all sectors of the Nigerian economy to foreign participation and removed all hindrances to the transfer of foreign capital by foreign investors who wish to own equity in Nigeria companies, advance loans to indigenous subsidiaries, or incorporate companies in Nigeria.

It allowed for foreign ownership of up to 100 percent equity subject to the particular restrictions and requirements of the relevant sectors.[212]For instance, it previously limited 100 foreign ownership in the petroleum sector, as FDI is limited to joint ventures or production sharing contracts arrangements.[213] However, the 1998 Amendment amended the provisions of section 18 to the effect that petroleum companies were are no longer excluded from the
scope of the NIPC Act. Furthermore, it prohibited investment in sectors prescribed in the negative list. Industries central to national security, national integrity and health and safety of the Nigerian Populace were referred to as sectors in the negative list. Section 32 of the NIPC Act precludes both Nigerian and foreigners from investing in business activities on the negative list. Business activities contained in the negative list include.

(i) the production of arms and ammunition

(ii) the production of and dealing in narcotic drugs and psychotropic substances

(iii) the production of para-military wears

(iv) such other items as may be determined from time to time by the Federal Executive Council.

[212] Section 17 of the NIPC Act 1998
[213] Section 18 of the NIPC Act 1998

In addition to allowing foreigners own 100% equity participation in domestic companies, Section 21 of the NIPC Act grants permission to foreign entities to acquire, in convertible currency, the shares of Nigerian companies without restrictions provided the acquisition is carried out through the Nigerian Stock Exchange.[214] In Ekwueme's opinion, it gives foreign enterprises liberty to acquire portfolios as well as direct investment in Nigeria by merging.

with or taking over Nigerian firms.[215] Section 21 of the NIPC Act is further complemented by the provisions of sections 15 and 16 of the FEMMP Act which allows an individual or firm (natural or juristic) person to invest in the Nigerian economy with foreign capital, irrespective of the residence of the investor. These provisions enable foreign investors to acquire shares of Nigerian companies. Furthermore, Sections 19(1) provides that:

> ''An enterprise in which foreign participation is permitted under Section 17 of this Decree shall not commence business, except it is incorporated or registered under the Companies and Allied Matters Act.[216]
>
> In the same vein, Section 20(1) provides that:
>
> "An enterprise in which foreign participation is permitted under Section 17 of this Act shall, before commencing business, apply to the Commission for registration."

The purport of Sections 19(1) and 20(1) is to the effect that a foreign investor seeking to establish a business entity in Nigeria is required to incorporate this entity according to the provisions of the Companies and Allied Matters Act, (''CAMA'') 1990 now the Companies and Allied Matters Act 2020.

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[214] Section 21(1) of the NIPC Act provides that: ''A foreign enterprise may buy the shares of any Nigerian enterprise in any convertible foreign currency.'' section 21(2) further provides that ''The purchase of the shares of any Nigerian enterprise shall be complied through the Nigerian Stock Exchange.''

[215]Ekwueme, K. "Nigeria's principal investment laws in the context of international law and practice", Journal of African Law, Vol. 49 No. 2, pp. 177-206 p.180 (2005)

[216] This provision was introduced by the NIPC Amendment Decree of 1988

The NIPC Act does not mandate the Commission to register a foreign enterprise that has been incorporated under the CAMA, rather section 20(2) of the Act allows the Commission a period of 14 days after the receipt of registration application from an incorporated foreign enterprise to review the application and make a decision.[217] It is worthy to note that this Act does not prescribe clear criteria for registration of investments. The effect of this omission is that it offers the Commission wide discretion in the acceptance and rejection of applications for registration of business enterprises. the implication of the absence of statutory laid down criteria for the assessment of foreign investment is that a foreign investor cannot effectively challenge a rejection of an application for registration of a business enterprise. [218]Under international law, it is imperative to register a foreign business enterprise with the Commission as failure to do so means the investment has not been admitted or recognised in Nigeria. Where an investment is not recognised, the implication is that the International Centre for the Settlement of Investments cannot entertain a claim or dispute on whether the affected foreign investor has right to compensation under the NIPC Act, customary international law or an investment treaty between Nigeria and the investor's state. The classic case of Mihaly International Corporation v. Sri Lanka[219] lends credence to this position. In this case, the claimant, Mihaly International Corporation, a US registered company, called on the ICSID to invoke the provisions of the US-Sri Lanka Bilateral Treaty of 20th September 1991 against Sri Lanka. This treaty was for the construction of a power generation facility in Sri Lanka. It was clearly known between the parties that the respondent, the Government of Sri Lanka selected the claimant out of several other foreign bidders. The power facility was estimated to cost U.S.$400m and was to be constructed on a build, own and transfer basis. The design plan, selection

[217] Section 20(2) of the Act provides that: ‘‘The Commission shall within 14 days working daysfrom the date of the receipt of the completed registration forms, register the enterprise if it is satisfied that all relevant documents for registration have been duly completed and submitted or otherwise advise the applicant accordingly.

[218]When the grounds for rejection of the application are unreasonable., the affected foreign investor can apply to court for an order of mandamus to compel the Commission to register the company on the authority of Kehinde v. Registrar of Companies. See (1979) 3 LRN 213 at 219–220.

[219]ICSID Case no. ARB/00/2 (Decision of 15 March 2002) archived online at www. worldbank.org/icsid/cases/mihaly-award.pdf or (2002) 41 International Legal Materials 867

stage, negotiations, financial and economic modelling of the conditional agreement required significant labour and cost on the part of the claimant.

After negotiations, the claimants were granted a Letter of Intent which translated to exclusive negotiations with the respondents. This was followed by a Letter of Agreement, made subject to contract. After substantial costs and work had been expended, negotiations between the parties did not materialise into a contract due to the claimant's inability to meet certain deadlines contingent to the conclusion of the contract. The issue for determination before the ICSID was whether the claimant's costs could be regarded as investment, a condition precedent for the exercise of its jurisdiction under the ICSID Convention. The ICSID abdicated jurisdiction and held that in the absence of express agreement between the parties, the pre contract work and costs of the claimant could not be regarded as investment. The Claimant's did not also present any evidence in the instant case to show that pre-contract and development costs could be admitted as investment in the absence of consent by the Respondent to the execution of the project. It is worthy to note that while the US-Sri Lanka Bilateral Treaty clearly defined what constitutes investment and the conditions for its admission, clearing taking into consideration the peculiar nature of the contract. As observed by the tribunal, if negotiations between the parties had materialised into an executed contract, the work and cost expended, could be subsumed as part cost of the project and fallen "within the ambit of an investment."

The Act also established the Nigerian Investment Promotion Commission (NIPC) as a corporate body for the purpose of administering the provisions of the Act.[220] By Section 5 of the NIPC Act, the Commission is vested with wide powers to promote, coordinate and administer investment, and to also offer advice to the Federal Government on fiscal and policy matters and the general development of the Nigerian economy.[221] The Commission is charged with the responsibility of encouraging, promoting,

[220] See Section 1 of NIPC Act Cap N117, LFN 2004
[221] Section 5 of the NIPC Act 1998

facilitating and monitoring all investments in Nigeria.[222] It facilitates investments by bringing together all relevant government agencies, coordinating their functions and streamlining their processes to provide efficient and transparent services to investors. The Commission aims at simplifying the process, eliminating bureaucracy involved in the incorporation of companies and the issuance of business approvals, thereby removing bottlenecks usually faced by investors setting up and operating business thus making Nigeria an investment friendly zone. By Section 28 of the NIPC Act, the Commission is to assist and guide foreign investors. In addition, Section 4(d) requires the Commission to ‘‘collect, collate, analyse and disseminate information about investment opportunities and sources of investment capital, and advise on request, the availability, choice or suitability of partners in joint venture projects.’’ Likewise, section 4(f) of the NIPC Act also mandates the Commission to: ‘‘identify specific projects and invite interested investors for participation in those projects.’’ When acting in an advisory capacity, the Commission does not act on behalf of the Government, thus an investor who relies on advice from the commission cannot hold the Government liable for any losses suffered from acting on the advice. This Commission is to ensure that investors, both domestic and foreign enjoy the maximum benefits of the liberalisation and deregulation of the national economy. The Commission provides market statistics and information on the Nigerian economy, the legal and regulatory framework, sector and industry information aimed at aiding current and prospective investors in making informed business decisions. By its actual design as a replacement for the Industrial Development Coordination Committee, it was to be a” one-stop agency” to handle the implementation of all regulations and procedures relating to investment in Nigeria as opposed to going through several government agencies for the purpose of registration of investments. However, Section 19(2) of the Act prevents the Commission from acting as a one-stop agency where foreign investors can swiftly complete all their processes, obtain necessary permits and licences for the operation of businesses in Nigeria. According to Section 19(2) “states that:

[222] Section 4 of the NIPC Act 1998

‘‘[...] nothing in this Decree shall be construed as precluding an enterprise to which this Decree applies from obtaining such license, lease, permit or any other approval as may be required for the establishment or operation of the enterprise.’’

Thus, what currently obtains is that the Commission grants its own business permit, then facilitates the collection of other necessary permits or licences from other governmental agencies. A major challenge experienced here is the lack of cooperation from other agencies who prefer to interact with the foreign investors directly.

Other salient provisions contained in the Act are the guarantees offered by the Government against expropriation and nationalisation.

Section 25(1) provides that:

‘‘Subject to subsections (2) and (3) of this section,

(a) no enterprise shall be nationalized or expropriated by any Government of the Federation; and

(b) no person who owns, whether wholly or in part, the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other person.

(2) There shall be no acquisition of an enterprise to which this Decree applies by the Federal Government unless this acquisition is in the national interest or for a public purpose and 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 the investor’s interest or right and the amount of compensation to which he is entitled.

(3) Any compensation payable under this section shall be paid without undue delay, and authorization for its repatriation in convertible currency shall, where applicable, be issued”

In the opinion of Ekwueme,[223] The purport of this section is important in many respects. First, it takes into consideration the difference between expropriation (discrete taking of investment) and nationalisation (large-scale taking of investment), and offers foreign investors guarantees against both. Second, these guarantees apply to both enterprises owned and capital of investors in enterprises in Nigeria. Thus, the protection offered by the NIPC Act extends not only to foreign direct investors but also portfolio investors holding shares sold on the Stock Exchange market. Finally, the use of the terms ‘‘expropriation’’ and ‘‘nationalisation’’ in the NIPC Act rather than ‘‘compulsory possession’’ and ‘‘compulsory acquisition’’ used in the Land Use Act, 1978 shows a lucid intention to expand the scope of what is regarded as taking under the NIPC Act to cover measures amounting to expropriation or nationalization. The conditions for expropriation or nationalization under the NIPC Act include ‘‘public purpose’’ and ‘‘national interest’’. It does not include ‘‘non-discrimination’’ as a condition for the taking of investment. The omission of this requirement is not a cause for concern however as the requirements of public purpose and non-discrimination are similar. It is pertinent to note that expropriation or nationalization cannot be nullified by an international tribunal because the taking was discriminatory. Where a state has expropriated foreign investment without compensation, a tribunal will only award compensation rather than nullify the taking. However, this scenario plays out differently under Nigerian law. In several cases, the apex court has nullified compulsory acquisition of land on the basis that it did not serve the public interest.[224] In the opinion of Professor Higgins, the requirement of natural interest is broader than that of public purpose. The requirement of National interest involves considering politics as well as issues of security. This requirement of national interest is rarely provided for in Bilateral treaties governing investment. condition for the taking of investment. However, its inclusion gives the

[223] Ekwueme, K. “Nigeria’s principal investment laws in the context of international law and practice”, Journal of African Law, Vol. 49 No. 2, pp. 177-206 p.184 (2005)
[224] R. Higgins, ‘‘The taking of property by the state: recent developments in international law’’, (1982) 176 III Recueil Des Cours 288

Federal Government a legal right to take over foreign investments for other uses other than for public purposes. In addition to the guarantees against expropriation and nationalisation, section 25(3) of the NIPC Act provides for the payment of compensation promptly. The Act also provides guarantees against currency risk. This gives investors the ability to convert the proceeds of their investment easily and meet their financial duties to creditors. In this vein, Section 24 of NIPC Act provides that: ‘‘[...] a foreign investor in an enterprise to which this Decree applies shall be guaranteed unconditional transferability of funds through an authorized dealer in freely convertible currency, of a) dividends or profits (net of taxes) attributable to the investment; b) payments in respect of loan servicing where a foreign loan has been obtained; c) the remittance of proceeds (net of all taxes), and other obligations in the event of a sale or liquidation of the enterprise or any interest attributable to the investment.’’

Section 15(4) of FEMMP Act stipulates that: ‘‘Foreign currency imported into Nigeria and invested in any enterprise pursuant to subsection (1) of this section shall be granted unconditional transferability of funds, through an authorized dealer in freely convertible currency, relating to: dividends or profits (net of taxes) attributable to the investment; payments in respect of loan servicing where a foreign loan has been obtained; and the remittance of proceeds (net of all taxes) and other obligations in the event of sale or liquidation of the enterprise or any interest attributable to the investment.

Section 26 of the NIPC Act provides a dispute resolution mechanism for the settlement of investment disputes in Nigeria. By virtue of Section 26(2)

> ‘‘Any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Decree applies which is not amicably settled through mutual discussion may be submitted at the option of the aggrieved party to arbitration as follows:

(a) in the case of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified in the Arbitration and Conciliation Decree of 1998; or

(b) in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties; or (c) in accordance with any other national or international machinery for settlement of investment disputes agreed to by the parties.''

In analysing the dispute resolution mechanisms in Sections 26(2)(a) and (b), it can be inferred that it provides for two means of dispute resolution, the domestic and foreign track for domestic and foreign investors respectively. Furthermore, Section 26(2)(c) allows foreign investors in Nigeria to determine the mechanism for the settlement of investment disputes with governmental agencies in Nigeria.

2.7.4 Foreign Exchange (Monitoring and Miscellaneous Provisions) Act Of 1995 (The "FEMMA Act")

This Act provides for the monitoring and supervision of all foreign transactions. It repealed the Exchange Control Act No. 16 of 1962 which significantly restricted foreign exchange transactions in Nigeria. This Act established an Autonomous Foreign Exchange Market (also referred to as "the Market") where foreign exchange transactions shall be carried out[225] between authorized public and authorized dealers, among the authorized dealers; the authorized dealers and authorized buyers; authorized buyers, the public and the Central Bank of Nigeria. Section 15 of this Act entitles any person to invest in any enterprise or security in Nigeria with foreign currency or capital imported into Nigeria through an Authorised Dealer either by telegraphic transfer, cheques or other negotiable instruments. These currencies will be converted into Naira in the Market in accordance with the provisions of the Act.

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[225] See Section 1(1) of the Foreign Exchange (Monitoring and Miscellaneous provisions) Act NO. 17 1995 Act Cap F34 L.F.N 2004

Furthermore, Section 4 of the FEMM Act provides a list of sources from which foreign currencies sold in the Market could be derived. They include: foreign currency in domiciliary accounts maintained in authorised banks in Nigeria; foreign currency held or imported by foreigners or Nigerians in the Diaspora; agency commissions, professional fees and other forms of invisible earnings; non-oil export proceeds earned by exporters of Nigerian commodities; foreign currency held by Nigerian citizens resident in Nigeria; foreign currency imported by foreign nationals to purchase goods in Nigeria; foreign currency imported or held by foreign Embassies, High Commissions and international organizations from external sources; foreign currency held in external accounts by individuals, bodies corporate and unincorporate, commission agents, professional bodies, insurance companies and other similar bodies; foreign currency imported by tourists in to Nigeria; foreign currency provided by the Central Bank; foreign currency imported for direct investment in Nigeria; and foreign currency from such other sources as the Minister may, from time to time specify by order published in the Gazette.

Eze et al noted that irrespective of the plethora of sources of foreign exchange, the Central Bank remains the main source of foreign exchange for the Market. This goes further to question the efficiency of the Market as an alternative source of forex for end users. In its entirety, the Act is aimed at ensuring the proper regulation of foreign exchange in Nigeria, prohibiting and penalising unlicensed dealings in foreign currencies. It also seeks to liberalize the flow of foreign exchange within the Nigerian economy at a market determined rate. However, the efficient implementation of the Act has been fraught with several hurdles such as malpractices in the Market by participants who fraudulently acquire foreign exchange and sell them to end users at exorbitant rates.[226]

[226] Eze et al, 2017

2.7.5 The Petroleum Industry Act 2021

The Petroleum Industry Act was enacted to provide for the legal, governance, the regulatory, and fiscal framework for the Nigerian Petroleum Industry, the establishment, and development of host communities and other related matters[227]. To state that this legislation has been long in coming is to state the least. It has been over a decade in the making and came over 50 years after the Petroleum Act 1969. This repealed the Petroleum Act 1969 and sought to overhaul the legal, regulatory and fiscal framework of the Nigerian Petroleum Industry. The Petroleum Industry Act is divided into 319 sections and 5 chapters which are further subdivided into parts. Chapter I provides for the Governance and Institutions; it focuses on the Vesting of Petroleum and objectives; the Powers of the Minister; The Commission; The Authority and the Nigerian National Petroleum Company Limited. Chapter II of the PIA provides for the administration of the Petroleum Sector. It focuses on General Administration, that is Objectives and Management of Petroleum Resources; Administration of Upstream Petroleum Operation and Environment; General Administration of Midstream and Downstream Petroleum Operations; Administration of the Midstream and Downstream Gas Operations; Administration of Midstream and Downstream Liquid Operations; Other matters related to Midstream and Downstream Operations and Common Provision for Upstream, Midstream and Downstream Petroleum Operations. Chapter III of the Act provides for Host Community Development. It highlights the objectives for this section of the Act, stating the purpose, initiatives and procedures necessary for the implementation of these provisions geared towards the development of the host communities. It also provides for the creation and management of trust funds, and such salient provisions necessary for the adequate development of the host community. Chapter IV of the PIA provides broadly for the Petroleum Industry Fiscal Framework. It highlights the Objectives and General administration of the Fiscal Framework; the newly introduced Hydrocarbon Tax.; Ascertainment of Chargeable Tax and profits; Chargeable Persons, Applicability,

[227] Long Title to the Petroleum Industry Act 2021

Accounts and Particulars; Appeals in respect of the Tax Disputes; "Collections, Recovery and Repayment of Tax"; Offences and Penalties for default; as well as Application of Companies Income to Petroleum Operation and other General Provisions. It concludes with Chapter V which provides for Miscellaneous Provisions.

2.7.6 Deep Offshore and Inland Basin Production Sharing Contract (Amendment) Act 2019

This Act was first introduced as a Decree, the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act 1999 and was subsequently amended by the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Decree No 26 of 1999. This Act was re-enacted as the Deep Offshore and Inland Basin Production Sharing Contracts Act, 2004 and amended to become the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act, 2019. This Act was enacted to give effect to certain fiscal incentives given to the Oil and Gas companies operating in the Deep Offshore and Inland Basin areas under production sharing contracts between the Nigerian National Petroleum Corporation or other companies holding oil prospecting licences or oil mining leases and various petroleum exploration and production companies.[228]

At first enactment, this was the encompassing function of the Act, however with a growth in the global Oil and Gas Industry coupled with a need to sustain a competitive growth of the industry and attract investments, an amendment was imperative. In succinct terms, the Amendment made provisions for price reflective royalties, an 8-year periodic review of Production Sharing Contracts and prescribes penalties for non-compliance with the Act. The introduction of these provisions was aimed at increasing Nigeria's revenue from the Oil and Gas Industry. The Amendments to the Act include:

[228] Long Title to the Deep Offshore and Inland Basin Production Sharing Contract Act 2004

(i) A revision of the royalty rates: Section 5 of the new Act substituted Section 5 of the previous Act revising how royalties are calculated. Previously, the calculation of the royalties' rates was dependent on the water depth of the field ranging from 12% to 0%. The amendment removed the 0% royalty rate. Royalties are now calculated on a field basis, based on the volume of crude oil and condensates produced per field that is chargeable for royalties. Royalties are now chargeable at the following rates: Deep Offshore fields (fields greater than 200m water depth) - chargeable at 10%; frontier or inland basin - chargeable at 7.5% rather than at 10% under the previous Act.[229]

In addition to this change, the Amendment Act introduced a royalty rate based on price. This new royalty rate will account for an increase in the price of crude oil when it is over $20 per barrel. Following these new rates, the royalties are chargeable at 0% when the price of oil is $0 to $20; above $20 to $60, chargeable royalty is 2.5%; above $61 to $100, royalty is chargeable at 4%; above $100 to $150, royalty is chargeable at 8% and above $150, royalty is chargeable at 10%.[230]

(ii) Review of Contracts: The Amendment Act introduces a new section 17, which provides that all PSCs shall be revised every 8 years. This is like Section 16 under the previous Act. The expected effect of the provision under the Act was a review of the price of crude oil if the price of oil at any time exceeded $20 in real terms. However, this provision was never implemented.

This Amendment Act is critical to the discussion on foreign direct investment in the Oil and gas Industry because it provides the framework and fiscal incentives for investments in the Deep Offshore and Inland Basins areas. The methods and procedures by which this Act is implemented determines foreign direct investment in the Deep Offshore and Inland Basin areas and the Nigerian Oil and Gas Sector as a whole.

[229] Section 5(1) of the Deep Offshore and Inland Basin Production Sharing Contract (Amendment) Act
[230] Section 5(4) of the Deep Offshore and Inland Basin Production Sharing Contract (Amendment) Act 2019

2.7.7 Banks and Other Financial Institutions Act (BOFIA) 2020

This is the principal legislation governing banks and all other financial institutions in Nigeria. The Banks and Other Financial Institutions Act ("the Act") came into force in 2020 repealing the erstwhile Banks and Other Financial Institutions Act 1991. The BOFIA 2020 is an overhaul of the preceding Act and all its previous amendments of 1997, 1998, 1999, 2002 and 2004. The BOFIA 2022 Act differs significantly in both structure and regulations.

The previous Act became obsolete because of developments and changes in the global financial sector and other growing risks and trends in the sector. The new Act was introduced to transform and reposition the banking and financial sector with the goal of enhancing the efficiency and resilience of the financial and investment ecosystem for the sustainable growth and development of the Nigerian economy.

The Act establishes innovations that ensure the efficiency and continued growth of the Nigerian Banking sector. It also contains provisions in relation to foreign investments in Nigeria banking Sector. One of such provisions was found in Section 3 of the Banks and other Financial Institutions Act 2020.[231] This section protects the Nigerian banking sector against situations of international malpractices. Section 3(5) provides that a foreign bank or investor entity without a permanent establishment in its country of incorporation, and not affiliated to a financial services group that is subject to effective regulations shall not be permitted to operate in Nigeria. The Act also prohibits Nigerian banks from operating in partnership with such banks. This section aims at protecting Nigerians from the malpractices that may arise from the virtual operation of international banks. This provision to protect the banking sector is like that which obtains in more advanced countries like Hong Kong[232]

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[231] Ibrahim Alley, "BOFIA 2020 And Financial System Stability in Nigeria: Implications for Stakeholders in The African Largest Economy" In Journal of Banking Regulation.9 (Springer Nature Limited 2022)

[232] . Schaechter, A, 'Issues in Electronic Banking: An Overview' IMF Policy Discussion Paper', No. 2002/006 (2002)

2.7.8 Central Bank of Nigeria Act 2007

The Central Bank of Nigeria Act of 2007 was enacted to repeal the Central Bank of Nigeria Act 1991 and to re-enact the Central Bank of Nigeria Act; and for related matters[233]. This Act establishes the Central Bank of Nigeria ("the Bank") as a body corporate with perpetual succession and a common seal which can sue and be sued, acquire and dispose of property.

The Central Bank of Nigeria proposes a comprehensive regulation that provides for the foreign participation in the Nigerian banking sector. The regulation provides that foreign investors and banks are allowed to establish banking operations in Nigeria provided they satisfy the minimum capital investment of N 25 billion.[234] Under this regulation, investors are required to possess all applicable requirements necessary for the receipt of a banking license in Nigeria. They are also at liberty to invest in already existing Nigerian banks. This regulation however contains a clause that no foreign investor or firm is allowed to own more than the largest share of the single largest Nigerian investor in any bank. For foreign investments, the total shareholding of foreign investors should not exceed 10% of the total capital of the bank.

2.7.9 Nigerian Oil and Gas Industry Content Development Act 2010 (Local Content Act).

This is an Act to provide for the Development of Nigerian Content in The Nigerian Oil and Gas Industry, Nigerian Content Plan, Supervision, Coordination, Monitoring and Implementation of Nigerian Content; and for Related Matters.[235]This is the principal Act government all matters relating to local content in the Nigerian Oil and Gas Industry. This Act prescribes local content requirements to promote the patronage of Nigerian products and services by operators in the oil and gas industry. According to

[233] Long Title of The Act
[234] CBN 2008
[235] Long Title to the Nigerian Oil and Gas Industry Content Development Act 2010

Atsegbua, [236] the passage of this Act into law represents one of the most significant acts of the government to domesticate and develop the Nigerian Oil and Gas Industry through the creation and use of indigenous content in the industry. This Act also establishes the Nigerian Content Monitoring Board (board), duty of managing the coordination, monitoring and implementation of the local content law. Nigeria is the ninth largest producer of Oil in the world and depends on crude oil as its main source of foreign exchange. This industry accounts for over 40 per cent of Nigeria's GDP and witnesses over a billion dollars' worth of investments annually. Despite these however, there is a dearth of indigenous players in the domestic industry, over 90% of the goods and services used are imported. This law aimed at correcting this flaw and prescribes minimum thresholds for the use of local products, services and the employment of Nigerian staff in the industry.[237]

It has been argued in some quarters that the requirements of this Act regulating investments in the Nigerian Oil and Gas Industry violate obligations under international investment laws such as the World Trade Organisation's (WTO) General Agreement on Tariffs and Trade (GATT) (1994) of which Nigeria is a member. In the analysis of Uchenna,[238] Sections 10(1) (a), 11(1), 12 and 13 of the NOGICD Act which requires the use of products and materials manufactured locally for investor projects in the Nigerian oil and gas industry, contravene the national treatment obligations under Article III of GATT. Furthermore, he opines that Section 53 of the Act is in violation of the obligation to eliminate quantitative restrictions under Article XI:1 of GATT. However, he further suggests that exemptions under the GATT could justify Nigeria's application of local content regulations in the Oil and Gas Industry. Based on these exceptions, Nigeria can rely on Article XVIII of GATT to apply local content measures for the

[236] Atsegbua, Lawrence Asekome. "The Nigerian oil and gas industry content development act 2010: An examination of its regulatory framework." *OPEC Energy Review* 36, no. 4 (2012): 479-494.
[237] Orji, Uchenna Jerome. "The Nigerian Oil and Gas Industry Content Development Act and GATT Treaty Obligations: On a Path of Harmony or Discord?" *Latin American Journal of Trade Policy* 3, no. 7 (2020): 56-80.
[238] Supra 8 at 480

purpose of promoting economic development and improving the standards of living in the in the country. Furthermore, Articles XII: 1/2 and XIX:1 of GATT allows Nigeria to enforce local content regulations that restrict the importation of fabricated/welded metal products in order to preserve foreign reserves, promote and protect domestic producers of similar products from "economic injury" that may arise from the increased imports of such products.

2.7.10 Federal Competition and Consumer Protection Commission Act, 2018

This is an Act to repeal the Consumer Protection Act Cap C25,Laws of the Federation of Nigeria 2004, establish the Federal Competition and Consumer Protection Commission and Competition and consumer protection tribunal for the development and promotion of fair, efficient and competitive markets in the Nigerian economy to facilitate access to all citizens to safe products and secure the protection of rights for all consumers in Nigeria; and for related matters.[239] This Act is essentially an integration of fundamental competition laws and principles. It provides for all businesses and all commercial transactions within or having effect within Nigeria. It also extends to ventures or entities in which the Federal, State or Local Government or any of its agencies have a controlling stake.[240]This law applies to both natural and juristic persons,[241] that is both individuals and corporations aimed at doing business for profit and satisfaction of demand. By inference, this Act applies to foreign investors doing business in Nigeria. Several provisions are contained in the act which affect or regulate foreign investments in the Act. The Act establishes the Federal Competition and Consumer Protection Commission.[242] as an independent body for the purpose of carrying out its functions, powers, duties and responsibilities conferred upon it. The Act also establishes the Commission and Consumer Protection Tribunal to

[239] Long Title to the Federal Competition and Consumer Protection Act 2018
[240] Adetoro David Oluwadare, 'Highlights of Nigeria's Federal Competition and Consumer Protection Act 2018: An Overview', (2021), 42, Business Law Review, Issue 6, pp. 300-305, https://kluwerlawonline.com/JournalArticle/Business+Law+Review/42.6/BULA2021041
[241] Section 2, FCCPA 2018
[242] Section 3, FCCPA 2018

adjudicate over conducts prohibited under the Act and exercise jurisdiction, authority and powers conferred on it. Before a matter is brought before the tribunal, the matter must be first determined by the Federal Competition and Consumer Protection Commission.[243] This is another body before which economic disputes and grievances during business can be brought before. In addition to this, Section 59 of the Act prohibits any form of agreement among groups or associations that restrict competition in any market. It prohibits acts such as fixing of purchase or selling price of goods, conclusive trading, making agreement subject to acceptance of parties not directly involved in the transaction. Section 68 of the Act provides exceptions to prohibited acts. These include activities of associations or interest groups such as collective bargaining aimed at protecting the interests of their members.[244]

2.7.11 National Office for Technology Acquisition and Promotion (NOTAP) Act

The National Office for Technology Acquisition and Promotion (NOTAP) was first established by Decree No. 70 of 1979 and amended by Decree No. 82 of 1992. now referred to as NOTAP Act.[245] This Act establishes a body known as the National Office for Technology Acquisition and Promotion (NOTAP) (also referred to as "the National Office") which shall perform all functions as prescribed by the Act. The principal function of NOTAP pursuant to the Act is to monitor the transfer of foreign technology to Nigeria. The Act and the accompanying guideline and manual issued presented a list of foreign technology agreements that are registrable to include agreements on technical know-how; management and technical services agreements; value added services and consultancy agreements; trademark and software licence agreements; research and development agreement; franchise agreement; and prescribes the procedures, guidelines and timelines for the registration of this technology. The Act

[243] FCCPA 2018, s47(2).
[244] Anyogu & Agubosim on A Critical Overview of The Federal Competition and Consumer Protection Act in International Review of Law and Jurisprudence (IRLJ) Vol 3, No 3 (2021) Page 70
[245] National Office for Technology Acquisition and Promotion on Charter, National Office for Technology Acquisition and Promotion retrieved from https://www.notap.gov.ng/content/charter on 27/2/2022

mandates the registration of all agreements for the transfer of foreign technology contracted by a Nigerian and a foreigner within 60 days from when the contract is sealed.[246] In the event of a dispute between a foreign investor and a Nigerian over a technology imported into the country, the applicable law will be the Nigeria, or international investment law not the law of the investor country.[247] In the opinion of Eze and al, this provision is laudable as it serves to protect the country receiving the investment in technology who the law presumes to be of a weaker bargaining power.[248] In regulating the transfer of technology, it provides situations where a contract will not be registered by the Director of NOTAP. These situations where a technology will not be registered include: Where the technology to be transferred is available in Nigeria; Where the price of the technology does not align with market prices; where the contract contains a term allowing the investor to regulate or interfere in the execution which in the opinion of the Director is unnecessary; Where there is onerous obligation on the receiver of the technology, to transfer to the investor technical information, patents, trademarks, innovations no support from investor or transferor; Where there is an gratuitous obligation on the receiver of the technology, to acquire raw materials and equipment, exclusively from the transferor of the technology or any other designated person ; Where there is a restriction on the exportation of the products produced by the receiver of the technology or an onerous obligation that the products be exclusively sold to the transferor of the technology or any person designated by the transferor; Where the term of a technology contract contains a term requiring the receiver of the technology to make full payment for a payment before use. A contract for transfer of technology not registered with NOTAP does not invalidate or make the transaction void. However, no payment will be authorised by the Federal Ministry of Finance, the Central Bank of Nigeria ("CBN") or any licensed bank in Nigeria to be made to any transferor of

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[246] See Section 4 of National Office for Technology Acquisition and Promotion (NOTAP) Act, Cap N62 LFN, 2004
[247] See Section 5 of National Office for Technology Acquisition and Promotion (NOTAP) Act, Cap N62 LFN, 2004
[248] Eze et al, 2017

technology in respect of any agreement for the transfer of technology unless the Certificate of Registration accompanied by a copy of the contract duly certified by NOTAP is presented.[249]

2.7.12 The Investment and Securities Act 2007

The Act was enacted by the National Assembly of the Federal Republic of Nigeria as an Act to repeal the Investments and Securities Act, 1999 and to establish the Securities and Exchange Commission (SEC) as the apex regulatory authority for the Nigerian capital market as well as regulation of the market to ensure the protection of investors, maintain fair, efficient and transparent market and reduction of systemic risk and related matters.[250] Section 1(1) of the Act establishes the Securities and Exchange Commission also referred to as "the Commission" to enforce the Act, and regulate the capital market for the safeguarding of the economy. It would also act as an agency which would readily provide remedies for unfair mismanagement of investor funds and serve as a corporation Ombudsman ready to investigate, probe or adjudicate in the interest of the shareholder.[251] Section 13 of the Investment and Securities Act broadly prescribes the functions and powers of the SEC. This section also empowers the SEC to register and regulate securities exchanges, and capital trade points. The Act requires the SEC to maintain separate registers of Foreign Direct Investments and Foreign Portfolio Investments.[252] This is to enable the Commission to effectively monitor the volume of Foreign Direct Investments into the economy at each point in time and enable policy makers assess the effect of policies on FDI at each point in time. To ensure proper settlement of investment disputes, section 274 of the Act established the Investments and Securities Tribunal to exercise jurisdiction over matters relating to disputes in the capital market. This

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[249] *Fred Young and Evans Legal Practitioners, Legal Framework for Transfer of Technology in Nigeria,* retrieved from https://www.thelawyer-network.com/documents/whitepapers/pdf/Sa8_4G_x18.pdf on 28/2/2022

[250] Long Title to the Investments and Securities Act, 2007.

[251] Wedderburn, K. W., "A Corporation Ombudsman", 24, 1960, Modern Law Review at p. 668.

[252] See Section 8(k) of Investments and Securities Act

jurisdiction is provided for in Section 284(1) of the Act. The main objective of this tribunal is to expeditiously resolve capital market disputes with fairness, flexibility and transparency to maintain capital market integrity and investor confidence. To ensure transparent operations, the SEC is empowered to properly scrutinise the records of capital market operators, where it is of public benefit.

2.7.13 The Nigerian Export Processing Zones Act, 1992

This is an Act to provide for the establishment of the Nigerian Export Processing Zones and other matters connected thereof.[253] The first attempt at the establishment of Export Processing Zones in Nigeria began in 1991 with the promulgation of the Nigerian Export

Zones Decree.[254] This Decree was repealed by another decree in 1992[255]. This Decree was re-enacted as an Act to become the Nigerian Export Processing Zones Act, 1992. The Decree of 1992 empowered the President to designate areas of the Country as Export Free Zones. It also established the Nigeria Export Processing Zones Authority as the authority responsible for the management, control and coordination of all activities within the Zones. These agencies have control over goods manufactured within the Zones and could designate areas for activities of customs.[256] The establishment of Export free zones aims at encouraging foreign investors to set up their business enterprises, those geared towards the production of export goods in the country. EPZs as large areas of land set aside for special investment and economic activities. These economic activities established here are for the purpose of achieving certain specific activities. As a result of this, they are regulated by special regulations aimed at achieving the set objectives.[257] These regulations seek to create a favourable investment climate for investors by providing them with incentives and necessary infrastructure. There are two types of EPZs. That is; the statutory-

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[253] Long Title to the Nigeria Export Processing Zone Act
[254] Decree No. 34 of 1991
[255] Nigerian Export Processing Zones Decree No. 63 of 1992
[256] Long Title to Nigerian Export Processing Zones Decree No. 63 of 1992
[257]Nduka Ikeyi. "The Export Processing Zones and foreign investment promotion in Nigeria: a note on recent legislation" in Journal of African Law 42, pp 223-230 (1998) retrieved from http://journals.cambridge.org/JAL on 29/03/2022

government owned EPZs and the private-sector EPZ. The Nigerian EPZs are an example of statutory government owned EPZ. In the second type, the private-sector EPZ, private entities undertake a lease of land with the aim of setting up an EPZ. The private entities develop the zone and offer licenses and leases to investors to set up their businesses. Powers of law making, and administration are divided between the government and the private entity in a way that regulation over economic activities are within the purview of the private entities.

Only entities engaging in specific economic activities are allowed to operate in an EPZ. In addition to this, products manufactured in the EPZ are solely designed for export and not tradable in the domestic market. Several fiscal and non-fiscal incentives are also provided to attract entities designed to operate in the EPZs and encourage production for export. In the opinion of Ikeyi, a host country derives benefits from EPZs in two main ways: through a net increase in foreign exchange receipts and an international reputation when the goods are competitive in the market. This international reputation pushes local manufacturers to try to gain access to the international market. Creating designated zones for foreign trade may also encourage foreign investors take part in the development of infrastructure necessary to help their business thrive. [258] Trade activities in the EFZs also result in the creation of jobs and an increase in government revenue. EFZs can also serve as a platform for the transfer of technical know-how, technology and managerial skills in Nigeria. The Act provides for the creation of three types of EPZs. One operated by a public authority, another operated by a private entity and the last jointly operated by a public and private authority. The Nigerian Export Processing Zone Authority (NEPZA) oversees overseeing all the zones created by the Decree.[259] Pursuant to this Act, the Calabar Export processing Zone was established. As an addition to this Act, the Federal government promulgated the Oil and Gas

[258]Pow and M. J. Moser, "Law and investment in China's special investment areas" in M. J. Moser (ed.), Foreign Trade and Investment Laws of The People's Republic of China, Hong Kong, 1987,199; Regulations on Special Economic zones in Guangdong province, (26 August 1990)

[259] Section 2 of the Nigerian Exports Processing Zone Act 1992

Export Free Zone Decree (the OGEFZ Decree.) This Decree established an Oil and Gas Export Free Zone at Onne/Ikpokiri.[260] The Act empowered the NEPZA,[261]to supervise and coordinate the activities of private and public entities operating in the EPZs. This agency is also responsible for the grant of approvals, licences, and permits necessary for operation in the EPZs.[262] For the purpose of administering its functions, NEPZA has the power to prescribe regulations.

governing the zones.[263]Only entities listed under the Third schedule as carrying on any of the businesses of that nature can be licensed to operate in an EPZ. However, amendments could be made to this list at the discretion of NEPZA[264]. Where an entity seeks to establish a business within the EPZ, it must apply to NEPZA, together with such documents and other information as may be required by NEPZA[265]. Where the agency is satisfied with the application, it may thereafter grant its approval. This grant of approval and license is based solely on the discretion of NEPZA approval NEPZA may approve or reject.

In the opinion of Nduka, a critical analysis of this Act shows the presence of certain loopholes. The first is that, following the enactment of this Act, there exists no subsidiary legislation or other regulations made pursuant to the Act which clearly specify the documents or information required to set up a business entity in the EPZ. These requirements for setting up a business are not laid down in any written law and are left entirely to the discretion of the NEPZA, which makes room for uncertainty and non-transparency. It is also contrary to the practice in other jurisdictions aimed at promoting foreign investments.[266]

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[260] Supra 107 at p. 225
[261] Section 2(2) of the Nigerian Exports Processing Zone Act 1992
[262] Section 9 and 10 of the Nigerian Exports Processing Zone Act 1992
[263] Section 9 (4) of the Nigerian Exports Processing Zone Act 1992
[264] Section 6(2) of the Nigerian Exports Processing Zone Act 1992
[265] Section 9(1) of the Nigerian Exports Processing Zone Act 1992
[266] An example is Chapter 2 of the Regulations for the Implementation of the Law of The Peoples Republic of China for Joint Ventures using Chinese and Foreign Investment, 20 September 1983

It is necessary that these requirements are stated clearly in each law, such that recourse can be made to it. In the absence of this certainty, investors may be deterred from establishing businesses in Nigeria. Stating the requirements for registration also offers an aggrieved party whose registration for a license is rejected by the NEPZA, an opportunity to seek judicial review. Another loophole is the fact that the grant of license for operation within the EPZ does not translate to registration under the Companies and Allied Matters Act 2020. It would have been more desirable if the license had the dual effect of registration under the CAC and registration in the EPZ. Entities operating in the EPZs are entitled to several fiscal and non–fiscal incentives. In the fiscal aspect, entities operating in the zones are entitled to tax breaks and excluded from the operation of levies, import duties, foreign exchange regulations, taxes and custom duties. This translates to a lower cost of doing business. In addition to these, the EPZ is regulated under special regulations, as such the Minister in charge of the EPZ could make amendments to other laws which could affect the unfettered operations of the EPZs.[267] An example of a law modified by the Act to suit the proper operation of the EPZs is the Trade Union Act.[268] The Act modified this law to ban strikes and industrial actions for a period of 10 years.

2.8 Problems hindering Foreign Investment in Nigeria

Several factors have been identified as hindering foreign investment in Nigeria. They include:

(a) Insecurity: In most recent times, there has been a growing number of cases of kidnapping and terrorist attacks in Nigeria particularly in Northern Nigeria. These developments have portrayed Nigeria as a nation incapable of protecting her citizens let alone foreigners. This has heightened the fear of both local and foreign investors over the security of their lives and investments. As observed by Okpi, Northern

[267] Section 24 of the Nigerian Exports Processing Zone Act 1992
[268] Cap. 200, Laws of the Federation of Nigeria, 2004

Nigeria, even with its vast arable land suitable for large scale agricultural production is unattractive due to the insecurity experienced there.[269]

(b) Inadequate Infrastructure: the absence of adequate infrastructure in Nigeria is seen in terms of poor electricity supply, absence of suitable road network, poor telecommunication and transportation facilities. The absence of these infrastructures prevents the easy movement of goods and services from one place to another. The rail infrastructure is poorly designed and does not cut across all states in the nation. Thus, investors must move across the nation via the poorly constructed roads, this is both uncomfortable, time and cost consuming. [270]

(c) Acquisition and Ownership of Land: Section 1 of The Land Use Act vests ownership of all lands and things attached thereto, in the State, to be held in trust for the use and common benefit of the people of Nigeria.[271] The effect of this provision is that anyone who wishes to acquire an interest in land must obtain a statutory right of occupancy from the State Governor for a fixed term.[272] The application of this provision is that the right to hold land is not permanent and the land reverts back to the Governor after a specific period of time. Also, the Governor has the power to reverse the statutory right of occupancy before the expiration of the fixed term. [273] Also, the consent of the governor is required before the holder of a statutory right of occupancy can transfer his interest to another person.[274] The owner who has the right of occupancy can only transfer his interest in the property with the consent of the Governor. The cumbersome process of obtaining Governor's consent under the Land Use Act deters foreign investors

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[269] Okpi 2017 in Okaphor, "An Appraisal of the Legal Framework for Foreign Direct Investments (FDIs) in Nigeria and Implications for Food Security", in International Economic Relations and Development Economics (JIERADE) VOL. 1 NO.1 Okaphor 53

[270] Supra 105 at pg 53

[271] Section 1 of the Land Use Act 1978

[272] See Section 8 of the Land Use Act 1978

[273] See Section 5(d)(ii) of the Land Use Act 1978

[274] See Section 12(4) of the Land Use Act 1978

from setting up businesses in Nigeria. Thus, to reduce this hindrance, amendments should be made to the Land Use Act to reduce the bureaucracy associated with obtaining the Governor's consent and acquiring land.

(d). Administrative bureaucracy: Rather than consolidate all the laws regulating foreign direct investments in one Act, these laws are contained in several Act and have several regulatory agencies. Trying to go through all these regulations and regulatory agencies fulfilling all the requirements may deter investors looking to invest in the country. Added to this issue is the issue of inconsistency in the regulatory framework, uncertainty of what laws apply to what situation will have the effect of discouraging investors. [275]

Other factors hindering foreign direct investment in Nigeria include:

(e). Conflicts among regulatory agencies

2.9 Conclusion

This section finds the position that foreign direct investment is essential for economic growth of a nation, particularly developing nations. While there are disadvantages and advantages to this process, the success or otherwise of foreign direct investments depends on how it is maximised by the host country. Analysis under this chapter also shows that Nigeria has a myriad of regulations governing foreign direct investment, this phenomenon is both a blessing and a curse. A blessing in the sense that it clearly defines what needs to be done in every sector for investment and a curse in that it leads to multiplicity of roles and increased bureaucracy. These regulations contain several provisions that aim at promoting and securing investments. These provisions are also contained in highly revered laws like the Constitution of the Federal Republic of Nigeria. In addition to this, investment regulations provide means by which

[275] Okaphor, "Actualizing Food Security in Nigeria Through Foreign Direct Investment' In Journal of International Economic Relations and Development Economics, Vol. 1 No.1 53

foreign investors can seek redress in the event of investment disputes. However, despite these provisions, investments have been low as some regulations are contradictory and create room for uncertainty and lack of confidence in the business climate. In the light of this, this chapter shows that the existence of regulations is not a magic formula for the promotion of foreign direct investment, it is essential for amendments for clarity to be made to certain provisions of the laws, especially as they relate to the promotion of foreign direct investments in Nigeria. These regulations should also seek to create a balance between the influx of foreign direct investments and growth of the domestic sector to prevent an overdependence on foreign investments. It is also necessary for foreign investors to ensure that they obtain all authorisations prior to the start of their project to avoid gridlocks and frustrations in the project due to government regulations. The government should also refuse commencement of projects in the absence of full regulatory approvals so as not to create distrust in the investment ecosystem.

CHAPTER 3: OVERVIEW OF THE NIGERIAN OIL AND GAS INDUSTRY

3.1 Introduction

In the opinion of several prolific writers, a critical study of the development of Nigeria, particularly its economy, cannot be properly appreciated without an analysis of the impact of the oil and gas

industry.[276]Until recently, in the last two decades Nigeria had been acclaimed to be sub-Saharan Africa's largest producer of oil and the eighth in the world.[277]

To gain a proper understanding of the Nigerian oil and gas industry, this chapter provides a background study of the Nigerian oil and gas sector, explaining the history of the oil and gas industry. It would further highlight its contributions to the Nigerian economy, both negative and positive impacts. It would also discuss the various regulatory and administrative agencies established by the legal framework regulating the industry. Furthermore, it would analyse various duties and powers vested in these regulating agencies, the industry, or specified sectors within the industry.

It then proceeds to dissect the various sectors of the oil and gas industry, its growth potential, outlining the laws governing these sectors and the various challenges facing these sectors. In addition, the chapter draws attention to the underlying factors that hinder the growth of the Nigerian oil and gas industry. It would then conclude with an analysis on the effect of low Foreign Direct Investment in the industry, focusing on the various factors contributing to low FDI in the Nigerian oil and gas industry.

3.2 History of the Nigerian Oil and Gas Industry Highlighting Contributions of Oil and Gas Industry to The Nigerian Economy

The history of oil exploration in the geographical location regarded as present-day Nigeria dates to the activities of the Nigerian Bitumen Company (NBC) in 1908 which performed exploratory work within the country. At this time due, to its colonial masters The Petroleum Ordinance 1889 and Mineral Regulation (Oil) Ordinance 1907[278] provided a basic framework for most legislations regulating the

[276] Falola Toyin, The History of Nigeria (Westport 1999); Toyin Falola, Ed. Nigeria in The Twentieth Century (Durham, 2002).
[277] Its Production Output Has However Been Undermined Due to The Insurgent Activities of The Niger Delta Militants. For Instance, In November 2021, Libya Displaced Nigeria as Africa's Largest Oil Producing State. Punch Newspaper Https:Punchng.Com/Libya-Overtakes-Nigria-As-Africas-Biggest-Oil-Producer/ Visited 21/02/2022.
[278] No. 17 LFN (1990) Cap. 120

industry in the current day. Other fundamental laws are the Mineral Ordinance 1914[279] and the Mineral Oils Amendment Ordinance 1958,[280] the latter vesting ownership of these resources on the crown. However, at the beginning of World War I, NBC departed the country, ceasing all activities. Thereafter there was the issuance of licenses given to the Whitehall Petroleum and D'Arcy Exploration Firm.[281] The firm later returned the license due to their non-discovery of oil worth commercial purposes.

In the year 1937, a new license was granted to a brand-new firm, Shell D'Arcy Petroleum Development Company of Nigeria (a consortium of Shell British Petroleum), overlaying the whole territory of Nigeria to discover oil. Their activities were also disrupted by World War II but resumed in 1947. However, between 1951 to 1957, the territory licensed to the firm was reduced. Nevertheless, with a focus on drilling commercially accessible petroleum, Shell BP discovered oil in the year 1956 in Oloibiri (present-day Bayelsa State, Niger Delta Region, South-South).[282]

Following the discovery of oil in 1956, the export of oil started about two years later.[283] In 1958, Nigeria then joined other oil producing nations, when its first oil field came on stream with a production of 5,100 barrels per day. This attracted other foreign companies and in the year 1960, exploration rights in Niger Delta areas, both onshore offshore, were granted to these foreign companies. In 1972, according to the International Management and Engineering Group (IMEG), offshore Niger Delta was regarded as one of the most prolific oil-producing prospects in the world. The excellent quality of its crude and Nigeria's relative proximity to markets in Western Europe, North and South America, ensured its continuity as a

[279] Lfn 1958 Cap 120
[280] No. 5 1958
[281] Ukiwo U., Oil Wealth and Development in Uganda and Beyond (Leuven University Press, 2020)
[282] Emembolu G. Prospects and The Role of Oil in Nigeria's Development; The Journal of Energy and Development; Vol. 1 No.1, Pp. 135-151 (1975)
[283] Oyeranmi S. (2018) "Crisis and Reform in The Nigerian Oil Industry,1999-2015" Kiu Journal of Social Sciences Vl.6 No. 1 Pp. 275-288

major area of offshore interest and activity.'[284] Similarly, in 1972, Nigeria produced about 5,100 barrels per day, and then to 2,400,000 barrels in 1979.[285] Nigeria was ranked seventh major oil producer worldwide.

Additional exploration licenses were then granted to Shell-BP and fifteen other companies, with Shell-BP dominating the industry. Some of such companies included Mobil, Agip, Safrap (now Elf), Amoseas (now Chevron), and Tenneco (now Texaco). As a result, there were increased activities in various branches of the industry– particularly exploration, seismic surveys, development drilling, test drillings, and the subsequent creation of production facilities such as offshore platforms, flow stations, jetties, and export terminals. This led to an increase in leaps and bounds of crude oil output from a mere 257,000 tonnes in 1958 to 112.8 million tonnes in 1974: culminating in an increase in exports from 230,000 tonnes to 110 million tonnes during the same period. Additionally, there was a discovery of huge reserves of natural gas in Nigeria, which was estimated at 45 billion cubic feet at the end of 1974.[286]

With the increase of activities in the industry, regulations to guide the conflicting interests of necessary parties became necessary. As the increase in profits from its exploration increased, the Petroleum Profit Tax Ordinance 1959[287], was enacted with the aim of subjecting profits of oil companies to tax. Although the initial interest of the Federal government was solely the collection of taxes, lease rentals, and royalties,[288] This was altered by the Resolution made by the United Nations on the Permanent

[284] International Management and Engineering Group of Britain, *Study of Potential Benefits to British Industry from Offshore Oil and Gas Developments* (London, HMSO, 1972), P.100

[285] Nigerian National Petroleum Corporation (NNPC), 2010 *Jointventure Operations (Online).* Retrieved On 26 February,2022 From Http://Www.Nnpcgroup.Com/Nnpc-Business/Partners

[286] Madujibeya S. (1975) *Oil and Nigeria's Economic Development;* African Affairs, Vol. 75, No. 300; Oxford University Press on Behalf of The Royal African Society.

[287] LFN 1959 Cap. 15

[288] This However Proved Unfavourable. It Became Obvious That the MOCs were Manipulating Amounts to Be Taxed and The Cost of Operations. Falola T. And Genova A. (2005), The Politics of The Global Oil Industry. *Westport: Praeger Publishers.*

Sovereignty over Natural Resources.[289] Consequently, the Nigerian Government took deliberate steps to solely control the oil and gas industry by enacting the Petroleum Act of 1969[290]. The Act vested control of all petroleum resources in the Federal Government of Nigeria.

In a bid of gaining more control, Nigeria joined the Organisation of Petroleum Exporting Countries (OPEC) in 1971.[291] The Organisation encouraged its members to participate in the affairs of their oil and gas industries, to enable them to control their resources.[292] In line with this the Petroleum Act 1979 and its subsidiary, the Petroleum (Drilling and Production) Regulation of 1969 were enacted.[293] The Act introduced new licensing,[294] agreements, and regimes to improve the participation and derivations of the Nigerian government in the oil and gas industry.[295]

In furtherance of acquiring a controlling interest in concessions held by foreign companies, the Nigerian Military Government in 1971 by a decree established the Nigerian National Oil Corporation (NNOC). The decree creating the NNOC vested the power in the NNOC to acquire a controlling interest in all oil companies operating in Nigeria. There was also the establishment of the Ministry of Petroleum Resources (MPR) in 1975. However, because of the then scarce personnel in the public sector of the

[289] GA Res. 1803 (xvii), UNGAOR, 17th Sess., Supp. No.17, UN Doc. A/5217 (1962)15.
[290] Petroleum Act of 1969
[291] Nigeria Was Not an Immediate Member of the OPEC, She Served as A Spectator for Four Years, Merely Attending the OPEC Meetings. She Joined In 1971.
[292] OPEC's Resolution xvi, Article 90 Of June 1968 Provides That: (1) Petroleum Had Become Too Critical to The Well-Being of Producing Nations to Be Left Completely in The Hands of Private Companies of Foreign Nations. (2) To Control Petroleum Resources Is in The Interest of The National Security of Producing Nations. (3) To Obtain a Fair Share of The Proceeds of Extraction from The MOCs whose Activities in The Industry Are Shrouded in Secrecy.
[293] Omorogbe Y. (2001), Oil and Gas Law in Nigeria, *Lagos, Nigeria; Malthouse Press Limited.*
[294] In Regulating and Furthering Government Participation in The Oil and Gas Industry, The Act Prescribed Certain Forms of Grants. The Act Vested the Power in The Minister of Petroleum Resources to Grant Three Types of Licences, Which Include, The Oil-Exploration Licence (Oel), Oil-Prospecting Licence (OPL) and the Oil-Mining Lease (OML) Hosman (2009)
[295] Akinrele (2003)

petroleum industry, the MPR was later merged with the NNOC in 1977 forming the Nigerian National Petroleum Corporation (NNPC).

The NNPC was created primarily to supervise the regulation of the country's oil and natural gas industry. Although in certain oil-producing states National Oil Companies (NOCs) directly handle the production operations, Multinational Oil Companies in Nigeria were allowed to continue production operations under certain agreements. Some of such agreements include the Joint Venture Contracts (JVCs), and Product Sharing Contracts (PSCs) amongst others. This however led to some sort of controversy, being that the NNPC being saddled with the responsibility of regulating the oil and gas industry had a commercial interest in what it regulated.

The industry was regulated via a unit in the NNOC called the Department of Petroleum Resources, which later was moved to the Ministry of Petroleum Resources in 1975. In 1977, the Department came under the NNPC, upon the merging of the NNOC and the MPR. However, although the Ministry of Petroleum Resources was re-established in 1985, the DPR remained part of NNPC until 1988 when it became commercialized. At this time the DPR was removed from NNPC and transferred to MPR.

Consequently, by 1973, the Nigerian government had obtained 35% of shares in oil companies through the first participation agreement. In 1979, Government share capital in oil companies had increased to 60% through third participation agreements between IOCs and NNPC. With the oil and gas production, processing, and distribution being capital intensive and skill-oriented, to increase revenue and its reserves, the NNPC engages in joint ventures (JV) with IOCs, where NNPC is a majority shareholder.[296]

[296] Nigerian National Petroleum Corporation; About NNPC, Retrieved on 24 February, 2022 From Http://Www.Nnpcgroup.Com/Aboutnnpc/Corporateinfo.Aspx

Currently, the NNPC has JVCs with six International Oil Companies (IOCs) and one indigenous oil company.

a. Texaco Overseas (TOPCON) is composed of NNPC (60%), Texaco (20%), and Chevron (20%).
b. Mobil (MPNU) is composed of NNPC (60%) and Mobil (40%).
c. Shell (SPDC), dominates the oil industry, producing 40 percent of Nigeria's total oil production. The joint venture is composed of Shell (30%), NNPC (55%), Agip (5%), and Elf (10%).
d. Agip (NOAC) is composed of Agip (20%), NNPC (60%) and Phillips Petroleum (20%).
e. Chevron (CNL) is composed of NNPC (60%) and Chevron (40%).
f. Elf (EPNL) is composed of NNPC (60%) and Elf (40%)

Other projects are handled through Production Sharing Contracts (PSC). Currently, NNPC has PSCs with companies such as ChevronTexaco, Ocean Energy, SnepCo, Esso, Addex, NAE, Statoil, Oranto, PetroBrass, Elf. It has one service contract with Agip.

3.3 Contributions of The Oil and Gas Industry to The Nigerian Economy

Until the discovery of oil in the 1950s, the Nigerian economy was majorly dependent on agriculture. This allowed better equal developments in all industries and part of the country, with the Northern region known to produce agricultural produce, like cereals and grains, while the Southern region thrived in the production of palm and cocoa amongst others. Following its Independence and subsequent internal wars in the country, the significant discovery of oil and gas brought about both positive and negative effects on the country. The former includes a geometric growth in the country's GDP, an increase in employment rates, and a beam of hope for economic development. However, the discovery of oil-fuelled the existing ethnic and political tension, especially during the civil wars which lasted between 1967 to

1970. This also led to a level of counter-development due to the subsequent shift of the nation's economic resources to the oil and gas industry at the detriment of other industries.[297]

Aside from its possession of diverse mineral resources and agricultural produce, the historical development of the Nigerian economy cannot be recounted without the diverse contributions of the oil and gas industry, particularly at the time with which oil was discovered. It would be false to classify these contributions as solely positive, as the industry also contributed to certain negative impacts on the economy. This is due to the reverse economic growth despite the abundance of this natural resource.[298] Some of these contributions include.

A. Foreign Direct Investment

The oil and gas industry has played a huge role in the attraction of Foreign Direct investment (FDI) to the Nigerian Economy. This investment is distinguished as a vital tool needed in facilitating the globalization of the international economy.[299] For instance, in the year 2017 FDI inflow into the Nigerian economy was around $3.5 billion, which however reduced although having significant impact in 2018 to $1.9 billion to the several austerity measures imposed in 2018.[300]

Foreign Direct Investment plays a significant role in facilitating technological transfers, capital formation, increased employment and healthy business competition. Moreso, FDIs support domestic investments in a country which is vital in maintaining sustained growth and progress.[301] In increasing the rate of FDIs in the Nation, governments across nations put in place certain FDI incentives, removing

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[297] Effiong Joseph (2010) Oil and Gas Industry in Nigeria: The Paradox of The Black Gold; *Research in Social Problems and Public Policy.* Doi: Http://Dx.Doi.Org/10.1108/S0196-1152(2010)0000018013

[298] Auty R. (2001) Introduction and Overview in Auty Rs. (Ed.), Resource Abundance and Economic Development (1st Ed., Pp.3-16). Oxford University Press.

[299] Akinlo A. (2012) "How Important Is Oil in Nigeria's Economic Growth?" In Journal of Sustainable Development Vol. 5 Issue 4, P. 165-179.

[300] Oyegoke O. And Aras O (2021) "Impact of Foreign Direct Investment on Economic Growth in Nigeria Journal of Management, Economics and Industrial Organization Vol 5 No.1 Pp. 31-38.

[301] Olokoyo F. (2012) "Foreign Direct Investment and Economic Growth: A Case of Nigeria", Bvimsr's Journal of Management Research Vol. 4 Issue 1 P.1-30

potential obstacles to foreign investments. While some of the major factors considered by potential foreign investors include the market size, safety of investors and their investments, accessibility to raw materials, availability of skilled labours, there are other specific incentives with which governments adopt. Some of these incentives employed by the Nigerian government fall within the ambit of low corporate tax and preferential tariff regimes.

In adopting tax incentives to make the oil and gas industry more attractive to investors, these incentives are guided by the FDI policies. In Nigeria, FDI policies are governed by the Nigerian Investment Promotion Commission Act No 16 of 1995 (NIPC Act). This law is regulated by the Nigerian Investment Promotion Commission (NIPC). The Commission makes policies regarding the operations in two of the oil and gas sectors, the upstream and the downstream sector. While the NIPC is silent on tax incentives available in the upstream sector,[302] not making template MOU or tax incentives offered upstream operations public. It would simply follow that only the oil and gas companies and the Nigerian government are privy to the MOU.

On the other hand, the NIPC clearly states its tax incentives made available to the downstream sector,[303] they include:

a) Companies operating in the upstream sector, are to be subject to the provisions of the Companies Income Tax Act.

[302] It States That Fiscal Arrangement Is to Be Reviewed in The Following Maaner: A) Capital Investments Facilities to Deliver Associated Gas in Usable Form at Utilisation or Designated Custody Transfer Points Will Be Treated for Fiscal Purposes as Part of The Capital Investment for Oil Development; B) The Capital Allowances, Operating Expenses and Basis of Assessment Will Be Subjected to The Provisions of Petroleum Profit Tax (Ppt Act) And Fiscal Incentives Under the Revised MOU.

[303] Baghebo M. And Atima T. (2013), The Impact of Petroleum on Economic Growth in Nigeria. Global Business and Economics Research Journal Vol.2 Issue 5, P 102-115.

b) The dividends distributed during tax holidays to investors in respect of investments in foreign currency or introduction of plant machinery of not less than 30% of the equity of the company shall be tax-free.

c) An initial tax holiday for three years, renewable for an additional two years, will be granted to such organizations subject to satisfactory performance of the organization. The tax relief period is to commence on the first production day of the company.

d) Accelerated capital allowances after a tax holiday are available as follows: Investment in plant and machinery; 90% annual allowance with 1% retention and Additional Investment Allowance of 15% which will not reduce the value of the asset.

In 1998, the Nigerian government added some other incentives to support the gas industry[304] in some of the following areas:

a) All fiscal incentives under the gas utilization downstream operations in 1997 are to be extended to industrial projects that use gas such as power plant, fertilizer plant, gas to liquid plant transmission pipelines and gas distribution.

b) The "Investment Capital Allowance" is to be increased from 5% to 15%.

c) All gas development projects, including those engaged in fertilizer plants, gas transmission, liquid plants and power generation are to be taxed under the provision of Companies Income Tax Act (CITA) and not the Petroleum Profit Tax Act.[305]

d) Gas is transferred at 0% PPT and 0% Royalty.

[304] Baghebo M. (2012) Natural Resource Economics. Bayelsa: Kadmon Printing Press and Publishing House.

[305] In integrated Oil and gas projects, oil operations which are to be subject to the PPT are to be separated from the gas operations projects for the latter to enjoy the concession of being taxed under the CITA. All expenses regarding the integrated oil and gas project would be chargeable under the PPT.

These are a few of the various efforts made by the Nigerian government in a bid to attract foreign investors to invest in the Nigerian oil and gas industry. The attainment of this particularly with other issues facing Nigeria's sociopath-economy is still in doubt.

B. *Employment Opportunities*

Before the discovery of oil and gas in Nigeria, Nigerians were employed in a variety of non-basic and basic activities such as the transportation of materials and equipment, building construction and roads, farming, and teaching. However, following the onset and growth of the oil and gas industry, together with industry training programs, individuals became more skilled and knowledgeable in the industry. According to a report by PricewaterhouseCoopers,[306] The oil and gas industry has impacted the Nigerian economy in three diverse ways, direct impact, indirect impact and induced impact.

While direct impact is measured through the jobs, value and labour income added within the oil and gas industry. According to Donwa,[307] The possible extension of direct industry employment seems deemed due to the capital-intensive nature of the industry as opposed to a labour-intensive industry. The indirect impact is measured through the jobs, value and labour income added because of the supply chain of the oil and gas industry. Lastly, induced impact involves the jobs, value and labour income and value added therefore directly or indirectly from the oil and gas industry's spending.

C. *Heavy Dependence on The Oil Industry*

[306] Pricewaterhousecoopers (2013), "Economic Impact of The Oil and Natural Gas Industry on The US Economy." Retrieved On April 26th,2022 From Www.Pwc.Com/Us/Nes

[307] Donwa P., Mgbame C., Julius M. (2015) "Corruption in The Oil and Gas Industry: Implication for Economic Growth". European Scientific Journal Vol.11 No.22

Prior to the 1950's, the Nigerian economy was easily funded by diverse sectors within the country, ranging from the agricultural sector to its mining, forestry and construction sector. At this time, Nigeria was accredited the world's largest exporter and producer of palm oil. However, upon the discovery of oil there was a major shift in funding and efforts towards the industry, resulting in a neglect of the other industries. According to Aigbokhan,[308] In 1986 agriculture accounted for about 38.7 percent of Nigeria's GDP, a massive decline was recorded in the year 1996 where it accounted for merely 30.7 percent. This was in contradiction to the increased contribution of the oil and gas industry to the Nigerian GSD, rising from 0.1 percent in 1959 to 87 percent in 1976. As the primary source of the country's revenue, this resulted in a decline in the all-round development of the country's economy. In the opinion of Oyewunmi[309], a proper diversification of the Nigerian economy has been hindered also by certain activities performed in both upstream and downstream sectors, such as oil spillage and gas flaring.

Ekaette[310] opines that one of the root causes affecting the level of economic impact of the Nigerian oil and gas sector is the inability of successive governments to properly utilize revenues derived from this sector in developing other sectors. Thus, this has resulted in a lag of the other sectors such as the transportation, agriculture, financial systems and investment environment amongst others. [311] In his study, Kafada states that this also reflected in the attitude of both the government and oil companies on the extensive and disruptive nature of petroleum operations on host communities.[312] Moreso, Odularo

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[308] Aigbokhan B. (2001) Resuscitating Agricultural Production. The Central Bank of Nigeria Occasional Paper, Resource Endowment, Growth and Macroeconomic Management in Nigeria.

[309] Oyewunmi O. (2018) "Oil Price Fluctuations and Dependency Malaise: What Will Engender Socio Economic Adjustments?" International Journal of Energy Economics and Policy Vol. 8 Pp. 167-173

[310] Ekaette, U. J. (2009). Development Challenges in The Niger Delta and The Implications for The Nigerian Economy. Port Harcourt: PANAM Nigeria Publishers.

[311] Asagunla T., Agbede M. "Oil Revenue and Growth Output in Nigeria" IIARD International Journal of Economics and Business Management ISSN 2489-0065 Vol. 4 No. 6 2018.

[312] Kafada (2012) "Environmental Impacts of Oil Exploration and Exploitation in The Niger Delta of Nigeria". Global Journal of Science Frontier Research Environment and Earth Sciences Vol.12 No. 3 PP. 2249-4626

states that such overdependence has created some level of vulnerability to the peculiarity of the international market, particularly in consideration of its impact on some macroeconomic variables.[313]

D. *Foreign Exchange Reserves*

In 2019, the Nigerian oil and gas industry was responsible for 95% of Nigeria's foreign exchange earnings. During the Nigerian industrialization and economic development there is a consequent increase in imports of capital goods and specialized services usually involving the massive expenditure of foreign exchange. In many underdeveloped nations, particularly ones which highly depend on a narrow range of primary commodities, a sharp decline in foreign exchange, especially ones caused by a huge decline in world commodity prices usually constitutes a challenge to optimal economic development. However, the oil and gas industry has helped alleviate the burden of this issue. In the opinion of Odularu, the Nigerian oil and gas industry possesses a substantial foreign exchange reserve capable of financing the foreign exchange cost of her development programme.

Other significant impacts of the Nigerian oil and gas industry on the Nigerian economy would include the significant contribution to the Gross Domestic Product (GDP), local expenditure on goods and services, and contribution to energy supply amongst others. According to Donwa, the gross output of the petroleum sector consists of earnings derived from local sales of natural gas, oil exports and local sales of crude oil for local refining. Although when compared to the value-added to foreign economies it seems insignificant because of the large involvement of foreign operators in the petroleum industry.

[313] Odularo, G. O. (2008). Crude Oil and The Nigerian Economic Performance. Oil And Gas Business. [Online]Available: Http://Www.Ogbus.Ru/Eng/

3.4 Regulatory and Administrative Bodies of The Nigerian Oil and Gas Sector.

The legal framework that guides operations and various sectors within the Nigerian oil and gas sector establish several agencies and corporations with the duty of regulating and implementing the various laws and policies created for the efficiency of the industry. While some of these authorities control all the various sectors within the industry, others have control over specified sectors. Some of these Corporations or authorities include the Nigerian National Petroleum Corporation (NNPC), the Nigerian Midstream and Downstream Petroleum Regulatory Authority, the Nigerian Upstream Petroleum Regulatory Commission. National Petroleum Investment Management Oil Field Services Companies (NAPIMS), Nigerian Content Division (NCD) amongst others.

3.4.1 The Nigerian National Petroleum Corporation (NNPC)

In the year 1971, under Decree 18 of 1971 and as a prerequisite for joining the OPEC, the Nigerian National Oil Corporation (NNOC) was established.[314] It was established with a core mandate to handle the exploration and production of hydrocarbon resources, refining crude oil, distribution finished and marketing of petroleum products for the benefit of all stakeholders, particularly Nigeria.[315] With the high revenue generation from the oil and gas sector and the potential impact with which it could give to the Nigerian economy, efforts were geared towards enabling the participation and control of NNOC in the industry. The Corporation was thus vested with the right to participate in all sectors of the industry, including the upstream, midstream, and the downstream.

With time, the inefficiency and inability of the NNOC to adequately carry out the mandate for which it was established became obvious. This was because of several factors such as the lack of technical expertise; funding; adequate monitoring system and incessant interference by the Federal Ministry of

[314] Ayoade M. (2009) State Petroleum Ownership Model-Symbolism Vs Progress? *Oil, Gas & Energy Law Intelligence 7, Pp. 1-20*

[315] Ismaila I., Ibrahim B. And Ameer Mohammed (2021) Performance Management and Organizational Productivity at The Nigeria National Petroleum Corporation (NNPC) *Ire Journals,* Vol. 5 Issue 6; ISSN: 2456-8880

Petroleum Resources.[316] As a result, the Nigerian Government merged the NNOC with the FMPR in the year 1977, under the NNPC Act of 1977 forming the NNPC. Consequently, merging the responsibilities of both bodies in the NNPC, that is, the commercial and operational function of the NNOC with the policymaking and regulatory functions of FMPR.[317]

The Nigerian National Petroleum Corporation (NNPC) is thus an integrated oil and gas company engaged in the exploitation, production, refining, transportation, storage, and marketing of petroleum/gas and its products. Pursuant to Section 53 of the Petroleum Industry Act (PIA) 2021, the Corporation is now incorporated as the Nigerian National Petroleum Company Limited. Consequently, the ownership of the corporation is vested in the Federal Government at incorporation, to be held by the Minister of Finance and the Ministry of Petroleum with equal equity on behalf of the Ministry of petroleum and the Federation as provided for in Section 53 (3) of the PIA.[318]

The NNPC is thus expected to operate on a commercial basis in a profitable manner, non-funded by the government. These restrictions shall be stated in their memorandum and articles of association. The Limited company is also expected to declare its dividends to its shareholders and retain 20% of its profits as retained earnings for its own growth.[319]

3.4.1.1 The Duties and Powers of the NNPC

[316] Gboyega A., Soreide T. And Shukla G. (2011) Political Economy of The Petroleum Sector of Nigeria, *Policy Research Working Paper 5779.*
[317] Nwokeji G. (2007) The Nigerian National Petroleum Corporation and The Development of Nigerian Oil and Gas Industry: History, Strategy and Current Directions. *Policy Report on The Changing Role of National Oil Companies in International Energy Markets,* Houston: The James Baker Iii Institute for Public Policy, Rice University.
[318] Resolution Law Firm (2021), Nigeria: Overview of the New Petroleum Industry Act 2021 Retrieved From Overview Of The New Petroleum Industry Act 2021 - Energy And Natural Resources - Nigeria (Mondaq.Com) On March 5th, 2022.
[319] Section 53 (7) Of the Petroleum Industry Act.

In fulfilling its mandate to protect the interest of Nigeria in the oil and gas industry, the Nigerian government through the NNPC Act 1977 vested the NNPC with certain powers and duties. This is regarded as necessary in carrying out the major objectives and goals of the industry. Gidado in his study, believes that these duties are in line with the Nigerian self-economic independence and Nigerianization, in line with the OPEC's Resolution XVI of 1968.[320] Some of these duties as provided for in the Nigerian National Petroleum Corporation Act[321] include:

a. exploring and prospecting for working, winning, or otherwise acquiring, possessing and disposing of petroleum.
b. Refining, treating, processing and engaging petroleum.
c. refining, treating, processing and engaging in the handling of petroleum for the manufacture and production of petroleum products and its derivatives.
d. purchasing and marketing petroleum, its products and by-products.
e. providing and operating pipelines, tanker ships or other facilities for the carriage or conveyance of crude oil, natural gas and their products and derivatives, water and any other liquids or other commodities related to the Corporation's operations.
f. constructing, equipping and maintaining tank farms and other facilities for the handling and treatment of petroleum and its products and derivatives.
g. carrying out research in connection with petroleum or anything derived from it and promoting activities for the purpose of turning to account the results of such research.
h. doing anything required for the purpose of giving effect to agreements entered by the Federal Government with a view to securing participation by the Government or the Corporation in activities connected with petroleum.

[320] Gidado M. (1999) Petroleum Development Contracts with Multinational Oil Firms: The Nigerian Experience; Maiduguri, Nigeria: Edlinform Services.
[321] Section 5 Of the Nigerian National Petroleum Corporation Act No.33 Of 1977

i. generally engaging in activities that would enhance the petroleum industry in the overall interest of Nigeria; and

j. Undertaking such other activities as are necessary or expedient for giving full effect to the provisions of this Act.

In a bid to ensure the accountability of the Corporation, the Corporation is mandated to provide a review of its or its subsidiaries' affairs and operations once required by the National Council of Ministers. This is to measure the effectiveness of its operations and further propose more efficient ways such operations could be carried out. The NNPC's Act allows the Corporation to adopt a quasi-public corporate enterprise, vesting it with the necessary powers needed in becoming a "world-class oil and gas company driven by shared commitment and excellence". [322] The Corporation is thus recognized as an independent legal entity, capable of suing and being sued.

Moreso, with the technical nature of its activities, the Corporation is empowered to hire the required technical capability in managing the Nigerian oil and gas resources. It is in this light that arguments have been raised on the need to achieve a balance between the MOC and locally owned companies. However, because of its financial and technical incapability, the Act empowers the Corporation to enter certain contracts or partnerships with companies to facilitate the discharge of its duties.[323] Some of these agreements include the Joint Venture Contracts, the Production Sharing Contract amongst others used in maximizing its oil and gas resources.[324] It further permits the NNPC to engage in independent

[322] NNPC (2014c) NNPC: MISSION, VISION AND CORE VALUES. (Online) Retrieved From Http://Www.Nnpcgroup.Com/Aboutnnpc/Missionvision.Aspx On 3rd March, 2022

[323] UNCTAD (2006) UNCTAD/CALAG AFRICAN OIL AND GAS SERVICES SECTOR SURVEY_ Vol. 1- Nigeria Creating Local Linkages by Empowering Indigenous Entrepreneurs", United Nations Conference on Trade and Development, New York And Geneva: United Nations.

[324] THURBER M., EMELIFE I. And HELLER P. (2010) NNPC AND NIGERIA'S OIL PATRONAGE ECOSYSTEM. *Program On Energy and Sustainable Development, Stanford University, Stanford.*

operation and innovation. An instance is the decentralised structure adopted by the NNPC, enabling an efficient management structure.

3.4.1.2 The Nigerian National Petroleum Corporation Organizational Structure

An organizational structure is defined as the framework of reporting relationships in an organization.[325] It is also stated to be the manual for management in achieving organizational goals through planning, organizing, directing and controlling.[326] Thus, the relationship between the efficiency and organizational structure of any organization cannot be overemphasized. Similarly, NNPC's organizational structure helps in properly aiding its values[327], reflecting the organizational behaviour, enhancing its performance and consequently facilitating the achievements of its goals and objectives.[328] It is with this background that the subsequent paragraphs discuss the NNPC's organizational structure and how it is utilized in exercising its duties and power.

According to Gidado, in its earlier years, between 1977 to 1988, the NNPC operated a centralized system through which its duties were being performed under two broad sections, namely the Petroleum Inspectorate Unit (PIU) and the Commercial Section. The PIU dealt with the regulation, enforcement and supervision of the oil and gas industry. The operations of the Commercial section were grouped into three sectors which include the operational sector, the service sector and the general management sector, all operating within a centralized structure.[329] This centralized administration was however restructured

[325] CLAWSON J. (2008) ORGANIZATIONAL STRUCTURE; *SSRN ELECTRONIC JOURNAL* DOI: 10.2139/Ssrn.910385
[326] MABEY Et Al (2001)
[327] The NNPC's Core Values Are Stated to Include: I) Respect for The Individual; Ii) Professional Excellence Iii) Integrity, Transparency and Accountability; And Iv) Staff Development and Growth.
[328] The NNPC's Main Mission Is to Engage in Adding Value to The Nation's Hydrocarbon Resources for The Interest of Nigeria and All Other Stakeholders.
[329] Ibid.

in 1985, dividing the NNPC into five autonomous sectors, each being headed by a Chief Executive Officer.[330]

Akinrele (2003) reported that in 1986, the Petroleum Inspectorate was dissolved and reorganized as the Department of Petroleum Resources (DPR). This was the official body responsible for the regulation of the Nigerian Oil and Gas industry.[331] However, pursuant to the Petroleum Industry Act (PIA) the DPR has been abolished and will gradually transition to the new agency in accordance with the Act. In 1988, pursuant to the Commercialisation and Privatization Decree of 1988 the organizational structure of NNPC was decentralized and reorganized.

With little changes in 2013, the execution of corporate business remained decentralized with the head office at the top. Below these strata are eight directorates and twelve Strategic Business Units (SBUs) also referred to as subsidiaries. These business units are used in ensuring the smooth running of operations at NNPC. Some of these units include the Petroleum Development Company (NPDC), Nigerian Gas Processing and Transmission Company (NGPTC), Nigerian Gas Company (NGC), NNPC Retail Limited, Nigerian Pipelines and Storage Company (NPSC) amongst others.

While the NNPC is headed by a Group Managing Director (GMD), below him in the hierarchy are the eight Group Executive Director (GED) responsible for the directorates of Gas and Power; Exploration and Production; Refineries and Petrochemicals; Corporate Services; Finance and Accounts; Business Development; Engineering and Technical; Finance and Accounts; and Commercial and Investments.[332]

[330] The Five Autonomous Sectors Include: Oil and Gas: Petrochemicals, Pipelines and Product Marketing; And Petroleum Inspectorate. NNPC (2014b)
[331] AKINRELE (2003)
[332] NNPC (2014b)

This is in addition to the nine member board of directors who are responsible for decision making within the Corporation,[333] while its legal adviser serves as its legal secretary.

3.4.2 The Nigerian Upstream Petroleum Regulatory Commission (NURC)

The Nigerian Upstream Petroleum Regulatory Commission is established by the Petroleum Industry Act[334] and is charged with the regulation of all technical and commercial operations in the upstream sector, having the power to acquire, hold and dispose of property, as well as sue and be sued in its own name. The Commission is vested with the power to administer over operations[335] on issues regarding national grid operations, lessees and licensees. It is also empowered to grant Petroleum Prospecting licences[336], Petroleum exploration licenses, Petroleum Mining Leases their renewal and other allied matters. The Act further establishes a fund, hereinafter referred to as the 'Commission fund'[337], into which all funds accruing to the Commission shall be paid into and expenditures of the Commission subject to the appropriation of the National Assembly.

Upon its establishment, some of the objectives assigned to this Commission[338] guiding its activities include, ensuring that all upstream petroleum operations are executed in such a manner so as to minimise waste and achieve optimal government revenues, promoting healthy, safe, efficient and effective conduct of upstream petroleum operations in an environmentally acceptable and sustainable manner, ensuring the implementation and maintenance of technical standards, codes, practices and specification

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[333] The Members of The NNPC Board of Directors Are: Chairperson of The Board, Mrs. Magret Chuba Okadigbo, Chief Executive Officer, Mele Kyari, Chief Financial Officer, Umar I. Ajiya, Tajudeen Umar (North-East), Lami O. Ahmed (North Central), Mohammed Lawal (North-West), Constance Harry Marshal (South-South) And Pius Akinyelure (South-West).

[334] Section 4 Of the Petroleum Industry Act

[335] Section 68 To 110 Of the Petroleum Industry Act

[336] This License Is Granted for Any Period Determined by The Minister of Petroleum Resources of Up to Five Years for Onshore Areas and Shallow Waters and Up to Ten Years for Deep Offshore And Inland Basins. This License Is Exclusive.

[337] Section 24 Of the Petroleum Industry Act 2021

[338] Section 6 of the Petroleum Industry Act 2021

applicable to upstream petroleum operations pursuant to good international petroleum industry practices and implementing government policies for upstream petroleum operations as directed by the Minister of Petroleum in accordance with the provisions of the Act amongst other objectives.

In achieving the various objectives for which it was created the Commission has been obligated to perform certain functions which are in three folds, technical, commercial and frontier basins functions. Some of its technical functions amongst others include:[339]

1. The enforcement and implementation of policies, laws, regulations relating to upstream petroleum functions.
2. Establishing, regulating and enforcing health, safety and environmental measures and standards relating to upstream petroleum operations such as the management of petroleum reserves and installations and exploration, production and development activities within the onshore, frontier, shallow water and deep offshore acreage of Nigeria.
3. Setting, defining and enforcing approved standards and regulations for design, construction, fabrication, operation and maintenance of plants, installations and facilities used or to be used in upstream petroleum operations such as upstream natural gas gathering and treatment, crude oil natural gas evaluation and management and the elimination of natural gas flaring and venting.

In achieving optimal gains in the several transactions intricate to upstream operations, the Act further provides for some commercial functions of the Commission,[340] they include:

a) Review and approval of all commercial aspects of field development plans in upstream petroleum operations.

[339] Section 7 of the Petroleum Industry Act 2021
[340] Section 8 of the Petroleum Industry Act. 2021

b) Allocate petroleum production quotas for the purpose of curtailing export of petroleum in conjunction with NNPC Limited pursuant to regulations.

c) Develop cost studies and benchmark for proper evaluation of upstream petroleum operations taking into consideration petroleum industry specific issues such as field size, reservoir depth, location of operations, technology applied, production methods and petroleum quality.

Regarding operations in frontier basins, the Act provides specific functions[341] with which the Commission is expected to execute, they include:

1. Promote exploration of the frontier basins of Nigeria.
2. Develop exploration strategies and portfolio management for the exploration of unassigned frontier acreages in Nigeria.
3. Undertake studies, analyse and evaluate unassigned frontier basins in Nigeria; and
4. Identify opportunities and increase information about the petroleum resources base in the frontier basins in Nigeria.

In respect to frontier basins, the Act further creates a Frontier Exploration Fund which shall be funded by 30% of NNPC's Limited's profit oil and gas in the production sharing, profit sharing and risk service contract[342]. These funds are to be used in the financing the exploration and development of frontier acreages. The transfer of these funds by the NNPC Limited is subject to appropriation by the National Assembly.

[341] Section 9 of the Petroleum Industry Act 2021
[342] Section 24(4) of the Petroleum Industry Act 2021

3.4.2.1 Powers of The Nigerian Upstream Petroleum Regulation Commission

To successfully execute the functions assigned to the Commission, the Act vests certain powers in Commission[343], some of which amongst others include, power to:

i. Enforce the provisions of any regulations made about upstream petroleum operations, or policies. Guidelines and regulations formerly administered by the Department of Petroleum Resources or the Petroleum Inspectorate, with regards to upstream petroleum operations; and enactments with regards to upstream petroleum operations made prior to the coming into force of the Petroleum Industry Act.

ii. Seal up any premises, under section 217 of the Act, such as any facility or plant engaged in upstream petroleum operations, where there has been a contravention of the Act, or any regulations made under the Act.

iii. Ensure compliance with nuclear safety Radiation Protection Act and such other legislative provisions as may be applicable in upstream petroleum operations.

iv. Issue guidelines in accordance with the provisions of the Act or any regulation regarding upstream petroleum operations.

v. Impose on a petroleum prospecting license, petroleum mining lease or petroleum exploration license to which this Act applies, special terms and conditions consistent with the Act at the grant or renewal of the license or lease.

The Act further vests the Commission with certain special powers[344] for the execution of its function. These special powers are to be executed by the Special Investigation Unit of the Commission or any person authorized by the Commission. Some of these special powers, include the power to:

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[343] Section 10 of the Petroleum Industry Act 2021

[344] Section 26 of the Petroleum Industry Act 2021

i. Conduct surveillance on crude oil and natural gas installations, premises and vessels where it believes that illegal upstream petroleum operations are conducted.

ii. Inquire, inspect, examine any business or activity relating to upstream petroleum operations under the Act, where it believes that illegal upstream petroleum operations are conducted.

iii. Use any machinery, equipment, appliance or thing as it may consider necessary in performing its functions.

In conjunction with the Nigerian police or other law enforcement agencies, arrest with a warrant, any person believed to have committed an office under this Act.

Exercise any other power that may be conferred on it under any law or regulation.

3.4.2.2 The Nigerian Upstream Petroleum Regulatory Commission Organizational Structure

At the helm of its affairs, the Act establishes the Governing board of the Commission[345] which is charged with the duty of policy and general administration of the Commission. The Board consists of one-nonexecutive chairman, two-non-executive commissioner, the chief executive of the Commission, two other executive commissioners responsible for managing the finance and accounts and exploration and acreage management, one representative each of the Authority[346], Ministry of Petroleum and Ministry of Finance not below the rank of Director.[347]

Some of the functions of the Board of the Commission as provided by the Act[348] include formulation of policy, supervision and providing strategic direction to the Commission, review and approval of business, strategic and operating plans of the Commission, deliberate and approve the annual budget of

[345] Section 11 of the Petroleum Industry Act 2021

[346] The Nigerian Midstream and Downstream Petroleum Regulatory Authority

[347] The appointment of all members of the board aside the representatives is to be made by the President subject to the approval of the Senate.

[348] Section 12 of the Petroleum Industry Act 2021

the Commission before submission to the National Assembly for appropriation and sanction the management accounts and audited accounts of the Commission, in addition to considering the management letter from the external auditors. The Board of Commission is also empowered to appoint the Secretary of the Commission,[349] who shall serve as the legal adviser to the Commission and determine the number persons that shall be employees of the Commission.[350]

3.4.3 The Nigerian Midstream and Downstream Petroleum Regulatory Authority

The Nigerian Midstream and Downstream Petroleum Regulatory Authority, hereinafter referred to as "the Authority", is established by the Petroleum Industry Act[351] and is vested with the power to acquire, hold and dispose of property, to sue and be sued, being a body corporate having perpetual succession and a common seal. The Authority is responsible for the technical and commercial regulation of the midstream and downstream petroleum operations. The Authority covers a merger of three defunct regulatory agencies which include the Petroleum Equalization Fund (Management) Board (PEFMB), Petroleum Products Pricing Regulatory Agencies (PPPRA) and the Midstream and Downstream Divisions of the Department of Petroleum Resources. The Act also establishes a fund to be maintained by the Authority, termed the Authority Fund.[352]

Some of its objectives[353] as provided by the Act include, the regulation of all technical, operational and commercial activities in midstream and downstream petroleum operations, ensuring the safe, efficient, effective and sustainable infrastructural development of midstream and downstream petroleum

[349] Section 23 of the Petroleum Industry Act 2021
[350] Section 19 of the Petroleum Industry Act 2021
[351] Section 29 of the Petroleum Industry Act 2021
[352] Section 47 of the Petroleum Industry Act 2021
[353] Section 31 of the Petroleum Industry Act 2021

operations, promoting the supply and distribution of natural gas and petroleum products in midstream and downstream petroleum operations, ensuring crude oil supply for domestic refineries and implementing government policies for midstream and downstream petroleum operations.

In addition, the Act provides for the various functions[354] with which the Authority is obligated to perform, such as, regulate and supervise all technical and commercial midstream and downstream petroleum operations in Nigeria, determine appropriate tariff methodology for processing, transportation and transmission of natural gas and crude oil, set cost benchmarks for midstream and downstream petroleum operations, supervise and enforce compliance with the terms and conditions of licenses, permits and authorisations issued by the Authority and establish customer protection measures in accordance with the provisions of the Act.

Also, the Authority is subject to a prior consultation with stakeholders[355] empowered to make regulations[356]:

i. regarding the processing, refining, transmission, distribution, supply, sale and storage of petroleum and petroleum products as well as other midstream and downstream operations.

ii. establishing those midstream and downstream petroleum operations to be subject to a license or permit from the Authority.

iii. Establishing the procedure for review and approval of license and permit applications for midstream and downstream petroleum operations.

iv. Establishing the penalties and enforcement mechanisms in respect of breaches of the regulations issued by the Authority.

[354] Section 32 of the Petroleum Industry Act 2021
[355] Section 216 of the Petroleum Industry Act 2021
[356] Section 33 of the Petroleum Industry Act 2021

v. Concerning the national strategic stock.

Ensuring the continuity and security of the supply of natural gas, crude oil, and petroleum products to customers.

3.4.3.1 The Nigerian Midstream and Downstream Petroleum Regulatory Authority Organizational Structure

At the top of its hierarchy, the Act establishes the Governing board of the Authority[357] which is charged with the duty of policy and general administration of the Authority. The Board consists of one-non executive chairman, two-non-executive Commissioner, the chief executive of the Authority, two other executive Commissioners responsible for managing the finance and accounts and exploration and acreage management, one representative each of the Commission,[358] Ministry of Petroleum and Ministry of Finance not below the rank of Director.[359] The remuneration and allowances of the Executive directors of the Authority are to be paid from the funds of the Commission.[360]

The Act provides for the various functions[361] with which the Board of Authority is obligated to person such as the formulation of policy, supervision and providing strategic direction to the Authority, determination of terms and conditions of service of employees of the Authority, consideration and approval of the annual budget of the Authority before submission to the National Assembly for appropriation, structurize the Authority into a required number of departments deemed fit for the

[357] Section 34 of the Petroleum Industry Act 2021
[358] The Nigerian Upstream Petroleum Regulatory Commission
[359] The appointment of all members of the board aside the representatives is to be made by the President subject to the approval of the Senate.
[360] Section 36 of the Petroleum Industry Act 2021
[361] Section 35 of the Petroleum Industry Act 2021

effective performance of the functions of the Authority and provision of overall guidance for the execution of the Authority's functions.

3.5 Sectors of The Oil and Gas Industry

The Nigerian Oil and Gas industry is characterized by both public and private actors. Some of the public actors include the Petroleum Products Pricing Regulatory Authority (PPPRA), the Department of Petroleum Resources (DPR), Nigerian National Petroleum Company (NNPC), and its subsidiaries amongst others. The vast activities required in the oil and gas industry resulted in interesting nuances and diverse jobs to be performed. While the oil and gas industry were dominated by multinational companies before the 1990s, the implementation of the Nigerian Contents Directives issued by the NNPC almost two decades ago increased local participation. This was further boosted by the enactment of the Nigerian Oil and Gas Industry Content Development Act (NOGIC) Act in 2010.

In the quest for specialization and better results, these activities have been divided into three sectors of the oil and gas industry, the upstream, midstream, and downstream sectors. These sectors have varying results due to their specific nature, being capital intensive, complex, requiring state of the art technology. Thus, a wholesome understanding of the industry requires an analysis of its component sectors.

3.5.1 The Upstream Sector

This sector is regarded as the most lucrative sector in the oil and gas industry. In the year 2014, it accounted for over 90% of the country's exports and about 80% of the Federal Government's revenue.[362] The income of companies operating in this sector are subject to taxes under the Petroleum Industry Act

[362] KPMG; Nigeria's Oil and Gas Industry Brief; 2014 Retrieved from 27th February 2022 on

2021.[363] This sector is considered the initial stage in the oil and gas value chain, involving the searching, exploration and production of gas.[364] This includes flowlines, drilling, flow stations and compressor stations, seismic surveys, manifolds, well location preparation, storage tank farms, pipelines network, and export terminals. According to the Nigerian Investment Promotion Commission Act,[365]The upstream sector involves 'all operations necessary in separating gas from the reservoir into usable form at utilization or designated custody transfer points, either through pipelines or tankers.'

The Nigerian Upstream Petroleum Regulatory Commission (NUPRC) is a key statutorily established agency in the upstream sector, responsible for the supervision and compliance of all stakeholders in the sector to the petroleum laws, regulations and guidelines in the Nigerian oil and gas sector.[366] It also plays advisory roles to the government and relevant government agencies on policies and technical matters that may have an impact on the petroleum industry.

The sector's capital-intensive nature results in its domination with large multinational companies, lucrative local investors, persons, or companies alike. The costs of executing operations in this sector are classified as capital expenditure (CAPEX) and operating expenditure.[367] As a result of this, the Nigerian government seeks to participate in the oil and gas industry both directly and indirectly through direct exploitation as well as through contractual arrangements with multinational oil companies. However, for this entity to carry out crude oil exploration and production activities, they must be granted

[363] Section 260 of the Petroleum Industry Act
[364] PILLAI et al (2010)
[365] No 16 of 1995 (NIPC) Act
[366] NURPC (2021a) FUNCTIONS OF THE NURPC Retrieved from https://www,nurpc.gov.ng/functios-of-nurpc/ on March 5th, 2022.
[367] WRIGHT and GALLUN (2008)

a valid license. This license must be given by a competent authority granting the licensee permission to do an act, without which such act would be regarded as illegal.

3.5.2 Existing Contracts in the Nigerian Upstream Sector

Pursuant to Section 3 of the Petroleum Industry Act 2021, the Minister for Petroleum and Energy Resources has the power to grant the Oil Exploration Licence (OEL) to the licensee. The OEL grants the licensee non-exclusive right to explore the specified area within the grant. The grant expires on the anniversary of the date with which it was issued, subject to renewal. This term has however been replaced under the recent enactment of the PIA 2021 as 'Petroleum Exploration License'.[368] A key distinguishing factor between the outgoing[369] and incoming[370] concessions are the sizes; this is due to the significant reduction in the overall surface area granted under the latter as against the former.

The Oil Prospecting License[371] is another license granted by the Minister of Petroleum and Energy Resources pursuant to Section 3 of the Petroleum Industry Act 2021. The license grants the licensee the right to explore and prospect for crude oil within the specified area contained in the grant. Consequent to the change in terms, the scope of the license is broadened beyond oil and now includes petroleum. The licensee has the right to terminate the licence at any time, so long as a notice in writing of not less than three months is given to the Minister of Petroleum with the payment of the prescribed termination fees.

[368] Section 70 of the Petroleum Industry Act 2021. Consequently, all existing licenses and leases will be automatically converted to PELs, PPLs and PMLs upon their expiration. However, the Act makes provision for certain conditions to be met, where holders of these licenses are willing to voluntarily convert them under the existing regime.

[369] Oil Prospecting License, Oil Exploration License and Oil Mining Lease.

[370] Petroleum Prospecting License, Petroleum Exploration License, Petroleum Mining Lease.

[371] Pursuant to Section 70 of the PIA, this is now termed as Petroleum Prospecting License. The change in nomenclature is to better reflect the mature status of gas as an independent resource and an independent target for investors.

3.5.2.1 Production Sharing Contract (PSC)

Production Sharing Contracts are formal agreements between Multinational Oil Companies termed "Contractor or Multinational Oil Company" and NNPC termed "State party or NNPC" authorizing the contractor to perform exploitation of oil/gas within a specific area as contained in the agreement.[372] The contract is usually necessitated by the state party, lacking the necessary funding, technical expertise, workforce or technology needed for carrying out such operations. These forms of contract are usually capital-intensive like most other operations in the upstream sector. In 1973, the first PSC was signed between NNPC and Ashland Oil Company. As of 2011, Nigeria had over thirty PSCs with IOCs.[373]

Under the agreement, the contractor is responsible for financing the operations, exploitation of the natural resources. The State party is considered the owner of these resources. For instance, where a PSC is formed between a MOC and NNPC granting the former exclusive general authorization over a specified area in the contract. However, due to the various uncertainties surrounding cost recovery in PSCs, most IOCs resort to Service Contracts.

3.5.2.2 Joint Venture Agreement (JVAs)

Joint Venture Agreement involves an agreement between one or more MOCs and the Nigerian National Petroleum Corporation (NNPC) for the joint development of a mutually held oil mining license and facilities.[374] Under this agreement, each partner contributes to the costs of the operations[375] and shares in the profit or loss by its proportionate equity interests in the venture. A partner or company of this agreement is regarded and termed the operator, responsible for the daily running of the venture. The

[372] Akinjide A. (2000) "Why Do Oil Companies Do Farm-Outs and Farm-Ins?" Retrieved From Https://Www.Mondaq.Com/Nigeria/Accounting-And-Audit/8501/Why-Do-Oil-Companies-Do-Farm-Outs-And-Farm-Ins> On March 3rd, 2022.
[373] NNPC (2011)
[374] Olujobi O. (2020) "Nigeria's Upstream Petroleum Industry's Contracts: The Hurdles and The Legal Stopgaps" Business Law Review Vol.11 No.4 P.170-186
[375] Ariweriokuma (2009)

other party or “non-operating partner” is permitted by the venture to acquire skills to aid its efficiency. An underlying provision of this contract is that the national partner must have sufficient interest and learning capability. One of the major disadvantages is its ability to complicate decision making processes, as it usually requires negotiations carried out beyond an integrated corporate organization. However, due to the NNPC failure to meet its financial obligations, the government has in recent years switched most of its JVCs to Production Sharing Contracts (PSCs).

Some of the other contracts adopted in the upstream sector include the Farm-Out Agreement which involves an arrangement in which a thirst party agrees to take on from one or more of the existing licensees, an interest in a production license and in the operating agreement attached to it, for consideration. In the oil industry, such interest would consist of a specified work obligation, otherwise regarded as the earning obligation, adopted in the drilling of one or more wells.

Lastly, there is the Risk Service Contract which is a form of an arrangement by which the multinational oil company finances the whole risk capital for exploration and production, where crude oil is found, the contract is terminated with no obligation to either party. In cases where there is a commercial discovery of oil, these expenses are retrieved, and the company is entitled to payment, which could be in either cash or crude oil where such terms are included in the contract.

3.5.3 Challenges Faced in The Nigerian Upstream Sector

The Nigerian National Petroleum Corporation reported that Nigeria’s oil and gas reserves had increased to over 37 billion barrels and 159 trillion cubic feet respectively. She currently ranks the 10th country

with the largest oil reserve in the world.[376] This should normally signify growth in the Nigerian upstream sector and the Nigerian economy, regardless of this, reverse is the Nigerian reality. This is because of several factors ranging from the negative public perceptions regarding its environmental and safety precautions and overall sustainability thus contributing to the future planned near-net-zero energy mix. Such perception is fuelled by certain factors such as the unnecessary gas flaring and other emissions associated in its exploration, aquifer contamination and excessive water use amongst others. These issues undermine efforts put into the growth of the upstream sector by the government.

Firstly, there is the continuous dwindling price of oil and volatility. The oil and gas industry has recently experienced a constant dwindling oil price and high volatility, resulting in a resistance of potential investors into the sector. Moreso, with difficulty in addressing oil price changes through domestic macroeconomics policies, this oil price volatility facilitates macroeconomic challenges in the economy.[377]

Secondly, the issue of resource ownership and allocation. The centralized and exclusive ownership of petroleum resources by the Federal Government of Nigeria has created certain negative implications such as the undue leakages in the economy, inefficiency in petroleum block allocation mechanisms, corruption and limited transparency, made ineffective any strategize made in the indigenization of the local petroleum industry and an important repression of the development of the local economy in each oil producing community amongst others.

[376] Orlando, O. 2006. Construction and Networking of Gas Distribution Infrastructure, Chartered Institute of Bankers of Nigeria, (2006) Oil and Gas Financing in Nigeria Issues, Challenges and Prospects. Lagos: The Chartered Institute of Bankers of Nigeria, p. 243.

[377] Akinlo A. (2012) “How Important Is Oil in Nigeria’s Economic Growth?” Journal Of Sustainable Development, Vol. 1 No.4

This has resulted in a series of conflicts between these host communities and the federal government. In previous years, there was no impact of petroleum taxation policies in host communities fuelling further conflict and damage to the national economy. The federal government to address this issue under the Petroleum Industry Act (PIA) created the Host Community Development Trust Fund (HCDTF).[378] Its function is to foster prosperity, infrastructural development and provide economic and social benefits from petroleum to the host communities amongst others. For instance, seventy five percent of the fund is to be invested into capital projects, twenty percent into reserve funds and five percent into administrative and special projects.[379] Although the legal authority of the Act is called into question due to the suspension of certain parts of this Act by the Federal government, efforts have been made towards its implementation.

Thirdly, the plague of corruption as with other institutions and industries within the Nigerian economy, bedevils the development of the upstream sector, particularly within the NNPC. This is because of several factors ranging from the mismanagement, low maintenance, the increased international deterioration of crude oil prices amongst others. According to Ayado,[380]This has led to the efforts made by the legislators as a constitutional obligation to adopt stringent anti-corruption laws aimed at ensuring and upholding transparency, accountability, seamless and viable growth of the Nigerian economy.

Fourthly, the constant environmental pollution caused by most operations within the upstream sector has led to an increased resistance. Such activities which pollute the environment is regarded as a violation of several international instruments which prohibit the same, for instance the 1992 United Nations

[378] Section 235 Of the Petroleum Industry Act 2021
[379] Section 244 of the Petroleum Industry Act 2021
[380] Ayado S. (2020) "Again, senate insists on probe of N40bn in NDDC", Business Day Newspaper Retrieved on April 29,2022 from: https://businessday.ng/news/article/again-senate-insists-on-probe-of-n40bn-in-nddc/

Convention on Climate Change and the 1997 Kyoto protocol, which demand that governments decrease greenhouse gas emissions in the oil sector. Olujobi states that the operations of certain multinationals have consequently led to a massive degradation of the environments, particularly in petroleum producing communities.[381] This has made most of such environments uninhabitable, rendering homeless persons in such communities.

Despite the diverse efforts of multinationals to mitigate such damage, it is deemed highly inadequate, particularly in consideration of its exploration activities resulting in gas flaring.[382] This is also traced to the poor efforts made by the government towards exterminating the same and implementing state penalties. In his study Olujobi[383], recounted some of these poor efforts made by the government, majorly the series of deadlines placed by the government to end gas flaring without any serious efforts and commitment to implement the same. According to Oyewunmi[384], about 2.5 billion cubic feet of gas is proclaimed as flared by the various oil facilities in Nigeria. This becomes more grievous as a better utilization of technical know-how would properly harness the gas flared.

3.6 Midstream Companies

While the upstream sector involves the production of oil and the downstream involves its distribution, the midstream sector on the other hand connects both the upstream and downstream sectors and is concerned with the transportation and storage of oil. This sector boosts two inland/offshore jetties, pump

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[381] Olujobi O. (2018) "Oil Spillage in Nigeria's Upstream Petroleum Sector: Beyond the Legal Frameworks" International Journal of Energy Economics and Policy. Vol. 8 No.1 P. 220.
[382] Olujobi O. (2019) The Appraisal of Legal Framework Regulating Gas Flaring in Nigeria's Upstream Petroleum Sector: How Efficient? International Journal of Advanced Research in Engineering and Technology Vol. 10 No.3
[383] Olujobi O. (2020) "Analysis of The Legal Framework Governing Gas Flaring in Nigeria's Upstream Petroleum Sector and The Need for Overhauling." Soc. Sci., Eissn 2076-0760 Published by Mdpi
[384] Oyewunmi, Olabode A., And Adebukola E. Oyewunmi. (2016). "Managing Gas Flaring and Allied Issues in The Oil and Gas Industry: Reflections on Nigeria." Mediterranean Journal of Social Sciences 7: 643.

stations, strategic depots and hundreds of crude oil pipelines and multi-product pipelines crisscrossing the country.[385] Thus, companies involved in the transportation and storage of crude oil and gas after its initial production are into midstream. To perform operations within the midstream sector the Petroleum Industry Act[386] requires that companies obtain certain licenses. These licenses are granted by the Minister subject to the application and payments of fees.

The oil and gas midstream sector involve operations such as the storage, marketing, and transportation of crude oil and gas. Some of the companies involved in this sector include Nigeria Liquefied Natural Gas (NLNG), Gaslink Nigeria Limited, and Accugas Limited. The profits of companies involved in the midstream sector are subjected to the Petroleum Profit Tax. The Nigerian Midstream and Downstream Petroleum Regulatory Authority (NMDPRA) is a key authority in this sector, created in August 2021, in line with the Petroleum Industry Act 2021. The Authority is responsible for the regulation of both the midstream and upstream sectors, which covers the technical, commercial, and operational activities.

3.7 The Downstream Sector

Like a channel, the upstream sector of the oil and gas industry deals with the exploration and production of crude oil and natural gas, while the storage and transportation of these crude oil and gas is handled in the midstream sector. However, for such oil to be ready for use, the downstream sector becomes necessary. This sector deals with the processing and refining of crude oil into usable products. However, despite possessing one of the largest oil reserves in the world, its significance with respect to Nigeria's economy remains undermined. This is because of the large amount still paid by the Federal government as fuel subsidy, due to several factors, particularly its poor, inefficient refineries.

[385] Abba A., Norhayati Z. & Usman S. (2019) "Supply Chain Sustainability Practices of Oil Servicing Firms in The Downstream Sector of Nigeria's Oil and Gas Industry". Journal Of Economic Info Vol. 6 Issue 4, Pp. 11-14.
[386] Section 183-204 Of the Petroleum Industry Act

Following the discovery of oil in Nigeria, there was a simultaneous growth in the Nigerian economy and the demand for petroleum products in the nation which was often met by importation. In a bid to meet the product needs of the country, Shell-BP Petroleum Development Company embarked on building the first refinery in Nigeria. In 1965, this project was completed and commissioned with the refinery producing 38,000 barrels per day. At the time, the refinery was solely a hydro-skimming plant. Under a participatory agreement with Shell-BP, the federal Government of Nigeria acquired 50% shareholding. In 1972, the refinery was registered as the Nigeria Petroleum Refining Company and the shareholding of the Federal government increased to 60%. However, its status as a Joint Venture Company remained, with its control and management kept under the private sector.[387]

In 1972, the refinery was constructed, and a Naphtha Catalytic Refining Unit added. This increased the production capacity to about 60,000 bpsd, meeting all the product needs of the country at the time, restricting importation to bitumen which was yet to be produced in the country. The Refinery was a private company, directly selling its products to marketing companies in Nigeria. The sale was done under an arrangement where these marketing companies paid for the stated capacities of crude supplied, lifted products obtainable from those capacities and the processing fee. Such profits were subjected to tax by the Federal government, making the arrangement quite efficient and profitable. However, in 1978 through an outright buy out, the Federal government acquired the remaining 40% shares and renamed it NNPC Refinery, Port Harcourt. It thereafter came under government control becoming a full Nigerian entity. This was in line with efforts of the government to take better control of the Nigerian oil and gas industry after the establishment of the NNPC in 1977.[388]

[387] NNPC Archives
[388]Ogbuigwe A. (2018) "Refining in Nigeria: History, Challenges and Prospects", Applied Petrochemical Research Vol. 8 No. 2

In the following years, the sector has been plagued with instability due to several factors, the monopolization of the sector by the government. In a bid to solve this challenge, the government adopted several strategies and recorded little successes. This ranged from the Uniform pricing of petroleum products adopted in 1973 and the establishment of the Petroleum Equalization Fund in 1975 targeted at combating the price disparities of petroleum products due to transportation of these petroleum products to different parts of the country.[389] Having created tremendous impact in other Nations, the Federal government of Nigeria adopted deregulation, a viable option needed to revolutionize the downstream sector[390].

In the opinion of Gberevbie,[391] Deregulation is an optimal method of combating corruption, decreasing the cost of governance and increasing the efficiency of the downstream sector.

With the deregulation of the sector and DE monopolization of state-owned oil companies, the market is now opening and characterized by better stability necessary for economic progress[392]. Profits of companies engaged in the downstream sector are taxed under the Companies Income Tax (CIT) Act, as compared to companies engaged in the upstream sector whose profits are subject to the PPTA.

However, despite the country's enormous crude oil reserves which have over the years engendered billions of dollars in oil revenue, its poor refineries and the large payment of subsidy by the government has resulted in an insignificant growth of the Nigerian economy. For instance, in preparation of its annual

[389] Abdurrahman B. (2019) "The Impact of Downstream Oil Deregulation Nexus Petroleum Gross Domestic Product: The Nigerian Experience", International Journal of Scientific and Research Publications, Vol. 9, (5),524.

[390] Kadiri, K.O., Lawal, S.O., (2016), Deregulating the Nigerians Downstream Oil Sector: Its Necessity as Way Forward to Correct the Battered Aspects of The Nation's Economy,

[391] Gberevbie, D.E., Ibietan, J., Abasilimu.D., Excellence-Oluyen.O., (2015) "Deregulation Policy and Development in Nigeria: The Petroleum Sector Experience, 1999-2014", Journal of Social Development in Africa, Vol. 30(2),129.

[392] Olujobi, Olusola J, Olujobi, Oluwatosin M. And Daniel E. Ufua, (2020)" A Critical Appraisal of Legal Framework on Deregulation of The Downstream Sector of The Nigerian Petroleum Industry". International Journal of Management, Vol. 11 (6), Pp. 252-268.

budget for the year 2022, the Federal government sought a budget of over four trillion naira for payment of fuel subsidy.[393]This is most specifically caused by the formerly sole control of this sector by the federal government. In a bid to resolve the issue, there have been efforts made towards the deregulation of the downstream oil industry.

In the opinion of Baghebo, Deregulation is a model decreasing the government's involvement in a particular industry,[394] consequently easing the various rules regulating an industry. It also involves a case of releasing the Nigerian Government of its concurrent control and involvement in the downstream oil market by relaxing the various regulations governing the sector for a free energy market where oil prices are determined by interplay of the forces of supply and demand in Nigeria's energy market. This would then result in the promotion of healthy competition, fair and reasonable prices of petroleum products, availability of petroleum products, development of the downstream infrastructures such as pipeline facilities, lubricant production depots and refineries.

Olujobi[395] in his study states that, a total deregulation of the downstream sector has the potential of regulating the price increases of petroleum products, ending huge revenue spent on fuel subsidy, ending the hoarding of fuel, improving petroleum products availability in Nigeria, promoting investments by local and foreign investors in petroleum infrastructures, and significantly reducing the long queues at filling stations. Moreso, such deregulation would fuel healthy competition amongst petroleum marketing companies in opposition to a continuous dependence on NNPC for petroleum products. Thus, total

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[393]" Fg Sets Aside Pia, To Pay N4.6 trillion On Fuel Subsidy" By Collins Olayinka, Kingsley Jeremiah, John Akubo in The Guardian National Newspaper, January 2022. Retrieved On April 15, 2022 From Https://Guardian.Ng/News/Fg-Sets-Aside-Pia-To-Pay-N4-6tr-On-Fuel-Subsidy/

[394] Baghebo and Beauty (2015)

[395] Supra

deregulation is foundational for any long-term reform necessary for facilitating transparency in the downstream sector.

3.7.1 Challenges facing The Nigerian Downstream Sector

Notwithstanding, the huge natural resources in the country, the inefficiency of the downstream petroleum sector has indeed bedevilled the progress of the Nation. Despite the numerous benefits with which an adoption of the deregulation of the downstream sector could bring to the Nigerian downstream sector, several factors have served as impediments to its full implementation. One of such impediments is the lack of adequate legislation to support the policy of deregulation. While there are several existing legislations which regulate the petroleum industry such as Section 44(3) of the 1999 Constitution serving as a grund-norm to most provisions regulating the oil and gas industry, there is an inadequate number of policies and regulations needed in achieving the required deregulation of the downstream sector.

Secondly, the existence of numerous regulatory authorities[396] strictly regulating the downstream sector and their overall inefficiency on refining of petroleum products has resulted in the poor growth of the sector. This results in several issues such as hampering the full deregulation of the downstream petroleum sector, diminishing investor's confidence in the sector and the prior delay of the passage of the Petroleum Industry Governance Bill (PIGB) 2017.

Thirdly, poor infrastructures in the sector further hinders the progress of the sector, this is seen in the under/non-functioning refineries, damaged pipelines and a lack of an effective logistics infrastructure. Asides the inadequate investment in the necessary infrastructures, some of the other causes include pipeline vandalism and product theft. Thus, because of constant unavailability of funds needed in

[396] Ministry Of Petroleum Resources, Nigeria National Petroleum Corporation (NNPC) And Department of Petroleum Resources (DPR).

purchasing or upgrading existing infrastructures and its poor maintenance, the sector constantly performs below expectations despite the abundant resources.

Fourthly, there is the challenge of product pricing and subsidy scheme which came about because of the Federal governments need to subsidize the products pump price, thus easing the burden of the actual cost of the pump price and that of the official pump price petroleum products dispensed at the pump. Thus, the subsidy scheme is an attempt by the government to balance the difference between the importer's cost and the official pump price of the products.[397] More so, little impact is felt by the citizens meant to enjoy some of its intended benefit, as a result of other issues facing the sector, some of which include, seasonal product scarcity, smuggling, long queues and adulteration. Furthermore, public funds used in paying for the subsidy reduces available funds needed in developing other sectors like education, healthcare, transportation amongst others.

Some of the other hindrances to the growth of the downstream sector include red-tapism and lengthy administrative processes needed in approving necessary regulations, corruption, poor management of fuel subsidy, under investment in the sector, poor petrol price control mechanisms in the sector, poor implementation of the legal framework regulating the downstream sector and inadequate commercial incentives for increased investments in the sector.

3.8 Challenges Bedevilling the Oil and Gas Industry with A Focus on the Low Foreign Direct Investment

The link between Foreign Direct Investment (FDI) and the economic growth of every economy has been a long progressive relationship which time has indeed proved useful. This has proved a strategic component in the economic growth scheme of any economy Moreso a developing economy. In the opinion of the OECD, it has proved a viable source of economic development and modernisation, income

[397] KPMG (2019) " Downstream Oil And Gas Sector Watch" Retrieved On April 26,2022 From Downstream-Oil-And-Gas-Sector-Watch.Pdf (Assets.Kpmg)

growth and employment.[398] As a result of this, in facilitating its increase, countries have sought to create a friendly economic environment by liberalizing their FDIs regimes and adopting other policies to attract investments.

However, controversy surrounds the concept due to factors such as increased share of foreign ownership of a country's economy, particularly regarding the long-term implications. Thus, despite its continuous practice by nations, there has been a debate amongst scholars and economic analysts on its disadvantages and costs outweighing the benefits.

3.8.1 Foreign Direct Investment in the Nigerian Oil and Gas Sector

According to Sudha, FDI involves a cross border investment made by a resident in one economy in an enterprise in another economy, with the objective of establishing a lasting interest in the investee economy.[399] This usually constitutes the investment into the production by either purchasing a company in the target country or by expanding operations of an existing business in that country. According to Aliyu,[400] governments have sought policies to attract FDIs into their country's economy, due to its significant impact in tackling shortage of financial resources, skills and technology. These investments could take one of the several forms, financial collaborations, joint ventures and technical collaborations, capital market, private placements or preferential allotments amongst others.

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[398] OECD Foreign Direct Investment for Development: Maximising benefits and minimising costs. Report prepared by the Committee on International Investment and Multinational Enterprises (CIME) (2002). Retrieved on April 12, 2022 at Foreign Direct Investment for Development (oecd.org)

[399] Sudha B. (2013) "Foreign Direct Investment" In International Journal of Scientific Research ISSN No 2277-8179 Vol. 2 Issue 4

[400] Aliyu M. (2015) "Impact of Foreign Direct Investment (FDI) On Economic Growth in Nigeria" Abuja Journal of Business and Management Vol. 1, Issue 2 Pp.44-54

3.8.2 Factors Contributing to Low Foreign Direct Investment in the Oil and Gas Sector

In the opinion of Nwachukwu[401]The resistance to FDI began when it was perceived as a means of political and economic domination. This was particularly seen in the decade following the attainment of Nigerian independence, where Nigerians heavily relied on foreign investments. This resulted in the enactment of the of the Nigerian Establishment Promotional Decree (NEPD) in 1972[402], restricting the inflow of foreign funds into the Nigerian economy as an implication of its regulations. This led to a heavy decline in the number of FDIs in the Nigerian economy at that time, negatively impacting the number of economic activities in the country.

Upon realization of the adverse effects with which the stringent regulations had on the Nigerian economy, to increase the economic activities within the system, the government introduced the Structural Adjustment Programme in 1986. The programme through the increase of exports and decrease of imports, adoption of deregulation and privatization policies sought to diversify the economy, create an investor-friendly environment, and reduce the high trade price depreciation. This highlighted the beginning of the deregulation era in Nigeria. This led to an increase in FDIs inflows from the initial N192.60m in 1973 to N2,499.60m in 1986. However, the continuous regime adjustments and the uncertainty surrounding this, have led to an inconsistent growth and the subsequent drop of 78.1% in 2017.

In addition, the Nigerian government repealed the Nigeria Enterprise Promotion Decree and the Exchange Control Act which contributed to a deterrence of foreign investment in the Nigerian capital market. In furtherance of their policy promoting objective of FDI the government enacted the Foreign

[401] Nwachukwu R. (2019) "Factors Influencing Foreign Direct Investment in Nigeria (Case Study Nigerian Oil and Gas Sector) In International Journal of Research and Innovation in Social Science, ISSN 2454-6186 Vol.3 Issue 8

[402] Subsequently Amended In 1977

Exchange (Monitoring and Miscellaneous Provisions) Act of 1995 and National Investment Promotion Decree (currently termed Nigerian Investment Promotion Act). While the former increased access to foreign exchange, the latter removed most of the restrictions which limited the scope of businesses to which foreign investors could participate. Some of other policies later implemented with the same objectives include the National Economic Empowerment Development Strategy (NEEDS), State Economic Empowerment Development Strategies (SEEDS), Local Economic Empowerment Development Strategies (LEEDS).

In analysing the inflow of FDIs into an economy, there are several factors considered, some of which include inflation rate, market size growth, tariffs, labour charges, host authorities' rules, investment incentives infrastructure, development of the regulatory framework and economic policy coherence and exchange rate amongst others. Krugell divides the several determinants into two, micro determinants and macro determinants. He further defines micro determinants of FDIs as FDI concerned majorly with those region's particular factors that have an impact on the profitability of FDI at enterprise stage.[403] Macro determinants on the other hand, he defines as elements that affect the profitability and the selection to make investments at an economy-extensive stage. Some of these macro determinants he listed include, the political stability, exchange quotes, scale and increase of the marketplace.

In his study on the determinants of FDI in Nigeria, Ekpo analysed the relationship between macroeconomic determinants and FDIs. The report showed that the high rate of inflation, debt service, political regime, real income per capita, world interest rate stood out as some of the factors responsible for the variance of FDI inflows to Nigeria.[404] Other factors affecting FDI inflows to Nigeria include the

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[403] Krugell M (2005) "Foreign Direct Investment, Economic Freedom and Growth: New Evidence from Latin America." In European Journal of Political Economy Vol.19 P. 529-545

[404] Ekpo E. (1997) "Unequal Exchange: A Study of The Imperialism of Trade, With Additional Comments by C. Bettelheim, New York: Monthly Review Press.

size of the host country, endowment of natural resources, deregulation and exchange rate depreciation. Souyananda further opines that in the long run it becomes evident that FDI inflow to Nigeria is co-integrated with natural resources outflow, inflation, foreign exchange rate and GDP per capita.[405]

According to Akanegbu and Chizea,[406] Despite the various reforms done by the government, Nigeria's share of the global FDI remains an insignificant percentage. It is in this line that this study is focused on the impact of FDIs on the Nigerian oil and gas industry which has over the years been a major attraction and indeed beneficiary of the FDIs. For instance, in 2016, the oil and gas sector above all other sectors recorded an inflow of about $20.83 million in the first quarter, the second quarter recorded an inflow of $200.39 million, the third quarter recorded $171.63 million, and the fourth quarter recorded $227.3 million. However, The National Bureau of Statistics (NBS) reported a 31.76% increase in the foreign investment inflow into the oil and gas sector in the first six months of 2017, in comparison to the 21.21% in the first six months of 2016. More importantly, this study would discuss the various factors responsible for the low FDI in the Nigerian oil and gas industry leading to high rate of divestment by several foreign investors. Some of these factors challenging the inflow of FDIs into the Nigerian oil and gas industry include:

3.8.3 Human Capital Factors Affecting FDI in the Nigerian Oil and Gas Industry

Academics have a consensus as to the importance and heavy role with which human capital plays in facilitating economic growth and development. Its importance is further heightened in the Nigerian oil and gas sector because of its technical and specialized nature. It is integral to the investment climate of

[405] Soumyananda J. (2009), "The Role of Foreign Direct Investment and Natural Resources in Economic Development." Working Paper No. 196. Central Bank of Chile, Santiago.
[406] Akanegbu B. And Chizea J. (2017) "Foreign Direct Investment and Economic Growth in Nigeria: An Empirical Analysis" European Journal of Research in Social Sciences Vol.5 No. 10 Pp. 1-10.

an economy and implies the availability of skilled labour.[407] This hypothesis was further concretized in the theoretical work that views FDI as a vital requirement of economic developments.

Some of such theoretical work is the economic growth models pioneered by Schultz[408] and Becker. The study analysed the impact of human capital factors in FDI inflow into the Nigerian oil and gas sector. It assessed the human capital measures such as the human capital incentives, quality of the Nigerian labour market and organizational operations of MNC as factors which could restrict the rate of FDI inflow into the sector. The survey carried out showed that 61%,51% and 37% of the sampled population agreed on the serious role with which quality of labour market, human capital incentive and organisational structure of MNC plays in facilitating FDI into the Nigerian oil and gas sector. This finding corresponds to that of Kalaitzidakis[409] which reflects the significance of a well-educated workforce as an incentive for foreign investment location decisions.

3.8.4 Infrastructural Factors Affecting FDI

According to Cheng and Kwan[410], who in their study analysed the impact of the business environment, infrastructure inclusive, on FDI. As part of the business environment, they listed power generation and insecurity as major infrastructural limitations in the country, which are considered by potential foreign investors before making FDI. An instance of this is insecurity, which was narrated in an annual report by the Foundation for Partnership Initiatives in the Niger Delta (PIND). The report is titled, Niger Delta

[407] Skills acquired by individuals through investment in education and training.
[408] Schultz M. (1961) "Does Foreign Direct investment accelerate the oil and gas sector?" University of Minnesota Working Paper, Minneapolis. Retrieved on April 12, 2022 from www.worldbank.org/research/coferences/financial_globalization/fdi.pdf
[409] Kalaitzidakis P. (1997) "Why Does FDI Go Where It Goes? New Evidence from The Transition Economies", IMF Working Paper WP?03/228. International Monetary Fund, Washington, D.C.
[410] Cheng And Kwan A. (2001) "FDI And Economic Growth: The Role of Oil and Gas Sectors". Department Of Economics, University of Houston, Houston.

Annual Conflict Report,[411] showing the number of violent incidents in 2019 totalling 416 which resulted in over one thousand deaths. This has indeed placed potential foreign investors away, despite the large natural gas reserves, crippling the oil and gas industry's growth.

Moreso, the poor power situation, where the electricity demand continuously surpasses the supply, can be described as epileptic. Gambo[412] comments on the poor power situation describing it as a major hindrance to socio-economic and technological development, in every economy. This includes the FDI inflow into the Nigerian economy. Unfortunately, while the poor situation of electricity is caused by poor infrastructures, it is more saddening that a proper utilization infrastructure in the oil and gas industry could preserve more of natural gas flares which could then be properly used in creating a better power situation in the country.

3.8.5 Policy Factors Affecting FDI

The policies adopted by a country plays a significant role in creating a friendly investment environment, capable of facilitating FDI into the Nigerian economy. It is to this end, that governments of various countries abolish or remove several laws or policies respectively, which could potentially serve as obstacles to foreign investments to make their countries prime investment locations. Scholars agree that these policies include improving the degree of trade openness which would involve removal of tariffs and other obstacles capable of discouraging potential foreign investors. According to Ari,[413] The fiscal/ monetary policies are articulated in strategic plans and the annual budgets with the objective of influencing indicators like GDP growth rate, unemployment, inflation, interest rates, exchange rate and deficit spending.

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[411]PIND "Niger Delta Annual Conflict Report Retrieved on April 12th, 2022, From File:///C:/%5cusers%5cjmccaslin%5cdownloads%5cniger-Delta-Annual-Conflict-Report-2019-FINAL.Pdf

[412] Sambo S., Garba B., Zarma H. And Gaji M. "Electricity Generation and The Present Challenges in The Nigerian Owner Sector ", Energy Commission of Nigeria, Abuja Retrieved on April 12th,2022 From Https://Www.Osti.Gov/Etdeweb/Servelets/Purl/21423178

[413] Ari M. The Determinants And Impact Of FDI Oil And Gas In Nigeria (2020) Published Thesis Accessed On May 7,2022 From Https://Wlv.Openrepository.Com/Bitstream/Handle/2436/624074/Ari_Phd_Thesis.Pdf?Sequence=1&Isallowed=Y

Despite these several policies, the unstable regulatory framework has kept potential foreign investors abay, decreasing the rate of FDIs in the Nigerian economy. While the effort of policy makers is commendable, until obstacles hindering these policies implementation and factors necessary for achieving its objectives are effectively put in place such policies become mere words without effect. Some of such obstacles include insecurity, unnecessary bureaucracy, illegal extortion of funds from these MOC.

Some of the other factors playing a major role in the low FDI in the Nigerian oil and gas industry are corruption, land acquisition, administrative bottlenecks amongst others. In his study, Akinlabi[414] states that, corruption negatively impacts FDI, making the economy less attractive for investors. Moreso, the diverse administrative bottlenecks caused by the cumbersome business registration process, improper documentation, inadequate sensitizations and lack of proper communication leading to prolonged delay in operations within the country constantly discourage foreign investors from investing in the Nigerian economy.

3.9 Conclusion

This section finds the position on the need to properly implement the long-awaited law which provided a proper revision of the Nigerian oil and gas sector. While the passing of Petroleum Industry Bill 2017 in August 2021, was a welcome development hoped for the industry, the subsequent suspension of certain sections within the Act had characterized the Act with a certain level of uncertainty detrimental to its effectiveness. The study showed the importance and significant contributions of the oil and gas industry to the Nigerian economy which although cannot be overemphasized, reinstated the need to ensure a balanced diversification of the economy.

[414] Akinlabi A. (2011) "Corruption, FDI and Economic Growth in Nigeria." Journal Of International Research in International Business Management Vol. 281

In discussing the sectors of the oil and gas industry and their new regulatory bodies as established under the Petroleum Industry Act. It emphasized the need to properly reflect deregulation policies adopted in our laws as a means for developing and overcoming most of the challenges facing the downstream sector. Also, the requirement of establishing necessary structures needed for the implementation of these laws. As in its earlier section, the study analysed the various factors responsible for the low FDI in the Nigerian economy. It applauds the diverse efforts made by the government in providing an investor friendly environment, particularly through monetary/fiscal policies. However, the study enjoins the government to eradicate several supposedly 'little obstacles' such as the poor infrastructures, insecurity, corruption and unnecessary administrative bureaucracy. This can be decreased through a more compact legal framework and proper utilization of infrastructures and resources.

CHAPTER 4: ANALYSIS OF FOREIGN DIRECT INVESTMENT IN NIGERIA OIL AND GAS INDUSTRY

4.1 Introduction

Evidence from several studies[415] indicate that Economic growth requires capital investment. Foreign direct investment is a significant addition to gross capital formation, while neoclassical economists are of the opinion that FDI promotes economic growth by increasing per capita income. Foreign direct investments also contribute to the productivity of capital by

[415] See Chenh H., And Yan S., Foreign Direct Investment and Economic Growth: The Importance of Institutions and Urbanization (Chicago Journals 2003, Volume 51, No 4) Available Online At Https://Www.Journals.Uchicago.Edu/Doi/Abs/10.1086/375711#

complementing domestic savings and elevating standards of living, through technology transfer, and greater competition. To the investor country, foreign direct investment is a fast means of expanding a global business by opening new markets, and advertising channels for a product or service. To the host/ receiving country, it provides the latest technology, modern operational practises, and capital, contributing significantly to the economic growth and development of the economy. [416]

The significance of foreign direct investment as it relates to the development of the economy cuts across all sectors and subsectors of the economy. FDI not only adds to the capital base of a country, but also enhances the productivity of domestic institutions through technology transfer. In the opinion of Adutse[417], the development of Africa and in particular, Nigeria depends on foreign direct investment, which is the main provider of scientific and technological innovation. Bengos and Sanchez-Robles are of the opinion that host countries require economic stability, free markets and human capital to reap the full benefits of FDI inflows. Considering the capital-intensive nature of the oil and gas sector, foreign direct investment presents significant benefits to the infrastructural development of the industry. [418]

I. *History of Foreign Direct Investment in Nigeria Oil and Gas Industry Highlighting Its Impact*

Due to the significant positive effects of foreign direct investment, host governments make policies and grant incentives that attract investors and promote an investment friendly environment. The Nigerian Government has not been left out in the efforts to create an investment friendly destination.

[416] Richard C Nwachukwu, Factors Influencing Foreign Direct Investment in Nigeria, International Journal of Research and Innovation in Social Science |Volume III, Issue viii, August 2019|Issn 2454-6186
[417] Adutse, P. W. And Basuo, B. K., (2008). Multinational Oil Companies and Oil in Nigeria Afrrev Ijah, Vol.2 (3)
[418] Bengos and Sanchez-Robles (2003)

The fight for political independence in most countries in Africa coincided with the cold war, as such most African countries did not receive the idea of free trade and foreign direct investment with open arms. The concept of foreign direct investment was marked with scepticism and thus hindered the growth of foreign direct investment in the country. Underdevelopment and low standards of living experienced by most of the African countries led them to seek foreign direct investment as a means of expanding their economies.

It is quite difficult to trace and state with certainty the beginning of foreign direct investment in Nigeria. This is because foreign companies such as Unilever actively participated in the Nigeria economy prior to independence. However, it can be properly assumed that these investments increased with the discovery of oil and gas. According to Macaulay, FDI can be traced to the advent of the colonial masters who came to Nigeria on a mission to exploit her oil and gas resources. Prior to this time, the colonial masters made little investments in Nigeria, and these investments were made into raw materials and agricultural produce. In general, there is a perception that FDI is usually directed at financially bereft, undeveloped countries with weak institutions.[419] Thus, the high dependence of Nigeria on Foreign Direct Investments was seen as a means of exercising political and economic dominance in Nigeria. As such, this led the Nigerian government to restrict foreign direct investment into Nigeria with the promulgation of the Nigerian Establishments Promotional Decree (NEPD) in 1972. This law was introduced to promote indigenization and regulate foreign direct investment into Nigeria, leading to a decline in FDI into the country. According to a 2009 report by the UNCTAD, FDI in the oil sector in the 1970s amounted to only 10%. With the discovery of oil however, FDI to Nigeria increased. (Macaulay, 2012 in Adeleke, Olowe & Oladipo, 2014). Most of the investors coming into Nigeria

[419] Hausmann, V., and Fernandez- Arias. (2000), “Foreign Direct Investment and growth in EP and IS countries”, Economic Journal, 106: 92–105.

at this time were from resource rich countries with knowledge of the value of Nigeria's oil and gas resources. A 1966 report by the World Bank (1996) reported Nigeria as the second largest recipient of foreign direct investment in Africa owing to its abundant natural resources. Awa Felix opined that an overvaluation of the naira during the period of the oil boom also accounted for the increased FDI into the country. A drop in the price of oil shifted the focus of investments from the extractive sector to the manufacturing and agricultural sector.

According to Ibi-Ajayi, between 1970-1999, Nigeria was the recipient of over 30% of Foreign direct investment into Africa. This was due to the attractiveness of its crude oil resources. However, in 2007, this investment declined to about 16% of the total Foreign Direct Investment flowing into Africa. His decline was due to the diversion of investment to other oil rich African destinations like Angola and Sudan. The enhanced performance of FDI in other African destinations in various sectors of their economies also increased the attractiveness of other African nations such as South Africa as foreign investment zones.[420] The UNCTAD World Investment Report in 2007 indicates that Nigeria received over 70% of the total inflow into the Sub-region and 11% of the total inflow into Africa. Of the total investment, the Oil and Gas sector received 90% of the funds.

The study of foreign direct investment in the Nigerian Oil and Gas Sector shows that the domestic capital formation is minimal compared with the rate of foreign direct investment in the Nigerian Oil and gas Sector. This has been linked to several other factors such as inadequate infrastructure, insecurity, corruption, and inconsistent policies.

4.2 Laws Regulating Foreign Direct Investment in Oil and Gas Sectors and Implications for Investments

a. The 1999 Constitution of the Federal Republic of Nigeria

[420] Ibi-Ajayi,2006

b. The Petroleum Industry Act 2021

c. The Deep Offshore and Inland Basin Production Sharing Contract (Amendment) Act 2019

4.3 Arguments for and Against Foreign Direct Investment in The Nigerian Oil and Gas Industry.

Nigeria has been ranked as the leading crude oil producer in Africa with an estimated production of 2.35 million barrels per day, however this output is a far cry from its crude oil demand and production potential of its resources. The production capacity of Nigeria's crude oil resources is undermined by inadequate funding, infrastructural lapses and governmental policies. As such, the potential has been undermined by its production capacity because of inadequate infrastructure. To effectively harness its resource potentials and meet its domestic and international demands, investment in the sector is necessary.

Studies have shown that among all the major sectors in the Nigerian economy, the Oil and Gas Sector was the highest recipient of foreign exchange. This translated to both positive impacts and backlashes in the sector. These positive and negative impacts will be discussed in detail in this section.

4.3.1 Advantages of Foreign Direct Investment in the Nigerian Oil and Gas Sector

1. *Promotion Of Domestic Investment*: Several theories have found that FDI promotes encourages domestic investment by creating and expanding new markets, increasing demand for labour inputs and new technology. The mobility of labour means that labour moves from multinational firms to domestic firms, transferring skill from multinationals to other domestic startups. FDI also increases market competition, creating more efficient markets that produce products of better

quality. FDI in the Oil and Gas Sector also enhances the productivity of mineral resources and all other factors of production.[421]

2. *Technology*: FDI often leads to technology transfer, thus helping the host country acquire mature and new technology. These technologies enhance the production process, optimise the factors of production, improve the standard of the product and reduce errors and wastages in production. This technology transfer has also contributed to maximisation of capital. In actual terms, only foreign firms have the financial capacity to introduce new technology into a host country. FDI, ensures firms in the host country have easy access to the parent company's technology without restrictions on licensing and use. They also allow the use of trademarks and franchises that aid trading.
3. *Employment Generation and Labour Skills*: Several theories have also found that the inflow of FDI leads to employment generation. And Countries with literate, skilled labour are more attractive for foreign direct investment. Multinational Oil Companies are a major source of employment and generate thousands of jobs in the region where they are situated. Through their employment in the Oil and Gas Industry, they create jobs across the entire Upstream, Midstream and Downstream value chain. Local content requires Foreign Oil companies to source a certain percentage of their materials locally, thus creating a market for domestic suppliers.
4. *Environmental Protection*: Few studies have shown that Multinational Oil Companies may introduce cleaner, more sophisticated technologies into their operations in developing countries to replace obsolete, outdated and pollution-intensive capital equipment. An example is the introduction of technologies to perform carbon capture and sequestration, rather than flaring of associated gas derived from Oil and Gas exploration and production activities. These

[421] Cotton, Linda; Ramachandran, Vijaya (2001): Foreign Direct Investment in Emerging Economies: Lessons from Sub-Saharan Africa, Wider Discussion Paper, No. 2001/82, The United Nations University World Institute for Development Economics Research (Unu-Wider), Helsinki

technologies are capital intensive and not readily available in Nigeria. However, with the influx of Multinationals from more developed countries, this would lead to a transfer of these technologies to ease environmental pollution and wastage.

5. *Export Competitiveness*: Several studies have shown that the participation of Multinationals in the Nigerian Oil and Gas Industry has help increase competitiveness of Nigeria's oil exports. It has also contributed a significant share to total oil and gas production in Nigeria. This increased efficiency in production and operations is brought about using more advanced technologies. These multinationals are better equipped to carry out marketing activities, secure larger trade and distribution deals across borders and reach wider markets. Thus, their subsidiaries in Nigeria can take advantage of these established distribution network to market and trade their products. They also have access to better financing, transportation and storage facilities to prevent losses. In addition to their wide reach, Multinationals bring the advantage of a recognised brand name. This influence, better trading facilities and wider reach has a positive impact on Oil and Gas exports, foreign exchange reserves, revenue generation and economic growth of Nigeria.

4.3.2 Disadvantages of Foreign Direct Investment in The Nigerian Oil and Gas Sector

1. *Monopoly*: The Oil and Gas Sector is a capital-intensive sector requiring a high level of capital and infrastructure. This domestic dearth in capital and infrastructure creates a gap necessary for Multinational Oil Companies to fill, thus creating room for the mass influx of Multinational Oil and Gas Companies into the country. This influx could have the effect of hindering the entry and growth of Indigenous Oil and Gas Companies unable to compete in terms of market share, skilled workforce and advertising power, thus creating a monopoly. Foreign Direct Investment could

also have the effect of stifling domestic investment by raising the demand for money interests and exchange rates, thus making Nigeria's exports less attractive.[422]

2. *Exploitation of Labour*: It is common knowledge that FDI generates employment, however, there have been several concerns surrounding the working conditions of multinational firms. Foreign multinationals often subject their workers to long working hours in difficult working environments. This has resulted in several public outcries, and laws that enforce basic labour standards.[423]

3. *Inappropriate Technology*: Several studies have found that the technologies introduced by multinational oil companies may be inappropriate for the host country. This new technology is often too capital-intensive and often expensive to maintain, leading to increased production and maintenance costs. This is particularly in countries where skilled labour is low, as they may have to import skilled workers to help in the operation of these technologies. In addition to the capital-intensive nature of these technologies, technology transfer associated with FDI may cause the transfer of pollution-intensive technologies prohibited in developed countries. On the question of whether foreign technology inhibits or propels the innovation and development of local technologies, FDI causes a spillover of technology from multinational firms into the domestic sector. These could involve the movement of employees from multinationals to domestic firms, the imitation of foreign technology by domestic firms and the development of enhanced

[422]Cotton, Linda; Ramachandran, Vijaya (2001): Foreign direct investment in emerging economies: Lessons from sub-Saharan Africa, WIDER Discussion Paper, No.
2001/82, The United Nations University World Institute for Development Economics Research (UNU-WIDER), Helsinki
[423] Cotton, Linda; Ramachandran, Vijaya (2001): Foreign direct investment in emerging economies: Lessons from sub-Saharan Africa, WIDER Discussion Paper, No. 2001/82, The United Nations University World Institute for Development Economics Research (UNU-WIDER), Helsinki

technology in response to a demand for these technologies in the operations of foreign firms. Local content policies that mandate foreign firms to purchase a certain percentage of their goods from local firms push the domestic firms to be more efficient and produce goods of better quality. On the other hand, FDI could stifle the growth of domestic firms by capturing a larger market share, acquiring skilled labour, leaving no resources for domestic firms.

4. *Environmental Violations*: Multinational companies are often the focus of environmental advocacy groups. Most times, environmental regulations within the host country are non-existent or not properly enforced, thus these foreign multinationals take advantage of these poorly enforced rules and weak institutions to pollute the environment with no regard.

4.4 Factors Affecting Foreign Direct Investment in The Nigerian Oil and Gas Sector- The Concept of Sovereign Immunity, Domestication of Bilateral and Multilateral Treaties, Enforcement of Local Content, Jurisdictional Issues.

In the opinion of Pelinescu & Radulescu, **(Pelinescu & Radulescu, 2009)** Foreign direct investment remains one of the most viable and safest ways to integrate the global economy. It actively contributes to the accumulation of national savings. Foreign direct investment in any given nation could be classified into two: market oriented and export oriented foreign direct investments. Each of these two classes of FDI are determined by certain micro and macro determinants. [424] These determinants affect the inflow or otherwise of foreign investments into a country. They could be geographical, economic, social, cultural, as well as political. Its determinants may be of varying importance to investors. It is often difficult to clearly state the level of each determinant to effectively attract inflows of foreign direct investment, it is however

[424] International Journal of Research and Innovation in Social Science (IJRISS) |Volume III, Issue VIII, August 2019|ISSN 2454-6186, page 404

necessary that a minimum of these determinants must be present before foreign direct investment can flow into a country. In the opinion of Krugell[425], the micro determinants of FDI are concerned with the factors in a country that influence the profitability of FDI at the enterprise stage. Some of the factors that affect profitability at firm stage include market size and growth potential, cost of labour, tariffs, host government policies etc. The macro-determinants of FDI are concerned with the factors that influence profitability and the decision to make an investment when the economy is in an extensive stage. They are usually export oriented. They include the scale and growth potential of the host country's market, political stability and exchange rate. In the analysis of Holland, the market size of a host company and its growth potential are key determinants of FDI, subsumed under these determinants are elements that impact the flow of FDI inflows into the country.

In another study by Ekpo[426] on the factors that determine foreign direct investment, he accessed the connection between FDI and certain macroeconomic variables. This study showed that factors such as the political regime, the inflation rate, the credit rating, the debt profile, interest and exchange rate have an effect on the inflow of FDI into Nigeria. An empirical study by Richard[427], showed that market size, political stability, investment policies, deregulation, exchange rate depreciation, abundance of mineral resources and inflation are major factors affecting the flow of foreign direct investment to Nigeria. Several other authors found a huge market size as a major factor that positively impacts the inflow of FDI into Nigeria.

[425]Krugell, M. (2005), "Foreign Direct Investment, economic freedom and growth: new evidence from Latin America," European Journal of Political Economy, Vol. 19, 529–545

[426] Ekpo, E. (1997), Unequal Exchange: A Study of the Imperialism of Trade, with additional comments by C. Bettelheim, New York: Monthly review press.

[427] Richard Page 405

A. **INFRASTRUCTURAL FACILITIES:** A study by Root and Ahmed[428] highlighted the increasingly significant role infrastructural facilities that aid commerce, transport and telecommunications have on the GDP of a country and its attraction of FDI. Infrastructure ranges from good transportation networks i.e. availability of roads, railways, ports, telecommunication, security, stable electricity and functional institutions. A further study by Cheng and Kwan which analysed the business environment as a sum of all infrastructure [429], showed that adequate infrastructure contributed to the inflow of FDI into Nigeria. Lack of infrastructural facilities is a major hindrance to Foreign Direct Investment in any nation. According to Asiedu,[430] good infrastructure enhances the productivity of foreign direct investments and promotes the inflow of foreign direct investment. In his research using cross-sectional data, Alfaro[431] also discovered that inadequate infrastructure can negatively affect a host nation's potential to maximise the benefits of FDI. In the opinion of Ajayi[432], structures such as bad roads, insecurity, inadequate ports, inefficient and unreliable institutions, unstable electricity, as well as unreliable communication channels serve to disincentive foreign investors. FDI is dependent on the infrastructure of host countries, thus the presence of adequate modern-day infrastructure is a necessity for attracting foreign direct investments. An empirical analysis using economic variables by Richard,[433] also found that infrastructural facilities have a significant impact on the flow of FDI into Nigeria's Oil and Gas Sector. Being a highly intensive capital industry requiring

[428] Root, R. and Ahmed J. (1979), International Economics. 7th Edition. South-Western College Publishing, Ohio
[429] . Cheng, B. and Kwan A. (2000), "Do Domestic Firms Benefit from Foreign Investment? Evidence from Venezuela", American Economic Review, 89, No.3.
[430] Asiedu (2002b)
[431] , Alfaro et al. (2001)
[432] (Ajayi, 2006).
[433] Richard C Nwachukwu, Factors Influencing Foreign Direct Investment in Nigeria, International Journal of Research and Innovation in Social Science (IJRISS) |Volume III, Issue VIII, August 2019|ISSN 2454-6186 page 407.

highly skilled labour and equipment, the importance of adequate infrastructure in enhancing its operations cannot be overemphasized.

B. **HOSTILE INVESTMENT CLIMATE:** Investment climate refers to the generality of the business environment. That is, the governing laws and institutions in a particular business sector.

C. **SKILLED LABOUR:** Skilled human capital has been stated as one of the main factors that accelerates the growth and development of a country, aids the building of a knowledge-based economy and attracts investments. This constitutes the investment clime of a country and suggests that sound investment has been put into the education and training of a nation's citizens. In addition to this, is the availability and low cost of labour and wages. In the opinion of Pigato,[434] where all other factors of production are constant, low cost of labour reduces the cost of production and encourages movement of the production process to a foreign destination. According to McKean[435], Foreign Investors and Multinational Companies are attracted to investment destinations that present a lower cost of production, of which wages for labour is a significant part. With the movement of FDI to technological intensive activities, there is a high demand for highly skilled labour. In a study by Azemar and Desbordes (2009) and Suliman and Mollick (2009), they analyse FDI flows to developing countries and conclude that the low FDI flows into sub-Saharan Africa are partly explained by poor human capital and illiteracy. In the opinion of Carnegie[436], the quality of human capital is a major challenge of multinationals looking to invest in developing countries. In accessing how the presence or otherwise of skilled labour affected the inflow of FDI into the Nigerian Oil and Gas Sector, Richard studied certain measures of skilled human capital and found that factors such as the organizational operations of

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[434] Pigato (2001),

[435]McKean, M., D. (1993), FDI in the Restructuring of the Japanese economy. The European Institute of Japanese Studies (EIJS), Working Paper No 91. Stockholm.

[436] Carnegie, S. (2009), "What Africa needs to do to benefit from globalization". Finance and Development, 38(4): 6–8

Multinational Companies, the quality of the Nigerian Labour Market, the human capital incentives impacted the inflow of FDI into the Nigerian Oil and Gas Sector. A similar study by Kalaitzidakis, found that a skilled workforce serves as a strong attraction in foreign investment decisions. In the absence of highly skilled labour to harness FDI, the host country will experience a migration of foreign capital.

D. INSECURITY: A 60.4% drop was witnessed in foreign direct investment in Nigeria between 2009 and 2010. Foreign direct investment which was previously recorded at $6bn in 2009, dropped to $2.3bn in 2010. Despite the several economic policies of the government to remedy the situation, no improvements were recorded. This situation was attributed to the growing insecurity in the Nigerian climate, triggering fear and uncertainty in foreign investors.[437] These statistics support the findings of Ramasamy[438] who analysed the impact of militant insurgency, in the Southeast and South-South region, where several of the multinationals operate. He found that militancy and insurgency deter Multinationals from investing in The Nigerian Oil and Gas Sector.

E. GOVERNMENT POLICY FRAMEWORK: This determines the degree to which the economy of a nation will attract FDI. The policies (political and socio-economic) of the government could hamper or promote trade. These policies could liberalise trade through removal of tariffs and other hindrances to trade, that discourage Multinationals from setting up and continuing business operations after taking advantage of initial entry benefits and serve to promote FDI in the Nigerian Oil and Gas sector. In the opinion of Liargovas and Skandalis[439], policies of the

[437] Salami Dada Kareem et al, Foreign Direct investment into Oil Sector and Economic Growth in Nigeria, pg. 127 in The International Journal of Applied Economics and Finance 6(4): 127 - 135, 2012
ISSN 1991 _ 0886/ DOI: 10.3923/ijaef.2012.127.135 Asian Network for Scientific Information
[438] Ramasamy, J. (2001), “Inference in Models with Nearly Integrated Regressors”, Econometric Theory 11, 1131-1147.
[439] Liargovas, M. and Skandalis B. (2011), “Foreign Direct Investment, economic freedom and growth: New evidence from Latin America”. European Journal of Political Economy, 19(3): 529–45.

government of a host country should be favourable, aim at promotion of trade in the country and encourage Multinationals to settle in the country. Government policies aimed at institutional organisation and management also affect the inflow or otherwise of FDI in the Nigerian Oil and Gas Sector. Policies in place should be designed to ensure flexibility, adaptability and efficiency of regulatory and other bodies in the Nigerian Oil and Gas sector. [440] Where these institutions are fraught with bureaucracies and inconsistencies, they serve to disincentive investments in the Nigerian Oil and Gas Sector. According to Wheeler and Mody[441], several developing, oil rich economies now enact policies aimed at making the business environment more favourable for investment, resulting in competitions for investments among countries. Policy makers are increasingly noting the need for FDI as a catalyst for rapid economic growth and generation of employment, thus implementing the right policies should be a priority for economies seeking to attract FDI in its Oil and Gas Sector.

F. IMPLEMENTATION OF LOCAL CONTENT POLICIES: Local content helps resource-rich countries improve indigenous participation in resource development, gain the maximum benefits from their resources and extend these benefits to their citizens and every other sector of their national economy. This policy actively helps them fight the resource curse and develop the economy. According to theories on resource curse,[442] and the paradox of plenty,[443] countries totally dependent on their abundant natural resources perform significantly lower economically and become less developed than countries that do not have any natural resources. A study by

[440] Someşan, A. (1999), "FDI and Growth: A Causal Relationship", UNUWIDER Research Paper No. 2005/25, UNU-WIDER
[441] Wheeler N. and Mody G. (1992), "The impact of domestic productivity of inward investment in the UK". TheManchester School, 69: 103–19.
[442] Auty, R.M. (1994) Industrial Policy Reform in Six Large Newly Industrialising Countries: The Resource Curse Thesis. World Development 22.1: 11-27. See also Ross, M.L. (1999) The Political Economy of the Resource Curse. World Politica, 51(2), 297-323.
[443] Karl, T.L. (1997) The Paradox of Plenty: Oil Booms and Petro-states (Berkeley, CA: University of California Press).

Bergensen et al (2000) revealed that sharp increases in natural resources may hinder diversified economic growth, increase over-dependence on a sector of the economy, cause political instability and widen the poverty gap, examples.

In the opinion of Collier,[444] data from a World Bank report revealed that countries dependent on one or a few commodities (especially natural resources) are more predisposed to underdevelopment and corruption. The idea of local content development remains one of the most efficient mechanisms to fight "resource curse", in any resource rich country. Local content can be defined as the quantum or percentage of inputs (human labour, and equipment) derived from the domestic economy and utilized in the production and exploration processes for value addition to the economy.[445] It leads to the creation of local employment, growth and expansion of the domestic market growth, and industrialization of the economy. However, this policy is one of the performance requirements prohibited by the World Trade Organisation (WTO), as it violates the provisions of the General Agreement on Tariffs and Trade (GATT), an international treaty to promote global trade and economic development by reducing tariffs and other trade restrictions. Nigeria is a member of GATT, thus creating a dilemma between attracting foreign direct investment and local content development in Nigeria's Oil and Gas Industry. According to UNCTAD[446]Trade-Related Investment Measures (TRIMS) refer to a wide class of performance requirements which host countries impose on investors. These requirements help countries achieve maximum benefits from foreign direct investment (FDI). Local content development is one of such requirements. It serves as a means of technology transfer and is used to prevent trade

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[444] Collier, P. (2000) Economic Causes of Civil Conflict and their Implications for Policy (Washington, DC: World Bank). See also Collier, P. (2003) Breaking the Conflict Trap: Civil War Policy (Washington, DC: World Bank).

[445] Belderbos, R.A., and Sleuwaegen, L. (1997) Local Content Requirements and Vertical Market Structure. European Journal of Political Economy, 13, 101-119.

[446] UNCTAD (2007) Elimination of Trims: The experience of Selected Developing Countries, United Nations, New York and Geneva.

imbalances. Foreign investors often frown at these requirements, and view it as hindrances to their investments, necessitating the US government to restrict certain performance requirements, of which local content development is one. Local content and trade balancing which relate to preferential national treatment specifically violate art. III of GATT. In this vein, countries were mandated to remove these performance requirements effective from 1st Jan 1997 in the case of developed nations,1st Jan. 2000 in the case of developing nations, and 1st Jan. 2002 in the case of least developed nations. However, some WTO countries such as Nigeria still employ the use of local content in their Oil and Gas industries. A number of arguments in favour of the application of local content laws by developing countries centre around the fact that these strategies were used by more advanced countries, and it is only just that, these developing countries are allowed the same privileges. Despite the several arguments to support the application of local content policy in foreign direct investments, the restriction on this performance requirement by the WTO still poses a significant hindrance to foreign investment in Nigeria.[447]

G. Market size and growth of the Nigerian Economy

H. Natural and human resources endowments-cost and productivity of labour

I. Openness to international trade and access to international markets

J. Development of the regulatory framework and economic policy coherence.

K. Inflation Rate

L. Exchange Rate

M. Infrastructure

[447] Rabiu Ado On Local Content Policy and The WTO Rules Of Trade Related Investment Measures (Trims): The Pros and Cons in International Journal of Business and Management Studies, CD-ROM. ISSN: 2158- 1479: 2(1): 137-146 (2013)

N. Investment Incentives

At the time Nigeria assumed first place as the continent's largest economy accounting for 18.3% of African GDP, market analysts predicted that Nigeria would soon assume world stage as a shining star in western Africa's FDI market, however, these potentials will remain just potentials if critical issues like geopolitical instability, corruption, civil unrest, and a lack of diversification remain unresolved. Overcoming these challenges will be crucial in ensuring the country achieves its goals of being the main attraction for foreign direct investment in Africa[448].

4.5 The Concept of Sovereign Immunity in Foreign Direct Investment in The Nigerian Oil and Gas Sector.

Foreign direct investment in any given nation entails a contract between sovereign states, foreign investors which are usually multinationals and the host country. The execution of these investments is brought about by state contracts which state the duties and liabilities of each party, as well as the means of enforcement and dispute resolution mechanism. State contracts are typically defined as a contract between a sovereign host country (or its agency) and a foreign investor regarding investment in a host country.

However, several controversies arise in the implementation of international state contracts. In some avenues, a state contract may be viewed as a contract between sovereign states. Here, it is governed by international law and gives rise to state responsibility. In some other discussions, a state contract may be seen as a contract between private parties. Here, the principle of *pacta sunt servanda* applies, a state loses its sovereign immunity and is liable for any breach. A consequence of this is that the state is

[448]Investment Monitor, The FDI landscape in Nigeria in 2023 retrieved at https://www.investmentmonitor.ai/features/fdi-nigeria-investment-africa-oil-gas-diversification/?cf-view

prevented from avoiding its obligations once the other party has offered consideration by altering its position.

A part of the UNGA resolution of 1803 which reads that foreign contract entered freely “by " or between states ought to be executed in good faith buttresses the viewpoint that state contracts should be administered as inter-state agreements. However, this viewpoint is weakened by the fact that foreign investors, often multinationals, do not possess international legal personality. As such, the use of “by" does not envisage the participation of multinationals. Also, the principle of *rebus sic stantibus*, exempts a state party from its contractual obligations in some situations, thus limiting the application of the principle of *pacta sunt servanda* in state contracts.[449]

In cases where the state is exempted from its obligations under a contract, it results in a breach and several lawsuits. The question of access to justice for the breach comes up. The question of access to justice comes up in various facets in international investment law.

Access to Justice for Impact of Exploitation Activities on Host Communities.

The waste materials from oil and gas exploration and production activities both offshore and onshore, are expelled into the surrounding environment causing significant harm to the environment. This environment is home to people, livestock and marine creatures. It is land where livelihoods are cultivated, and daily survival happens. The expulsion of these toxic materials into the environment causes significant destruction to the environment of the inhabitants of host communities. Oftentimes, these international companies do not comply with regulatory measures to prevent the degradation of the environment.

[449] Adebayo Adaralegbe, 'Methods of Dispute Settlement for State Contracts in the Nigerian Petroleum Sector', (2003), 69, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Issue 4, pp. 265-271,

This is one of those issues arising from international investment in Oil and Gas in Nigeria.

Oil Spillage in Ogoniland in the Niger Delta

The history of oil spillage in Ogoni runs simultaneously with oil discovery and exploration in Nigeria as Oil exploration triggered the three major causes of environmental pollution namely the impact of the seismic survey, gas flaring and oil spills. The Niger Delta region is the home of Nigeria's oil resources and houses most of the industry's oil installations and activities. On average, one oil spill occurs every week in Nigeria. Pipelines are laid across farms, waterways, and fishing grounds. Some pipes cross communities and living quarters. 6000 km of pipelines were laid across Ogoni land.

Between 1976 and 1991, more than two million barrels of oil polluted Ogoniland in 2,976 separate oil spills as Nigeria became one of the world's largest oil producers. Those who depend on farming and fishing have felt a direct impact on their livelihoods and residents have reported myriad health issues. Today, most of the youths and women have become jobless since their local economic support system is no longer sustainable. Life expectancy in the Niger Delta is 41 years, 10 years lower than the national average. The Ogonis have sought more political autonomy and compensation for environmental damage to their land by oil companies and this has been met with negligence or brutal force.[450]

These issues raise the question of access to justice for inhabitants of the host communities. As international private law has developed to protect foreign investors by waivers of sovereign immunity, it is also necessary to ensure that inhabitants of communities affected by the activities of foreign multinationals are adequately remedied/ compensated for the harm done to their surroundings. This access to justice is imperative especially in situations where the impact of the IOC had an actual or potential impact on the health, environment and socio-economic environment of the inhabitants of the host country. In the right circumstances, the right of access to justice for harm affecting the inhabitants

[450] Inah E.O, Chima O.O, (2018), The Impacts of Crude Oil Exploitation on Soil in Some Parts of Ogoni Region, Rivers State, Southern Nigeria at 10.4236/oalib.1104297

should be entrenched and guaranteed by the law of the host country. However, in the case of modern international investment law, the host country, in this case, Nigeria, delegates the dispute settlement right of disputes arising from its territory between inhabitants and international investors to an international body such as the ICSID, and ICJ. This outright delegation downplays the authority of the national courts and causes the protection they may offer to the inhabitants to be subject to extensive review by international arbitration. They may also be condemned on the grounds of interference with investments. In this instance, it becomes difficult to offer protection to inhabitants of investment zones.

Several approaches can be taken to ensure that the state upholds the fundamental right to justice for its inhabitants that have been harmed by foreign investment activities. Firstly, the state can ensure that the law governing the arbitration or dispute resolution mechanism includes provisions of its domestic law that mandate the foreign investors to follow strict health, environmental and social standards that prevent harm to the inhabitants of the communities. This is provided in Article 42(1) of the ICSID Convention, in the absence of express agreement of the parties to the contrary, the tribunal shall apply the law of the Contracting State to the dispute. In line with the Latin maxim, "*he who comes to equity must do so with clean hands*", a progressive interpretation of the term 'fair and equitable standards' applied in Bilateral International treaties requires that a foreign investor who seeks equity for the protection of his investment must also be equitable and fair in his dealings in respect to the inhabitants of the host state. Secondly, another approach to promoting justice for the inhabitants of the host state affected by the activities of foreign investors is a recourse to the international medium for the protection of human rights, where they can be accessed by individuals. A precedent in this respect is the case of *Social and Economic Rights Action (SERAC) v. Nigeria.* In this case, SERAP on behalf of the people of Ogoni in the Niger Delta brought an issue against the Federal government of Nigeria, for the harm done to the land because of the concessions granted to foreign investors. Here, the African Commission on Human and Peoples' Rights affirmed its jurisdiction to hear a complaint that foreign oil and gas investments were causing serious

economic, health and environmental harm to the Ogoni people. The Commission also found that no effective mitigation techniques had been provided to ease these complaints by the Nigerian Government. It therefore held that the oil exploration and production activities by international investors had caused an intolerable, life-threatening environmental pollution and degradation, severe damage to human health, livestock, food crops as well as economic produce, threatening the existence of the inhabitants of the land.

Another case which involved a contention between the rights of investors and the rights of inhabitants of the state is the case of Inter-American Court of Human Rights in *Awas Tingni v. Nicaragua.*[451] This case involved a dispute between the Awas Tingni Community and the government of Nicaragua. As a result of the government's decision to grant a concession for logging in an area claimed to be a traditional land. After a series of disputes before the domestic courts, the matter was taken to the Inter-American Commission of Human Rights and then the Inter-American Court. The Court recognised and upheld the right of the people of Awas Tingini Community to the preservation of their cultural heritage under the American Convention on Human Rights. The Government of Nicarague was found to be in violation of Article 25 0f the Convention which provides for the right of all persons to have recourse to simple and prompt action for the protection of acts that violate their fundamental human rights. [452]

Another approach to promoting access to justice for members of a host state affected by the activities of foreign investors is the indirect involvement of amici curiae in investment arbitration. The concept of amici curiae stems from a practise in common law and is most practised in the US where its functions is to allow third parties who though not parties to the case are privy to useful and information that is

[451] Inter-Am Ct HR (ser. C) No. 124 (15 June 2005).
[452] American Convention on Human Rights, signed in San Jose, Costa Rica, 22 Nov. 1969, entered into force 18 July 1978, 9 ILM (1969) 101.

instrumental in the determination of the case. These individuals only play an indirect role in dispute resolution, and to the extent in which they introduce relevant legal and factual considerations regarding the protection of public rights and property, they are pivotal to widening the scope of investment arbitration to handle matters relating to violation of the rights of host communities. The concept of Amici curiae is paramount as it presents a way to bypass the extensive limitations placed on a host government's sovereignty in relation to certain matters set within the domestic jurisdiction of the host country. These limitations are particularly noticed in matters relating to environmental protection and public health. Though the concept of amicus curiae is not usually introduced in proceedings before the ICJ, a petition of the involvement of amicus curiae has been codified in the rules of procedures of relevant treaty bodies and is often accepted in proceedings before other international dispute settlement bodies. An example of international recognition of the concept of amici curiae can be found in the practise of dispute settlement before the WTO. Despite the non-express provisions in the Dispute Settlement Understanding, the WTO following a progressive interpretation of the rules of procedures allows the introduction of briefs by amici curiae in several cases.

Following from the practise of the WTO. the ICSID and NAFTA tribunals also allow the introduction of briefs by amici curiae. Although it cannot be stated with certainty the influence of the submissions of the amici curiae on the decision of the arbitral tribunal, their participation has helped integrate socio-economic and cultural perspectives in investment disputes.

These development in international law allowing the involvements of civil society and NGOs is not the final solution to remove all the limitations to access to justice for members of a host stat's community affected by investment activities, it has however aided the emergence of NGOS and civil society groups

as important stakeholders in the resolution of international investment disputes where it affects them.[453] This involvement is independent of the interests of the states or the investors, as such it works in actively promoting the interests of the affected communities.

Access to Justice in the case of extra territorial investors

This is another group that require access to justice by virtue of their vulnerable position in an investment contract. With relation to a state's immunity, it is important to access the extent to which the right to access justice in cases where an action is brought by extra territorial investors may affect a host country's sovereignty/ immunity.

4.6 International Boundary Disputes

Disputes regarding international boundaries is an issue that comes up often in state contracts, this is because boundaries determine property rights. According to modern economic analysts, insecurity or uncertainty of property disincentives earnings and investments. [454]In the opinion of Barzel, "the net income or value of an asset, depends on the delineation of rights". [455] Thus, the issue of boundary disputes which questions the rights of one part over the other, would hinder investment. Applying this view to Nigeria, it states that multinational Oil Companies will be unlikely to invest in areas subject to boundary disputes. In Nigeria, there have been reported cases of boundary disputes regarding oil-rich regions between Nigeria and surrounding nations such as Cameroon and Equatorial Guinea in relation to the Bakassi Peninsula and the Gulf of Guinea respectively. A study on multinational oil companies showed that the boundary disputes in the Gulf of Guinea served as a major threat to foreign investments, as this area was regarded

[453] On the concept of civil society and its impact on the development of international law see P.M. Dupuy and L. Vierucci (eds), *NGOs in International Law-Efficiency in Flexibility?* (2008).
[454] Some of the most eminent writers on the subject included Coase (1960), Demsetz (1967), Alchian (1977), Posner (1977) and Barzel (1989).
[455] Barzel, Yoram. (1989) Economic Analysis of Property Rights. Cambridge: Cambridge University Press. Page 6)

as Africa's most promising oil exploration region in the 1900s. It was a subject of boundary disputes between several African nations, of which Nigeria was included.[456]

The boundary contention between Nigeria and Cameroon regarding the Lake Chad area and the Bakassi Peninsula dates to as early as the 1960s, with the independence of both states. It arose because both states inherited land boundaries though defined, however not clearly demarcated by the colonial rulers. [457] The presence of abundant oil resources in this region heightened the disputes between the parties. Several efforts by third parties and the invocation of the Maroua delimitation agreement of 1975[458] to cease hostilities between the countries proved futile. As such, in 1994, Cameroun instituted proceedings against Nigeria at the International Court of Justice (ICJ). In October 2002, the International Court of Justice gave judgement in favour of Cameroun. However, the dispute remains unsolved as the parties are set to return to the ICJ seeking a clarification of the judgement on certain land areas.[459] In spite of these disputes, oil companies still operated in and around the area of the dispute. [460]

Another dispute involving Nigeria, is one over definition of the maritime boundary between Equatorial Guinea and Cameroon, which dates to the mid-1990s. This dispute was also fuelled by the presence of oil resources. In 1996, Exxon Mobil explored oil from the Zafiro oil field, in the offshore area, under a contract with the government of Equatorial Guinea amidst ownership disputes between the government of Nigeria, Cameroon and Equatorial Guinea. However, despite

[456] Dzurek (1999) and the website of the Central Intelligence Agency (CIA) of the United States at http://www.odci.gov/cia/publications/factbook/index.html (February 2000)

[457] (Young, Dola J. (1984) "Energy Development and Maritime Boundary Disputes: Two West African Examples," Texas International Law Journal 19(2): 435-461).
Merrills, J.G. (1997) "The Land and Maritime Boundary Case (Cameroon v. Nigeria), Order of 15 March 1996," International and Comparative Law Quarterly 46(3): 676-681.

[458] Nigeria and Cameroon signed a maritime border agreement in 1975, known as the Maroua Agreement. Nigeria's Head of State Yakubu Gowon and his Cameroonian counterpart, Ahmadou Ahidjo, signed the agreement. However, Gowon was removed in a coup d'état in 1975 and the agreement was never ratified by Nigeria (Young 1984, 441). Attempts at mediation made by several states, including France, Britain and Togo, also failed to settle the dispute (PostExpressWired, 3 May 1997 and 30 March 1999).

[459] https://thenationonlineng.net/nigeria-cameroun-in-fresh-dispute-over-bakassi/

[460] (PostExpressWired, 27 October 1999)

the above, multinational oil companies are not deterred from investing in areas with boundary disputes. Formerly, international boundary disputes were a raging concern in state contracts. This change can be attributed to changing international laws and legal institutions. One of such legal developments is the principle of *uti possidetis.*

4.6.1 The principle of uti possidetis

The principle of *uti possidetis*, establishes a law that all post-colonial states should respect the formerly colonial boundaries. This is principle African governments acknowledge and respect. It was adopted in Africa during the period of decolonization and served to preserve the economic and political stability of newly independent states. In 1963, the member states of the Organisation of African Unity (OAU) pledged "*to respect the sovereignty and territorial integrity of each state and for its inalienable right to independent existence*". In 1964, the OAU passed a resolution adopting the principle of *uti possidetis.*

The principle of *uti possidetis* dates to early Rome[461]. In its modern use, it was first used in the 19th century among the former Spanish colonies of Latin America. In the opinion of Ratner[462]The purpose of this principle at that time was to ensure that no land in South America remained open for claims by the Spanish or other foreign governments and to prevent disputes between the newly independent states. Thus, before its adoption in Africa, the principle of *uti possidetis* existed in international law. This principle has been applied in several high-profile boundary disputes in Africa. In the 1986 case of Burkina Faso v. Mali, the court highlighted the

[461] Under the Roman law of the republican era, when two parties claimed ownership of real property, an edict issued by a praetor, or administrator of justice, would grant provisional possession to the possessor during the litigation, except where the land was obtained by force, clandestinely or in a form revocable by the other party. The principle was summarised in the phrase Uti possidetis, ita possideatis (as you possess, so may you possess). In its modern form, the meaning of the principle was altered in two important respects: first, uti possidetis was no longer applied in respect of private land but in respect of the territorial sovereignty of states, and second, the provisional status of uti possidetis was transformed into a permanent one (Ratner 1996, 593).

[462] Ratner, Steven R. (1996) "Drawing a Better Line: Uti Possidetis and the Borders of New States," American Journal of International Law 90(4): 590-624 (Page 593-594)

importance of *uti possidetis* as a principle of international law. The ICJ judgement stated thus "*The fact that the new African States have respected the territorial status quo which existed when they obtained independence must be seen not as a mere practice but as the application in Africa of a rule of general scope which is firmly established in matters of decolonization*".

This principle has also been followed in the resolution of several other cases of boundary disputes such as that between Cameroon and Nigeria and between Guinea and Guinea Bissau. In the application of the principle of *uti possidetis*, the work of the ICJ and other dispute resolution bodies was the interpretation of colonial maps, treaties and other documents to determine colonial delineation of land. By and large, the application of this principle in international law has provided a safe landing for foreign investors seeking to invest in disputed areas, as it ensures a degree of certainty of legal outcome in boundary disputes, however this principle is inapplicable to disputes in respect of maritime boundaries, as they are rarely delimited by the colonial rulers, thus calling for an advancement in the laws regarding resolution of boundary disputes. [463]

4.6.2 The Law of the Sea

Historically, unlike land boundaries, states did not delimit their maritime boundaries. However, with the advent of offshore exploration and production of oil and other natural resources, this practice changed.

As opined by Charney, the primary motive behind the establishment of maritime boundaries is the development of technology for the recovery of natural resources.[464]

The start of Offshore drilling in Africa can be traced to the 1960s. In Nigeria, the first licenses to drill oil offshore was granted in 1959 and oil production in the continental shelf began in 1965.

[463] Jedrzej George Frynas, Foreign Investment and International Boundary Disputes in Africa: Evidence from the Oil Industry African Studies Centre Occasional Papers Series No 9
African Studies Centre School of International Studies and Law Coventry University Priory Street Coventry CV1 5FB

[464] Charney, Jonathan I. (1993) "Introduction," in Jonathan I. Charney and Lewis M. Alexander (eds) International Maritime Boundaries, Vol. I. Dordrecht: Martinus Nijhoff

Oil drilling and production in the deepwater offshore areas began by the mid-1980s, heightening the interests of the multinational oil companies in the Gulf of Guinea. With the discovery of oil and its potential for exploration, it became necessary to define the property rights of coastal states. The rapid growth and development of offshore exploration and its technologies led to the establishment of maritime boundaries and hence maritime disputes.

These ensuing disputes led to the development and advancement of legal rules regarding maritime areas. The first United Nations Conference on the Law of the Sea (UNCLOS) was held in 1958, this was followed by another in 1960 and 1973- 1982 respectively. These conferences compiled, codified and redefined the law regulating maritime boundaries (Law of the Sea). The Third Conference on the Law of the Sea held in 1982 adopted the UN Convention on the Law of the Sea, and this convention entered into force in November 1994. At this time, the Convention had been ratified by 28 African States, of which Nigeria was a part. This Convention was ratified by Nigeria on the 14th of August 1986. Codification of these conventions, in addition to other sources of law, helped to develop and define concepts such as the continental shelf and the exclusive economic zone. As noted by Charney[465], between 1940 and 1990, over 130 states defined their maritime boundaries.

The Law of the Sea acts as a safeguard in transactions involving the Sea. where there is a dispute between the host state and a multinational enterprise, recourse can be made to the Law of the Sea to settle these disputes and such judgements could be relied upon in subsequent court proceedings at the ICJ, in a national court or a tribunal.

A limitation to the Law of the Sea is that it merely requires that boundaries be delimited in line with equitable principles, rather than according to set or specified standards. In the opinion of

[465] Charney, Jonathan I. (1993) "Introduction," in Jonathan I. Charney and Lewis M. Alexander (eds) International Maritime Boundaries, Vol. I. Dordrecht: Martinus Nijhoff

Charney, this creates an uncertainty in the application of the current law. In the opinion of several other scholars,[466] The advancement in maritime boundary law offers a degree of consistency and aids the settlement of maritime disputes. In the application of international maritime law, the ICJ or other international arbitration bodies do not consider socio-economic conditions, but rather rely on coastal geography. As argued by Kwiatkowska,[467] While environmental and economic factors play an important role in boundary contracts, this practice is quite different from what obtains in adjudication practices before the International Court of Justice and other arbitral tribunals. In the case of agreements between states, parties could influence the outcome of the proceedings. In a hearing before the International Court of Justice, parties have no power or influence over the proceedings. The latter viewpoint is often considered more favourable by foreign investors, as it leads to greater certainty and predictability in maritime dispute cases. In clear terms, the Law of the Sea helps provide a basis for the resolution of maritime disputes. As stated by Jennings[468] Regarding the law, beyond its function of dispute resolution, a more important function of law is to "*provide clear principles and rules for the routine ordering of a society governed by the rule of law*".

Despite the application of the principle of *uti possidetis* and the advancements of the Law of the Sea, several disputes still arise regarding the interpretation of certain treaties and legal principles in boundary disputes, thus, it is necessary to have in place, an effective system of dispute resolution.

Dispute Settlement Mechanisms in International Contracts

[466] Charney, Jonathan I. (1993) "Introduction," in Jonathan I. Charney and Lewis M. Alexander (eds) International Maritime Boundaries, Vol. I. Dordrecht: Martinus Nijhoff.

[467] Kwiatkowska, Barbara. (1993) "Economic and Environmental Considerations in Maritime Boundary Delimitations," in Jonathan I. Charney and Lewis M. Alexander (eds) International Maritime Boundaries, Vol. I. Dordrecht: Martinus Nijhoff. (page 105-106)

[468] Jennings, Robert Y. (1997) "The Proper Work and Purposes of the International Court of Justice," in A.S. Muller, D. Raič and J.M. Thuránszky (eds) The International Court of Justice: Its Future Role After Fifty Years, The Hague: Martinus Nijhoff. page 42)

This often involves a recourse to adjudication in arbitral tribunals and international courts and institutions such as the International Court of Justice (ICJ). A major advantage of adjudication over other forms of dispute resolution is its binding nature.

Apart from the recourse to arbitration as a form of dispute resolution, the settlement of international boundary disputes is now increasingly carried out by several international institutions such as the Organization of African Union and the International Court of Justice (ICJ). Some of these institutions resolve disputes more effectively than others. In general, the International Court of Justice in the Hague is the most effective body for international dispute resolution. It adjudicates cases involving both land and maritime boundary disputes. Since the introduction of the ICJ in 1946 to replace the Court of Justice, it has adjudicated five cases bordering on boundary disputes between African States. At present, the boundary dispute between Nigerian and Cameroon over the Bakassi Peninsula is still before the ICJ. A significant number of world countries have accepted the compulsory jurisdiction of the ICJ. and Nigeria is one of those countries. The implication of this acceptance of this compulsory jurisdiction is that a boundary dispute can be effectively resolved even where there is a lack of cooperation by the other state. A case in point is where Cameroon instituted a boundary case against Nigeria, without the consent of Nigeria, citing the declarations made by both parties in acceptance of the ICJ's compulsory jurisdiction.

The International Tribunal for the Law of the Sea in Hamburg is another body which has the jurisdiction to adjudicate on matters relating to the Law of the Sea. This Tribunal was established in 1996 pursuant to the Law of the Sea Convention of 1982. No maritime boundary disputes have been decided by this court. However, this is not atypical of newly established international courts.

As observed by Sohn[469]"*when a new international tribunal is established, states hesitate to submit a case to the yet untried institution*". This was the case with the International Court of Justice after 1946. However, the institution has a potential dispute resolution body in the future. The implication of the signing and ratification of the Law of the Sea Convention by a state is that a state has three options for dispute resolution, the ICJ, The Tribunal or Arbitration. Where the parties in a dispute choose the same option to resolve a dispute, that option is exercised and where there is no agreement as to the dispute resolution method, a resort is made to arbitration. Whichever method the parties choose to settle the dispute, the decision of the body is final and binding. States may choose that a dispute be excluded from the binding policy of the decision, in this case, the Law of the Sea has an alternative procedure.

In recent times, the ICJ and the Tribunal play a pivotal role in the resolution of boundary disputes. However, it is still a concern of investors that the outcome of a dispute resolution is unpredictable. In the opinion of Vicuna[470]The concern is not the absence of principles, but the way weight is assigned to each fact, to reach an equitable decision. According to Charney, in the delimitation of maritime boundaries, the courts and tribunal adopt the proportionality principle. In the application of this principle, the court calculates the relative length of the designated coastlines and compares and compares it to that of the provisionally delineated water area. Where there is a significant difference between these two measurements, the court adjusts reach an equitable ground. The application of this principle ensures that no party loses out and encourages states to take their disputes to adjudication.

[469] Sohn, Louis B. (1999) "Advisory Opinions by the International Tribunal for the Law of the Sea or Its Seabed Disputes Chamber," in Myron H. Nordquist and John Norton Moore (eds.) Oceans Policy: New Institutions, Challenges and Opportunities, The Hague: Martinus Nijhoff. Page 61

[470] Vicuna, Francisco Orrego. (1990) "The Role of the International Court of Justice and Other Tribunals in the Development of the Law of Maritime Delimitation," Proceedings of the Annual Conference of the Law of the Sea Institute 23: 601-625. page 615

An advantage of these advancement in dispute resolution techniques is that it increases the faith of prospective investors in investments. The existence of permanent legal institutions such as the ICJ and the International Tribunal for the Law of the Sea, serve to curtail illegal behaviours which give rise to boundary disputes and hinder international investments.

In general, the evolution of public international law and its institutions have helped promote investment in Africa and by extension, Nigeria. It has helped to tilt the balance in the interest of foreign investors in international oil and gas contracts.

4.6.3 Cases Bordering on Foreign Direct Investment in The Oil and Gas Sector- P & ID Case

This case relates to several instances of disputes that arise in international oil and gas contracts. This case borders on the effectiveness of arbitration and highlights the loopholes in investor-state arbitration as a form of dispute resolution in International Oil and Gas Contracts.

Facts of the Case

In 2010, a contract was signed by the then Nigerian Ministry of Petroleum Resources, for the construction and operation of a new gas processing facility with Process and Industrial Developments Limited (P & ID).Under the terms of the contract, neither had had not begun any development or even construction of the facility commenced construction of the facility or even purchased a site on which the facility could be built. Nevertheless, P&ID argued that it stood ready to carry out its obligations under the contract and that the project foundered due to Nigeria's failure to perform its sct, Nigeria was to supply natural gas (wet gas) at no cost to P & ID. On the part of P & ID, its obligation was to construct and operate the facility, carry out processing of the gas supplied to remove natural gas liquids- which was to be utilised by P & ID- and return the lean gas ("dry gas") to Nigeria at no cost, to be utilised in power generation and other purposes.

The terms of the contract and the circumstances relating to its conclusion were unclear. The contract was based on an unsolicited proposal made to the Nigerian Government in the absence of a tender or bid round. In addition to this, P & ID did not appear to have any expertise in the gas sector, nor any other public information regarding its operations.

Under Clause 20 of the contract, it was agreed that the contract will be governed by Nigerian law and disputes arising under the contract will be resolved by arbitration. In August 2012, P & ID initiated arbitration proceedings, claiming a repudiation of the contract by Nigeria. At this time, P&ID did not have any development or construction plan for the gas processing facility, nor did they have a site on which the facility would be constructed (8). Despite this, P & ID argued that it had the capacity to carry out its obligations under the contract and that delay in the project was because of Nigeria's failure to perform, its side of the deal.

In the usual practise of contract-based investor-state arbitration, the arbitration was conducted in private. For emphasis, knowledge of this arbitration did not become public until 2025, when there was a change of government in Nigeria.

Despite the several loopholes evident in the arrangement, Nigeria did not raise the issue of corruption in procuring the contract in its defence. In the light of documents available at that stage, it appeared the court did not also take active steps to determine if the contract might have been gotten through corruption.

The arbitration procedure followed had several loopholes, Nigerian lawyers failed to file expert evidence questioning jurisdiction, neither did they insist on an oral hearing and cross examination that would have found loopholes in P & ID's evidence. [471] At the merits phase, The Nigerian lawyers failed to challenge

[471]Corruption and confidentiality in contract-based ISDS: The case of P&ID v Nigeria https://www.iisd.org/itn/en/2021/03/23/corruption-and-confidentiality-in-contract-based-isds-the-case-of-pid-v-nigeria-jonathan-bonnitcha/ accessed on 09/10/2022

the claims of P & ID'S central witness, Its Chairman, Micheal Quinn. It brought forward only one witness who had no firsthand knowledge of the relevant events. Eventually, the tribunal held that Nigeria had repudiated the contract.

Several faults trailed the decision of the tribunal, first of, its decision on quantum was based on the witness statement of a single witness. It did not order for any other proof in this respect on the strength of this same evidence, it awarded P & ID, USD billion in damages plus interests of 7% p.a. This award was too magnanimous given that the commenced plan development or construction on the facility and merely estimated its expenditure to be around 40 million. In subsequent proceedings in a British Court, P & ID revealed that this expenditure had not been incurred by the company rather, by another company owned by a former Nigerian General.

This tribunal award sparked further litigation in several other jurisdictions. However, it was only in November 2019, that Nigeria first raised the defence of corruption, to convince English Courts to set aside the award. By the interpretation of the arbitral tribunal, London was designated as the seat of the arbitration, as such the English courts had jurisdiction to entertain and set aside the decision by way of appeal. Corruption is a ground on which the English court could set aside the arbitral award. A major hurdle for Nigeria at this stage was that the deadline for initiating proceedings to set aside the award had lapsed by 3 years. As such, the English court had to consider if there was prima facie enough evidence of corruption to grant Nigeria an exceptional extension and have the award set aside amidst the lapse of time.

In meeting this requirement, Nigeria was assisted by new evidence obtained through an application for discovery of banking records made in New York earlier in 2020.[20] As a result of disclosure orders made by the U.S. court, Nigeria was able to introduce evidence of bank transfers to Nigerian government officials that had been made by entities affiliated with P&ID, as well as evidence of large, unexplained

cash withdrawals from a P&ID affiliated entity's Nigerian bank account around the time the contract was signed. This evidence, when considered considering the many other unusual aspects of the case, led to the court's conclusion that there was a 'strong prima facie case' that the contract was procured by bribes and thus they granted an extension of time.

The case of P & ID v Nigeria highlights two particularly important concerns. First, it examines the issues of confidentiality in contract-based investor–state arbitration. As was the situation in the case above, these proceedings are usually conducted in private, away from the eyes of the public. This prevents public scrutiny and early detection of loopholes. This scrutiny might open investigation into the terms of the contract, circumstances under which the contract was negotiated and concluded and a demand for accountability on the part of the state participants. Taking the P & ID case for instance, questions regarding the corrupt transactions would have come up if it had been in the public realm that a foreign investor was seeking compensation for a supposed gas facility it never built. This publicity might lead to 3rd party interference and the introduction of more evidence to refute the false claims.

The 2014 UNCITRAL Rules on Transparency in Treaty-Based Investor–State Arbitration provides a classic example of transparency measures that can be adopted in contract-based investor–state arbitration.[472] These rules establish presumptions in favour of transparency. The fact that these transparency rules do not apply in contract-based investor–state arbitrations reflect an anomaly in contract-based investor state arbitration.

Secondly, the case of *P&ID v Nigeria* examines the efficiency of arbitration as a dispute resolution mechanism for investor-state disputes. Arbitration as a dispute resolution mechanism is dependent on the consent of the parties. Thus, arbitral tribunals do not take into considerations happenstances such as contractual irregularities or corruption, unless an allegation is expressly raised by one of the parties.

[472]UNCITRAL. (2014). UNCITRAL rules on transparency in treaty treaty-based investor-state arbitration https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf

Another issue is that the lawyers and other state participants may be beneficiaries of the alleged corruption or may be restricted from blowing the whistle by certain institutional constraints. Thus, the absence of an allegation does not guarantee the legitimacy of the contract.

In the eyes of international law, the state and its participants are seen as one and the same entity. As such, the law sees acts of incompetence and negligence by state participants as acts of the state itself, as such it is not willing to sympathise with the states when there are issues of bribery and corruption by its participants.

Due to the limited range of laws governing investor-state arbitration, the issues arising from investor-state arbitration are not easily resolvable. As such, it is more favourable for states to consider resolving disputes in courts rather than through arbitration.

There are no easy solutions to these challenges within the existing framework of investor–state arbitration. On this basis, states may wish to go further and consider whether contract disputes are more appropriately resolved in courts than through arbitration.

CHAPTER 5: COMPARATIVE ANALYSIS OF FOREIGN DIRECT INVESTMENT POLICY IN THE OIL AND GAS INDUSTRY OF NIGERIA AND ANGOLA

5.1 INTRODUCTION

A major problem faced in Sub-Saharan Africa is the low foreign direct investment. In countries where they experienced significant foreign direct investment, it was because of the abundance of natural resources and a large domestic market. The main recipients of foreign direct investment in Africa were resource rich nations such as Nigeria, Angola, and South Africa. A downside to this is that FDI in these countries is concentrated in natural resources and investments in these industries have not been geared to generate positive spillovers into other sectors of the economy such as the transfer of technology and the creation of employment.

However, a study by Morisset highlights the fact that there is a difference between attracting FDI and sustaining FDI in a resource rich country. Thus, in addition to their mineral resources, there are a few

Sub-Saharan countries who, by enhancing their business environment, have attracted and sustained substantial foreign direct investment in their economies, compared to other African countries with larger markets and abundant natural resources. These improvements have placed them on the pathway of being globally competitive and positioned them to attract more foreign direct investment.

This chapter of the study presents a focus on foreign direct investment in Angola, a country in Sub-Saharan Africa that has succeeded in attracting and expanding foreign direct investment into its economy, especially its oil and gas sector. The methodology employed involves the use of primary and secondary data. The primary data was obtained largely from interviews with Oil and Gas Industry participants in Angola carried out between August 2021 and October 2021. These interviews were conducted in the form of survey forms to ensure accessibility and a wide range of participation. The surveys were conducted in 2 stages. The first interviews and surveys were carried out on contractors and operators, that is International Oil Companies and Indigenous Oil Companies in the Angolan Oil and Gas Sector. The second stage interviews were conducted on representatives of public institutions regulating the Angolan Oil and Gas Industry and those institutions focused on training and the development of local manpower in the Angolan Oil and Gas Sector. These institutions include: Sonangol; the National Oil Company, the Ministry of Petroleum, MINPET, The Ministry of Industry, The National Petroleum Institute (INP), among several other bodies. The impact of foreign direct investment in any nation is measured by several parameters such as the number of jobs created, the rate of technology transfer.

As stated by Wangwe 1979:3, the economic differences between the developed and underdeveloped countries are the gap in technological resources and tools. There is little evidence on the link between FDI inflows and technological growth and transfer in developing countries, however as pointed out by

Zarsky[473], There was an increase in FDI inflows into Africa between 1980 and 1999. According to Ajayi (2006) FDI increased by over 218%, whilst overall inflows from 1970 to 2010 increased by over 4,000%. This increased inflows of FDI into Africa, has been into the natural resources sector. This increase is also attributable to the introduction of policies, regulations and institutions aimed at promoting Foreign Direct Investment [474]

5.2 OVERVIEW OF THE ANGOLAN OIL AND GAS INDUSTRY

According to data collected from the 2022 Annual Statistical Bulletin of the Organization of Petroleum Exporting Country, Angola is the second largest oil producer in Sub Saharan Africa, after Nigeria. The Angolan Oil and Gas Industry produced approximately 1.124 million barrels of crude oil per day and this volume is expected to increase to about 1.18 million barrels in 2023.It also boasts of a proven crude oil reserve of approximately 2,516 million barrels. Despite its position as a major producer of crude oil, the Government of Angola still expends approximately $2 billion on refined oil products. In terms of its gas reserves, it has approximately 300 billion cubic metres of proven natural gas reserves. [475] The development of the natural gas sector is controlled by Angola LNG and over 90% of the LNG utilised in the country is produced by the Angolan LNG project. While the country largely imports refined oil products due to the absence of oil refining facilities in the country, this is not the same case in relation to its buoyant gas sector. In 2022, there was a sharp increase in the natural gas exported from Angola from 627.6million cubic metres to 5,084 cubic metres.

The Impact of Oil Production on the Angolan State

[473] Zarsky, Lyuba (ed.) (2005), International Investment for Sustainable Development: Balancing Right's and Rewards. London: Earth

[474] Mugabe, John (2005), Governing Foreign Direct Investment in Sub-Saharan Africa: Policies and Practices Reanalysed, in Zarsky (ed.), international Investment for Sustainable Development: Balancing Rights and Rewards, London: Earthscan.

[475] 2022 Annual Statistical Bulletin of the Organization of the Organization of the Petroleum Exporting Country.

Post Independence, the Government of Angola established the National Oil Company Sociedad Nacional de Combust´ıveis (Sonangol). The General Petroleum Activities Law enacted in 1978, gave Sonangol exclusive concession to carry out Oil and Gas Exploration and allowed the Company partner with International Oil Companies. As shown in Table 1, Oil production in Angola was relatively low until the establishment of Sonangol in the late 1980s. In present times, Sonangal has been regarded as one of the most successful and thriving National Oil Companies. The operation of this company has positioned Angola as one of the top oil producers in Africa and a strategic exporter of crude oil to The United States and China.

Revenue from the Angolan Oil and Gas Industry, constitutes the mainstay of the Angolan economy. It represents over 60% of the Nation's GDP, 80% of government revenue and 95% of exports.

5.2.1 History of Foreign Direct Investment in Angola

Between 2000 and 2008, Angola was the highest recipient of FDI among the top recipients of FDI in Africa. Total FDI receipts into the country averaged $6,631.5 million, this was followed by FDI inflows into Egypt averaging $4,586.5 million and FDI inflows into Nigeria averaging $4,529.1million. Also, in 2014, FDI inflows into Angola averaged $16 billion, majorly into its Oil and Gas Sector. As observed by Fingar,[476] It was only in 2014, that Angola FDI inflows for capital investment averaging $16billion was second to Egypt at $18billion, among all the top recipients of FDI in Africa.

This chapter focuses on foreign investment in Angolan energy in particular, the oil and gas sector. The Angolan energy sector is a key sector, as it is a major financier of the Angolan economy. Angola, like Nigeria is another principal example of an economy that is highly dependent on its oil and gas resources.

[476] Fingar, Courtney (2015), Foreign Direct Investment in Africa Surges, online:<www.ft.com/intl/cms/ s/0/79ee41b6-fd84-l Ie4-b824-00144feabdc0.htm> (31 March 2020)

As such, it is highly prioritised by the government of Angola. The operations of this sector are managed directly by the presidency and officials of state security.

During the colonial period, the Angolan economy was largely agricultural-based, and it was a major exporter of Agricultural products in Africa. At this time, it ranked as the 4th largest exporter of coffee and maize. There had been no massive discovery of oil in commercial quantities in Angola currently.

Post colonialism in 1975 and the appointment of a president, a civil war ensued which disrupted the agricultural export sector in Angola. By 1980, Crude Oil replaced Agriculture as Angola's primary export resource. There was an increase in Oil production through the period of the Civil war, providing revenue for the ruling party to fund its military operations and prolong the Civil war. With the urgent need to restructure, Angola sought help from other international nations such as the United States, China and Europe.

Post the Civil-War and with an urgent need to restructure, the government of Angola sought the help of international nations such as the United States and Europe, who did not offer much aid in the situation given that these nations were experiencing national challenges at this time. However, China helped in $2 billion to Angola on the condition that the bulk of the construction projects undertaken in Angola will be undertaken by Chinese contractors. The presence of abundant oil resources gave the ruling party leverage to borrow large sums of money using the oil as collateral. The participation of the Chinese in the economy of Angola led to a boom in the oil economy of Angola between the period of 2004 - 2008. By 2012, Petroleum Produce in Angola now accounted for over 95% of total exports. However, despite this boom, the Oil and Gas sector created very few jobs. At this time, continued deepwater drilling by the IOCs off the Angolan coast was projected to increase Angola's production in the succeeding years, positioning it as one of the fastest growing oil producers in the world.

In Angola, the Oil and Gas Sector remains the largest recipient of foreign direct investments. According to Mouzinho (2015)[477] between January 2003 and 2015, approximately 32 greenfield projects worth $65.6 billion in coal, oil and gas were scheduled for commencement in Angola. Major Operators in the Angolan Oil and Gas Sub Sector and their antecedent partners and projects are represented in the table below:

Operators	Partners	Location	Projects
Exxon Mobil	P, Eni, Statoil	Block 15 Deepwater	Kizomba A (Hungo, Chocalho, Marimba) Kizomba B (Kizomba, Dikanza) Kizomba C (Mondo, Saxi Batuque) Kizomba Satellites Project (Clochas, Mavacola)

[477] Mouzinho, Aurea (2015), The Oil Factor. Contextualising FDI and Private Investment Polity in Angola, a presentation on SADC investment policy and regional integration, Johannesburg: South African Institute of International Affairs (SAIIA)

Chevron	Sonangl, Total, Eni Eni, Sonangol, Total, Galp Energia, Inpex	Block 0 - Area An Offshore Block 0- Area B Offshore Block 0 - Area B Offshore Block 14 Deepwater	Taķula, Malongo, Mafiimeiia Norte Bomboco, Kokongo, Lomba, N'Dola, Sanha Neba Tombua, Landana Kuito, BBLT (Benguela, Belize, Lobito, Tomboco)
BP	Sonangol Sinopec International (SSI) Statoil, Sonangol, Marathon, SSI	Block 18 Deepwater Block 31 Ultra Deepwater	Greater Plutonio, Galio, Cromio, Paladop, Cobalto) PSVM (Plutao, Saturno, Venus, Marte)
Total	Statoil, Exxon Mobil	Block 17 Deepwater	Dalia Pazflor (Perpetua, Zinia, Hortensia,

			Acacia) Girassol, Jasmin, Rosa CLOV (Cravo, Lirio, Orquidea, Violeta)
Eni	Sonangol, SSI, Falcon	Block 15/06 Deepwater	West Hub
Pluspetrol	Sonangol, Force Petreoleum, Cubapetroleo	Block 123-5 Cabinda Onshore	Cabinda C (South)
Somoil	Chevron, Sonangol	Onshore	Soyo
Sonangol	Total, Chevron, Petrobras, Somoil, Kotoil, Poliedro, BTG Pactual Total, Eni, Inpex, Mitsui, Naftagas, Mitsubishi, Somoil,	Block 2/85 Offshore Block 3 Offshore	Lombo East Palanca, Cobo, Pambi, Oombo,

	Svenska, New Bright International Development Statoil, Somoil, Angola Consulting Resources	 Block 4/05	Nunce Sul Gimboa
Chevron	Sonangol, Total, Eni	Block 0 Offshore	Mafumeira Sul
Chevron	Total E & P Congo, Angola Block 14 BV, Eni, Sonangol P & P, SNPC, GALP	Block 14 Deepwater	Lianzi Field
Exxon Mobil	BP, Eni, Statoil Angola	Block 15 Sub-Sea	Kizomba Satellites Phase II

Source: United States Energy Information Administration 2015

This improvement was brought about through the implementation of strategic proactive policies and government reforms. These strategic policies and actions included streamlining their investment framework, improving their institutions.[478]

[478] Jacques Morisset, 'Foreign Direct Investment in Africa, Policies also Matter 'A Policy Research Working Paper 2481 The World Bank and International Finance Corporation Foreign Investment Advisory Service November 2000

This Chapter analyses the history of foreign direct investment in the Angolan Oil and Gas sector, highlights the structure of the Angolan Oil and Gas sector and analyses the national policies and institutions put in place by the government of Angola to attract FDI into its energy and particularly, its oil and gas sector and the resultant benefits of this investments into the sector.

According to Albert[479]investments into the Angolan Energy Sector can be analysed from two viewpoints, pre and post 2004. According to the Angola National Private Investment Agency (ANIP)

After the civil war, the government sought to focus on development of key sectors of the economy, one of which is the energy sector. Several initiatives were put in place to attract investments. In late 2004, significant investments came in from China, in the form of loans and direct investments. Thus, pre-2004, it can be observed that there were low investments in the Angolan Oil and Gas sector. However, the period after 2004 witnessed a significant increase in foreign direct investments in the Angolan Energy sector.[480]

The significant differences between FDI inflows into the Angolan Energy Sector pre and post 2004 is presented in the table below.

Key Parameters	**FDI flows to Angola's energy sector, pre-2004**	**FDI flows to Angola's energy sector, post-2004**
Sources of Foreign Direct Investment	Majorly from more developed countries such as the United States, United	Derived from both developing and developed countries such as Brazil,

[479] Albert E.M, Foreign Direct Investment and the Transfer of Technologies to Angola's Energy Sector in Africa Spectrum, 2016, Vol. 51, No. 1 (2016), pp. 55-83 by Sage Publishers Limited

[480] Angola National Private Investment Agency (ANIP) (14 July 2014)

	Kingdom, France, Spain, Italy, and the Netherlands.	China, and Argentina.
Focus of FDI in the sector	Investments were mainly into Oil and Gas	There was a shift from Oil and Gas to renewable and alternative energy sources.
Policy Framework	This was largely state centred. Delivery of energy to the customers was through the national grid and there was little or no participation from independent power producers	There are now several regulations in place to promote the involvement of independent power producers and the take-off of off-grid, decentralised, and renewable energy solutions.
Role of the State in the Projects	The State is the owner of all energy projects through equity shares	Creates and regulates the framework for the various participants to operate and only participates in certain projects which are of strategic importance to the State.

Since 2004, there has been more investments in greenfield[481] than brownfield energy projects in Angola. These greenfield projects were commenced with the active participation of state-owned enterprises (SOEs) such as the State National Oil Company, Sonangol.

Year on year, Oil Production in Angola increased with more investment into the Oil and Gas Sector with the entrance of International Oil Companies (IOCs). The unprecedented pandemic that occurred in 2020 resulting in subsequent limitations in movement and lockdowns, has a significant impact on the global oil and gas industry, particularly States largely dependent on their Oil and Gas resources such as Angola. Globally, there was suspension of petroleum exploration and production activities. There was also a decline in the price of Crude Oil and its derivatives. The Government of Angola through its Ministry of Mineral Resources, Petroleum and Gas (MIREMPET) took steps to reduce the effects of the pandemic and ensure a sound recovery of the industry post the pandemic. These led to the design and implementation of key strategic plans for the short-, medium- and long-term outlook for the post-pandemic period.

In analysing FDI inflows for these projects it is imperative to key strategic decisions and efforts on the short-, medium- and long-term outlook for the post-pandemic period of these projects. The project cycle consists of the exploration phase, the project development phase and the production phase.

In the first phase of exploration, there is active participation of the Angolan State, through the Ministry of Petroleum (MINPET) and the National Oil Company (Sonangol). These institutions work in collaboration with a TNC to explore the feasibility and profitability of embarking on a proposed project. Under this phase, the TNC submits a proposal for the development of the project to MINPET and Sonangol.

[481] Greenfield project refers to an Oil and Gas project that is begun from scratch. Here, the site has not been developed and the infrastructure to carry out the project is not present. Examples of this includes a new refinery construction, setting up a petrochemical plant.

Exploration activities are essentially capital intensive. As such, they are majorly financed by the state or an interested TNC. Financial institutions usually get involved in the project when it has been proven to be bankable. Exploration activities in Angola are majorly carried out in onshore and offshore oil and gas fields. In the area of exploration, the National Oil Company, Sonangol has carried out exploration in the Cabinda North Block.

The second stage involves the construction and development of the project. This happens when the phase of exploration has proven the project to be bankable and profitable. A typical greenfield project is usually comprised of project owners (the TNCs who own over 10% equity); the project financiers;[482] the engineering, procurement, construction and management firms;[483] and the training and advisory service firms (TASFs). IOCs participate in the development of projects through the ownership of shares in one or several projects.

An example is the case of the Angola Liquefied Natural Gas Project, involving a partnership between Chevron holding 36.4%, Sonangol holding 22.8%, BP, Total and Eni holding 13.6% each and several other TNCs having a more than 10% equity share.

Due to the magnitude and capital-intensive nature of Oil and Gas projects, EPCMs are typically large TNCs from developed and developing countries with minimal participation from indigenous companies. In this regard, a useful frame of reference in examining FDI inflows to greenfield enterprises in the energy sector is the project cycle, comprising the phases of exploration, project construction or development, and project operations or production.

[482] These refers to banking and financial institutions who make capital funding accessible to project developers for the construction and development of oil and gas projects. Majority of the funding for Oil and Gas projects comes from the United Kingdom, The United States, Russia, Brazil and China. Banking and Financial institutions which provide funding for energy projects other project funders include the African Development Bank (AfDB), Standard Chartered Bank UK, the Development Bank of Southern Africa (DBSA). and Standard Bank de Angola

[483]EPCM refers to Engineering, Procurement, Construction and Management. In this case, the contract acts as a construction manager and consultant for the project taking care of all the stages of engineering onbehalf of the client.

5.3 Laws and Regulations Governing the Angolan Oil and Gas Industry

1. Law 10/04 of 12 November ('Petroleum Activities Law'): This law was amended by *Law 5/19* ('Petroleum Law') and by Decree 1/09 of 27 January 2009 ('Petroleum Regulation'). This is the Principal Law governing all exploration and production activities of oil and natural gas in Angola. This law reiterates the essential premise of state ownership of petroleum resources which is established in the country's constitution. It affirms the potential for oil and gas development and establishes the essential rules governing the exploitation of the nation's natural resources. Within the context of petroleum concessions, this law establishes the regimes of mandatory association and exclusive concessionaire. Additionally, this regulation establishes the procedures for accessing and engaging in oil and gas operations in the available surface and submerged areas of the national territory, exclusive economic zone, inland waters, continental shelf and territorial sea. It also attempts to cover all segments of the oil and gas. It also attempts to cover all segments of the oil and gas 'value chain', including the process of refining crude oil, logistics (such as transportation, storage and distribution) and commercialisation of petroleum.

   Petroleum as defined by the Petroleum Activities Law consists of crude oil, natural gas and any other hydrocarbon that can be discovered in or extracted from a petroleum concession. In accordance with the Petroleum Activities Law, all liquid and gaseous hydrocarbon deposits that are present on the submerged and surface areas of national territory, exclusive economic zone, inland waters, continental shelf and territorial sea are considered to be public property of the state and the National Agency for Petroleum, Gas and Biofuels arre the holders of the mining rights for the prospection, exploration, appraisal, development, and production of liquid and gaseous hydrocarbons.[484] Thus, the right to carry out exploration and production of oil and natural gas is

[484] André D, F, Francisco S.N, João S.S and Lourenço V on A General Introduction to the Oil and Gas Industry in Angola accessed at https://www.lexology.com/library/detail.aspx?g=bb61c6c9-4bfd-4756-bcdf-e032e4660cbd on 10th January, 2023

granted through a prospecting licence granted by the Ministry of Mineral Resources, Petroleum and Gas ('MIREMPET'). or a concession agreement often preceded by a public tender. This concession is often granted to the National Agency for Oil, Gas and Biofuels ('ANPG'), the right to develop a specific oil concession.

In addition to this Law, other Laws regulating the Angolan Oil and Gas Sector are:

2. Decree No. 49/19, of 6 February: The National Agency for Petroleum, gas and Biofuels (APNG or Agency) in Angola was established by this decree. The decree regulates the Agency's by-laws, while restructuring the country's hydrocarbon industry, which was formerly run by Sonangol, the Angolan Concessionaire for Oil and Gas exploration and Production Activities. Sonangol's regulatory function was extracted by ANPG; this approach has been successfully adopted by other nations and has the benefit of giving one governmental organization the strategic responsibility of overseeing the petroleum sector without getting directly involved in the operations. The decree also specifies that Sonangol and ANPG must properly allocate between themselves the assets and human resources owned by Sonangol to maintain the stability of their contracts and business operations, and recognizes the different rights and obligations resulting from previous contracts signed by Sonangol EP.
3. ANPG is entrusted with the responsibility of implementing the policy of the Ministry of Mineral Resources, Petroleum and Gas ('MIREMPET') as well as all necessary procedures for the procurement and management of oil and gas contracts. ANPG also has general powers to execute national petroleum policy in collaboration with MIREMPET; align and cooperate with other regulators on issues of shared interest; suggest plans and programmes for the revaluation of the country's reserves and hydrocarbon resource exploration, encourage studies for block

delimitation procedures; promote concession bids; execute the corresponding contract; and facilitate the research, development and adoption of new oil-related technologies.

4. The various tax regimes relating to petroleum activities were synchronised by The Petroleum Activities Tax Law (Law No. 13/04, of 24 December) which was amended by Law No. 6/19, of 18 April (Amendment of the Petroleum Activities tax Law. This law aimed to streamline and simplify all the various tax assessment and administration policies and procedures, ensuring that they are consistent with the evolving technology and global realities, and making sure that they take into consideration the details surrounding the main forms of association in petroleum operations, the different arrangements for the exploration and production of Oil and Gas, as well as the details of production sharing agreements (PSAs) and joint venture agreements, especially with regard to tax rate on petroleum income, the calculation of taxable income, transaction tax in PSAs and the tax exemption on oil production.

   This law's main objective is to establish the tax regime that will be applied to the various industry players about activities such as exploration, development, production, storage, commercialization, exportation, processing and transportation of crude oil, natural gas and other petroleum derivatives. It is applicable to all organisations, domestic and foreign oil companies that conduct petroleum operations on national territory as well as other territorial or international areas over which the Republic of Angola has taxing jurisdiction under the international law or treaties.[485]

5. Law 11/04 of 12 November: Petroleum Customs Law, Law No. 11/04, of 12 November is the law that establishes the custom regime for petroleum operations for all companies and organisations that engage in petroleum related activities (oil and gas companies and service

[485] André D, F, Francisco S.N, João S.S and Lourenço V on A General Introduction to the Oil and Gas Industry in Angola accessed at https://www.lexology.com/library/detail.aspx?g=bb61c6c9-4bfd-4756-bcdf-e032e4660cbd on 10th January, 2023

providers). Due to the capital-intensive nature and level of risk associated with the kind of operations carried on by these companies, it is necessary that their operations are regulated under a custom regime that is different from that binding other economic ventures. This law sets the custom framework that will govern petroleum operations in the territories that are under the Angolan States's jurisdiction. The rules and procedures established by this law shall apply to the National Concessionaire, its associates and the companies, both domestic and foreign that conduct petroleum activities on their behalf.[486]

6. Presidential Decree No. 86/18 of 2 April 2018, approved the rules and procedures for conducting and carrying out public tenders as well as the step procedure to obtain the quality of associate of the National Concessionaire. This decree revoked the previous Decree No. 48/06, of 1 September, and set the rules and procedures for purchasing goods and contracting services in the petroleum sector. The National Concessionaire and any domestic or foreign company with demonstrated technical and financial capacity that desires to collaborate with the National Concessionaire for the execution of petroleum activities are subject to this regulation.
7. Presidential Legislative Decree No. 5/18, of 18 May establishes the Legal Regime on Additional Exploration Activities in the Petroleum Concession Development Areas and revokes former Presidential Decree No. 211/15, of 2 December, that specified the terms and conditions applicable to petroleum exploration activity within targeted development areas. Decree No. 5/18 which serves as an exceptional rule before the General Petroleum Activities law, regulates

[486] André D, F, Francisco S.N, João S.S and Lourenço V on A General Introduction to the Oil and Gas Industry in Angola accessed at https://www.lexology.com/library/detail.aspx?g=bb61c6c9-4bfd-4756-bcdf-e032e4660cbd on 10th January, 2023

additional exploration within these areas, procedures, cost recovery and deduction, tax, production sharing, customs regime and foreign exchange and customs regime.[487]

8. General Strategy for the Allocation of Petroleum Concessions for the period 2019–2025, issued by Presidential Decree No. 52/19, of 18 February, authorised the Strategy for Petroleum Concession Allocation for the period of 2019–2025, and established the guiding principles for future petroleum concessions by identifying critical factors with the aim of ensuring the replacement of reserves to counteract the clearly declining production seen in recent years.[488]
9. Angola's Hydrocarbon Exploration Strategy authorised by Presidential Decree No. 282/20, of 27 October, approves the Angola Hydrocarbon Exploration Strategy 2020–2025, which is intended to boost and intensify the replacement of reserves, with the aim of mitigating the decrease in production of hydrocarbon, guaranteeing the proliferation of robust exploration activity, and ensuring the creation of new oil concessions.[489]
10. The Model for Defining the Prices of Crude Oil and natural Gas Derived Products issued by the Presidential Decree No. 283/20, of 27 October, revokes the previous Presidential Decree No. 1/12, of 4 January, and establishes an updated Model for determining the prices of products derived from Crude Oil and Natural Gas, including the price regime that applies to the crude oil supply mechanism and the price rate at which crude oil is sold to national refineries, the flexible price adjustment mechanism and the tax regime. The pricing model also applies to crude oil refining operations as well as the logistic importation, distribution and commercialisation of

[487] André D, F, Francisco S.N, João S.S and Lourenço V on A General Introduction to the Oil and Gas Industry in Angola accessed at https://www.lexology.com/library/detail.aspx?g=bb61c6c9-4bfd-4756-bcdf-e032e4660cbd on 10th January, 2023

[488] André D, F, Francisco S.N, João S.S and Lourenço V on A General Introduction to the Oil and Gas Industry in Angola accessed at https://www.lexology.com/library/detail.aspx?g=bb61c6c9-4bfd-4756-bcdf-e032e4660cbd on 10th January, 2023

[489] André D, F, Francisco S.N, João S.S and Lourenço V on A General Introduction to the Oil and Gas Industry in Angola accessed at https://www.lexology.com/library/detail.aspx?g=bb61c6c9-4bfd-4756-bcdf-e032e4660cbd on 10th January, 2023

derivative goods, throughout the national territory, with the exception of the refining, importation, distribution and commercialisation of fuel, bitumen and lubricants.[490]

11. The Law on the Transportation and Storage of Crude Oil and Natural Gas, Law No. 26/12, of 22 August, defines the rules and licensing procedures for the transportation and storage of crude oil and natural gas, when they take place within the limitations of petroleum operations stipulated by the Petroleum Activities Law, as approved by Law No. 10/04, of 12 November. Additionally, it defines the legal and penal system, the modes for transporting crude oil and natural gas, the tariffs, environmental protection and safety and the monitoring and inspection procedures for transportation and storage activities.[491]

12. Law No. 10/04, of 12 November established by Decree No. 1/09, of January 27, defines petroleum operations in Paragraph 1 of its article 2, as including the 'activities involving prospecting, exploration, appraisal, development and production of petroleum'. Taking into cognizance the need for compatibility of both onshore and offshore petroleum operations with other operations relating to other natural resources exploited in the available areas of the national territory, it was necessary to establish the rules and procedures to ensure that petroleum operations are carried out in line with the basic principles and rules stipulated in the Petroleum Activities Law.[492]

13. This regulation shall apply to all petroleum operations that are carried out both onshore and offshore, in accordance with the terms set out in Law No. 10/04, of 12 November 2004 but

[490] André D, F, Francisco S.N, João S.S and Lourenço V on A General Introduction to the Oil and Gas Industry in Angola accessed at https://www.lexology.com/library/detail.aspx?g=bb61c6c9-4bfd-4756-bcdf-e032e4660cbd on 10th January, 2023

[491] André D, F, Francisco S.N, João S.S and Lourenço V on A General Introduction to the Oil and Gas Industry in Angola accessed at https://www.lexology.com/library/detail.aspx?g=bb61c6c9-4bfd-4756-bcdf-e032e4660cbd on 10th January, 2023

[492] André D, F, Francisco S.N, João S.S and Lourenço V on A General Introduction to the Oil and Gas Industry in Angola accessed at https://www.lexology.com/library/detail.aspx?g=bb61c6c9-4bfd-4756-bcdf-e032e4660cbd on 10th January, 2023

activities related to crude oil refining, storage, transportation, distribution and marketing shall be exempt from these laws. Prospecting and concession licences that have been granted as at the date of this decree's entry into force are subject to the regulations outlined in it.[493]

14. Legal Regime on Additional Exploration Activities in the development Areas of Petroleum Concessions authorised by the Presidential Legislative Decree No. 5/18, of 18 May, sought to optimise the geographical potential of the development areas in the country's current blocks, through the ANPG and MIREMPET. Without affecting the general regime of the Petroleum Activities Law, this scheme established an exceptional regime that would allow 'additional' exploration activities to be conducted in concessions during production periods that show the potential to significantly increase the nation's hydrocarbon production.
15. The Legal and Fiscal Regime Applicable to the Activities of Prospection, Exploration, Appraisal, Development, Production and Sale of Natural Gas in Angola authorised by the Presidential Legislative Decree No. 7/18, of 18 May, establishes a distinct legal and financial framework for the exploration of natural gas and industries that are related to it. It will apply to any agreement that commercial oil companies, whether domestic or foreign, sign with the ANPG, in any of the forms provided for in accordance with the provisions of Article 14, Paragraphs 2 and 3 of the Petroleum Activities Law.
16. The law determines, among other things, that the petroleum investing companies carrying out the activities defined therein are not subject to petroleum transaction tax, regardless of the contractual

[493] André D, F, Francisco S.N, João S.S and Lourenço V on A General Introduction to the Oil and Gas Industry in Angola accessed at https://www.lexology.com/library/detail.aspx?g=bb61c6c9-4bfd-4756-bcdf-e032e4660cbd on 10th January, 2023

regime, and establishes longer time periods than those typically established for crude oil exploration, determines deductible costs and tax benefits.[494]

17. Joint Executive Decree No. 331/20, of 16 December 2020 (Rules and Procedures for Fixing and Changing the Prices of Crude Oil Products and Natural Gas), establishes the applicable price regime for Crude oil products and natural gas. It regulates and determines the basics for price formation and regularly updates the prices of oil and natural gas derivatives, the international standard prices, the publication of costs and maximum margins, regulates supervision and inspection, recidivism, infringements and fines. The rules and procedures set forth in this decree apply crude oil refining operations as well as the importation, logistics, distribution and marketing of crude oil products and natural gas across the national territory, except for the operations of refining, importing, distributing and marketing of fuel, and lubricants. This decree also establishes accessory sanctions, revokes the Executive Decree No. 132/19, of 6 June, regarding the sale price of jet fuel and Executive Decree No. 706/15, of 30 December, and stipulates that price formation of diesel fuel will now be done under the free price regime.[495]
18. Executive Decree 140/22 of 24 February sets the rules, guidelines and procedure for fuel exportation within the national territory and requires the acquisition of authorization from the Institute for the Regulation of Petroleum Derivatives (IRDP) prior to exportation.[496]
19. Law 2/2012 of 13 January: Angolan Oil and Gas Foreign Exchange Law for the Oil Industry

[494] André D, F, Francisco S.N, João S.S and Lourenço V on A General Introduction to the Oil and Gas Industry in Angola accessed at https://www.lexology.com/library/detail.aspx?g=bb61c6c9-4bfd-4756-bcdf-e032e4660cbd on 10th January, 2023

[495] André D, F, Francisco S.N, João S.S and Lourenço V on A General Introduction to the Oil and Gas Industry in Angola accessed at https://www.lexology.com/library/detail.aspx?g=bb61c6c9-4bfd-4756-bcdf-e032e4660cbd on 10th January, 2023

[496] André D, F, Francisco S.N, João S.S and Lourenço V on A General Introduction to the Oil and Gas Industry in Angola accessed at https://www.lexology.com/library/detail.aspx?g=bb61c6c9-4bfd-4756-bcdf-e032e4660cbd on 10th January, 2023

20. Law 28/11 of 1 September (Oil and Gas Distribution and Commercialisation Law): set the legal framework for the distribution and trading of Oil and Gas.
21. Presidential Decree of 91/18 of 10 April establishes framework for the decommissioning and abandonment of wells.
22. Presidential Legislative Decree 6/18 of 18 May, rectified by rectification 13/18 of 31 July: establishes the regulatory framework for the development of marginal fields.
23. Presidential Legislative Decree 7/18 of 18 May: Legal and Tax Framework Applicable to the Surveying, Exploration, Assessment, Development, production and Sale of Natural Gas in Angola. This statute is designed to enhance the exploration of natural gas in Angola as well as the development of related industries.
24. Presidential Decree of 208/ 19 of 1 July: this set the rules applicable to the refining and production of crude oil, the storage of petroleum products and their transportation and distribution.
25. Law 26/12 of 22 August (Oil and Gas Transportation and Storage Law): set the framework for the regulation of Oil and Gas Storage and Transport.

The Oil and Gas Sector in Angola has undergone several restructurings since 2017 and has resulted in the passage of new legislation. This restructuring brought about a New Hydrocarbon Exploration Strategy for the 2020 - 2025 with the introduction of new tax incentives to boost the oil industry, after the decline in capital expenditure and investment in the industry to US$3 billion in 2021, against US$15 billion in 2014[497]. This was aimed at increasing the hydrocarbon exploration and production activity in Angola to ensure the expansion of the country's oil potential, including the development of

[497] André D, F, Francisco S.N, João S.S and Lourenço V on A General Introduction to the Oil and Gas Industry in Angola accessed at https://www.lexology.com/library/detail.aspx?g=bb61c6c9-4bfd-4756-bcdf-e032e4660cbd on 10th January, 2023

unconventional reservoirs, to replace reservoirs and reduce the decline in Oil Production, and the continuous increase of discovered oil resources and to foster competition in the oil industry. \\

This strategy was built on four key areas:

a. The availability and accessibility of the areas that constitute Angola's sedimentary basins for exploration and assessment activity,
b. The expansion of geographical knowledge and access to Oil and Gas resources.
c. Ensuring the effective implementation of the General Strategy for the Allocation of Petroleum Concessions in Angola, under the Presidential Decree 52/19 of February 18.
d. The intensification of exploration and assessment in the concessions and Free Areas of Angola's sedimentary basins. [498]

   In Angola, like what applies in Nigeria, the State is the owner of all mineral resources found in the state. Thus, all exploration rights in all oil and gas fields, whether onshore or offshore, reside with the state.

For the development of the petroleum resources, the state through the National Concessionaire may enter into agreements with other Angolan and foreign entities via any of the following ways:

a. Production Sharing Contracts
b. Consortium
c. Corporation

[498] Claudia S. C & Bruno X. on Oil and Gas Laws and Regulations Angola 2023 in https://iclg.com/practice-areas/oil-and-gas-laws-and-regulations/angola#:~:text=PLD%207%2F18%20sets%20out,the%20development%20of%20related%20industries. Accessed on 10th January 2023

d. Risk Service Agreements

Under these various agreements, the state derives value from its Oil and Gas resources, from taxes levelled on the entities involved in the development of oil and natural gas resources. These taxes include:

a. Petroleum Transaction Tax
b. Petroleum Production Tax
c. Petroleum Revenue Tax
d. Surface Area Charge
e. Contributions to the training and development of Angolan staff.

5.4 Licensing in the Angolan Oil and Gas Sector

The specific responsibility of regulating, overseeing, and promoting the execution of petroleum activities in the realm of operations and contracting in the oil, gas, and biofuels sector, is assigned to ANPG-the national concessionaire, a privilege that was formerly awarded to Sonangol EP. The contracting for oil and gas exploration and production is consequently overseen by ANPG. According to Articles 13 and 14 of the Petroleum Activities Law, any company, whether domestic or foreign, intending to conduct petroleum operations in Angola's national territory outside the purview of the prospecting license may only do so in partnership with the National Concessionaire. The following methods may be used to award the concession: public tender, where Sonangol will collaborate with third parties to conduct operations within a specific area, MIREMPET-awarded concessions, and will take the form of a commercial company, joint-venture (consortium contract), PSA or risk service agreements (RSA), as stated in Article 13 of the Petroleum Activities Law.

The National Concessionaire must have a majority stake in any petroleum agreements as a matter of principle, and when it has an associative participation, it must be larger than 50%. The government may, however, permit the National Concessionaire to hold ownership lower than 50% but no less than a participating interest of 20% in cases that are well justified.

According to the Petroleum Activities Law, only a prospecting license or a petroleum concession may be used to carry out petroleum operations. The government has the authority to grant a concession to carry out mining rights, while the relevant MIREMPET and ANPG are responsible for issuing prospecting licenses. Article 12 of the Petroleum Activities Law stipulates the maximum duration of each phase, however the specific terms of each prospecting license and concession are specified in the respective licenses, concession decrees and concession agreements. Regardless, a prospecting license has a maximum term of three years, but in exceptional cases, this duration may be extended, following the submission of a properly justified application to ANPG by the licensee.

In a case where the National Concessionaire associates with other entities in accordance with Article 14, the concession is considered to have been awarded from the moment the relevant contract is signed, however when there is no such association, between the National Concessionaire and other entities, the concession is deemed to have been awarded from the moment the concession decree enters into force.

Presidential Decree No. 86/19 of April 2 establishes the guidelines and processes for the public tenders in the oil and gas industry, and it regulates the tender procedures for obtaining the status of partner of the National Concessionaire and for products and services in the oil sector. This Presidential Decree outlines the public bidding process that occurs before the appropriate PSA is awarded and executed. The requirements for acceptance may differ depending on the criteria and characteristics of the bidding process. In addition to the mandatory requirements that the candidate company must meet in terms of technical and financial capability, this process necessitates the prior qualification of MIREMPET.

Additionally, the recently approved Law No. 41/20, of 23 December which took effect from 22 January 2021, established the new Public Procurement Law in Angola (LCP) revoking Law No. 9/16, of 16 June and is applicable to all public procurement procedures started after that date as well as the execution of subsequent contracts. Administrative concession contracts, among other things, are now covered under the LCP. Additionally, two new processes have been introduced: the Emergency Contracting, which is to be used in dealing only with unforeseen circumstances not due to the contracting organisation; and the Electronic Dynamic Procedure, intended for the acquisition of standardised goods and services.

A number of changes were brought on by the LCP, some of them include the possibility to remove a company from the List of Companies in Default, the elimination of the provisional bond and the stipulation of a single bond (the former 'definitive bond'), the exemption of the requirement to execute contracts in writing in certain cases, the development of a penalty regime, the power or ability to authorize costs associated with the formation and execution of contracts, and mandatory contingency payments for contracts worth more than 182 million kwanza.

5.4.1 Production restrictions

In accordance with the participating interest in the PSA, each company affiliated with the licensee/concessionaire has the right to freely trade off its share of the production. Only an obligatory requirement from the Angolan state, made expressly to satisfy domestic consumption, or a national emergency, in which case the government would have the authority to purchase the specified production, might impose a restriction on this right. In this situation, in addition to the output of the concession area, the production restriction may also apply to petroleum installations. The government may requisition all or a portion of the production in the event of a declared national emergency or war to meet Angola's strategic needs. An amount equal to the market price of the quantity of the requisitioned product must be paid to the affiliated company as compensation. No more than 40% of the entire output from the

relevant concession region may be used to satisfy domestic consumption needs, nor may it exceed the ratio between the yearly output from the concession area and the country's overall annual petroleum output.

The transfer of a contractual position held by a private company that is an associate of ANPG to a third party is subject to rules and restrictions that may be included in the law or in each of the concession contracts and PSAs. This requires prior approval from MIREMPET through an official executive decree, and the transfer of a stake or shares that represent more than 50% of the associated share capital deemed equivalent to a transfer of a contractual position. If the transfer is done to an affiliate as defined by law, this authorization is not necessary if the assignor continues to be jointly and severally accountable. ANPG is given the right of first refusal if a stake or shares comprising more than 50% of the related share capital are transferred to a third party.

5.4.2 Assignments of interests in the Angolan Oil and Gas Industry

A Licence holder may assign all or a portion of its right to third parties, subject to prior authorization from MIREMPET, as requested through ANPG. An assignment shall be considered to have occurred when 50% or more of a licence holder's shares are sold. According to Article 16 of the Petroleum Activities Law, 'Associates of the National Concessionaire may only transfer part or all their contractual position to third parties who are proven to be suitable and possess the technical and financial capacity after obtaining the necessary authorization for such, in the form of an executive decree from the Minister responsible.

It should be noted that any transfers to third parties of shares constituting more than 50% of the transferring company's share capital would be regarded as a transfer of contractual position. The authorization will not be required in cases where the transfer is between affiliated companies and where

the transferor remains equally and severally liable for the transferee's obligations considering that the terms will be outlined in the PSA. When transfers are made to parties that are not affiliates of the transferor, the National Concessionaire will be entitled to pre-emption. However, if the National Concessionaire chooses not to use this pre-emption power, it will immediately be transferred to national partners who have been granted the unique status of a national company in accordance with article 31(3). The assignment may be sanctioned for competition in accordance with relevant legal requirements. The profit (difference between book value and actual selling price) obtained from the sale proceeds will be taxed if the assignment is affected by selling a participating interest.

5.5 Tax Regimes in the Angolan Oil and Gas Industry

The special tax regime that applies to oil companies engaged in upstream petroleum operations is Law No. 13/04, of 24 December which is The Law on Taxation of Petroleum Activities. Petroleum trading tax, petroleum production tax, surface tax, petroleum income tax and the payment for the training of Angolan staff are the taxes that apply under this regime. To encourage the development of marginal fields, the application of innovative technologies and the recovery of new reserves, ring-fencing of the tax charges shall be applied to each concession or area of development, despite the important rule or ring-fencing and the exceptions to this rule which may be altered soon.

The company's share of the profit oil, under the regulations of the PSA which applies to most of the oil blocks, is subject to a petroleum tax income (PIT) of 50% and if the petroleum operations are conducted under an RSA or any other type of business arrangement with the National Concessionaire, this tax increases to 65.75%. In a situation where the company is public or owned by Angolan citizens, the tax is reduced to 35%.

The petroleum transaction tax (PTT) is charged on taxable income at the rate of 70% but may also be deducted as an expense against the PIT. The petroleum production tax (PPT) is set at 20% and is charged on the total oil produced, excluding the oil used in operations. There is a possibility of reducing this tax rate to 10%. Both the PPT and the PTT are not applicable to PSA's contracts.

5.5 Other Taxes

Surface charge: this is levied at 300 USD/ km2/year per concession or development area.

Contribution towards Angolan staff training: State owned oil companies and companies owned by Angolan citizens are exempted from training levies. Oil companies that only possess a research licence are given 100,000 USD, oil companies engaging in research are given 300,000 USD, oil companies that are in the production stage are given 0.15 USD/ oil barrel, oil companies that engage in refining activities are given 0.15 USD, companies that engage in storage, transportation, distribution and commercialisation of crude oil are given 0.5% of the annual turnover and companies that regularly render services to the oil companies are given 0.5% of the values of contracts.

The State Budget Law for 2021 (Law No. 42/20, of 31 December) authorized a reduction of the withholding tax rate that applies to services rendered by non-resident entities to Angola oil companies from 15% to 6.5%. This disposition is not included in the State Budget Law for 2022 (Law No. 32/21, of 30 December).

Oil companies are liable to a captivation regime, which requires them to withhold the input VAT specified in the supplier's invoice and pay it directly to the government, despite the fact that oil production and exploration are free from VAT. Additionally, the input VAT associated with the following expenses is not deductible for VAT purposes (although they may qualify as deductible expenses against the company's PIT): the provision of water and energy, services related to electronic

communications and telecommunications, hotel and accommodation services, the leasing of equipment, unless the lease qualifies as a royalty payment, consultancy, legal, tax, financial, accounting and IT services, security services and the leasing of vehicles.

About the oil and gas service providers, Law No. 10/21, of 22 April, which amends Law No. 10/18, of 26 June, The Private Investment Law, introduced new revisions to the law with the intention of making private investment more appealing to investors. The value of the investment and the number of jobs produced are now included among the elements deemed important under a new contractual system that was put in place.

5.6 Foreign investment considerations in Angola

The Private Investment Law, Law No. 10/18, of 26 June which stipulates the principles and general bases for private investment in Angola was amended by the newly enacted law, Law No. 10/21 of 22 April. This new legal framework introduced a contractual structure which was absent in the previous law, that provided for effective negotiations of incentives, benefits, and other rights for private investors especially in structuring projects that have a significant economic and social impact. The creation of the contractual regime, which is applicable to all sectors of operations, permits the negotiation of facilities and tax incentives as well as the terms for implementing investments projects. Prior declarations and special regimes also remain applicable. The Tax Benefits Code (Law No. 8/22, of 14 April) now regulates tax benefits, however given that Article 36-A of the Law No. 10/21, of 22 April, permits an open negotiation between the Private Investment and Export Promotion Agency of Angola (AIPEX) and the investor, this poses a challenge. Hence for the purpose of granting benefits and facilities the amount invested and the number of jobs created are now additional criteria that are crucial when negotiating with AIPEX.

Previously, certain benefits were only accessible to foreign investors after the implementation of investment projects, but now foreign investors and the companies' majority held by them can access domestic credit, and foreign investors can transfer abroad investment-related sums such as dividends prior to the complete implementation of an investment project. Also, investors are no longer required to obtain provisional licences and other forms of authorization to implement investment projects and in situations where such authorizations are indispensable, the relevant bodies are obliged to issue the authorises in compliance with the timeline stipulated in the contract schedule agreed with the investor. Registration of investments that were previously implemented without private investment projects may now be regularised by the investing companies, and such companies may be entitled the right to repatriate dividends but with no access to tax benefits.

According to Article 36-A of the Law No. 10/21, of 22 April, the contractual regime is applicable to private investment projects in any sector of operation and involves the negotiation between the investor and the Angolan State, on the terms for project implementation, incentives, and facilities to be awarded under the contract. The creation of the contractual regime, which is applicable to all sectors of operations, permits the negotiation of facilities and tax incentives as well as the terms for implementing investments projects. Furthermore, private investors are offered the freedom under Article 37, to choose any of the investment regimes. Finally, Article 48, Paragraph 2, allows the tenets of the new regime to be applied to projects that have been approved under Law No. 10/18. Although the private investment law does not decide the benefits and incentives granted to the investor, it creates a possibility for negotiation that was limited by the previous law.

The Private Investment Law applies to private investments of any value range, regardless of whether the investors are international or not. This law however is not applicable to investments made by companies of which the state is the sole or majority capital holder. It is also not applicable to sectors of operations

such as telecommunications, energy, and tourism whose investment regime is regulated by special laws. About sectors regulated by special laws, investment projects in such sectors shall be registered with AIPEX, subject to any regulations, for statistical control purposes and the awarding of the private investor status.

5.7 Current developments in Angolan Oil and Gas Industry

The President of the Republic of Angola through the Presidential Decree No. 249/21, of 5 October, authorized the Rules and Procedures of the Permanent Offer Regime for the Promotion of Oil Concessions, under the Concession Award Strategy for the 2019-2025 period.

This Presidential Decree No. 249/21 was made as a result of the need to incorporate new rules, and serves to augment the 2019-2025 general bidding strategy with the aim of increasing investment, exploration and production activities for oil and gas, by allowing the permanent availability and negotiation of non–awarded tender blocks, ‘free areas’ in concession blocks, under the conditions permitted by the Petroleum Activities law, particularly Article 44 of Law No. 10/04, of 12 November.

Currently there is a critical need to replenish the deposit reserves in Angola and this can only be achieved through the creation of a more enticing legal and tax framework for the sector. The Permanent offer regime was authorized to provide flexibility and clarity in value orientation for Angola by ensuring that ANPG and MIREMPET fully respond to timely proposals from investors through rules that are in line with procedures established by the regulations of the oil sector.

Development in two key projects in Angola are worthy of mention. One of which is the ‘Barra do Dande project’ in Bengo Province. This project is of strategic and national interest as it is the main platform for the reception and storage of oil products and derivatives for Angola’s security, strategic and operational reserves as stipulated in the Angolan Government’s 2018-2022 National development Plan. The

Presidential Despatch No. 62/21, of 6 May, created the Barra do Dande integrated development zone with a storage capacity of 580,000m3 of refined products, thus advancing Dande as a key centre in the region for the storage and marketing of fuel.

The project commenced in 2014 and the first phase was scheduled for completion by the end of 2022, but progress was interrupted in 2016 due to the economic conditions experienced by the country and the company at the time. The first phase was intended to meet the country's need and in relation to the previous capacity; improve efficiency in the process of reception and distribution of refined products and yield cost management benefits.

In April 2021, the announcement for the commencement of the bidding round for nine onshore blocks was made by the ANPG and this was well received by the national investors. From the proposed timeline for the bidding round, concessions were supposed to be awarded by 13 September 2021, negotiations concluded by 19 October 2021 and agreements signed by 22 November 2021. However, this was not the actual turnout of events as the award of concessions took place in July 2022 with the signing of agreements taking place about 30 days following the publication of the authorization for the award of the referred concessions in the Diário de República.

In August 2022, ANPG achieved a milestone that revived onshore exploration and created a unique opportunity for medium-sized national and international companies, when they signed off on several production share agreements for the blocks awarded in the 2020 round. Of the sixteen companies bidding for the oil blocks, thirteen were nationals with six being public limited companies. The areas awarded include blocks CON1, CON5 and CON6 in the Lower Congo Onshore Basin and blocks KON5, KON6, KON8, KON17 and KON20 in the Kwanza Onshore Basin. The award of KON9 was cancelled by The National Concessionaire with the approval of the Ministry of Mineral Resources, Oil and Gas. The

agreements signed on the eight blocks awarded in this round were intended to develop the resources at the Angolan onshore basins, thereby alleviating the country's production decline.

Given that these agreements are made on onshore blocks, investors had a period of 40 days after the commencement of the bidding round to provide their bids, proof of payment of US$1 million as entry fee as well as all other necessary documentation verifying their eligibility and technical and financial capabilities.

The Presidential Decree No. 52/19, overall defines the Allocation of Petroleum Concessions for the period from 2019-2025 and in accordance with this, specific blocks and basins will be assigned to each licensing round up until 2025. The licensing rounds will follow clearly stated timelines and how these awards will be made are restricted public tender, public tender and direct negotiation.

The Angolan Government has adopted new legislation from 2020 onwards, which is focused on optimising the benefits of the oil and gas value chain and promoting local content and has placed this duty under the supervision of ANPG. This plan by the government to hasten the growth of the local economy by supporting and enhancing local business development through targeted and improved legislation may be crucial in accelerating growth in the Angolan energy sector. However human capital and the increased involvement of local companies in the supply of Angolan made products and services to support the oil and gas sector, continue to be the most important strategy for success in the energy industry. As Angola moves to focus its effort on energy transition, it is vital that it undertakes investment initiatives that promote indigenous skill development that will propel the hydrocarbons industry. In adjusting to the concept of clean energy transition and promoting the utilisation and monetization of gas, the Angolan government also places the collaboration between the Organization of the Petroleum

Exporting Countries (OPEC) and the African Petroleum Producers Organisation (APPO) at the forefront of its strategy.

5.8 Dispute resolution in Angola Oil and Gas Industry

Angola has since 2017 been a signatory of the New York Convention and has a history of consensus on the use of arbitration as the preferred strategy for dispute resolution including those involving the state. Arbitration could be used to resolve disputes between MIREMPET and the licence holder, or ANPG and its associates or disputes regarding licence or concession instruments. Angola has also ratified ICSID. Thus, ANPG and MIREMPET permits the stipulation of an arbitration clause in each concession contract negotiation except in cases where such matter is expressly exempted from arbitration under the Petroleum Act.

A general administrative procedure, in accordance with Decree Law No. 16-A/95, Law No. 2/94 and Decree Law No. 4-A/96, may also be used to contest the decisions of MIREMPET and ANPG. Activities involving the refining, transportation, storage, distribution, and commercialisation of petroleum are not regulated by the provisions of the Petroleum Act.

5.9 FDI and Technology transfers into the Angolan Oil and Gas sector

Studies have shown that a resultant effect of FDI into greenfield oil and gas projects in Angola is the technological transfer of specialised equipment, hardware and skills which enhance the efficient exploration of the oil and gas resources, the enhanced transportation of the oil and gas resources to local refineries and exportation to regional and international markets and the design, construction and expansion of indigenous refineries.

These technologies are readily made available by OEMs which have subsidiaries or business ventures in Angola. Thus, FDI, import and licensing activities have created an essential pathway for the entrance of new, advanced and more efficient technologies into the Angolan Oil and Gas Sector.

In an interview, authorities in the Angolan Ministry of Energy and Water Resources revealed that prior to the development of the Angola LNG Project in 2014, there was no transfer of hardware and machinery. The plant design and construction technology introduced into the Angolan Oil and Gas landscape were acquired under a licensing agreement between Angola LNG and ConocoPhillips, a renowned LNG technology architectural firm. The construction of the LNG Plant was carried out by Bechtel, another renowned EPCM company, in line with the optimised design plan provided by CONOCO Phillips.

Under these projects, there was the transfer of highly advanced integrated engineering systems which enhanced the LNG exploration, cleaning, and transportation process. Thus, despite the capital intensive and technical complexities of the Oil and Gas Sector and the incapability of the Angolan State to produce these technologies, the influx of FDI into the Angolan Oil and Gas Sector have helped ensure these technologies are readily available. In a 2014 interview with an official of the Angolan Ministry of Energy and Water Resources, he expressed his opinion on the incapability of Angola to produce these technologies, stating 'Angola, like several developing countries imports basic commodities, even to electric bulbs, we envisage a time when we will be able to develop and manufacture components for oil rigs and power plants. Apart from the transfer of hardware and equipment, there is also technology transfer in the form of knowledge. This technology knowledge transfer involves the passing of skills such as design skills, from the international oil companies to the Angolan technicians who participate in the exploration phase and the feasibility/ viability studies. Knowledge transfer could also occur through training on the technical aspects of the projects aimed at creating linkages in the supply chain. The local

content laws applicable in Angola encouraged the training and capacity building of local firms to enable them to make supplies to TNCs. These indigenous firms usually participate in training programmes focused on financial and business management organised by International NGOs with funding from the TNCs.

To aid technology transfer into its Oil and Gas Sector, there existed in Angola, the policy of Angolanization, this provided that the ratio of expatriates to Angolans employed must be 30:70 percent, however as an incentive to the investors, the government waived this policy.

However, a flaw that has existed in the issue of technology knowledge transfer especially in providing services is that the services contracted to the domestic firms are basic services such as hospitality, cleaning, and catering services, not technical services such as engineering or other core business areas.

Thus, most indigenous companies are not involved in providing core business services to the TNCs, as the agreements between the project owners, OEMs and PCMs provide that repairs and maintenance of plants and technical equipment remain within their sole purview, thus limiting the participation of the indigenous firms, although there exists some supply linkages between domestic firms and TNCs, these linkages are limited, as domestic companies lack the technical manufacturing skills and capabilities to provide core business services to the TCNs. Thus, to enable the local firms to participate in the provision of core business services and engender penetration of these firms, there is a need for them to build technical manufacturing capabilities. There is also a need to closely align the requirements of local content with the capacity building institutions (the technical institutions), the industrial policies and with the bodies that develop and implement these policies such as the National Oil Company, the Angolan Ministry of Energy and Water Resources and the Ministry of Industry. [499]

[499] Sawada, N, the economic impacts of technology transfer and spillovers through foreign direct investment in developing countries. University of Hawai'i at Manoa. (2005)

5.10 Issues Arising from Foreign Direct Investment in The Angolan Oil and Gas Sector.

As in every instance, Foreign Direct Investment in any location is associated with several pros and cons. This section seeks to highlight the issues arising from foreign direct investment in the Angolan Oil and Gas Industry.

A. CIVIL WAR: the dispute that occurred in the civil war that lasted for several years (1979 - 2002) and disrupted the economy of Angola is the war between the inhabitants of the Cabinda region and the Government of Angola. The Cabinda separatists were particularly aggrieved that the Government of Angola mismanaged their management of oil revenues, which are extracted from their province (which amount to approximately 60 percent of Angola's total output) yet are not invested locally or used for the benefit of local Cabindans. These agitations were exacerbated by the presence of IOCs in the area whose activities posed significant harm to their environment. In 1999, there was an incident of oil spill in the Malongo oil base. This caused tremendous loss to the local fishing industry. Chevron, the IOC operating the oil base, paid compensation to about 10% of the affected population, but did not stop the incidences of pollution. The Malongo community was known to be an affluent community in which Chevron carried out its offshore operations and where its employees (majorly expatriates) enjoyed the luxuries of a good education, feeding and very comfortable housing. In this vein, the community came to be despised by the locals and was often a target for attacks. To forestall the brewing conflicts, the government of Angola, pressured Chevron to adopt a more inclusive policy which involved integrating its employees into the local community. With this move, it helped to pass across the message that the government was committed to protecting the interest of the locals as well as promoting the corporate interests of the multinationals.

5.11 Features of the Angolan Oil and Gas Sector.

This section seeks to shed light on the key features of the Angolan Oil and Gas Industry that promotes foreign direct investment / participation in its Oil and Gas Industry.

1. The existence of linkages between the Oil and Gas Industry and the domestic industry: Several studies have shown that the development of linkages between the Oil and Gas Sector has a resounding positive impact on the growth of the industrial, service and other sectors in several resource rich countries. Using Norway as a case study, within 30 years of oil discovery and exploration, the country developed a wide petroleum supplier base working in partnership with several world class firms. This they achieved by forming alliances with leading oil and gas technological and services firms such as Aker Kvaerner, and Vetco Gray.[500] Developing these linkages evolved from the supply of raw products to the supply of more sophisticated products, contributing to the development of a broad base economy.[501] Leveraging these partnerships and revenue from its natural resources, Norway diversified into other activities such as the development of machinery, transport services and engineering products. This historical experience from Norway shows the potential for economic diversification and industrial expansion from the Oil and Gas resource sector. And this template for diversification and development from the Oil and Gas sector was what was sought to be adopted in the Angolan Oil and Gas Sector. As an Oil producing Nation, Angola ranks as the 15th largest oil producer and second largest oil producer in Sub-Saharan Africa (2.2 mb/d). Over the years, from discovery of oil over 20 years ago till date, it has grown to be a major player in the Global Oil and Gas Sector. However, it is still plagued by the challenges such as the Resource Curse[502]plaguing Oil Producing Nations in Africa.

[500]Zeferino T, Linkages to manufacturing in the resource sector: The case of the Angolan oil and gas industry in Resources Policy 37(2012):461-467 (December 2012)

[501] Magnus Blomström and Ari Kokko, FDI, Human Capital and Education in Developing Countries (Technical Meeting) in Stockholm School of Economics, 2001

[502]According to the hypothesis of the resource curse, the abundance and development of petroleum and mineral resources in a developing country often results in lower economic development and performance. This is often because of over dependence on the resources, corruption, security and conflicts over the natural resources, which is a significant source of wealth. Nigeria and Angola are often cited as examples of Oil-rich African Countries plagued by the resource curse.

Angola is a resource dependent country, with Oil and Gas resources accounting for 90% of its export revenue, over half of its Gross Domestic Product and two-thirds of government export revenue.[503] This dependence on its natural resources stems largely from the aftermath of the 27 years of civil war which displaced both the industrial and agricultural sectors. However, several attempts have been made by the Angolan Government to revitalise and diversify the economy from the oil resources, imitating the strides and policies of nations like the United Kingdom and Norway. Creating backward linkages to the domestic sectors from the Oil and Gas Sector has been identified as one of the ways of maximising the greatest benefits from foreign direct participation in the Oil and Gas Sector, while enhancing foreign direct participation in the Angolan Oil and Gas Sector, without reneging on international policies that govern foreign direct investment in the Sub-Saharan Oil and Gas Sector. It is important to note that though there exists a wide difference between the economies of Angola and Norway, both in terms of size, per capita income, contribution of oil and gas to the entire economy, and the potential of creating backward linkages, the process of creating backward linkages from the Oil and Gas sector to the domestic sector has already been set in motion. As observed by Chairman Mao, the longest journey begins with taking the first step. Thus, the development of linkages is a gradual process and a path the Angolan State is fervently treading.

2. Local Content: over the years, several scholars[504] have propounded the concept of local Content development as a panacea for promoting development in the Domestic Oil and Gas Sector in Sub-Saharan Africa amidst the dearth of foreign direct investment in the Oil and Gas Sector. Post the civil war in Angola, Angola strategically put in place measures to develop its local content. These efforts were particularly strengthened and influenced by policies from and partnerships with the Norwegian Agency for Development Cooperation and the Norwegian Petroleum Directorate, as well as countries Malaysia and Brazil, that have achieved a high level of domestic participation in their oil and gas industry. In pursuing local content

[503] World Development Indicators, 2011

[504] Jesse S.O, (2016) Local Content policies and Petro-development in Sub-Saharan Africa: A comparative analysis at https://doi.org/10.1016/j.resourpl.2016.04.003

development now, Angola places focus on existing policies with Sonangol, its national oil company, international oil companies and the Ministry of Petroleum (MINPET) and partnership between the Angolan Chamber of Commerce and Industry. A particular feature that has helped the Oil and Gas Sector in Angola is the presence of robust legislations regarding the development of local content. These legislations do not stand alone but take into cognizance the legal regimes of the various petroleum production and sharing contracts. Discussing these legal frameworks is important for getting a grasp of how local content is developed and implemented. The first law developed in respect of domestication of the Oil and Gas Industry is Decree No. 20/82. This decree of 1982 sought to implement the mandatory employment and training of Angolans by the International Oil companies operating in the Angolan Oil and Gas terrain. This law was however poorly enforced due to the absence of strong institutions to regulate the sector and as such did not yield the desired results. In its entirety, it was a properly constructed regulation and still the primary reference in current Petroleum transactions, even after revocation by decree No. 116/ 08, which was subsequently revoked by *Decree-Law No. 17/2009.* These subsequent legislations were criticised for having no concrete targets for promotion of local contents. By the purport of *Decree-Law No. 17/2009*[505]. The IOCs are obligated to fill all staff vacancies at all positions with Angolan Citizens. However, it also provides that where it is shown that there is an inadequate number of qualified Angolan personnel to fill in the positions, expatriate personnel may be hired with the prior consent of the Ministry of petroleum. In actual reality, this law merely provided a leeway for the employment of expatriates, as the requirements for the jobs required up to 15 - 20 years of training and experience which the local nationals did not possess. Under this same Decree, IOCs were required to enter training contracts with the Angolan Ministry of Petroleum for the development of its human resources in the Oil and gas sector, also a Petroleum Training fund was required to be set up. The law also contained some controversial provisions such the requirement of equal employment benefits for

[505] Decree-Law No. 17/2009.

Angolans and foreign nationals[506]The non-compliance with this provision has, however, created tension between the international Oil companies and the Angolan Government.

Several other general laws provided for that had provisions on local content development including the 'Petroleum Activities Law', which established the regulations for petroleum exploration and production in Angola.[507] According to Article 26 of this law, 'The Government shall adopt and implement measures to guarantee, promote and encourage investment in the petroleum sector by companies held by Angolan citizens and create conditions necessary for such purpose'. Article 27 further provides several guidelines for the use of domestic products and services. Also, many of these regulations are also found in Production Sharing Contracts and other petroleum development agreements.

1. Acquire materials, equipment, machinery and consumer goods of national production, of the same or approximately the same quality and which are available for sale and delivery in due time, at prices which are no more than 10% higher than the imported items including transportation and insurance costs and customs charges due.
2. Contract local service providers who provide similar services with their international counterparts to the extent in which they are similar in price, when subject to taxes, or if higher not more than 10% higher than their foreign counterparts. This law also contained the provisions of the previous Decree-Law No. 17/2009 which provided for equal employment benefits for Angolans and their foreign nationals employed by International Oil Companies.

Decree No. 127/036 provided a further push for the use of Angolan goods and services in the procurement activities of the IOCs.

The Production sharing Contracts in Angola were governed by a separate regulation which also provided for Local Content, with stricter terms and most of which were contained in the legislations primarily for

[506] Article 5 of Decree No 17/2009
[507] 'Petroleum Activities Law'

Local Content. The National Oil Company, Sonangol pays particular attention to enforcement of the Local Content provisions contained in the PSAs rather than those contained in the Primary Local Content legislations. This has greatly helped strategic implementation as the Sonangol is the only body responsible for negotiating the terms of the PSAs and over the years, the IOCs are infamous for flouting local Content regulations. Sonangol also has ample powers to enforce local Content because it can show preference to any company. It also has the responsibility of dictating where materials are manufactured and procured.

The history of the development of local content in Angola started in 2001 with a report titled, the 'Report on the Penetration Strategies of Private Angola Businesses in the National Petroleum Sector'. This report was authored by a technical commission set up to liaise between the Angolan Chamber of Commerce and Industry and the Ministry of Petroleum (MINPET).

The recommendations of the report were adopted in Decree No. 127/03. Since the passing into law of this Decree, the Angolan Ministry of Petroleum has entered several liaisons with the CCIA for the purpose of promoting dialogue between indigenous companies in Angola, International Oil Companies, and the government. Further to this, in March 2003, the Government of Angola embarked on a "Project to develop National Participation in the Oil Industry". However, this project was ill structured which led to its failure and eventual shutdown in May 2008. Its failure was attributed to the absence of an action plan with clear goals, inadequate liaison between operating companies and other sectors for national content development, undefined role of Sonangol role in the management structure, lax execution of penalties for the non-compliance with local Content provisions and the absence of the updated policies in the Production Sharing Contracts. To correct this approach, Sonangol entered a collaboration with the Angolan Ministry of Petroleum and the IOCs to implement a new content strategy built on correcting the failures of the Project.

In analysing the impact of these local Content strategies on the growth of the Angolan Oil and Gas Industry, interviews of top participants in the Angolan Oil and Gas Industry were conducted. These interviews featured open ended questions, to enable one to get a full perspective of the industry. These interviews showed that the Local Content in Angola is essentially divided into two parts: (1) The development of human resources and (2) The procurement of goods and services manufactured in Angola. Even though these goals are related, they were at different stages of development and regulated by different laws.

The implementation of the new training law has strengthened the capacity of the Ministry of Petroleum to monitor the sector and promote the development of its human resources. Working together on this cooperation agreement with Norway provided it with an opportunity to develop a strategic human resource development plan for its Oil and Gas Industry and to effectively monitor this plan. This strategy is designed to identify high quality skills to reduce the inequalities that exist between Angolans and the expatriates. A major challenge associated with this Training Law is that, like the former Laws, the IOCS found a way to evade the regulations and still engaged in pay discrimination.

Most times the IOCS concealed the extent to which they compiled with the training policies. An interview with the Director of Human Resources in a major IOC operating in Angola exposed the fact that even where Angolans were employed to high position, this was merely a charade to show compliance with the Angolisation policies, and the jobs were in fact done by other persons abroad or outside Angola. This show was also to get accorded the preferential treatment granted to Indigenous Companies employing largely Angolans and using products manufactured in Angola. Put together, the various Legislations on local content and the implementation of the Production Sharing Contracts helps the Government to attract investments into its Oil and Gas Sector, while developing local content to ensure continuous development and domestic input in its Oil and Gas Sector. [508] One of the challenges

[508] 404 J.S. Ovadia Downloaded by [UNAM Ciudad Universitaria] at 16:05 27 December 2014

encountered in the development of Local content is that discrimination exists even among Angolan Citizens. In the words of a black Angolan working in an IOC's Angolanization of the Oil and Gas Industry must be followed by Angolanization of the benefits of the Oil and Gas Industry''[509] This statement pointed to the fact that even among Angolans, there were issues of widespread inequalities. Beneficiaries of the Local Content Development Policies were in fact privileged, white and bi-racial Angolans. Most of these individuals, though Angolans, had schooled abroad. This happening he described as 'structural racism' [510]This points to the fact that there is a need to probe the implementation of the Angolanization policy and ensure that the policy is not targeted to benefit a particular class of people.

These challenges discussed above show that despite years of strategic planning and policy making, Angola is still unable to ensure the development of local content in its Oil and Gas Industry because of non-compliance by the IOCs, mismanagement, and certain political factors.

According to J.S Ovadia, though the development of local content is a very important goal for the Angolan State, the challenges arising from its implementation will have to be addressed by all participants in the industry and requires the utmost cooperation of the International Oil Companies. In addressing the issue of Local Content Development, it is necessary for the State to pay particular attention to its educational sector. Local content policies must be designed to ensure that these initiatives do not hurt the profitability of the International Oil Companies. Else, there will be a pushback from these companies. In addition to ensuring the cooperation of the IOCs, there is also a need to rid Sonangol of the corruption that has eaten deep into its system. The position occupied by the National Oil Company also constitutes a threat to the operation of other private National Investment Companies. Despite the

[509]August 2021
[510] (Interview, August 2021).

several challenges with the development of Local Content in the Angolan State, several lessons can be taken from its development.

That is:

1. Local Content Development should be complemented with access to credit to enable companies to expand and be able to compete with their counterparts abroad in the Oil and Gas Industry. centres should be set up across various states in the nations, especially Oil Producing States to encourage the easy training and development of employees of Indigenous Oil Companies. [511]A significant part of the Local Content Development is the development of local refining capacity. To tackle the internal deficit in the availability of petroleum products, several strategic have been undertaken to increase the national oil refining capacity. And new refineries are expected to start operations by 2025. The midstream sector of the Oil and Gas value chain is key for Angola, which has led to the development of landmark projects essential to incrementing Angola's refining capacity. An agreement for the construction of the Cabinda Refinery[512] has been reached, the bidding was launched for the Soyo Refinery[513] and the review of the technical and financial feasibility studies is underway for the public tender pertaining to the construction of the Lobito Refinery[514]. The unavailability of local refining capacity is a situation that still haunts the Nigerian Oil and Gas Industry. It is however believed that the Dangote Oil Refinery with a production capacity of 650,000 barrels per day (bpd) will transform the Nigerian Oil and Gas Industry.
2. Ease of repatriation of funds: In 2012, Law 2/2012 in the Angolan State established a general foreign regime in respect of Oil and Gas activities carried out under the Petroleum Act. Under

[511] Chad E. D. M & John O., Local Content Frameworks in the African Oil and Gas Sector: Lessons from Angola and ACODE Policy Research Series No. 72, 2016
[512] Cabinda refinery
[513] Soyo refinery
[514] Lobito refinery

this law, foreign investors have a right under this law to repatriate their profits from the payments of production under the contracts with the Angolan State.

3. Market Policies: Under Law 26/12 in the Angolan Industry, the licensee has the right to tariffs for the transportation of Oil and Gas. Also, as an incentive to the export of petroleum and its derivatives, Article 8 of Law 11/04 exempts it from custom duties and general customs service fee. Under the Angolan Laws,[515] There is deregulation of the downstream sector. Distribution of Oil and Gas products is carried out on a market basis, thus encouraging competition and the efficient performance of downstream participants. Under the Angolan Laws[516], the operations in the Downstream Sector involving Crude Oil refining, storage, transportation, distribution, and commercialisation of petroleum products, are open to all Market Participants. This open market and competition policy also applies to the marketing of oil products. While the prices are set by market participants, the government supervises the prices through the Instituto Regulador de Derivados de Petroleo ('IRDP').
4. Energy Transition Policy: The covid-19 pandemic acted worldwide as a catalyst to promote the transition to cleaner alternative energy sources, including natural gas. Angola has been working on its policies and programmes that aim for the energy transition, without forgetting that the main objective in the short to medium term is still to increase oil and gas production. The objective is to convert thermal power plants from diesel to gas, as is the case with the combined cycle power plant in Soyo, with a capacity of 750MW, or replace them with new hydroelectric plants. In parallel, renewables projects are being developed, namely the construction of a photovoltaic electric power plant in Namibe (50MW), a partnership between Sonangol EP and ENI, which is already in motion.

[515] Presidential Decree 208/19
[516] Law 28/11

Angola possesses a liquefied natural gas (LNG) power plant in Soyo that has been in operation since 2012, with an initial processing capacity of one million cubic feet of gas per day, which was founded because of the necessity of monetising natural gas resources, eliminating flaring in oil and gas operations.

In the face of the changing global energy landscape, the Angolan government in 2020 while developing its Petroleum Industry embarked on a $600 million project for the development of photovoltaic solar stations with a production capacity of 370 megawatts.

5. Foreign Policies and International Obligations: Bilateral treaties are only enforceable where they have been domesticated and passed into law by the National Assembly of Angola. Angola is a signatory to two treaties aimed at avoiding double taxation. One is with Portugal and the other is with the United Arab Emirates. It is also a signatory to several other bilateral and multilateral treaties with South Africa, Italy, Turkey, Russia, Brazil, Cape Verde, the United Kingdom, Germany Cape Verde, and France.

   [517]In relation to the settlement of international disputes and enforcement of arbitral awards, Angola is also a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and the International Centre for Settlement of Investment Disputes (ICSID), it has an established history of agreeing to arbitration as its preferred method for the settlement of investment disputes. On 4 November 2019, Angola ratified the African Continental Free Trade Area (AfCFTA). This agreement was entered into force on 30 May 2019, with the

[517]André D, F, Francisco S.N, João S.S and Lourenço V on A General Intrduction to the Oil and Gas Industry in Angola accessed at https://www.lexology.com/library/detail.aspx?g=bb61c6c9-4bfd-4756-bcdf-e032e4660cbd on 10th January, 2023

objective of setting up a free trade area to improve regional integration and boost economic growth across the African continent. Among the several initiatives introduced by this agreement, signatories to the agreement committed to remove tariffs on 90% of the goods. It also seeks to liberalise trade in services and envisions the use of a single currency and the free movement of people across their borders.

5.5 Conclusion

The Angolan Oil and Gas Industry has undergone a series of profound changes and development from the beginning of its Oil and Gas Industry till date. It is still undergoing several strategic changes to transform its Oil and Gas Industry from a position of dependence and dearth of foreign investment to one of self-sufficiency. Some of the strategic steps it has undertaken in attempting to become an investment friendly destination, as well as build a self-sufficient Oil and Gas Industry is the continuous development of its local content industries and human resources. This development of local content is also linked to the development of strategic linkages to other sectors of the Angolan Society. This is a formula that is required especially in the Nigerian State. The development of linkages from the Oil and Gas Industry to other industries is regarded as most efficient where these industries are developed domestically. These linkages will also help prevent over dependence on Oil resources, while developing other sectors. Another is the provision of adequate incentives to foreign investors to enhance the attractiveness of the Sector. This chapter also extensively discussed the challenges experienced by the Angolan State in the implementation of the various legislations for the development of its Oil and Gas Industry. During these discussions, the goal is to highlight the policies adopted in the Angolan Energy Sector and recommend its adaptation for the Nigerian Energy Sector.

CHAPTER SIX: SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

6.1 Summary of Conclusions

The history of the Nigerian State from pre-colonial times, through colonial times, and post-colonial times till date has shown that quite a few political systems have emerged ranging from centralised monarchy, decentralised states, liberal democracy, and military rule. Several economic activities were associated with these political systems and state structures from the development of iron tools to the rise of agricultural activity and the discovery, exploitation, and dependence on crude oil. During the colonial period, there was the discovery of oil at Oloibiri and its emergence as a major export commodity, caused a shift in economic focus from the agricultural sector to the oil and gas sector. However, political instability, upheavals, mismanagement, and overdependence among several other factors has not enabled Nigeria to reap the full benefits of this sector in developing its economy.

For the purposes of developing a structured and economic system, the government took steps to initiate plans and policies for their actualization. From the first development plan to the fifth and through ancillary policies of government to stimulate the economy, such as the structural adjustment programme and the National Economic Empowerment and Development Strategy (NEEDS) (2003-2007); Vision 20:2020, 7 – point Agenda; Economic Recovery and Growth Plan (ERGP) 2017 – 2020; National Development Plan (NDP) 2021- 2025. Countries and their governments strive to institute business climate and industry friendly regime that promote trade and cross border business ventures through the purchase of an asset for the principal purpose of storing value with the assurance that the value of the asset increases over time The economic reforms in a country such as Nigeria has the potential of exponential growth with requisite legal framework and institutions.

Beyond the policies, sector – specific laws were enacted at different periods, towards consolidating gains and creating opportunities for growth. Some of the laws are the Investment and Securities Act 2007; National Office for Technology Acquisition and Promotion (NOTAP) Act; Federal Competition and

Consumer Protection Commission Act, 2018; Nigerian Oil and Gas Industry Content Development Act 2010 (Local Content Act); Central Bank of Nigeria Act 2007; Banks and Other Financial Institutions Act (BOFIA) 2020; Deep Offshore and Inland Basin Production Sharing Contract (Amendment) Act 2019; The Petroleum Industry Act 2021; Foreign Exchange (Monitoring and Miscellaneous Provisions) Act of 1995; Companies and Allied Matters Act, 2020; and the Nigerian Export Processing Zones Act, 1992.

However, the laws and institutions are yet to attain their optimal operationalization and functionality due to some factors such as public service bureaucracy, corruption, insecurity concerns, infrastructure deficit, land use and resources management across traditional and conventional frameworks. There seem to be a concentration of economic activities on the oil and gas sector of the Nigeria economy, though. There is a need to emphasise that there are other viable sectors such as tourism, agriculture, mining, and textile that can be harnessed for industrial growth and development.

However, as the major revenue comes from crude oil, the drilling began in Nigeria in 1956 when it was discovered in commercially accessible scale under operations of Shell BP in Oloibiri, present-day Bayelsa State, Niger Delta Region, South-South of Nigeria. It was considered that the excellent quality of its crude and Nigeria's relative proximity to markets in Western Europe, North and South America, ensured its continuity as a major area of offshore interest and activity. Subsequently, the Nigerian National Oil Corporation (NNOC) was established 1977, with a core mandate to handle the exploration and production of hydrocarbon resources, refining crude oil, distribution finished and marketing of petroleum products for the benefit of all stakeholders, particularly Nigeria. Presently, pursuant to Section 53 of the Petroleum Industry Act (PIA) 2021, the Corporation is now incorporated as the Nigerian National Petroleum Company Limited. Consequently, the ownership of the corporation is vested in the Federal Government at incorporation, to be held by the Minister of Finance and the Ministry of

Petroleum with equal equity on behalf of the Ministry of petroleum and the Federation as provided for in Section 53 (3) of the PIA.

Two industry regulators were established under the Petroleum Industry Act which are the Nigerian Upstream Petroleum Regulatory Commission charged with the regulation of all technical and commercial operations in the upstream sector, having the power to acquire, hold and dispose of property, as well as sue and be sued in its own name; and then, the Nigerian Midstream and Downstream Petroleum Regulatory Authority, vested with the power to acquire, hold and dispose of property, to sue and be sued, being a body corporate having perpetual succession and a common seal. The Authority is responsible for the technical and commercial regulation of the midstream and downstream petroleum operations. The Authority covers a merger of three defunct regulatory agencies which include the Petroleum Equalization Fund (Management) Board (PEFMB), and Petroleum Products Pricing Regulatory Agencies (PPPRA).

Studies have shown that among all the major sectors in the Nigerian economy, the Oil and Gas Sector was the highest recipient of foreign exchange. This translated to both positive impacts and backlashes in the sector. Some of the advantages include Promotion of Domestic Investment; technology transfer, thus helping the host country acquire mature and new technology; Employment Generation and Labour Skills; Environmental Protection; Export Competitiveness considering that participation of Multinationals in the Nigerian Oil and Gas Industry has help increase competitiveness of Nigeria's oil exports.

However, the disadvantages include monopolistic outcomes due to huge cost of capital outlay or cost-intensiveness of investments in the sector. Costs and financing have hindered the entry and growth of Indigenous Oil and Gas Companies unable to compete in terms of market share, skilled workforce and advertising power, thus creating a monopoly. Human rights violations and breach of labour rights of

staff have been part of several concerns surrounding the working conditions of multinational firms. Furthermore, technologies introduced by multinational oil companies may be inappropriate for the host country. Also, environmental regulations within the host country are non-existent or not properly enforced, thus these foreign multinationals take advantage of these poorly enforced rules and weak institutions to pollute the environment.

Foreign direct investment is essential for economic growth of a nation, particularly developing nations. While there are disadvantages and advantages to this process, Nigeria has a myriad of regulations governing foreign direct investments. The laws begin with the Constitution of the Federal Republic of Nigeria, and other investment regulations which provide foreign investors ways of seeking redress in the event of investment disputes.

It is also necessary for foreign investors to ensure that they obtain all authorisations prior to the start of their project to avoid gridlocks and frustrations in the project due to government regulations. The government should also refuse commencement of projects in the absence of full regulatory approvals so as not to create distrust in the investment ecosystem.

The enactment of the Petroleum Industry Act deregulated and liberalised the petroleum industry while providing a favourable regime for increase in foreign direct investment. While applauding the diverse efforts made by the government in providing an investor friendly environment, particularly through monetary/fiscal policies, measures should be to eradicate several supposedly 'little obstacles' such as the poor infrastructures, insecurity, corruption and unnecessary administrative bureaucracy.

A comparative lesion from the Angolan Oil and Gas Industry shows that strategic changes are possible and can transform Oil and Gas Industry from a position of dependence and dearth of foreign investment to one of self-sufficiency. Some of the strategic steps it has undertaken in attempting to become an investment friendly destination, as well as build a self-sufficient Oil and Gas Industry is the continuous

development of its local content industries and human resources. The Angolan local content model could be for the Nigerian Oil and Gas industry.

6.2 Recommendations for promoting Foreign Direct Investments in the Nigerian Oil and Gas Sector

1. Investment in Local Content: In addition, instead of mandating that investors hire locally, Angola and nations like Singapore invested in basic and advanced public education and professional training programmes. In this 'supply side' approach, the increase in the supply of local skilled labour and managerial and executive staff meant that foreign companies voluntarily sought out local employees to take advantage of assets such as language and cultural familiarity. Other created assets that attract FDI to high investment zones are competent, non-corrupt government agencies, a transparent and well-established legal framework, sound macroeconomic management, excellent physical and financial infrastructure and liberal trade and investment policies. The inherent advantages of Angola and Singapore were a favourable geographic location and a cohesive society. The creation of comparative advantage was only possible due to strongly committed and competent political leadership. Additionally, it is important to implement policies that enhances or increase local content via encouraging foreign investors to collaborate with their Nigerian counterparts, local involvement in the oil and gas value chain, create seed or virgin funds to aid local Nigerian companies in the sector and the expansion of additional incentives to FDI in order to encourage them to engage content development locally/domestically.

2. Enforcement of Justice and Security of assets: In the attraction of foreign investments into the Nigerian Oil and Gas sector, it is important to ensure security of assets of the investors. Several factors affect the security of assets of the investment, paramount of which is the treatment of the host communities. An analysis of the Ogoni case shows that the incessant degradation of the

environment by the International Oil Companies without adequate justice or compensation for the people is a factor that fuelled the upheavals, insecurity and pipeline vandalism in the Niger Delta region, the main oil producing region in the country. It is trite knowledge that oil and gas exploration often leads to environmental degradation, and endless litigations which is often limited and to no end, further fuelling these agitations and upheavals in the region. As stated by Professor Dr. Emeka Duruigbo in his paper, Balancing Energy Development and Environmental Rights: From Foreign Litigation to International Insurance? while litigation may be a valuable tool, it is limited, and its effectiveness can be strengthened by deploying other tools. In this paper, he recommended the implementation of compulsory international insurance for catastrophic oil spills and other environmental degradations that occur within the territory of the host country. This insurance will ensure that victims of these degradations are redressed even in the face of endless litigations.

This approach will ensure that upheavals and crimes arising from agitations because of environmental degradations are quelled, leading to enhanced security in the region.

3. Balance in trade policies: The Nigerian Government needs to liberalise its trade regime to enhance the flow of FDIs. ASEAN trade and investment policies are a mixture of investment incentives on the one hand and restrictions, regulations, and performance requirements on the other. In this regard, it is necessary for the Government of Nigeria to put in appropriate legislation, for proper adjudication. These policies and legislation should be unambiguous and provide a clear direction for investors. The Government should also work on strengthening and stabilising the fiscal policy framework. The full benefit of liberalising trade will only be achievable if investors perceive the reform is credible as well as permanent.

4. Political, economic stability and constant favourable macroeconomic indices should be explored. The Nigerian Government must take up the challenge of implementing policies that enhance political and economic stability and reduce trade barriers. Macroeconomic reforms in many countries have often been implemented slowly and with difficulty. The Government monetary policy should focus on reducing inflation, and interest rates, prevent over-regulation of markets and implementation of corrupt, burdensome tax regimes.

5. Macroeconomic policy reform to promote a stable environment and to strengthen underlying institutional weaknesses including corruption are crucial to the success of these packages. Risk management strategies to reduce the perceived possibility of future policy reversals are also very important. African economies may have to do something to combat the 'neighbourhood effect' where investors confuse events in neighbouring African countries. Investors may also use a country's past performance to judge it, thereby ignoring recent reforms and making them difficult to sustain in the face of political opposition.

6. The Nigerian Government should work on creating an enabling institutional environment. Strengthening the institutional environment may involve the privatisation of state-owned entities. Oftentimes, the privatisation of state entities creates room for competition, accountability, and better efficiency. This increased efficiency will work to enhance capacity and credibility to the business of the Government and thus attract foreign direct investments in the Oil and Gas Sector. Of particular applause here is the move of the Nigerian Government incorporating the State Oil Company, the Nigeria National Petroleum Company, as a Limited Liability Company. To further prove the credibility and determination of the Government to make this institution accountable, it is important that 100% of the ownership of the company is not vested in the government.

7. Improving fiscal policies: This involves implementing targeted mechanisms and measures such as tax policy incentives and reforms. These tax policy incentives include tax holidays, investment allowances, reduced tariffs, tax credits, reduced tax rate and accelerated depreciation allowance.

8. Establishment of strong institutions: This action involves removing bureaucracy associated with registering a new business, reforming the judiciary to create a strong judiciary, entrenching the rule of law, establishing strong political institutions, putting in place anti-corruption measures, ensuring ease in assessing financial instruments, providing amenities and better exchange rate management in other to resolve current impediments to investment, especially foreign direct investments. As stated by Professor Dr. Christian Nwachukwu Okeke in his paper, "The Second Scramble for Africa's Oil and Mineral Resources: Blessing or Curse", in preparation for the coming of international investors into Africa, it is important for African countries to reform the judiciary and make it more assessable to individuals and groups seeking to enforce fundamental rights. In this case, he recommended the creation of commercial courts, to decongest the regular courts and ensure that cases against oil companies are expedited.

9. Policies should be designed to ensure or encourage technical skill transfer in bilateral and internationally – driven productive undertakings, to enable human capital development through skill acquisition in relevant processes. Education at University level should focus on both the theoretical as well as the practical part of the industry.

10. Local communities should be enabled and empowered in climate change mitigation, resilience, and adaptation, consistent with the global pressure and clamour on countries to pursue energy transition, reducing reliance on non-renewable sources of energy while exploring renewable sources of energy.

11. Proper consideration of Socio-economic circumstances: In striving to advance her economy and attract foreign direct investments into her oil and gas sector, Nigeria must take into consideration her special socio-economic conditions. Some of the economic policies that were introduced into the country were modelled according to that of the Europeans without taking into consideration their special social and economic conditions in Nigeria. This in turn translated to failure while implementing these policies. Thus, the Nigerian Government must avoid blindly replicating policies that have worked in other countries in Nigeria and ensure that policies introduced are tailored to fit the circumstances in Nigeria.

12. I would like to conclude by underpinning once more the importance and immediacy albeit urgency of the government of Nigerian streamlining approval processes. Yes, giant strides have already been made since the passing and assent of PIA, but there is still room left for improvement in making approval processes less convoluted for foreign investors. A situation where all agencies/departments of the FGN, could be sourced through one office/portal would greatly enhance ease of operation of business in the oil and gas sector. This would vicariously engender the much-debated demand/need for transparency in all dealings in the oil and gas sector.

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