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## Legal Aspects of Foreign Investments and Financing of Energy Products in Nigeria

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# Articles

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Niki Tobi\*

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## I. Introduction

Nigeria is a Federation<sup>1</sup> consisting of twenty-one States,<sup>2</sup> and a Federal Capital Territory.<sup>3</sup> It is the largest African Country with probably the largest concentration of foreign investment potentialities with a viable and adequate financing. In the true tenet of Federalism, the 1979 Constitution provided for a distinction in the legislative powers between the central Government and the State Governments.<sup>4</sup> The Constitution of the Federal Republic of Nigeria 1989 has also maintained this federal arrangement.<sup>5</sup> Although that is the constitutional position, the Military Government has, as a matter of policy, built into the system some element of unitarism in a federal disguise. While the Military Government in essential legal details maintain the federal content in the system,<sup>6</sup> there are known areas of federal presence in the States in the

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1. The Country attained Independence in October, 1960 and became a Republic in October, 1963. The first Military Government came into power on 15th January, 1966 by a revolution. See the preamble to the Federal Military Government (Supremacy and Enforcement of Powers) Decree, No. 28 of 1970. There has been successive Governments, both civilian and Military since then, culminating in the present Military Government under the leadership of General Ibrahim Babangida. He came into power on 27th August, 1985, take over from Major-General Mohammed Buhari.

2. The 1979 constitution in its S. 3 had created 19 States: Anambra, Bauchi, Bendel, Benue, Borno, Cross River, Gongola, Imo, Kaduna, Kano, Kwara, Lagos, Niger, Ogun, Ondo, Oyo, Plateau, Rivers and Sokoto. Two more new States were however created in 1987 by the General Ibrahim Babangida regime thus bringing the total number of States to twenty-one. The new States are Akwa Ibon and Katsina. See S. 3 of the 1989 Constitution which will come into force on 1st October, 1992.

3. The Federal Capital Territory is at Abuja. For the legal status of the Federal Capital Territory see SS. 261 to 264 of the 1979 Constitution. See also SS. 311 to 313 of the 1989 Constitution.

4. See S. 4 of the 1979 Constitution and the Second Schedule to the Constitution which provides for the Exclusive Legislative and the Concurrent Legislative Lists.

5. See S. 4 of the Constitution, *ibid*.

6. See the Constitution (Suspension and Modification) (Amendment) Decree No. 17 of 1985 which made material amendments to the constitution (Suspension and Modification) Decree, No. 1 of 1984. The Decree maintained the legislative dichotomy between the Federal Government and the State Governments. Thus, while the Federal Government legislate by the promulgation of Decrees, the State Governments do so by the promulgation of Edicts.

interest of the governance of the peoples<sup>7</sup> and the economic viability of the States.<sup>8</sup>

The highest policy making body of the Federal Military Government is the Armed Forces Ruling Council, a body created by the present Military Government headed by General Ibrahim Babangida.<sup>9</sup> The body which is essentially made up of top military personnel,<sup>10</sup> is the highest body charged with law making.<sup>11</sup> The body succeeded the Supreme Military Council.<sup>12</sup> All laws relating to foreign investments and financing of energy products are promulgated by the Armed Forces Ruling Council. Since the energy products are located in the different component States, the National Council of State, again comprising essentially of military personnel,<sup>13</sup> participate in the law making process by deliberating on Decrees relating to energy products.

The ownership of energy products in Nigeria is vested in the Federal Government. This is consistent with practice in most third world Countries<sup>14</sup> and to some extent beyond.<sup>15</sup> Apart from the statutory provisions,<sup>16</sup> the 1979 Constitution clearly provides for the state ownership of energy products with particular reference to minerals, mineral oils and natural gas. Section 40(3) of the Constitution provides in part:

Notwithstanding the foregoing provisions of this section,<sup>17</sup> the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial water<sup>18</sup> and the Exclusive Economic Zone<sup>19</sup> of Nigeria shall vest in the Government of the Federation. . . ."

While it is not the intention of this paper to deal with the ever vibrant debate on state ownership of energy products, this much could be said

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7. By S. 2 of Decree No. 1 of 1984, the Federal Military Government has power to make laws for the peace, order and good Government of Nigeria or *any thereof with respect to any matter whatsoever*.

8. See for example the National Economic Emergency Powers Decree No. 22 of 1985.

9. See the Constitution (Suspension and Modification) (Amendment) Decree No. 17 of 1985.

10. See S. 4 of Decree No. 17 of 1985 for the composition of the body.

11. See S. 2(6) of Decree No. 17 of 1985.

12. See S. 2(3) of Decree No. 17 of 1985.

13. See S. 4 of Decree No. 17 of 1985.

14. See for example, Algeria — Statute No. 58 — III of November 22, 1958, Articles 1 and 18; Gabon — Law No. 64-LF-3 of 6 April, 1964, Article 4(1); Egypt — Law No. 66 of 1953 on Mines and Quarries; Libya—Law No. 25 of 1955, the Petroleum Law, 1955, Article 1(2).

15. Cf. the position in the United States and Canada where the ownership of energy products co-exist between the Federal Government and the State or Provincial Governments.

16. See for example s. 1 of the Petroleum Act, 1969.

17. The section deals with the Power of the State to compulsorily acquire property.

18. See the *Territorial Waters Act*, 1967 as amended.

19. See the *Exclusive Economic Zone Act*, 1978.

that the Nigerian position reflects the position in international law as it relates to state sovereignty<sup>20</sup> in the management and control of its resources within its geographical space.

Foreign investment and the financing of energy products<sup>21</sup> is a federal subject. The advantage of this, coupled with the State ownership of energy products is that a foreign investor will be exposed to a single system of laws and a single body in the context of the Federal Government. Although investment laws proliferate even at the federal level, a foreign investor will not be exposed to an agglomeration of state laws in this area; an aspect which in itself will facilitate investment efforts in no little way.<sup>22</sup>

Investment agreements on energy products in the early years with particular reference to the oil industry were in three categories: Oil Exploration Licence (OEL), Oil Prospecting Licence (OPL) and Oil Mining Licence (OML).<sup>23</sup> The said aspect of these agreements, which featured prominently in the early sixties immediately after Nigeria's independence, were their parochial and lopsided contents. The terms of the different agreements were not only laconic but neat *window dressing* if not *window dressing* at all, if one may use that expression unguardedly. It was more cosmetic than real in terms of economic achievement on the part of Nigeria as a sovereign nation. The agreements were couched in the best legal phraseology of the Colonial prototype,<sup>24</sup> achieving economic benefit to the industries than to Nigeria the owner of the products. This was reminiscent of the investment policy of the Colonial Government which was understandably British oriented. The basic aim was to promote more of the economic well being of British investment than Nigeria. Nigeria provided a ready market for the products of the British industries. As a matter of fact, the Nigerian economy basically knew no other market than that of Britain. Gustafson admirably explained the prevailing position:

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20. See Article of the United Nations Charter. Collado in his book titled *Foreign Affairs* (1963) rightly said; "In the majority of developing Countries, the adoption of a framework of laws and regulations conducive to the full use by their citizens of productive resources that already exist would probably make a great contribution towards their development than is now provided by all external assistance from both public and private sources".

21. See for example, items 12, 37 and 40 in the Exclusive Legislative List.

22. See Tobi, N., "Legal Aspects of Foreign Investment in Nigeria" (1978), Vol. XVIII *The Indian Journal of International Law*, 18.

23. See Omotola, J.A., and Adeogun, A.A., (ed) *Law and Development*, Lagos University Press (1987) P. 87.

24. Nigeria had just moved out of the clutches of British Colonialism. The wounds were still fresh.

"As a result of the nature of the colonial relationship, Nigeria was developed to a considerable extent as a branch of the parent economy. The entire colonial purpose centered on trade considerations. The Colony was a source of raw materials and a market for finished goods. All the economic and financial institutions created to serve this system were oriented around external trade, and assets not required in Nigeria for this purpose were exported."<sup>25</sup>

The above position was not normal. It was a relic of Colonialism. Nigerians therefore reacted; reaction which resulted in a change of investment policy. Instead of restricting foreign investment to the British market, Nigeria adopted a more generous and open foreign investment policy.<sup>26</sup> Government assured all willing foreign investors irrespective of their countries of origin, and irrespective of their political, economic, social and cultural backgrounds to invest freely in the Nigerian economy. This investment guarantee which started in the early sixties still persist with greater articulation and force. Though Governments change, this basic investment policy does not change.

While the investment guarantees are more in the premise of politics than law, as they are not enforceable in a court of law,<sup>27</sup> Government entered into specific bilateral investment agreements with some other Countries.<sup>28</sup>

## II. *Incorporation of Investment Companies*

A foreign investor desirous of doing business in a corporate name must ensure that the Company is registered in accordance with the provisions of the *Companies Act* of 1968.<sup>29</sup> Apart from a few innovations,<sup>30</sup> the Act

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25. Gustaton, "The Monetary and Fiscal Background of Nigeria's Six-Year Development Plan," in Faver (ed.) *Financing African Development*, p. 72.

26. Immediately before the attainment of independence, Government Policy on investment opportunities were made known to foreign investors. The initial policy was in these words: "The Government of Nigeria will, for many years to come, need overseas capital and management and technological skills if her resources are to be developed to the extent to which the Government and the people of Nigeria desire. It realises that overseas investors will be reluctant to lend their capital unless they can be assured that such investment and skilled overseas personnel which may be necessary to make it successful, will be welcome." See *National Economic Council, Economic Survey of Nigeria*, Lagos (1959) p. 119.

27. See Nwogugu, E.I., *The Legal Problems of Foreign Investments in Developing Countries*, Manchester and Dobbs Ferry (1965) 61. See also Fatouros, *Government Guarantees to Foreign Investors*, New York (1962).

28. See for example the Bilateral Agreement between Nigeria and the United States. Exchange of Notes on August 28 and December 24, 1962. See USTOIA XIII (1960), TIAS No. 5237. See Further Mummery, *The Protection of International Private Insurance, Nigeria and the World Community* (1968).

29. No. 51 of 1968.

30. See for example Part X of the Act.

closely follows the *English Companies Act* of 1948. It should be mentioned here that the Act is undergoing a major amendment process and it is hoped that a new law will be promulgated before the present Military Government of General Ibrahim Babangida hands over power to a civilian Government in 1992.

A company incorporated under the *Companies Act*, 1968, like most others in other countries, could be either a public or a private company. A public company is an association of any seven or more persons for the carrying on of a lawful business.<sup>31</sup> It is the largest trading concern and the shareholders are generally members of the public. The shares of a public company, unlike those of a private company are freely transferable. A private company, on the other hand, is a company which by its articles of association restricts the right to transfer its shares, limits the number of members to fifty and prohibits any invitation to the public to subscribe for any shares or debentures of the company. Unlike the statutory limitation of seven persons to form a public Company, two persons can validly form a private company.<sup>32</sup>

A company incorporated under the 1968 Act could also be a company limited by shares,<sup>33</sup> guarantee,<sup>34</sup> or an unlimited company.<sup>35</sup> A foreign investor can register any of the following companies under the Act for purposes of carrying on investment business: Public Companies Limited by Shares, Private Companies Limited by shares, Public Companies Limited by guarantee, Private Companies Limited by guarantee, Public unlimited Companies and finally Private Unlimited Companies. The point should be made that foreign investors in the field of energy products normally incorporate public companies in view of the public nature and the enormity of the business.

Before a company is incorporated in Nigeria, certain statutory requirements must be fulfilled. As a matter of law, the proposed company must file certain documents with the Registrar of Companies. The major ones include Memorandum of Association, Articles of Association, a Statement of Nominal Capital and notice of situation of the registered office of the company. Where a public company is being formed and persons have been appointed directors by the articles or named as directors by the prospectus or statement in lieu of the prospectus, such subscriber or his agent must also indicate his consent to be director in writing.

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31. See S. 1 of the Act.

32. See S. 1(1), *ibid.*

33. S. 2, *ibid.*

34. S. 3, *ibid.*

35. S. 4, *ibid.*

Where he has not signed the memorandum of association for his qualification shares or paid or agreed to pay for such shares, the director must file an undertaking in writing to take from the company and pay for his qualification shares or a statutory declaration to the effect that a number of shares not less than his qualification shares are registered in his name. The proposed company must, as a matter of law, file a list of persons who have consented to be directors of the Company.<sup>36</sup> There must also be a statutory declaration of compliance with the requirements of the *Companies Act*.

### III. Taxation

It is in the interest of a foreign investor to be very familiar with the taxation laws of its investing Country. This is because taxation plays a major role in the economy of the foreign investor in terms of gain and keeping afloat in business. Company taxation is basically governed by the *Companies Income Tax Act*, 1979,<sup>37</sup> the *Petroleum Profits Tax Act*, 1959<sup>38</sup> as amended<sup>39</sup> and the *Capital Gains Act*, 1967.<sup>40</sup> Company taxation falls into three broad categories: Income tax, Petroleum tax and Capital gains tax.

#### 1. Income Tax

Income tax, as the name implies, is a tax on income of the Company but the term is not defined in the *Companies Income Tax Act*. The Act merely defines the sources of income. The Act provides that a company shall pay income tax on profits in respect of any trade or business carried on for whatever period accruing, derived from, brought into or received in Nigeria.<sup>41</sup> This provision implies that profits arising from goods imported into Nigeria or exported out of Nigeria are taxable.<sup>42</sup> The Act also provides that dividends, interests, discounts, charges, annuities accruing in, derived from, brought into or received in Nigeria are assessable to income tax.<sup>43</sup>

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36. S. 172, *ibid*.

37. No. 28 of 1979. This Act is popularly referred to as the C.I.T.A.

38. No. 15 of 1959.

39. See *Petroleum Profits Tax (Amendment) Act*, No. 1 of 1967; *Petroleum Profits Tax (Amendment) Act*, No. 22 of 1970; *Petroleum Profits Tax (Amendment) Act*, No. 15 of 1973; *Petroleum Profits (Amendment) Act*, No. 55 of 1977; *Petroleum Profits (Amendment) Act* No. 4 of 1979; *Petroleum Profits (Amendment) (No. 2) Act*, No. 24 of 1979 and *Petroleum Profits Tax (Amendment) (No. 3) Act*, No. 65 of 1979.

40. No. 44 of 1967.

41. S. 8(1) of the *Companies Income Tax Act*.

42. See generally *Commissioner of Taxes N.S.W.v. Kirk*, [1901] A.C. 588; *Commissioner of Taxes N.S.D.v. Hallsdon Watts Ltd.* (1937), 57 C.L.R.36.

43. S. 8(1)(c) of the *Companies Tax Act*.

It would appear that where the source of obligation arises outside Nigeria, the Federal Board of Inland Revenue<sup>44</sup> will have no jurisdiction to tax on such income. Thus in the Nigerian case of *Aluminium Industries Aktein Gesellschaft v. Federal Board of Inland Revenue*,<sup>45</sup> where the Aluminium Company was assessed on interest of a loan raised in Zurich in Switzerland, the Supreme Court of Nigeria held that such interest was not assessable to tax in Nigeria as the source of obligation was an agreement which was entered outside Nigeria.<sup>46</sup>

## 2. *Petroleum Profits Tax*

Petroleum profits tax is chargeable on petroleum companies in the Country under the provisions of the *Petroleum Profits Tax Act*, 1959, as amended. Section 24 (1) of the Act requires any company engaged in petroleum operations to maintain accounts of its profits and losses arising from these operations covering each accounting period.<sup>47</sup> The accounts so prepared must indicate the following particulars: (a) residues at the end of that period in respect of its assets, (b) all qualifying petroleum expenditure incurred by it in that period, (c) the values of any of its assets<sup>48</sup> disposed of in that period, and (d) the allowances due to it under the Second Schedule for that period.

The Company is expected to prepare accounts showing a computation of its estimated chargeable profits of that period and a statement of all royalties and other sums deductible under section 17, the liabilities of which are incurred during that period. The Company is under a statutory duty to forward to the Board a duly signed copy of its accounts within five months after the expiration of the accounting period.

## 3. *Capital Gains Tax*

Capital Gains tax is distinguishable from mere capital receipts without any realisation of gains or profits. While capital receipts in this context is an accretion to capital which involves a mere realisation of capital assets without a trading motive, and therefore not taxable,<sup>49</sup> capital gains are, in the words of section 1 of the *Capital Gains Tax Act* of 1967 "gains

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44. This is the Taxing Authority.

45. Suit No. SC 64/1790 delivered on 15/1/73.

46. Cf. Section 11(2) of the Act which provides that the profits of a company other than a Nigerian Company from any trade or business shall be deemed to be derived from Nigeria to the extent to which such profits are not attributable to any part of the operations of the company carried on outside Nigeria.

47. See the definition of accounting period in S. 2 of the Act.

48. Estimated by reference to the provisions of the second schedule.

49. See Tobin, N., 'Legal Aspects of Foreign Investment in Nigeria' (1978), XVIII *The Indian Journal of International Law* No. 1, at page 25.



accruing to any person on a disposal of assets". Although the word "gain" is nowhere defined in the Act, it is submitted that it includes profits of a Company upon a realisation of a capital asset. Every such gain, except so far as otherwise expressly provided in the Act, is a chargeable gain.

It will be further noted that such gains, accruing to a company cannot be designated as income receipts and therefore not chargeable to income tax. It is however, a matter which the court has to determine. In determining whether assets realised by a company is in the nature of a capital gain or income the court must, in the words of Knox, C.J. consider "the nature of the company, the character of its assets, the nature of the business carried on by it and the particular sale or realisation."<sup>50</sup> In arriving at the decision, the court will not merely look at the articles of association. It is a hard matter of law to be considered strictly on the facts of each given case.

Chargeable assets include options, debts and incorporeal property generally and currency other than Nigerian currency or any form of property created by the Company disposing of it or otherwise, coming to be owned without being acquired whether such property is situated in Nigeria or not.<sup>51</sup>

## V. *Foreign Exchange Control*

It is recognised under customary international law that a State has the right to control its currency within its municipal domain. This is a concomitant attribute to sovereignty.<sup>52</sup> In pursuance of the rule of customary international law, the Nigerian Government has enacted some Exchange Control Legislation. The two major pieces of legislation are the *Exchange Control Act*, 1962<sup>53</sup> and the *Exchange Control (Anti-Sabotage) Decree*, 1984.<sup>54</sup> While the 1962 Act could be described as a parent Act, the 1984 Decree provides essentially for enforcement measures in case of breach of the provisions of the parent Act. The Decree enumerates in Section 1 thereof acts which are inimical to the exchange control regulations of the Country, while section 2 provides for different types of penalties in the event of breach of the regulations. The Decree provides for the trial of offenders by specially constituted Tribunals, the chairman of which must be Judge of the High Court.

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50. See *Ruhambh Property Company Ltd. v. F.C.T.* (1928), C.L.R. 148.

51. S. 3 of Capital Gains Tax Act, 1967.

52. See Nwogugu, E.I., *The Legal Problems of Foreign Investments in Developing Countries*, Manchester University Press (1965), P. 18; Mann, *The Legal Aspects of Money*, 2nd edition, (1953), p. 419; Idem 26 *BYBIL* (1949), p. 259.

53. No. 16 of 1962.

54. No. 9 of 1984.

While the trial procedure and the penalties may appear stiff on their face value, it does not appear that the Government has any alternative in the matter, in view of the rampant commission of offences under the exchange control laws, and the devastating effect this has on the economy of the Country. A foreign investor who operates in accordance with the *Exchange Control Act* of 1962 will never be exposed to the operation of the *Exchange Control (Anti-Sabotage) Decree* of 1984.

#### IV. *The Energy Commission*

The *Energy Commission of Nigeria Act*, 1979<sup>55</sup> as amended,<sup>56</sup> establishes the Energy Commission of Nigeria.<sup>57</sup> Section 4 of the parent Act provides for the following functions of the Commission:

- (a) Serve as a centre for gathering and dissemination of information relating to national policy in the field of energy development.
- (b) Serve as a centre for solving any inter-related technical problems that may rise in the implementation of any policy relating to the field of energy.
- (c) Advise the Government of the Federation or a State on questions relating to such aspects of energy as the Government of the Federation or a State may from time to time refer to it.
- (d) Prepare, after consultation with such agencies of Government whose functions relate to the field of energy development or supply as the Commission considers appropriate, periodic master plans for the balanced and co-ordinated development of energy in Nigeria and such plans shall include
  - (i) recommendations for the exploitation of new sources of energy as and when considered necessary, and
  - (ii) such other recommendations to the Government of the Federation relating to its functions under the Act as the Commission may consider to be in the national interest.
- (e) Lay down guidelines on the utilization of energy types for specific purposes and in a prescribed sequence.
- (f) Inquire into and advise the Government of the Federation or of a State on the financial needs of energy research and to ensure that adequate provision is made for this in relevant energy departments of the Commission.<sup>58</sup>

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55. No. 62 of 1979.

56. See the Energy Commission of Nigeria (Amendment) Decree of C No. 32 of 1988.

57. See S. 1 of Act No. 62 of 1979.

58. S. 1 2(a) of the Act provides for the energy departments. They include the Fossil Fuel Department, the Nuclear Energy Department and the Solar Energy Department.

(g) Advise the Government of the Federation or of a State as to grants and other financial disbursements to authorities charged with production and distribution of energy and other similar institutions in Nigeria.

(h) Collate, analyse and publish information relating to the field of energy from all sources, where such information is relevant to the discharge of its functions under the Act.

The funds of the Commission consist of such sums, as may from time to time be provided by the Federal and State Governments. The Commission is under a statutory duty to keep proper accounts of its financial activities annually.<sup>59</sup>

## VI. *Participation and Financing*

Although Nigeria has a number of energy products,<sup>60</sup> the most versatile is in terms of economic potentiality and economic power to investors is petroleum. This paper will therefore concentrate on this, in view of the space factor.

### 1. *The United Nations Policy*

Since Nigeria is a member of the United Nations,<sup>61</sup> it will be convenient to predicate the discussion with the United Nations Policy on the ownership of natural resources. One basic problem in the international Community in the early sixties was the global concept of investor-ownership of natural resources. This concept which even dates back to the fifties, acquired a much more vocal dimension in the world economic order in the sixties, to the extent that it gave some understandable concern to the United Nations. It was a very formidable paradox which had its foundations and proppis in colonialism.

The United Nations did not like the deal or package in favour of the investor. And so in 1962, the General Assembly acted, and promptly too. The basic law, governing Naturalisation and expropriation in the international scene is the General Assembly Resolution on "Permanent Sovereignty over Natural Resources." Paragraph 1 of the Resolution provides as follows:

"The rights of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their natural development and of the well-being of the people of the State concerned."<sup>62</sup>

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59. S. 7, *ibid*.

60. Mines, Coal, steel and petroleum.

61. Nigeria became the 99th member of the World body on attainment of independence on 1st of October, 1960.

62. G.A. Res. 1803 (XVII), Dec. 14, 1962. See also G.A. Res. 1314 (XIII), Dec. 12, 1958.

This right duly entrenched is qualified by paragraph 8 to the effect that “foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith.”<sup>63</sup>

That is how it should be. The United Nations approach to the matter is sound. It should not, or better still, it cannot be otherwise. It is brutish and out of the natural course of humanity for an investor to take over the natural resources, and the natural wealth of a people merely because of an investment relationship. There is no situation of a war and so the concomitant or by products of the spoils of war principle cannot apply here. One can say on the lighter side that the greatest discoverers of historical fame like Vasco Dagama, Christopher Columbus and Mungo Park, did not even lay permanent claim to their hard ‘earned’ discoveries. They were only satisfied with their prolific prowess and no more. The occupational and environmental hazards suffered by the people of the immediate environment because of natural or human action or reaction to the natural resources could at times be very telling and devastating. And they develop to a point not only of economic crunch but also results in debilitating health and subsequent death in some cases. In the circumstances, it is submitted that the initial policy of “investor take all”, if one may so unguardedly designate it, was most callous and inhuman. The United Nations action was therefore in the right direction.

## 2. *The Initial Nigerian Policy*

In 1969, the Military Government under Retired General Yakubu Gowon, promulgated the *Petroleum Decree*<sup>64</sup> which provided for the participation by the State in the petroleum industry. This was provided for under Schedule 1 to the Act. The Minister for Mines and Power may:

“Whenever he considers it to be in the public interest impose on licence or lease special terms and conditions not inconsistent with the Act as to participation by the Federal Government in the venture to which the licence or lease relates in terms to be negotiated between the Minister and the applicant for the licence or lease.”

The above policy envisaged new agreements whereby the Government and the company agreed upon the establishment of a joint venture or partnership. It did not apply to participation in the existing concessions at the time.

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On the resolution, see O’Keefe, “United Nations and Permanent Sovereignty Over Natural Resources” (1974), 48 J.W.T.L. 239; Schwebel, “The Store of United Nation’s Declaration on Permanent Sovereignty Over Natural Resources” (1963), 49 A.B.A.J. 463; Umzunke, “Naturalisation of Foreign Property and Economic Self-Determination” (1972), J.A.L. 79.

63. Paragraph 4 of the Resolution deals with the issue of compensation arising from naturalization and expropriation of property.

64. Now Act.

Nigeria's policy of participating in the oil industry in 1969 was merely consistent with its long term plan to own and control the oil and gas industry. The rationale for the policy was stated in 1970 in the second National Development Plan:

"The Government seeks to obtain enough of the Nigerian economy to maintain long-term stability to use industry's capital resources for stimulating development of related enterprises, to integrate the oil industry more fully into the economy, thereby providing more employment opportunities of a management and technical character for qualified Nigerians and furthering the development of local scientific and technological skills relevant to the Nigerian industrial economic objectives set out in the second National Development Plan."<sup>65</sup>

In 1970, Government announced that it would participate in three branches of the petroleum industry, and these were exploration and mining, refining and distribution, and marketing. The reason for the decision was; "the strategic role oil is going to play in the nation's economy."<sup>66</sup> Following this policy, Government entered into participation agreements with certain Oil companies.<sup>67</sup> And by the agreements, the Nigerian Government and the Oil Companies jointly financed the projects.

By the joint venture agreements, Government entered into joint participation with the oil companies holding an Oil Prospecting Licence (OPL) or Oil Mining Lease (OML) "with a view to developing and producing jointly petroleum in the area subject to the agreement in accordance with the laws and regulations of the Lost State"<sup>68</sup> Ajomo said:

"Such agreement normally provides in detailed form the mode for sharing of costs and expenditure incurred in carrying out all operations under the joint venture. It also stipulates the respective rights of the parties to the assets created in connection with the operation in the area earmarked, including the right to ownership at wellhead of each party's share of petroleum produced and also the right to disposal."<sup>69</sup>

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65. *Ministry of Mines and Power* (1974). See also OPEC's Resolution of January 25, 1968.

66. Nigeria: *Second National Development Plan 1970-1974*, Federal Minister of Information, Lagos (1970) pp. 133-134.

67. For example, the Participation Agreement between the Federal Military Government and the Shell-BP Nigeria Petroleum Ltd. was dated 16th February, 1974 and the Nigeria/Agip Participation Agreement was signed earlier in 1971.

68. See Ajomo, "Law and Changing Policy in Nigeria's Oil Industry" in Omòtola and Adeogun (ed.) *Law and Development* Lagos University Press (1987) at page 97.

69. Ajomo, *op. cit.*, It will be noted that under the agreement between the Federal Government and a consortium of Shell-BP, the Federal Government took 60% participating interest, Shell-BP took 20% and the British Petroleum (BP) also took 20% in the Port Harcourt Refinery.

### 3. *The Present Position*

The present position is as contained in the *Privatisation and Commercialisation Decree, 1988*,<sup>70</sup> as amended.<sup>71</sup> The present Military Regime under the leadership of General Ibrahim Babangida, in a genuine desire to make the people more involved in participating in the economy with a view to improving the lot of the people, the *Privatisation and Commercialisation Decree*, was promulgated in 1988. The Decree, as the name implies, deals with two specific areas, viz: privatisation and commercialisation of Government Enterprises.

By section 14 of the Decree commercialisation means “the reorganisation of enterprises wholly or partly owned by the Federal Military Government in which such commercialised enterprises shall operate as profit-making commercial ventures and without subventions from the Federal Military Government”.

On the other hand, the same section defines privatisation as “the relinquishment of part or all of the equity and other interests held by the Federal Military Government or its agency in enterprises whether wholly or partly owned by the Federal Military Government.”

Under the Decree, the following Oil Marketing Companies are partially privatised: Unipetrol, National Oil and Chemical Company Limited and African Petroleum Limited. In all these companies, out of the earlier Federal Government Holding of 100%, the Government will now not hold more than 40%.<sup>72</sup> While the National Electric Power Authority and the two steel companies<sup>73</sup> are partially commercialised,<sup>74</sup> the Nigerian National Petroleum Corporation, Associated Orea Mining Company Limited, Nigerian Mining Corporation and Nigerian Coal Corporation are fully commercialised.<sup>75</sup> The processes for implementation are in full gear. Nigerian Companies and Nigerians are busy buying shares. They are happy, and so the Government is succeeding.

### VII. *Investment Incentives*

In order to facilitate foreign investment, the Government of Nigeria has deliberately worked into the economic system some investment incentives. We will briefly take the major incentives here.

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70. No. 25 of 1988.

71. See *Privatisation and Commercialisation (Amendment) Decree*, No. 33 of 1988.

72. See Schedule 1, *ibid*.

73. Ajoakuta and Delta Steel Companies.

74. See Schedule 2, Part 1, *ibid*.

75. See Schedule 2, Part II, *ibid*.

### 1. *Pioneer Companies*

The National Council of Ministers is empowered under the *Industrial Development (Income Tax Relief) Act, 1971*<sup>76</sup> as amended<sup>77</sup> to declare certain industries as pioneer industries as well as any products of such industries. A pioneer certificate is issued on the authorisation of the National Council of Ministers upon receipt of an application from the Company seeking exemption.<sup>78</sup> It is not all companies that qualify as pioneer companies. The enabling law provides for a ceiling in terms of estimated cost of qualifying capital expenditure to be incurred by the company on or before production day.<sup>79</sup> The National Council of Ministers has the discretion to declare a company of pioneer company.

A pioneer company so declared or so designated will enjoy a tax relief period which will commence on the date of the production day of the company and subject to the provisions of the Act will continue for three years.<sup>80</sup> The National Council of Ministers reserves the right to extend the tax relief period for a period of one year commencing from the end of the first period for one period of two years.<sup>81</sup>

The tax relief period cannot be extended, unless the National Council of Ministers is satisfied as to (a) the rate of expansion, standard of efficiency and the level of development of the company; (b) the implementation of any scheme for the utilization of local raw materials in the processes of the company and for the training and development of Nigerian personnel in the relevant industry; (c) the relative importance of the industry in the economy of the country; (d) the need for the extension, having regard to the location of the industry; and (e) such other relevant matters as may be required.

Section 3 of the *Pioneer Companies (Temporary Taxation Provisions) Act, 1968*,<sup>82</sup> provides that the first 10,000 naira of the profits of any pioneer company to which the Act applies will be exempted from tax or will be treated as capital allowance. Any deductions to be made or allowed as capital allowance to any such company will be 10,000 naira in lieu of any capital allowances which may be granted under the *Companies Income Tax Act*.<sup>83</sup>

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76. No. 22 of 1971.

77. See *Industrial Development (Income Tax Relief) (Amendment) No. 42 of 1971*.

78. S. 2 of Act. No. 22 of 1971.

79. S. 4, *ibid*.

80. S. 10(1), *ibid*.

81. S. 10(2), *ibid*.

82. No. 52 of 1968.

83. This applies only to pioneer companies that had assessable profits in excess of 10,000 naira for the assessable period of 1968/69 tax year.

## 2. *Tax Relief Under CITA*

The *Companies Income Tax Act* of 1979 provides that every Nigerian Company shall be entitled to relief from tax in the manner provided for in the Act.<sup>84</sup> Relief from tax shall be given at the rate equal to the full rate of tax upon the first 6,000 naira of the total profits of such a Company.<sup>85</sup> No relief shall be granted to any company formed to acquire the whole or any part of trade or business previously carried on by another company.<sup>86</sup>

## 3. *The National Economic Emergency Powers Decree, 1985.*

Following the global recession, which obviously affected Nigeria, as a country in the world economy, the present Military Government took very bold, dynamic and pragmatic steps aimed at cushioning or ameliorating the tormenting effects of the economy on the people. One of the measures was the promulgation of the *National Economic Emergency Powers Decree, 1985*.<sup>87</sup> The Decree did not only provide for the domestic economy but went beyond sovereign Nigeria to the international community. And so the Decree vests in the President, Commander-in-Chief of the Armed Forces, powers to make regulations to revamp the economy of Nigeria which includes “the introduction of such measures that may provide incentives to local and foreign investors”.<sup>88</sup>

The Federal Military Government is taking very positive steps towards the implementation of the *National Economic Emergency Powers Decree* of 1985 and its like.<sup>89</sup>

## 4. *Import Duties Relief*

In addition to the foregoing, there exists viable governmental machineries for giving reliefs to importers in the economy. The different transient customs tariffs testify to this.

## 5. *An Assessment*

Commenting on the different investment incentives of the Nigerian Government, Mumery said:

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84. S. 29(1), *ibid*.

85. S. 29(2), *ibid*. See also the *proviso*

86. S. 29(3), *ibid*.

87. No. 22 of 1985.

88. S. 1 (h) of Decree No. 22 of 1985. See also *National Economic Powers (Amendment) Decree No. 25 of 1986, National Economic Emergency (Extension etc.) Decree No. 35 of 1986*.

89. See also *Industrial Development Co-ordination Decree, No. 36 of 1988*.

90. *The Protection of International Private Investment: Nigeria and the World Community* (1968) at page 4.



"Industrial development has been and is a major objective of Nigerian government policy. Entrepreneurs receive incentives such as tax and import duty relief. Attracted by such incentives and the opportunities of the large Nigerian market, to flow of foreign private investment in the first four years of independence reached nearly 7 million naira a month."<sup>90</sup>

The *Industrial Development (Income Tax Relief) Act*, 1971 repealed the *Industrial Development (Income Tax) Act*, 1958. Examining private investment in Nigeria, Charles Olmstead described the 1958 Act as "one of the greatest attractions Nigeria has for the businessman, particularly for the foreign businessman".<sup>91</sup>

It has taken some years since the above positive assessment of the incentive measures of the Nigerian Government were made and there has been progress not only in the area of legislation, but also in the area of implementation. There is no doubt that more facilities for the promotion of investment incentives exist in Nigeria today, and this is the truth.

### VIII. *Settlement of Investment Disputes*

Nigeria adopts a very flexible policy on the settlement of investment duties. It can enter into bilateral agreement with other States in which arbitration clause(s) is inserted. If this procedure is followed, then the dispute arising therefrom can only be settled in accordance with the provisions of the agreement or treaty. For instance, the investment guarantee agreement between Nigeria and the United States contains a clause in which disputes are referred to arbitrial tribunal for settlement.

Apart from agreements of the United States type, Nigeria is a party to international conventions on the settlement of investment disputes. One of such conventions is that on the Settlement of Investment Disputes between States and nationals of other States which was concluded in 1965. The Convention, which was designed to settle disputes between States under the auspices of the World Bank, entered into force after two States had ratified it. Nigeria, whose Minister of Finance had "whole heartedly" supported the convention at the drafting stage<sup>92</sup> was the first state to ratify.<sup>93</sup>

The 1965 Convention established an international organisation called the International Centre for Settlement of Investment Disputes (ICSID). Although the Centre is structurally linked to the World Bank, it has a

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91. 'Private Investment in Nigeria' in Warren Hausmen (ed) *Managing Economic Development in Africa*, Cambridge (1963) at pages 89-94.

92. See (IMF, IBRD, IFC and IDA Boards of Governors 'Press Release' Annual Meetings 1964) No. 49 (Tokyo 1964) page 4 (Statement of Chief Hon F.S. Okotie — Eboh).

93. The Convention was signed in July, 1965 and ratified on August 23, 1965.

separate juridical personality. The ICSID maintains not only a secretariat but also a Panel of Conciliators and Panel of Arbitrators to each of which each contracting State may designate four persons;<sup>94</sup> and to which the Chairman of the Administrative Council may designate ten persons each having a different nationality.

The jurisdiction of the ICSID is defined as extending to "any legal dispute arising directly out of an investment between a contracting State and a national of another contracting State if the parties consent in writing to submit it to the ICSID".<sup>95</sup>

Nigeria is also a party to the United Nations Conference on Trade and Development (UNCTAD) in which provisions are made for the settlement in investment disputes.<sup>96</sup>

In the absence of any specific agreement governing the transaction, the practice in Nigeria is to follow the local law in the settlement of investment disputes. And as a matter of practice, Nigeria may enter into a bilateral agreement with a foreign investor in which the applicable law is the local or municipal law. For instance, Article 57 of *Nigeria's Oil Prospecting Licence (OPL) for Landing and Territorial Waters Area* — a standard contract and Article 116 of the *Refinery Agreement* between the Federal Government of Nigeria and Shell B.P. Petroleum Company of Nigeria Limited dated July 25, 1962 choose the local law as the applicable law.

There are instances when an arbitration clause does not specifically state the applicable law. Again, under such a situation, the applicable law is Nigerian Law on the subject matter. This practice is consistent with international law. It was held in *Serbian and Brazillian Loans Case and Anglo-Iranian Oil Company Case*<sup>97</sup> that an agreement between a State and a private foreign legal person is not a treaty but a contract and the applicable law of such a contract must be some system of municipal law.

It is established law that a State has the right to regulate a contract subject to its own laws. In *Kahler v. Midland Bank Limited*<sup>98</sup> an English Court recognised Czechoslovakia's competence to regulate a contract subject to its laws. In *R. v. International Trustees for the Protection of Bond holders, A.G.*,<sup>99</sup> Great Britain issued bearer bonds in New York in 1917 in pursuance of a British Act. The House of Lords found the proper law of these bonds to be New York Law.

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94. Who may but need not be nationals.

95. Art. 25(1), *ibid*.

96. See Director's Report, at page 13.

97. (1952) ICJ Reports

98. [1950] A. C. 24.

99. [1937] A. C. 500.

But where the contract is governed by a treaty, the municipal law of Nigeria would not apply. In the *Greco-Bulgarian Communities Case*,<sup>100</sup> the Permanent Court of International Justice said:

"In the first place, it is a generally accepted principle of international law that in the relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."

Similarly, if there is no specific reference to the law of the host country and if the transaction is so related to international law, the rules of international law would govern such transaction.<sup>101</sup>

### IX. Conclusion

We have examined in this paper, albeit briefly, the foreign investment package Nigeria has for foreign investors in the sensitive area of energy products. The Nigerian Government adopts an open door policy to foreign investments in the Country. And in this respect, Governments have consistently given foreign investors guarantee for their investments in the country. Before the Country attained independence Government policy on investment opportunities were made known to foreign businessmen. The initial policy was in these words:

"The Government of Nigeria recognises that Nigeria will, for many years to come, need overseas capital and managerial and technological skills if her resources are to be developed to the extent to which the Government and the people of Nigeria desire. It realises that overseas investors will be reluctant to lend their capital unless they can be assured that such investment and skilled overseas personnel which may be necessary to make it successful, will be welcome."<sup>102</sup>

And in 1960, the Government made a policy statement on the nationalization of industries. In that statement, it was made clear that the Government "have no plans for nationalizing industry beyond the extent to which public utilities are already nationalized, nor do we foresee any such proposals arising".<sup>103</sup> While the point could be conceded that the above investment guarantees are between the borderline of law, and diplomacy, it is most reassuring that the promises have not only been broken but supported by virtually all Governments. We have seen from this paper that the present Government has adopted the opposite measure to nationalization by the promulgation of the *Privatisation and Commercialisation Decree*, 1988, a very bold step that any well meaning Government with the interest of the governed in heart can take.

100. P.C. IJ. Series B. No. 17.

101. See Manu, F.A., "The Law governing State Contracts" (1944), 21 *Brit. Y.B. Int. L.*, 11.

102. See National Economic Council, *Economic Survey of Nigeria*, Lagos (1959) at page 119.

103. See *Nigeria Hand Book of Commerce and Industry*, Lagos (1960), page 230.

Despite the fairly frequent political changes in Nigeria, the investment policies of succeeding Governments remain stable. The only worrying aspect is that Nigeria, being a country in the world economic setting, must share in the abysmal global economic recession which results in discomfort to the people. The tottering global economic situation notwithstanding, the present Military Government under the leadership of General Ibrahim Babangida, is purposefully, and aggressively tackling the deplorable condition, and it is doing so in so much admirable detail to the satisfaction of the entire polity. The point should also be made that foreign investment occupies a formidable position in the agenda of the Government and everything is done to ensure that investors acquire reciprocal benefits from their investment efforts by a viable profit margin. And this is made more possible by the fact that municipal restrictive legislation on foreign participation in certain sectors of the Country's economy, does not meaningfully affect investment in energy products.<sup>104</sup>

It would be appropriate to conclude this paper by quoting David Mummery once again. He assessed the Nigerian investment laws:

"First, a foreign investment law should clearly be such as to attract investment to the host country in question. Typical incentives include income tax relief, duty exemptions and depreciation allowances. Secondly, a foreign investment law may encourage investment to be directed to one activity rather than to another, according to social priorities. Typical instrumentalities include tax exemptions, tariff protection and foreign exchange control. The Nigerian Laws examined manifest a number of these features."<sup>105</sup>

It is concluded that the investment climate existing in Nigeria is favourable enough to attract foreign investors to a Country which believe in the free flow and interaction of different economies as the basis for promoting world trade through world law and world diplomacy.<sup>106</sup>

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104. See Tobí, N., "The Nigerian Enterprises Promotion Act" (1980), 15 *Journal of World Trade Law*, 543 to 553; (1981) 2 *The University of Maiduguri Law Journal*, 65-73.

105. *Op. cit.*, at pages 248 to 249.

106. See Tobí, N., "Legal Aspects of Foreign Investment in Nigeria," in *The Yearbook of the AAA, Foreign Investments Today and Tomorrow*, Martinus Nijhoff Publishers 1977/78, at page 53.