THE LEGAL PROVISIONS RELATING TO FOREIGN INVESTMENTS IN NIGERIA WITHIN THE CONTEXTS OF NEPAD AND AGOA

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DECLARATION

I, Omughele, John Mudiaga hereby declare that the information contained in this thesis is my work and that it has not been presented in any form for any award elsewhere. Information obtained from other literary publications has been duly acknowledged.

OMUGHELE, JOHN MUDIAGA DATE ----------

CERTIFICATION

The thesis titled "The Legal Provisions Relating to Foreign Investments in Nigeria within the Contexts of NEPAD and AGOA" by OMUGHELE, JOHN MUDIAGA meets the regulations governing the award of the degree of Master of Laws (LL.M) of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is dedicated as a first and immediate memorial to the memories of Peter Omiragwa Omughele and Mary Akpotchimoraa Omughele, my parents, both of whom died in the course of my studies for the degree of Master of Laws at Ahmadu Bello University, Zaria. They gave me what they did not have, education.

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Any acknowledgement is necessarily imperfect: some persons would be unfairly, maybe inadvertently, left out and those who receive a mention may not be adequately credited for their contributions. I confess my struggle to avoid this problem as I note the contributions of others to this work.

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ABSTRACT

Any country's economic score sheet is influenced by the events within and from abroad. The reality of globalization has come to mean that the former speaks louder now than in the days past when domestic measures dictated matters. The passion being expressed by the Nigerian government for foreign investments needs to be examined in the context of the two tendencies broadly shown by a nationalistic approach in which nationalization, indigenization and control are key factors and by liberalization in which deregulation and privatization are notable. Nigeria indeed practised the first hoping to achieve growth, development and self-sufficiency that way before courting, gently at first, the second.

This study begins where the former stopped. It examines the high points of the national approach which relied so much on domestic measures and legislation, in this case exchange control and indigenization laws. It then considers the crisis stage when Nigeria was torn between the two: this is shown for instance in her not totally repealing the indigenization laws but conceding some participation without voting (control) rights to foreign investors and admitting some liberality into foreign exchange holding and administration until, finally, in 1995 when by the Nigerian Investment Promotion Commission Act, Act No. 16 of 1995 and the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Act No. 17 of 1995 the existing structures were dismantled to allow unrestrained foreign investments in Nigeria.

The place of external influences is examined in relation to certain trends, some legal, other not, which affect foreign investments. This work accepts the reality of such influences, even to the extent of testing the host countries' economic sovereignty. Questions of regional integration and co-operation in Africa are considered in terms of their potential to affect domestic measures, and it is in this sense that NEPAD is considered and related with them. AGOA, as a life – line, is also considered as offering potentials which could enhance investments particularly in the agricultural and agri-business sectors. Those being the case, laws on these sectors are examined to test their harmony with AGOA. All of these offered an opportunity to see what appear to be those areas in Nigerian law where changes are necessary in order to produce good results.

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A. C.	Law Report Appeal Cases
AGOA	African Growth and Opportunity Act
Breton Woods Institutions	Major international financial bodies, notably the International Monetary Fund and the International Bank for Reconstruction and Development
CAMA	Companies and Allied Matters Act, Act No. 1 of 1990
Ch	Law Reports Chancery Division
G. 8	Group of Eight most developed countries
ICLQ	International and Comparative Law Quarterly
JENRL	Journal of Energy and Natural Resources Law
MPJFIL	Modern Practice Journal of Finance and Investment Law
NEEDS	National Economic Empowerment and Development Strategy
NEPAD	New Partnership for Africa's Development
NEPAD Agenda	The basic document of NEPAD issued at Abuja, 2002 titled, The African Strategy for Sustainable Development in the 21st Century
NIALS	Nigerian Institute of Advanced Legal Studies
NMLR	Nigerian Monthly Law Reports
NWLR	Nigerian Weekly Law Reports
S. C.	Judgment of the Supreme Court of Nigeria
UNCITRAL	United Nations Commission on International Trade Law
WRN	Weekly Reports of Nigeria

CHAPTER 1

INTRODUCTION

1.1 Background

The challenges of growth and development have necessitated various economic experiments in Nigeria since independence. Development plans and a nationalistic indigenous approach were apparent in the first twenty–five years. Failure to meet fair and just expectations, given the potentials and resources of this country, has allowed a large room for foreign influences in the search for solutions, particularly since the mid–1980s. In both cases the prevailing economic philosophy was always reflected by the legal system as many laws were enacted which in form and content defined the regulatory principles for the relevant period.

As to foreign influences, the close of the last millennium brought about the fall of insular approaches to the management of the economies of nations and this is very significant for a developing country like Nigeria. Great advances in information technology, the opening up of Eastern Europe after the fall of communism, regionalization of economic concerns, globalization, deregulation, privatization and commercialization became realities to which nations could not be indifferent, particularly Nigeria,

which after a period of prosperity brought about by the oil boom of the 1970s was in economic decline.

Since Nigeria retuned to civil rule in 1999 the government has been campaigning world-wide to attract foreign investment to the country. A similar campaign termed “economic diplomacy” by the administration of General Ibrahim Babangida did not yield success. Africa which had largely moved from dictatorship to democratic rule at the end of the last millennium began to pay attention to the problem of colonial rule, and this concern has led to two significant developments: the metamorphosis of the Organization of Africa Unity (OAU) into the African Union (AU), and the economic initiative of some of the leaders of the continent known as the *New Partnership for Africa’s Development* (NEPAD) which they intend should “provide an impetus to Africa’s development by bridging the gap in priority sectors to enable the continent catch up with developed parts of the world”.[1] Outside Africa, the government of the United States of America under President Bill Clinton passed the *Africa Growth and Opportunity Act* (AGOA) in 2000 which offers incentives for African countries to open their economies and to have access to the American market.

There is thus an internal aspect in the use of the Nigerian legal system to attract foreign investments as is apparent in the various laws passed to

address the matter, as well as the foreign aspects under the NEPAD and AGOA initiatives all of which are intended to work together to achieve the same end.

1.2 Origin of the Research Problem

In view of the attention being paid to the question of foreign investments in Nigeria, an inquiry into the legal regime under which they are regulated becomes relevant. There is not in Nigeria a foreign investment law, properly so called, as there are particular statutes which regulate the affairs of companies, the conduct of arbitration, or the protection of trade marks, for instance. In the absence of single law or code, the question which arises is: what are the provisions which regulate foreign investments in Nigeria?

Again, NEPAD and AGOA are not Nigerian initiatives. NEPAD has its agenda, and it is the plan of its initiators that it should be a spring–board for development by African countries. By a presidential proclamation, the government of the United States has listed Nigeria as a country eligible to benefit from AGOA with effect from 2nd day of October 2002.[2] But what are NEPAD and AGOA, and what are their relevant provisions on foreign investments as far as Nigeria is concerned?

Nigeria participated in the formation of NEPAD

> The objective of the *New Partnership for Africa's Development* is to consolidate democracy and sound economic management on the continent. Through the programme, African leaders are making a commitment to the African people and the world to work together in rebuilding the continent. It is a pledge to promote peace and stability, democracy, sound economic management and people–centered development and to hold each other accountable in terms of the agreements outlined in the programme.[3]

It approaches the development of Africa by proposing political reforms, focus on good governance, infrastructural and human resources development, resources mobilization and access to markets. It relies on a new relationship with industrialized countries and multilateral organizations. It creates a common forum of economic relationship between African countries on the one hand and the industrialized world and multilateral agencies on the other. It is also a goal–setting forum among African countries. Commitment by Nigeria to NEPAD means its plans and purposes should be brought to bear on the administration of the country in the relevant aspects, including foreign investments.

AGOA accords special trade and tariff status on numerous selected exports to the United States of America from certain African countries, of which Nigeria is one. Since its objective is the promotion of international trade through market access for the eligible countries, it would necessarily have impacts on Nigeria in terms of opportunities to invest in the relevant areas and to develop resources for facilitating trade between the two countries.

This may challenge the existing economic and legal orders to adjust themselves so as to take advantage of it.

These initiatives have their own standards. For Nigeria to take advantage of them there must necessarily be an interrelationship between Nigerian laws on the foreign investments and the standards of the initiatives. The question which arises is whether the state of Nigerian law on foreign investment meet the demands of these initiatives, or whether some other response is called for by the Nigerian legal system? This is particularly apposite since the key domestic laws have been enacted before 2000, whereas the foreign initiatives came up after. The totality of these questions constitutes the problems to be examined in this study.

1.3 Evolution of Nigeria's Foreign Investment Laws

A survey of the legislative measures relating to foreign investments in Nigeria is necessary to establish the relevant legal provisions before the advent of the foreign initiatives.

1.3.1 Foreign Investment Laws between Independence and the Era of Structural Adjustment (1960 to 1982)

At independence, the policy of granting pioneer status to companies engaged in certain pursuit was in place under the Industrial Development

(Income Tax Relief) Act, 1958.[4] As amended in 1971, tax relief of three to five years was available to a foreign undertaking in Nigeria with an investment of ₦150,000 engaged in one of the industries gazetted by government as a pioneer industry subject to expansion, efficiency, training of Nigerian staff and the use of local raw materials. Ayua reviewed this law and concluded that it was partly responsible for some inflow of capital into Nigeria in the 1960s, although this view is not universal.[5]

The Immigration Act, 1963[6] controlled the employment of aliens in Nigeria in enacting the grant of expatriate quota and of residence permits to enable them reside in Nigeria. The administration of the quota and permits would affect the availability of expert foreign knowledge, though it could be exploited as a ruse to gain work for foreigners. The Exchange Control Act, 1962[7] in place in the independence era did not provide any of the drastic measures and sanctions for which subsequent exchange control laws would become notorious. "The trade and investment policy of the period focused on the promotion of direct foreign investment in most cases with direct participation by government".[8]

Akanle writes that:

> Although the post–independence economic policy of the government greatly favoured an "open–door" attitude to foreign investment, the voice of dissent to the continued foreign domination of the economy

> grew louder by the day. The emergence of military rule, aided by the outbreak of civil war, brought with it a wave of economic determinism. Towards the end of the first decade of independence, the national campaign by the intelligentsia that Nigeria should assume prominent position in the ownership, control and management of the economy started to receive the serious consideration of the government.[9]

The era that immediately followed is known as the *indigenization era* because the laws and measures of government then sought to place the economy in the hands of indigenes and to give a Nigerian character to undertakings. The Companies Act, 1968, for instance, deemed foreign companies in Nigeria to have been incorporated in Nigeria, while those outside Nigeria which had the intension of commencing business in Nigeria were required to obtain incorporation as separate entities in Nigeria.[10]

By far the most notable legal measures of this period were the Nigerian Enterprises Promotion Acts [11], known as the Indigenization Acts. Under these laws, certain scheduled enterprises were reserved exclusively for Nigerians or Nigerian companies or associations, and they required a minimum Nigerian participation ratio in others. In its 1977 form, there were enterprises in which non–Nigerians could not participate at all, those in which their participation may not exceed 60% and, finally, those in which it could not exceed 40%. This necessary meant that foreigners were obliged to dis-invest or not to invest, as the case may be, subject to those limits.

Although the promotion of Nigerian entrepreneurship was not supposed to have that effect, the Indigenization Acts had the effect of making it an antithesis of foreign investments. They stifled foreign participation, leaving wide fields for Nigerians, which there was no proof that they were able effectively to cover. There was no proof either of any serious concern with production although importation and marketing of foreign goods and fraudulent deals in foreign exchange were remarkable.[12] The reign of the Acts over two decades with each amendment making reservations on entrepreneurship based on citizenship invited the conclusion that government was averse to an open-door policy on foreign investments at this period.[13]

The measures taken to regulate the administration of foreign exchange were remarkable. The Exchange Control (Anti–Sabotage) Act, 1977 provided stiff penalties for acts subversive of the Exchange Control Act, 1962 and the Regulations issued pursuant to it. The effect of such a law was bound to be double–edged. Apart from its sanitizing aspects, a regime of strict control could not be an inducement to an investor who was concerned to repatriate earnings. The reversal of policy which would follow two decades after shows that a purist concern for the former meant a discouragement of the latter. Nonetheless, the law was emphasized subsequently by the Exchange Control (Anti–Sabotage) Act of 1984.[14]

1.3.2 Legislation under the Structural Adjustment Programme

The first significant legislative reaction to economic problems in the 1980s was the Economic Stabilization (Temporary Provisions) Act, 1982 pursuant to which measures were taken to regulate the administration of foreign exchange and import licences. These were the so–called *austerity measures.* The administration of General Ibrahim Babangida initiated measures which were meant to be alternatives to an active participation by Breton Woods Institutions, particularly the International Monetary Fund, known as the *Structural Adjustment Programme.* Some of its features included greater reliance on market forces, realistic foreign exchange policy, restructuring of tariffs, trade and payment liberalization, among others. The programme recanted the nationalistic policies of the Indigenization Era as the legal measures on which it was anchored show.

Contrary to the Exchange (Anti–Sabotage) Acts which stifled the repatriation of foreign exchange, the Foreign Currency (Domiciliary Accounts) Act, 1985[15] permitted non–Nigerians as well as Nigerians to open and operate domiciliary accounts in foreign currency in Nigeria banks. There was a guarantee against seizure or any form of expropriation. This and the Second–Tier Foreign Exchange Market Act[16] which followed were intended to encourage international trade and investment and to encourage the in-flow of foreign capital into Nigeria. It protected the seller of foreign

currency from disclosing its source, assured against seizure or expropriation and also encouraged foreign currency repartriation.[17] The hard regime of indigenization was reviewed under the Nigerian Enterprises Promotion (Non–Voting Equity) Act[18] which permitted foreign investment in Nigerian enterprises which were publicly quoted. While under this Act the foreign investor did not acquire voting rights, incentives were offered to such an investor. Akanle, submits that the Act was the starting point of the internationalization of the Nigerian capital market.[19] The Nigerian Enterprises Promotion Act, 1989 permitted foreign participation in reserved enterprises if the investors invested ₦20 million or more.[20]

Other laws passed include the Securities and Exchange Commission Act, 1988 under which transactions involving securities held by aliens must be approved by the Securities and Exchange Commission as to price, timing and amount of sale, among other requirements.[21] The Industrial Development Co-ordination Act, 1988[22] set up a body of ministers to grant approval of expatriate quotas, approved status and technology transfer agreements, which had been distributed among diverse bodies hitherto by the Immigration, Exchange Control and other Acts. The promulgation of the Privatization and Commercialization Act, 1988 also affirmed a policy of deregulation and privatization opening up room for foreign investors to invest in the affected enterprises.

It could be said that the Structural Adjustment Programme marked a departure from indigenization and strict control to liberalization of investment with opening for foreign investors. It was intended as the foundation for economic recovery. Its policies are not markedly different from those currently enunciated under the National Economic Empowerment and Development Strategy (NEEDS). The latter has the objectives of greater economic diversification by fostering a climate conducive to private business and job creation; preserving macro-economic stability; improving efficiency in parastatals and key public service industries and ending a culture of institutionalized corruption thereby making the authorities accountable. Like the Structural Adjustment Programme it is an alternative to IMF programmes. President Olusegun Obasanjo informed the Nigerian Investment Forum organized by the Commonwealth Business Council and the Nigerian government at Abuja from 2 to 4 February 2005 that:

> Under the NEEDS regime, the country plans to attain a growth in real GDP of seven per cent by 2007, provide two million new jobs, control inflation to a single digit by 2007, enhance the manufacturing capacity utilization by 2007, raise export earnings from agriculture to US $3bn by 2007, and have the solid minerals sector provide employment to at least 500,000 Nigerians.[23]

Such a strategy if well managed would encourage foreign investments, as foreign investors are concerned to know if there are healthy domestic policies place.

1.3.3 Extant Major Laws Related to Foreign Investments

It is proposed to consider these under the following heads.

Form of Entrepreneurship and Undertakings

The indigenization policy has been abandoned.[24] Foreigners may now participate in any enterprise in Nigeria under the Nigerian Investment Promotion Commission Act, 1995[25] (NIPC Act), contrary to the restrictions under the Nigerian Enterprises Promotion Acts.[26] Like Nigerians, they may not participate in the production of arms and ammunition, deal in narcotics or produce military and paramilitary accoutrements.[27] Nigerians were, under the original Act, permitted to the exclusion of foreigners to deal in petroleum enterprises, a discrimination removed by Act No 32 of 1998.

The forms of undertaking of entrepreneurship may be sole proprietorships, partnership or by the formation of a limited liability company, pursuant to the provisions of the Companies and Allied Matters Act, 1990 (CAMA).[28] A business name may also be registered. Every foreign company incorporated outside Nigeria is obliged to obtain incorporation as a separate entity in Nigeria[29] unless it procures exemption under section 56 of CAMA. Under this section a foreign company may apply in writing for exemption to the Federal Council of Ministers if it was invited to Nigeria by or with the approval of the Federal Government to execute any specified individual

project; or it is in Nigeria for the execution of specific individual loan project on behalf of a donor country or international organisation; or is a foreign government-owned company engaged solely in export promotion activities; or is a company offering consultancy services in engineering or other technical areas which is engaged in an individual specialist project under contract with any of the Federal or State Governments or their agencies, or with any other body or persons if that contract was approved by the Federal Government. Such a company is required to furnish proof of its registration abroad, including particulars of its place of business in Nigeria, its local agents and such other information as may be required by the Secretary to the Government of Nigeria. The Council may then grant the exemption. It could be said that the NIPC Act has extended a national standard to foreigners in investment matters in laying virtually the same requirements on them as on Nigerians.

Deregulation, Privatization, Commercialization

These open room for foreign investors. The regnant law is the Public Enterprises (Privatization and Commercialization) Act.[30] A list of public enterprises for partial privatization is shown in Part I of the First Schedule to the Act, while a list of those for full privatization is in Part II of the same schedule, with power vested in the National Council of Privatization to amend the schedule.[31] Privatization is by public issue, private placement, or

with the permission of the Council on a willing seller and willing buyer or other basis.[32] Government may further divest itself of its shareholding in accordance with the Council's guidelines, "so however that the Council may dispose of the shares or part thereof to interested investors through any local or international capital market".[33]

A privatized enterprise which require participation by strategic investors may be managed by such investors from the effective date of privatization.[34] A strategic investor is "a reputable core investor or group of investors having the requisite technical expertise, the managerial experience and the financial capacity to effectively contribute to the management of the enterprise to be privatized".[35] The fully privatized enterprises are mainly in petroleum products marketing, cement production, banking, motor assembly, hotels and stadiums. Government divests itself completely of its shares in them; while in the partially privatized it retains a modal share-holding of 40%. The enterprises listed in Part I of the Second Schedule are partially commercialized; those in Part II are fully commercialized. A commercialized enterprises operates as a purely commercial enterprise and determines the price and value for its goods and services.[36] Where commercialization is partial, there is still some support from government. Under the Act, the Council and the Bureau of Public Enterprises have their respective statutory duties[37] involving the

realization of its objects the faithful discharge of which would affect the value of foreign investments.

Anti Corruption Measures

In response to an unfortunate reputation as a very corrupt country where business is difficult to pursue on its principles only, certain significant laws have been passed to combat corruption and to encourage foreign investment. The Money Laundering Act, 1995[38] requires that any transfer of funds to or from Nigeria which exceeds US $10,000 should be reported to the Central Bank of Nigeria.[39] The Money Laundering (Prohibition) Act, Act No. 7 of 2003 has now repealed it. The new Act provides at section I that transactions of N500,000 or more by individuals and of N2 million or more by corporate bodies shall not be in cash but through financial institutions. Any transfer to or from Nigeria of funds or securities of US $10,000 or above is required by section 2 to be reported to the Central Bank of Nigeria with these details: the nature and amount involved and the names and addresses of the sender and the receiver. Stricter requirements on customer identification are laid on banks. Financial institutions are obliged by section 10 to report to the Central Bank of Nigeria and National Drug Law Enforcement Agency transactions of N1 million and above in the case of individuals and N5 million in the case of corporate bodies. It created several offences such as conversion of proceeds of narcotics or

other illegal acts, disguising the criminal nature of transactions, retention proceeds of crime, and conspiracy.[40] Money laundering, however; does not have the notoriety of the advance fee fraud which has given this country a very negative image among foreigners who are frequently the victims. The Advance Fee Fraud and Other Fraud Related Offences Act, 1995[41] enacts condign measures to deal with this vice and at section 4 makes the offence of inviting any person to Nigeria for any purpose connected with the commission of an offence under the Act punishable with a seven years term of imprisonment.

While the capital market receives a lot of emphasis in matters of foreign investments, orderliness and the health of the money market is no less important. In this respect, the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act, 1994[42] has facilitated the recovery of debts owed to financial institutions through the tribunals set up thereunder which exercised civil and criminal jurisdiction. It tore the corporate veil which shielded directors from personal liability. Since the advent of civil rule in 1999 the tribunals have been wound up, while their residual work has been transferred to the Federal High Court.[43]

The Corrupt Practices and Other Related Offences Act, 2000[44] has been repealed by the Corrupt Practices and Other Related Offences Act, Act No.

6 of 2003. The new Act created the Anti-Corruption Commission at section 3. The Commission has investigatory powers and by section 33 may summon suspects before it. Section 42 adds the innovation that where an allegation of corruption is made against the President of Nigeria, the Vice-President, or the Chief Justice of Nigeria, a Governor of a state or his deputy an independent counsel who shall be a legal practitioner of not less than 15 years shall investigate the allegation and report to the National Assembly in the case of the President or the Vice-President, or to the House of Assembly of the state where a Governor or his deputy is involved. The Commission has power to carry out searches, seizures as well as prosecutions. Sections 12 to 29 of the Act created the offences of seeking gratification by an official, corrupt offers to officials, corrupt demands, fraudulent acquisition and receipt of property, and bribery of public officials, among others.

This Commission as well as the Economic and Financial Crimes Commission (EFFC)[45] which oversees the enforcement of the Money Laundering (Prohibition) Act and the Advance Fee Fraud and other Fraud Related Offences Act have had some notable prosecutions in court.[46] The EFCC which is established as a body corporate by section 1 of Act No. 1 of 2004 lists out its functions at section 6 to include the investigation of all financial crimes laws; and adoption of measures to eradicate the

commission of economic and financial crimes. Sections 7 makes it the coordinating agency for the enforcement of the Miscellaneous Offences, Banking and other Financial Institutions, and the Fail Banks (Recovery of Debts) and Financial Malpractices Acts beside those on money laundering and advance fee fraud.

Dispute Resolution

Foreign investors are always interested in the machinery available for this. The NIPC Act provides for mutual discussion or arbitration under the Arbitration and Conciliation Act; and in the specific case of foreign investors, it provide for dispute resolution 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 failing agreement the Rules of the International Centre for the Settlement of Investment Disputes shall apply.[47]

Incentives and Assurance

Certain laws on specific enterprises enact incentives apart from those in the tax laws and the NIPC Act. Some of these are found in the Nigeria Export Processing Zones Act, 1992, the Oso Condensate Project Act, 1990, Liquefied Natural Gas (Fiscal Incentives, Guarantees and Assurances) Act,

1990 and the Minerals and Mining Act, 1999. These are to be considered in the next chapter.

The NIPC Act provides that the National Investment Promotion Commission created by the Act and the government may negotiate special investment packages for the promotion of investment.[48] A foreign investor is guaranteed unconditional transferability of funds through an authorized dealer, in freely convertible currency of dividends or profits net of taxes, payments in respect of loan servicing where a foreign loan has been obtained, remittance of proceeds (net of all taxes) and other obligations in the event of a sale or liquidation of the enterprise.[49]

It is provided clearly at section 25 that no enterprise shall be nationalized or expropriated by any government of the Federation; and no person who owns the capital of any enterprise shall be compelled by any law to surrender his interest in the capital to any other person. In the event of any enterprise being acquired in the national interest by the Federal Government, payment of fair and adequate compensation, and the right of access to court by the person aggrieved by such an act are guaranteed. It is also guaranteed that the payment of any compensation shall be without undue delay, and that such may be repatriated in convertible currency.

Foreign Exchange

The severe Exchange Control (Anti–Sabotage) Act has been repealed by the Exchange Control (Repeal) Act, 1995. This repeal was done again under the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, 1995 (FEMMP Act)[50] which also repealed the Foreign Currency (Domiciliary Account) Act and the Second–Tier Foreign Exchange Market Act.[51] It retains the provisions of the former Act by creating an autonomous foreign exchange market.[52] It shields any person from disclosing the source of foreign exchange traded in the market, protects it from seizure, forfeiture or expropriation,[53] and unless the amount exceeds US $5000 or its equivalent, no person is required to declare it at any port of entry into Nigeria.[54]

Under its provisions, currency purchased from the market may be repatriated from Nigeria without further approval.[55] Any person may invest in any enterprise or security with foreign currency or capital imported into Nigeria through an authorized dealer and it guarantees its unconditional transferability.[56] It permits anyone to hold and maintain domiciliary accounts designated in foreign currency and shields them from expropriation.[57] It further permits, with emphasis, a resident or non-resident, citizen or non-citizen, to deal in, invest in, acquire or dispose of, create or transfer any interest in securities or other money market

instruments whether or not denominated in foreign currency, and to invest in securities traded on the Nigerian capital market, or by private placement.[58]

1.4 Objectives of the Research

The objectives of the research are as follows:

(a) To identify the significant laws regulating or affecting foreign investments in Nigeria and to highlight their key provisions;

(b) To examine the development strategies outlined in the instrument establishing NEPAD and in the provisions of AGOA of which Nigeria is a beneficiary country;

(c) To relate extant Nigeria laws to the development strategies set out in the instrument of NEPAD and in the provisions of AGOA in order to discover the advantages they confer on Nigeria and whether Nigerian laws satisfy their standards or are otherwise in harmony with them; and

(d) To make recommendations as to how Nigeria's foreign investment drive could profit from NEPAD and AGOA.

1.5 Research Methodology

A purely doctrinal approach would succeed in presenting the relevant Nigerian laws on foreign investments. It would also succeed in showing

what NEPAD is and what the relevant provisions of AGOA are. It would, however, leave the Nigerian laws and the foreign initiatives unrelated. For this reason an analytical and co-relational approach was preferred for this work.

A secondary data method was employed in the search for the relevant Nigerian laws and the literature they attracted. Libraries were used for this. The NEPAD document as well as the text of AGOA were sourced from the Presidency, and the Internet and the American Embassy respectively. Recourse was had to the electronic and print media and the Internet for any recent developments.

The empirical data aspects involved study trips to the Presidency, the Nigerian Investment Promotion Commission and other Federal Government Ministries and Departments, the American Embassy, the British High Commission and the British Council in connection with the foreign initiatives. The approach to the presentation of this work is primarily expository, though the occasional normative or moral concern is expressed.

1.6 Scope of the Research

This work concentrates on laws passed during the 1990s and after. References to Acts passed before this period are for comparative or references purposes. Despite the desire to incorporate recent developments, developments after 30 June 2005 were not taken into account.

It is a study in domestic and international economic law, and not in economics, and in this sense statistical back-ups are not necessarily called in aid as such. The context of analysis is limited by the foreign initiatives specified unless it is otherwise expressly extended.

1.7 Research Limitations

The major research limitation is on the availability of scholarly work on NEPAD and AGOA. There is no available reference work on them. Related items in the print media tend to be simple and very unauthoritative. This, however, is an impetus for the study and a challenge for its accomplishment.

The second limitation has to do with the lack of recent monograph and serials on the subject. Dr. Nwogugu's The Problems of Foreign Investment in Developing Countries and Dr. Kachikwu's Nigerian Foreign Investment Law and Policy were published before the period chosen for this study.

Apart from lack of recent monographs, three serials which dealt with foreign investment matters are no longer being regularly published.[59] This perhaps explains the reason for the first limitation expressed.

The final limitation is that this work is not funded or supported from any source other than the candidate's. There is thus and constraint on persons and places which could be reached for information.

1.8 Literature Review

It is regretted that the scholarly works of Dr. Nwogugu and Dr. Kachikwu mentioned in section 1.7 cannot be relied on for this study, great as they are. Kachikwu's work which is the more recent was issued in 1985. It has been overtaken by developments in the Nigerian investment arena. The policy of indigenization in place in 1985 has given way completely and is replaced with privatization, deregulation and liberalization of foreign exchange measures, among other developments. Dr. Nwogugu's is even older and focuses on developments in the era of independence, whereas the scope of this work is on developments in the 1990s and after. The relevant literature is considered below.

Kanyip,[60] for instance, considered foreign investment and the effectiveness or otherwise of tax incentives in 'Taxation Issues in Foreign Investment'.

He did not however consider the NIPC Act and the FEMMP Act. Akper,[61] however, did in his 'Foreign Investment Laws of Nigeria and Namibia: a Comparative perspective'. He held the view that the Nigerian developments in these laws are salutary and likely to be welcomed by foreign investors having regard to the provisions on incentives to investors, transfer of capital, profits and dividends, guarantees against expropriation, dispute resolution mechanisms, among others. He thinks, though, that the restriction against investment in petroleum enterprises by foreigners and the possibility of expropriation on grounds of national interest and public purpose may be disturbing to such investors. Prof. Guobadia[62] also studied the two Acts and foreign investments generally in 'Issues in Facilitating Foreign Investment for National Development in Nigeria'. She also paid attention to some other laws on the subject and made a comparative analysis with the Malaysian and Ghanaian situations and urges the definitions of clear goals as well as an emphasis on human resources development.

Other studies relevant include Omorogbe's 'Investment Guaranties and Incentives in the Nigerian Natural Gas Industries', Dr. Kolo's 'Legal Issues Arising from the Termination of Oil Prospecting Licences by the Nigerian Government' and Odaise–Alegimenlen's 'New Regime for Solid Mineral Development in Nigeria'. These references are acknowledged with others

in the thesis. While Omorogbe argued that an enthusiasm to win investments has led to rather generous incentives which government may regret and seek to reconsider, Dr. Kolo deals with a specific case where the Nigerian government did in fact terminate oil prospecting licences already granted, an event which to him could cast doubt on the sincerity of the government and send negative signals to foreign investors.

In all, the literature considered is expository on the specific areas within the subject of foreign investments in Nigeria. It deals with the most significant laws around which any meaningful examination of the subject must turn, and their analysis and findings provide useful background materials for this study.

1.9 Organizational Layout

The study is presented in six chapters. The first introduces the study in its historical and contemporary contexts and advances the means for presenting it. It gives an overview of the relevant domestic laws on foreign investments. The second chapter pays attention to the trends in foreign investments and impact of influences outside Nigeria. It considers certain norms and instruments of international law which are applicable to the study. It introduces the foreign initiatives. The third chapter is expository on NEPAD describing its key provisions, having first mentioned the

African Union with which it must relate symbiotically. Chapter four is a study of AGOA and its key provisions and demands. Some attention is also paid to the very new British initiative, that is the Commission on Africa, which is viewed as a sort of Marshall Plan for Africa. The fifth chapter relates extant Nigeria laws on foreign investments to the NEPAD and AGOA standards and considers whether or not they meet their demands. The sixth and final chapter offers certain recommendations after stating the findings and conclusions.

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2. See http://www/agao.gov/eligibility/country-eligibility.html

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4. This Act and the amendments are consolidated and codified under the same title at cap 117, Laws of the Federation of Nigeria 2004.

5. Ayua, I. A, The Nigerian Tax Law, Spectrum Books Ltd, Ibadan (1996) p. 320. But see Kanyip, B. B., 'Taxation Issues in Foreign Investments', 1998 MPJFIL vol. 2 No. 1. pp 108 & 109 for a different view.

6. Retained under the same title as cap. I 1, Laws of the Federation of Nigeria 2004.

7. The Act has been repealed by the Exchange Control (Repeal) Act No. 8 of 1995. The extant legislation on the subject is the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, cap F34, Laws of the Federation of Nigeria 2004.

8. Akanle, O. 'Regulation of Trade and Investment in Nigeria', in M. A. Ajomo, et. al. (ed), Regulation of Trade Investment in an Era of Structural Adjustment: The African Experience, NIALS, Lagos (1995), p. 42

9. Ibid, pp. 44 & 45

10. Companies Act, 1968, section 369. The Act is no longer in force.

11. Act No. 4 of 1972 amended by Acts Nos. 28 of 1973, and 13 of 1974, and 3 1977.

12. Akanle, O, op. cit., pp 46 – 50

13. Kolo, A, 'Legal Issues arising from the Termination of Oil Prospecting Licences by the Nigerian Government', JENRL, vol. 19 No. 2 May 2001, p. 165.

14. These laws have been repealed, a signal structural change in exchange control administration.

15. Act No. 18 of 1985

16. Act No. 18 of 1986

17. The two Acts have been repealed at cap F34, Laws of the Federation of Nigeria 2004, but their liberal exchange control provisions are, in large, retained.

18. Act No. 34 of 1987.

19. Akanle O., op. cit., p. 57

20. Cap 303, Laws of the Federation of Nigeria 1990, section 1. The Law has been repealed by the Nigerian Enterprises Promotion (Repeal) Act, No. 7, of 1995.

21. Act No. 29 of 1988, section 7;

22. Act No. 36 of 1988, now repealed by the Nigerian Investment Promotion Commission Act, cap N 117, Laws of the Federation of Nigeria 2004.

23. Speech to the Forum, reported in *African Review of Business & Technology*, March 2005, p. 33

24. Note 19, supra.

25. Act No. 16 of 1995, see now cap N 117, Laws of the Federation of Nigeria 2004.

26. Section 17, Nigerian Investment Promotion Commission Act, cap N 117, Laws of the Federation of Nigeria 2004

27. Ibid, sections 18 and 32,

28. Cap C 20, Laws of the Federation of Nigeria 2004

29. Ibid, section 54,

30. Cap P 38, Laws of the Federation of Nigeria 2004

31. Ibid, section 1

32. Ibid, section 2

33. Ibid, section
34. Ibid, section 4

35. Ibid, section 33

36. Ibid, section 8

37. Ibid, sections 11 and 13

38. Act No. 3 of 1995; now cap M 18 Laws of the Federation of Nigeria 2004

39. Ibid, section 2 (1)

40. Ibid, sections 14 and 17

41. Cap A7, Laws of the Federation of Nigeria 2004

42. Cap. F2, Laws of the Federation of Nigeria 2004

43. Sections 1 and 2, Tribunals (Certain Consequential Amendments, Etc) Decree No. 62 of 1999

44. Cap C31, Laws of the Federation of Nigeria 2004

45. Established first under the Economic and Financial Crimes Commission (Establishment) Act, cap E1, Laws of the Federation of Nigeria 2004, and now the Economic and Financial Crimes Commission (Establishment) Act, Act No. 1 of 2004 which repealed the former Act.

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47. Section 26, Nigerian Investment Promotion Commission Act, cap N117, Law of the Federation of Nigeria 2004.

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52. Ibid, section 1,

53. Ibid, section 3,

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CHAPTER 2

ECONOMIC TERMS AND EMERGING GLOBAL TRENDS

2.1 Relevant Fundamental Concepts and Terms

In aid of the presentation of this study, an attempt is made to define certain concepts and terms used. Being terms in current use in association with foreign investments and also in the principal instruments of the New Partnership for Africa's Development (NEPAD) and African Growth and Opportunity Act (AGOA), they have meanings usually associated with them currently, and lend themselves to being received as such even if no universal definition is available. Other terms and concepts are taken as they arise in the course of the presentation.

Globalization

It is easy to understand, though difficult to define. It is about the growing interdependence of peoples and nations worldwide. Professor Obadan described it as the increasing inter–connectedness and interdependence among the world's nations, government, regions, business, institutions, communities, families and individuals; in its economic sense, that is economic globalization, he says it is "the process of change towards greater international economic integration through trade, financial flows, exchange of technology and information, and movement of people. Openness and

markets constitute the platform of globalization while trade, finance and investment, and entrepreneurs are the heart".[1] Krietzman says about it thus:

> There is an intuitive understanding of what globalization means and with it an uneasy feeling about how much in control of events we really are or can be in a world of large, transnational organizations. Anthony Giddeus defines it as 'the intensification of world–wide social relations which link distant localities in such a way that local happenings are shaped by events accruing many miles away and vice versa'.

He goes on to say that it is not an entirety new phenomenon given the experiences of mercantilism, and that "the movement of capital around the world and the new geometry of production that is developing in which firms take a global view of location, is an inexorable trend."[2]

Regional Integration

By multilateral treaties and protocols, nations in certain geographic setting may agree on a common approach to problems of trade, development, migration, and the environment, although trade and tariff are the usual areas of attraction. The level of co-operation could increase from a community of interest to an economic union with central economic and political institutions.

The European Union (EU) which started as the European Community may be cited as its best model. The nations of the continent of European are united with a Court, Parliament, and a common currency, among others.

Below this example are other bodies which have not achieved the same degree of integration but have areas of co-operation among the constituent nations, and may be sub-continental bodies. The North Atlantic Free Trade Area (NAFTA) brings Canada, the United States and Mexico together. The African Union, which will be considered later, has not achieved the cogency of the EU, but it has sub-regional bodies of which the Economic Community of West Africa (ECOWAS) founded in 1975 is its best model. Other efforts at regional integration in Africa are the Southern Africa Development Community (SADC) which interlocks with the less successful East African Community; while the unsteady Arab Maghreb Union brings Algeria, Libya, Mauritania, Morocco and Tunisia together.[3]

Regional integration will be in favour as a response to globalization. It encourages trans-border trade and investment. It is an express policy objective of Nigeria.[4]

Good Governance

In its sweeps, it includes multiparty democracy, open and accountable government, and actions aimed at eliminating gender inequality, poverty and corruption. Its existence is also judged by such other indices as access to justice, operation of fair economic policies, respect for human rights and the rule of law, and public participation through the civil society. As an

inclusive term its scope is open. Developed countries urge it on developing ones in issues of aid, investment, debt relief and the like.

Deregulation, Privatization, Commercialization

They are frequently used in association with investment and globalization. They involve a reversal of regulation by state legislation and of state participation in economic activities. Deregulation involves the removal of existing restrictions on investments and the operation of market forces in the determination or participation and value of economic activities through the repeal of the relevant legislative and institutional controls. Privatization involves dis-investment by the state to give place to private investors in particular enterprises.[5] Commercialization involves removal of state subsidies in a particular enterprises and opening it to the market. The terms have blurred boundaries.

Economic Sovereignty

This is a dimension of the sovereignty of states that concerns particularly their right to exercise permanent ownership and control over the natural wealth, resources and economic activities within their territories for national development and well-being of their people. It expresses the economic self–determination of states to give real meaning to legal independence. It is expressed in two major resolutions of the United

Nations: Resolution 1803 (xvii) of the General Assembly on the Declaration of Permanent Sovereignty over Natural Resources in 1962 and Resolution 3281 (xxiv) of 1974 adopting the Charter on the Economic Rights and Duties of States. "There is considerable support for the view that the doctrine of permanent sovereignty over natural resources is a *jus cogens* principles of modern international law".[6]

Foreign Investment

Foreign investment means investment with a foreign element and it involves the flow of capital, technology and knowledge from abroad to be host state. The usual characterization is into Foreign Direct Investment (FDI) and Portfolio Investment (PI) with control as the distinguishing factor. In the former, control and management are important to the foreign investor; in the latter they are not, as he is primarily interested in dividends, interest, capital gains and other benefits.[7]

Views differ as to the value of foreign investment for a developing country, such as Nigeria is, but arguments for its advantages preponderate and are better received.[8] This study assumes its necessity. It is in any case a goal of the government of Nigeria since the return to civil rule in 1999.

Other concepts such as **sustainable development** have brought in the idea of developing in a consistent and wholesome manner, with environmental and poverty alleviation questions having primacy;[9] while **development partners** refers to partners who may not necessarily be in the same economic group but lend support to one another to achieve agreed goals. NEPAD members on the one hand and the European Union and the "G.8 countries", for instance ,are development partners because they accept the NEPAD objectives and channel their own development programmes to Africa through NEPAD. World leaders such as the American President George Bush and the British Prime Minister Tony Blair use the term to suggest relations of equity and not of dominance.

2.2 Economic Sovereignty and Emerging Global Trends

Sovereignty is received generally in the sense of supreme power, freedom from control, or autonomy. The broad legal sense accepts this general usage. Specific legal usage includes territorial sovereignty, sovereignty of the state, people or parliament and economic sovereignty.

Nigeria is a sovereign state. This refers to the fullness of her powers and freedom to act in matters concerning her as a country, and her equality with other nations in the affairs of nations. Sovereignty, the equality of states,

and self determination are principles of customary international law, and are often expressed in international instruments.[10]

2.2.1 Nigeria's Economic Sovereignty against the Background of International Law

While sovereignty as expressed above is an old principle of international law, economic sovereignty as a nuance of it is recent, arising approximately with the emergence of many new nations into formal independence in the last century. Nigeria was in this category. According to Bollecker–Stern.

> While sovereignty was for a long time, and until recently, only a legal sovereignty, it has become now – that is since the Second World War and especially since decolonization, which can be analyzed as the translation into reality of legal sovereignty – also an economic sovereignty. This evolution was brought about by the establishment that legal sovereignty did not suffice to give a State the mastery over its existence: and while States acceded to international existence that is to sovereignty, the neo–colonial economic relations they entered into with developed countries – either their former metro poles or other States – wove around them a network of constraints so tied as to empty of all its meaning their newly acquired sovereignty. Sovereignty did not suffice. The economic problems were there to remind us of that fact. A new dimension had to be added to sovereignty to give its true meaning: the economic dimension.[11]

The consideration of this concept is important because the view will be advanced that even the realization of the fullness of it is affected by modern trends. But first it is necessary to consider how Nigeria's economic sovereignty is expressed in international instruments.

Nigeria as a young State in the post World War II flood of the grant of independence by the colonial powers had not only legal sovereignty as expressed above but was a beneficiary of international action towards economic sovereignty. It has its greatest expression in the issue of control over national and natural resources and economic activities within her domain.

In 1962 the United Nations General Assembly adopted Resolution 1803 in the form of a Declaration of Permanent Sovereignty over Natural Resource. It made declarations on the inalienable rights of states to explore and dispose of their natural wealth to suit their national interests, recognition of such right and the freedom to express it in the importation of foreign capital, nationalization and expropriations, among other matters.[12] So far as foreign investments are concerned, the Declaration subjects them to agreement, national legislation and international adjudication and the development goals of the host state.[13] It provides that, "violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principle of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace."[14] As to foreign investments, paragraph 8 provides that "foreign investment agreements freely entered into by or between sovereign states shall be observed in good faith".

The Declaration affects the principles of freedom of contract and *pacta sunt servanda*[15] hitherto employed by foreign corporations to protect unequal and unfair contractual relations on the exploitation of the resources of the countries concerned. Its effect was to support the right of developing countries to repudiate, modify and renegotiate contractual arrangements for mineral development. Stevenson maintains that the principle enacted brought about "a new legal and contractual framework for natural resource development moving away from the traditional concession agreements to joint ventures, production–sharing and service contacts. As a result, the principle came to include control not only over resource, but also over production as well."[16]

Dissatisfaction by the newly independent states over the world economic system lead to demands for a new international economic order. Putting the case across at UNCTAD III at Santiago, Chile, in 1972, President Echeverria of Mexico proposed a charter of the economic rights and duties of states formulated to reinforce "the precarious legal foundations of the international economy … removing economic co-operation from the realm of goodwill and rooting it in the field of law by transferring consecrated principles of solidarity among men to the sphere of relations among nations".[17]

The Charter of Economic Rights and Duties of States was adopted in December 1974 by the United Nations General Assembly after adopting an earlier resolution, Resolution 3201, containing the Declaration on the Establishment of a New International Economic Order in May 1974. "The Resolution reflected a high point in opposition to a liberal international regime".[18] The Charter provides in Article 2(1) that "Every State has and shall freely exercise full permanent sovereignty including possession, use and disposal, over all its wealth, natural resources and economic activities. The provisions of Article 2(2) are important.

Every State has the right:

(a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its law and regulations and in conformity with its national objectives and priorities. No state shall be compelled to grant preferential treatment to foreign investment.

(b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with laws, rules, regulations and conform with its economic and social policies.

(c) To nationalize, expropriate or transfer ownership of private property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case where the question of compensation gives rise to controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and naturally agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of the choice of means.

Many of the developing nations which could benefit from these legal provisions suffer a limitation which Zakariya expresses thus:

> It goes without saying that before any country can experience sovereignty over its natural resources, these resources must first be located and developed. Since most, if not all, of the LDCs [Less developed Countries] are not in a position to do so without the financial and technological assistance of outsiders, the problem, if not the dilemma, for these countries, is not only how to obtain such assistance, but also, and more importantly, how to ensure that its terms conforms to the spirit of the above–mentioned UN resolutions.[19]

The reality of the operation of legal rules may be different from the rules themselves, but on the premises of the foregoing it is clear that Nigeria has and can assert sovereignty over foreign investments in her domain.

2.2.2 Nigeria's Economic Sovereignty Expressed in Domestic legislation

References to the control of her economic life by domestic legislation have been made in section 1.3 of chapter one. By other laws, she exercises control over other principal areas of the economy such as banking and currency, capital issues, customs, shipping, insurance, intellectual property, taxation and labour matters, all of which are very relevant to foreign investments and development.[20] Section 16 of the Constitution of the Federal Republic of Nigeria, 1999 (the 1999 Constitution) which states the economic objectives of the nation is consistent with the encouragement of foreign investments particularly when it is read with section 9 which provides for the promotion of African integration, respect for international law and treaty obligation, as well as seeking the settlement of international

disputes by negotiation, mediation, conciliation, arbitration and adjudication, as well as the promotion of a just world economic order.

Other relevant provisions include section 44(3) of the 1999 Constitution which provides that 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 waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly on which such laws[21] as the Territorial Waters Act, the Exclusive Economic Zone Act, and the Petroleum Act receive validity; and the Land Use Act which brings all land in Nigeria under State control. On the controversial subject of expropriation of foreign investments by a host country, the 1999 Constitution sets standards in section 44(1). Prompt payment of compensation and a right of access to court in the issue are guaranteed. This accords with the standards set in the international legal instruments on the subject already considered, in section 2.2.1 of this chapter.

2.2.3 Sector – biased Legislation on Foreign Investments

The Nigerian Investment Promotion Commission Act (NIPC Act) as the dominant general legislation on foreign investments in Nigeria has been mentioned under section 1.3.3 of chapter one. Incentives and assurances on

the flow of foreign exchange into and from Nigeria as well as certain tax provisions have also been mentioned under section 1.3.1 and 1.3.3 of chapter one. As for tax incentives in foreign investments, their advantages to Nigeria and their expected catalytic effects on investments and development do not go without doubt. Thus Kanyip[22] after a study of the different views summarizes that:

> A general reassessment of the efficacy of tax incentives needs to be done particularly in other than the petroleum sector. It is doubtful as the evidence shows that foreign investment in that regard will be or is influenced by the grant of tax incentives. Alternatives are no doubt needed. The continued practice of granting tax incentives even when they are known to lack any impact is not wasteful but has the tendency (effect) of shifting focus from the more important task of concentrating on the search for the better alternative policies to improve on our investment culture. This, to say the least, is the saddest and most unfortunate impact of our tax incentive policies; and our continued belief and reliance on them as panacea for poor investment in the non oil sector in indeed baffling.

In the petroleum sector, specifically gas, Udoma thinks the incentives are attractive.[23] Undoubtedly, other factors such as the high quality of Nigeria oil and gas resources, political turmoil elsewhere and high consumption by developed countries contribute to the interest in this industry. Rather generous incentives are contained in the Nigerian LNG (Fiscal Incentives, Guarantees and Assurances) Act of 1990 as amended by Act No 113 of 1993.[24] First the company is conferred with pioneer status as to make the benefits created under the Industrial Development (Income Tax Relief) Act 1971 applicable to it.[25] It enjoys a 10 years tax relief period[26] and is

subjected to the Companies Income Tax Act instead of the Petroleum Profits Tax Act[27] which stipulates a higher tax rate than the former. It allows full deduction of interest on loans for tax purposes, exempts the company, the Nigeria LNG Ltd, from customs duties, and frees it from certain pre–shipment inspection in respect of plant within two years of the commissioning of the plant for which the importation is necessary. The Government bound itself to hold the incentives as sacrosanct and unilaterally unalterable on its part. Omorogbe[28] criticized this generosity as limiting the legislative capacity of Nigeria.

It is urged that laws like this devalue Nigeria's economic sovereignty when viewed in terms of profitable development of her resources. It suffices to say that it is contrary to the principle of equity in taxation as it virtually frees one company of all tax burdens though it operates in a very profitable industry. It is prodigal in the potential revenue it throws away. Accepting that there are attractive incentives as Udoma does merely restates the obvious without justifying it. It is certainly strange to assume that multiplex incentives would catalyze investments. It seems as if Nigerian LNG Ltd is supposed to have a monopoly status. If other investors entered the market, would they be obliged to invest in the same company, and if not would similar incentives be given them? The example of the private mobile telecommunication companies – MTN, V Mobile and Globacom – shows

that investors are ready to bear their cost to enter a profitable industry. A sustained campaign on investment opportunities, provision of general infrastructure – roads, power supply and communication – institutional efficiency and a reduced level of corruption would encourage investors more than forty years of prodigal incentives have done. Fortunately, NEPAD is turning attention to these things.

The Minerals and Mining Act 1999[29] is a new comprehensive law on its subject. All foreign investment must be through the mechanism of a corporate personality which alone can have a mining title.[30] Part IV of the Act provides incentives, obviously to highlight Nigeria's interest in the development of the solid mineral sector. An investor benefits by way of exemptions from customs and import duties for plants, machinery, equipment and accessories imported for use in mining operations;[31] from expatriate quotas and resident permits for approved expatriate employees; and from exemption of the salaries of such employees from duties on remittance overseas. The company may keep an external account to pay in a portion of its sale proceeds abroad for use in the purchase of equipment.[32] It provides for free transferability of funds for the purpose of servicing foreign loans used in financing the investment in section 21. Section 22 grants a three-year tax holiday which may be increased to five years from the time of the commencement of its operation.

These generous provisions make matters rest on the good faith of the investor as the provisions may be used for other ends, particularly as to expatriate quotas which may be at the expense of the employment or development of Nigerian personnel, and the retention of part sale proceeds abroad which may be used for non–capital enhancement purposes.

The provisions of the NIPC Act and the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act (FEMMPL Act) earlier discussed in section 1.3.3 of chapter one are made applicable to the solid minerals sector by section 23(1) of the Minerals and Mining Act. It is submitted that this is a surplussage since the provisions of the former Acts are intended to apply, and apply, of their own force to all investments.[33]

Apart from natural gas and the solid minerals sectors there is also the effort by government to encourage the production of goods in designated geographical parts of Nigeria for the purpose of export. This undoubtedly apart from providing employment would enhance earning if indeed goods are produced from them and marketed abroad. The Nigeria Export Processing Zones Act No 63 of 1992[34] has provisions which foreign investors may take advantage of. Approved enterprises carrying on business in a zone are exempted from Federal, State and local taxes.[35] They may

import into the zone capital and consumer goods and raw materials for use in connection with their activities and undertakings.[36] Section 18 provides that approved enterprises shall be entitled to the benefit of legislative provisions relating to taxes, levies, duties and foreign exchange regulations not applying to them; the freedom to repatriate foreign capital invested in the zone at any time with capital appreciation on the investment; the remittance of profits and dividends earned by foreign investors in the zone; the inapplicability of export and import licences to them, among others.

2.2.4 Venture Capital Projects

The Federal Inland Revenue Service is empowered by the Venture Capital (Incentives) Act No 89 of 1993 to determine whether a company is a venture capital company or whether a project is a venture capital project for purpose of allowing it certain incentives.[37] The company or project must satisfy one of these criteria:[38]

i) the acceleration of industrialization by nurturing innovative ideas, projects and techniques to fruition;
ii) the commercialization of research findings with high potential for reaching forward or backward linkages;
iii) the promotion of self reliance through the establishment of resource–based and strategic industries through the provisions of risk guarantee and insurance;
iv) the encouragement of indigenous processes and technologies;
v) the promotion of the growth of small and medium scale enterprises with the emphasis on local raw material development and utilization;
vi) such other objectives as may from time to time be specified by the Federal Inland Revenue Service.

The criteria of judgment are sound; but the appropriate body to determine compliance with them should have been the ministry regulating industrialization and not the Federal Inland Revenue Service. The Federal Inland Revenue Service is primarily concerned with tax collection pursuant to federal tax laws and not with industrialization. On a careful consideration of the criteria, it is apparent that they concern industrialization, an area which is the concern of the ministry overseeing industrialization. As the law stands, the Federal Inland Revenue Service would have to provide service in a field in which there is a competent department of government, an unnecessary duplication of efforts. Nonetheless, the Service is to ensure that for the company to qualify for the incentives under the Act, its investment in the venture project is not less than 25% of the total capital required for the venture project.[39]

The incentives are[40] capital allowances of 30%, 30%, 20%, 10% and 10% respectively for the first to fifth year under the Companies Income Tax Act. Capital gains exemption under the Capital Gains Tax Act for disposal of capital within five years of investment is 100% between six to ten years is 75%; eleven to fifteen years is 25% and after that, 0%. Withholding tax on dividends is reduced by 50% of the prevailing rate of investment on dividends received in the first five years. The provision of the Industrial

Development (Income Tax Relief) Act and the Export (Incentives and Miscellaneous Provisions) Act[40a] are made applicable. An investment with foreign participation may take advantage of the provisions of this legislation.

2.2.5 The Role of Nigerian Institutions in Foreign Investments

By and large, the key provisions on incentives on foreign investments are generous enough. The experience of their application by the relevant institutions and persons would be important in retaining or repelling the interest of foreign investors.

The Nigerian Investment Promotion Commission created by section 1 of the NIPC Act is obliged to carry out the functions enumerated in section 4, particularly in information gathering and dissemination, and counseling. Its website must be rich in this, and its personnel good. Similarly, the proper administration of the FEMMPL Act casts roles on banks, customs and immigration authorities and other law enforcement agencies for its due administration. Ministries concerned with industries, commerce, solid minerals and the Central Bank of Nigeria also have very significant roles to play if the provisions are to have any impact on foreign investments. The Securities and Exchange Commission and the Nigerian Stock Exchange

must also meet the challenges to the capital market which foreign investments offer.

The National Council of Privatization and the Bureau of Public Enterprises are responsible for privatization and commercialization. The mechanisms for achieving this are several and they raise their own questions and fears.[41] Siddiq holds the view that a successful implementation of privatization would profit Nigeria in foreign investments. He says that:

> A successful process requires a proper legal–regulatory frame-work to ensure fair competition, improved public services and to prevent the rise of a private monopoly. Privatization is also the key to attracting foreign investments in the non-oil economy, as in Russia and the Middle East Gulf States – notably Bahrain and Qatar. More importantly, attractive investment opportunities at home may induce some high net-worth Nigerians to repatriate even a small proportion of their offshore assets – estimated by Prof Paul Collier of the UK's Oxford University at US $107 bn.[42]

In order to have an effective co-ordination of the various efforts on foreign investments, it is suggested that an authority or body higher than the Nigerian Investment Promotion Commission is needed. While conceding that section 4 of the NIPC Act empowers the Commission to co-ordinate and monitor investments in the Nigerian economy and to serve as a link between investors and government, it is doubted whether it could effectively issue directives to the Central Bank, the Customs and Immigration Services, or the Federal Inland Revenue Service, for instance.

To make for effective co-ordination which is very much needed in view of the diverse institutions concerned with foreign investments, it is suggested that a Committee on Foreign Investments headed by the Vice President of Nigeria and having among its member the ministers responsible for finance, commerce, Industry and internal affairs, and the Governor of the Central Bank be set up. In the United States the Committee on Foreign Investment is headed by the President. The suggestion of the Vice President in the Nigerian case stems from the fact that the Vice President is the chairman of the National Economic Council created by section 153 paragraphs 18 and 19 of the Third Schedule to the 1999 Constitution. Indeed this council is given power under the said paragraph 19 "to advise the President concerning the economic affairs of the Federation, and in particular on measures necessary for the co-ordination of the economic planning efforts or economic programmes of the various governments of the Federation." Besides, he is the chairman of the National Council of Privatization, and the execution of the privatisation programme is bound to have an impact on foreign investments.

2.2.6 Emerging Global Trends in Foreign Investments

The concepts introduced at the beginning of this chapter have their prominence in world political and economic history, and allow no

indifferent response. Thus globalization has spurred privatization and deregulation and made regional integration a very relevant forum of response. It has lead to a situation in which "we are instead witnessing a desegregation of the State, with many of its traditional functions being performed by private parties, based on transnational network".[43] Developments arising from the deregulation of the telecommunication sector in Nigeria with the entrance of such foreign mobile telephone networks as MTN and V Mobile bear this out. Judge Higgins[44] mentions the new World Trade Organization dispute settlement system as a trend in response to trade disputes and says that the ability to compete in a globalized world, without losing all sense of identity, has led to further regional free trade grouping or indeed at regional integration. Nigeria's role in the Economic Community of West African States extending recently to the development of its Community Court and the establishment of its Parliament in Nigeria shows her acceptance of this trend.

In opposition to globalization is the anti-globalization movement, a phenomenon which is being manifested worldwide. In Africa,[45] it insists on non-interference by developed economies and international finance institutions and opposes neo-liberal economic policies. It expresses itself in intellectual opposition, nationalism, labour unrest and environment protests

aimed at multinational and international economic bodies and foreign investments.

The fall of communism have the following clear impacts: planned economies of the former Soviet pattern are shown not to have fared as well as free-market economies; liberal democracy prevailed over dictatorship; new markets and investment opportunities are opened in countries formerly behind the Iron Curtain; and of course African countries which have had support from the communist countries were obliged to 'reform', usually after Western models.[46]

The flow of investment into Eastern Europe and the fast developing parts of Asia means that Nigeria, like other African countries, is put to solicitation, given poor economic performance at home. The developed countries are united in stipulating democracy, good governance, observance of human rights, deregulation, and removal of subsidies among other criteria for active and purposeful economic relations. The Breton Woods Institutions particularly emphasize deregulation. Nigeria is certainly not resisting this but is rather eager to show her achievements in these respects.

All over Africa, the awareness of the negative impact of instability and civil strife has led to a change of attitude from non-intervention[47] to active

intervention as exemplified by action taken by African leaders in Togo, Cote d'Ivoire, Sudan, Somalia and other countries. Interest in Africa which led to former US President Bill Clinton's 1998 tour of certain African countries were linked to reforms, with Uganda and Ghana earning his commendation. This was before AGOA was passed.

There is also a tendency on the part of Western nations to insist on such things as legislative reforms or activity particularly in the domestication of multilateral conventions such as those on transparency, economic crimes and human rights. They take other active roles in stating where they want reforms from time to time. Thus apart from such requirements as stability of government, infrastructural support, security, benevolent laws on repatriation of investment earnings, among others, factors which are not exactly economic or which are obviously required of the host state become very relevant on the question of foreign investment; and there have been assaults on state sovereignty in recent times in the areas of human rights and environmental law.[48]

A trend that is becoming very prominent in economic matters has to do with the attitude of people's desire within and outside the host states of investments to have a say. Pring, Zillman and Lucas[49] described it as "one of the most striking phenomena of the last years of the 20th century" when it

became very apparent. According to them, it may be in the form of public participation, citizen involvement, stakeholder engagement, NGO intervention, but they say of it that it promises to define and redefine sustainable development in the 21st century. Long viewed as only a concern of Western–style democracies, this human rights dimension is increasingly permeating resource-planning, exploration, financing, licensing, operating, and closure on a global scale. It has been accelerated by democratization trends, the break–up of the Soviet Union, adoption of the new international legal paradigm of 'sustainable development' (of which it is a key component), activist Non – Governmental Organization (NGOs), incorporation in the guidelines of International Governmental Organizations (IGOs) and International Financial Organizations (IFOs), human rights law regimes, recognition of rights of indigenous peoples, globalization and certainly not the least, the internet.[50]

All the items specified are at play in Nigeria. People in the Niger Delta oppose the contract for the dredging of the River Niger on environmental grounds; human rights and environmental rights activists are at issue with oil and gas companies in the Niger Delta on the rights of the indigenous people; and the execution of Ken Saro–Wiwa in 1995 brought world-wide condemnation on Nigeria, for a period affecting her economic relations.

For Nigeria, the impact of regional integration is becoming apparent in such undertakings as the West African Gas Pipeline Project which brings Nigeria, Togo, Benin and Ghana together through a treaty of 31 January, 2003 with a possibility of extension westwards beyond Ghana. Gas will be supplied from the Escravos fields in Nigeria with commitments at: Chevron Texaco 38.2%, NNPC 26%, Shell 18.8% and Takoradi Power 17.0%.[51] A similar undertaking is the joint exploration of oil by Nigeria and Sao Tome and Principe pursuant to a February 2001 agreement with a sharing ratio of 60% and 40% respectively in an area of 28,000km2.[52] Incidentally, the issue of transparency as an emerging trend is exemplified in the agreement signed by Nigeria's President Obasanjo and Sao Tome's Fradique des Menezes which require participating oil companies to publish on an individual basis all payments made to the countries' Joint Development Authority which manages the oil rich zone.[53] This accords with the Extractives Industries Transparency Initiative and also the US President Bush's Millennium Challenge Account launched in 2002 in Mexico which links new aid to effort made to fight corruption, to enact free market reforms, to increase spending on health and education, and to create room for development partnership instead of underdevelopment and dependency.[54]

Regional integration will make mergers and acquisitions, cross–border mergers, and intellectual property rights topical in Nigeria as is the case in Europe. Another side to this would be the desire of multinationals to want to manage all their concerns from abroad. The Shell Group has such a plan called Exploration and Production Globalization Initiative pursuant to which it will manage all its business in Nigeria from the Netherlands.[55]

The New International Economic Order (NIEO) born in the 1970s may have in all these circumstances given way as the undeveloped countries including Nigeria are acting at the cue of the developed world. The formal assertions in Article 2 of the Charter of Economic Rights and Duties of States have, in the circumstance of the dire need of foreign investment, been in large waived by the NIPC Act, particularly sections 25 and 26. Whereas Article 2 of the Charter gives jurisdiction to the tribunals of the nationalizing state in any case where compensation for nationalized foreign investments is in issue, section 26 of the NIPC Act permits choice of jurisdiction by agreement.

The developed nations from which the current notions and initiatives on development flow were not in any case in support of the Charter. The present happenings simply empty it of force. “Skepticism concerning the reality and depth of the changes implicit in the NIEO is legitimate. The

developed market economies only reluctantly accepted the concept of the NIEO, in the aftermath of the petroleum crisis of 1973…", hence it can be put aside by the will of States.[56] The economic distress of African economies offers just the needed excuses.

A remarkable new trend is international goal–setting based on which nations are to take domestic action in specified areas. The United Nations Millennium Declaration[57] pursuant to which Millennium Development Goals were identified offers programmes of sustainable development which influences economic planning in Nigeria and Africa. Emphasis on this theme was made at the World Summit on Sustainable Development which took place in Johannesburg from 26 August to 4 September 2002. The Summit's Plan of Implementation accepted the Goals, thus challenging states to invest in those areas on which the Goals focus. For instance, the year 2015 is a target year for reduction of child and maternal mortality rates by two–thirds, while the proportion of the world population without access to safe drinking water is expected to be reduced by half within the same period.[58]

NEPAD and AGOA are specific instances of a trend of active intervention in economic matters. They exemplify co–operation; but they also present an offeror-superior case in which it would be extremely unlikely that the

initiatives would be rejected. NEPAD is about co–operation within Africa and co–operation to present a common front on development issues in Africa. Its potentials are great and it would have more impact than AGOA in the sense that the issues under its agenda are broader than those of AGOA; and it opens opportunities for relationship with development partners which are individual countries, creditor groups, and many bodies. Indeed AGOA fails under its aegis.

In the case of AGOA, it is a unilateral initiative of the government of the United States. It responds to the cry of lack of market access by Nigeria and other countries. In facilitating exports, AGOA opens opportunities for foreign exchange earnings, as well as product and investment drive in relevant areas for Nigeria. Its benefits are available at the cost of domestic reforms.

The specific contents of these initiatives are studied in subsequent chapters. The primary instruments of the initiative are, the African Strategy for Achieving Sustainable Development in 21st Century, referred to as the NEPAD Agenda, for NEPAD, and the African Growth and Opportunity Act, for AGOA.

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CHAPTER THREE

INITIATIVES UNDER NEPAD

3.1 Origin of the African Union and NEPAD

The New Partnership for Africa's Development (NEPAD) has a political origin and as an initiative for the sustainable development of Africa depends on the continent's political and organizational formations. It is accordingly necessary to give prefatory attention to the African Union (AU) as the paramount political and economic organization in Africa in order to have the discussion of NEPAD in its proper context. Beside, the role-actors of the AU and NEPAD are the same, and the document of the latter imposes roles on African Heads of States and claims to be as exposition of their common vision.[1]

The decision to establish an African Union in succession to the Organization of Africa Unity (OAU) was taken in Sirte, Libya at the Fourth Extra Ordinary Session of the Assembly of Heads of State and Government of the member states of the OAU in September 1999. Its precursor, the OAU, had been a rallying point for harmonizing African positions on world issues, ensuring the end of colonial rule on the continent, and fighting against apartheid, among other objectives. Economic challenges, however, loomed large at the approach of the third millennium such as the debt burden on African countries, widespread poverty among Africans,

globalization, a united Europe, the fall of communism and the resultant flow of investments into Eastern Europe and Asia, among several other challenges. Thus, a new approach, a new will and new institutions and initiatives became necessary.

In furtherance of their decision in Libya, the Heads of States and Governments at the OAU summit in Lome, Togo, in July 2000 formally adopted the Constitutive Act of the African Union (the Constitutive Act). The Constitutive Act did not come into force until Nigeria in 2001 deposited her instrument of ratification. By article 28 of the Constitutive Act at least two-thirds of the OAU states must ratify it to bring it into force, and Nigeria was the 36th state out of the 53 in Africa to do so. The treaty establishing the AU is given full recognition in Nigeria by virtue of section 1 of the Treaty to Establish the African Union (Ratification and Enforcement) Act, Act No. 4 of 2003.

Presidents Abdelaziz Bouteflika of Algeria, Hosni Mubarak of Egypt, Olusegun Obasanjo of Nigeria, Thabo Mbeki of South Africa and Abdoulaye Wade of Senegal are credited with the formation of NEPAD. It is a fusion of development agenda formulated by certain African leaders to confront the visible challenges of poverty, illiteracy and disease; the marginalization of the continent in world economic relations, globalization

and trade; economic integration and sustainable development; and the achievement of certain development goals. The Omega Plan of Senegal's Abdoulaye Wade focused on the need for huge infrastructural programmes in Africa funded by Western capital. The Millennium African Plan of South Africa's Thabo Mbeki focused on greater closer integration in Africa, more trade and common policies, and emphasized political and leadership inputs in development. The Omega Plan and the Millenium African Plan were merged at the OAU summit in Lusaka, Zambia in July 2001 and named the New African Initiative. In October 2001 at Abuja, Nigeria, it was renamed NEPAD and its agenda, The African Strategy for Achieving Sustainable Development in the 21st Century (NEPAD Agenda), was formulated and issued.[2]

3.2 The Constitutive Act of the African Union

The Constitutive Act evinces the determination of the African Union to take up the multifaceted challenges that confront Africa in the light of the social, political and economic changes taking place in the world, to promote the development of Africa and to face the challenge of globalization, end conflicts, promote and protect human rights, democracy, good governance and the rule of law, and to strengthen African institutions to perform their roles.[3] In its 33 articles, it created institutions and bodies

and defined their functions and also identified the goals and principles of the AU.

In this study, the focus is on the key institutions created and on the provisions relating to economic matters of which foreign investments are a necessary part.

3.2.1 Institutions

The Constitutive Act having established the AU in article 2, identified its organs in article 5 to be the Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Committee, the Specialised Technical Committees, the Economic, Social and Cultural Council, and the Financial Institutions, the last being by article 19 the African Central Bank, the African Monetary Fund, and the African Investment Bank. While the composition, powers and functions of the Assembly of the Union, the Executive Council and the Specialised Technical Committees are defined in the Constitutive Act, those of the other organs abide relevant protocols.[4] To ensure a balance, four of the five regional groups, North, West, East and South Africa have respectively the Investment Bank, the Central Bank, the Court of Justice and the Pan-African Parliament. Possibly, central Africa may have the Monetary Fund.[5]

The Assembly of the Union, composed of the Heads of States and Governments or their duly accredited representatives, is the supreme organ of the AU and meets once in a year in ordinary session. It may hold an extra-ordinary session at the request of two-thirds of its membership. Its chairman is elected after consultations, while its decisions are taken by consensus, and failing that, by a simple majority. It proceeds to its business with a quorum of two-thirds of its membership and adopts its own procedure.[6] The Assembly determines the common policies of the AU, takes decisions on the reports of the other organs, monitors and ensures compliance with the policies and decisions of the AU, adopts its budget, establishes other organs, and can delegate its functions and powers to other organs.[7] Its power to impose political, economic or other sanctions is given in aid of the functions enumerated to ensure compliance.[8]

The Executive Council is composed of ministers of foreign affairs or other designated ministers of the member states. It meets twice a year in ordinary session. Its extra-ordinary sessions, quorum, and procedure are like those of the Assembly of the Union. The Executive Council co-ordinates and takes decisions on policies in areas of common interest to the member states such as foreign trade, energy, industry and mineral resources, agricultural matters, water resources and irrigation, the environment and emergencies,

immigration, and social security. It also implements the decisions of the Assembly of the Union.[9]

Seven Specialised Technical Committees are established. These specialised committees are responsible to the Executive Council and are composed of ministers or senior officials of member states responsible for sectors falling within the appropriate areas of competence.[10] These are treated in the contexts of the economic provisions of the Constitutive Act.

3.2.2 Provisions Related to Foreign Investments

Nigeria as a signatory to the Constitutive Act would profit from its provisions which could facilitate foreign investments. The preamble states the desideratum of accelerating the process of implementing the treaty establishing the African Economic Community. That treaty was made at Abuja, Nigeria, in June 1991 and states its objectives in its article 4 to include the promotion of economic development, integration of African economies and co-operation in all fields of human endeavour. Since the AU has adopted the treaty, the programme for its implementation outlined in six stages, still stands. Action expected at the Economic Community of West African States to which regional grouping Nigeria is part, include the elimination of tariff and non-tariff barriers, harmonization of customs duty and the setting up of a free trade zone and customs union through the

adoption of common external tariff.[11] As a signatory, Nigeria has the promotion of trade and investments in view.

The Constitutive Act assimilates these economic objectives of the treaty in its article 3 (c), (j), (k) and (l), apart from its interest in world affairs, human rights, good governance and democracy and co-operation with development partners in various other fields. To achieve its purposes it stresses the principles of sovereignty, peaceful resolution of conflicts, and introduces new norms such as the participation of the African peoples in the activities of the AU; the right of intervention to prevent genocide, war crimes and crimes against humanity; the promotion of gender equality; and the rejection of unconstitutional changes of government.[12]

If they do their work well, the Executive Council and the Specialised Technical Committees could catalyze intra-African investments owing to the matters with which they have to deal. The Specialised Technical Committees are on rural economy and agricultural matters; monetary and financial affairs; trade, customs and immigration; industry, science and technology, energy, natural resources and environment; transport, communications and tourism; health, labour and social affairs; and education, culture and human resources.[13] To deal with agriculture and natural resources, it is notorious that the raw materials trade between

African countries and the industrialized world has not been beneficial to Africa for want of value addition and market access. Typically, raw cocoa beans are bought cheap from Africa, but refined chocolate is expensive; similarly, diamonds are obtained from Africa but traded in Antwerp and Israel with control over price outside African hands. Thus attention to the matters so well outlined in articles 13, 14 and 15 of the Constitutive Act would promote intra-African and foreign investments, and Nigeria would gain thereby.

3.3 Agenda and Purpose of NEPAD

The NEPAD Agenda is expressed in 207 paragraphs, contained in eight parts. The first four parts comprising paragraphs 1 to 58 are essentially prefatory. The fifth to eighth parts are the operative parts. The poverty and backwardness of Africa are expressed in demographic details in terms of infant mortality, low life expectancy, poor access to safe water, high illiteracy and poor teledensity. The debt trap is expressed as hindering development of the continent.[14] Put against realities in the developed world, globalization and the need for sustainable development, the mobilization of resources through imaginative leadership is identified as necessary.[15] The increasing number of democratic regimes replacing previous dictatorships and the refusal of Africans to tolerate poor leadership further are seen as beacons of hope and progress.

Part II deals with certain paradoxes and challenges in Africa. Africa is very poor, whereas she should be very rich. Minerals, oil and gas, and unspoilt natural habitats rich in flora and fauna abound. These are also seen as bases for investments and development. The rich cultures of Africa are also seen as resources for tourism development, particularly with undoubted historical and current evidence that Africa is the cradle of civilization.[16] Against all this is a sorry history of slavery, colonialism, bad post-independence leadership and an unfair economic relationship in which her cheap labour and raw materials are used for the development of the industrialized world while she remains the world's poorest continent. The structural adjustment programmes of the 1980s on which economic recovery efforts were based also came in for criticism as having promoted reforms which gave inadequate attention to the provision of social services thus depriving many countries of sustained higher growth.[17] In sum, a vicious circle in which economic decline, reduced capacity and poor governance reinforced one another was identified as having put Africa in a peripheral and diminishing role-play in the world economy.

The Agenda also paid attention to developments in the new millennium in the global economy which have affected Africa. Globalization, economic integration and advances in information and communication technology which have been tremendous have been favourable to the industrialized

world and resulted in an exponential growth in the scale of cross-border flows of trade and capital but not in Africa.[18] The Agenda posits that:

> In the absence of fair and just global rules, globalization has increased the ability of the strong to advance their interest to the detriment of the weak, especially in the area of trade finance and technology. It has limited the space for developing countries to control their own development, as the system has no provision for compensating the weak.[19]

Against an identified backdrop of a low level of economic activity creating further decline and deep structural poverty arising from financial collapse in Africa at the close of the last millennium, there is an appeal to nominative as oppose to pure, positive, economics, as would improve the living standards of the marginalized and necessitate the creation by the international community of fair and just conditions in which Africa can participate effectively in the global economy.[20]

The Agenda confesses a new political will by African leaders in accordance with modern trends and challenges. Democracy is accepted as inclusive of accountable government, respect for human rights, and popular participation. Regional integration, the role of the AU in conflict resolution, and the participation of the civil society are accepted. The Millennium Development Goals are seen as development platforms. NEPAD is urged as African in concept and design and an agenda for the renewal of Africa.[21] In paragraph 49, the African leaders accept to deal with conflicts, promote

democracy and human rights; develop fiscal and monetary policies and ensure transparency in financial markets and in corporate government; pay attention to educational, health and gender issues; and promote infra-structural development. There is an appeal to "the African peoples to take up the challenge of mobilizing in support of the implementation of [the NEPAD initiative] by setting up, at all levels structures for organization, mobilization, and action".[22]

3.3.1 Goals and Objectives

These are dispersed all over the NEPAD Agenda. Sometimes they are found intertwined with the means of achieving them and the expected results but the following are clearly expressed:

1. The provision of an impetus to Africa's development by bridging existing gaps in priority sectors to enable Africa catch up with the developed parts of the world.[23]

2. The eradication of poverty and the placement of African countries individually and collectively on a path of sustainable growth and development and to halt the marginalization of Africa in the globalization process.[24]

3. The advancement of women in Africa.[25]

4. The attainment of an average gross domestic product growth rate of above seven percent per annum between 2001 and 2016.[26]

5. The achievement of the Millennium Development Goals, with emphasis on the target year of 2015 for halving the proportion of people living in extreme poverty, enrolment of all children of primary school age in school, reduction of infant mortality by two-

third and maternal mortality by three-quarters, access to reproductive health as well as environmental protection.[27]

6. Consolidation of democracy, sound economic management, and accountability.[28]

These may be regarded as general statements of broad goals. In the presentation of the programme of action the Agenda identified specific principles and objectives which must be realized.

3.3.2 NEPAD and Sustainable Development

In the pursuit of its goals, NEPAD identified certain objectives which should be actualized by certain initiatives.

Peace and security are necessary for sustainable development and for foreign investments. There is accordingly focus on conflict prevention, management and resolution, through collective action.[29] Significantly, President Olusegun Obasanjo of Nigeria and Thabo Mbeki of South Africa have played active roles in conflict management in Liberia, Sudan and in the Democratic Republic of Congo.

Democracy and good governance are also stressed as creating an enabling environment for development. NEPAD accordingly commits itself to leading in ensuring democracy and good governance.[30] It focuses also on reforms in the administrative and civil services, parliamentary oversight,

public participation in governance, judicial reform and anti-corruption measures.[31]

Paragraphs 76 and 85 could be taken as the bases of the now famous **Peer Review Mechanism** of NEPAD.[32] Participation in the mechanism is open to all AU states and it ensures that the principles and objectives being considered are put into use by states: in short, it is a mechanism for ensuring that best practices are brought into governance and openness is ensured. Participating states notify the Chairman of NEPAD's Heads of State and Government Implementation Committee and the peer review is periodic with agreed parameters. The review team appointed submits its report and where shortcomings are identified appropriate measures of assistance are offered including counsel on needed steps, solicitation of aid under the NEPAD umbrella, or the like.

The Economic and Corporate Governance Initiative aims to promote a set of concrete and time-bound programmes aimed at enhancing the quality of economic and public financial management and corporate governance. A task force of ministers of finance and central banks[33] is given the responsibility. It reports to the Heads of State Implementation Committee which in turn refers its recommendations to African states for implementation. This committee is charged to focus strongly on the

management of public finances and to mobilize resources for capacity building to ensure that all states comply with agreed minimum standards.[34]

A great stress is put on regional integration because of the size, low per capital income of many African states and, consequently, limited markets which would not attract investors. To this end the five sub-regional grouping in Africa: North, West, Central, East and South are urged to pool resources together by integration. Integrating countries are urged to consider joint action on transport, energy, water, information and communication technology, disease eradication, environmental preservation, and research and thus promote intra-African trade and investments.

3.4 Sectoral and Investment Priorities under NEPAD

The NEPAD Agenda identifies six priority sectors to be focused upon. These are infrastructure, human resources development, agriculture, the environment, culture, and science and technology. The infrastructure sector is broken down into the general infrastructure sector, that is roads, railways, air and sea ports, water ways and telecommunication; information and communication technology; energy; transport; and water and sanitation. Coming for attention under the human resources development sector is poverty reduction, education, the brain drain problem and health.

Under each sector or sub sector, the desired objectives are stated as well as the action needed to achieve them. In view of the emphasis that NEPAD states give to these sectors it is very apparent that they constitute areas where foreign investments would be most welcome. This is also borne out by the statement of objective at paragraph 65 in terms of bridging existing gaps in priority sectors. Similarly it is declared at paragraph 103 that "if infrastructure is to improve in Africa, private foreign finance is essential to complement the two major funding methods, namely credit and aid".

Thus local, foreign and government investments are expected on road, railway, sea and airport development to improve access to and reliability of the services, enhance regional and cross-border trade and to develop the technology associated with them. NEPAD states propose putting in place legislative and policy frame-works to encourage competition and generally to take action to encourage foreign investors.

The value of information and communication technology is stressed in terms of facilitating democracy and good governance, regional integration and identifying and exploiting opportunities for trade, investments and finance. To achieve these objectives of increased teledensity, reduced cost

of services, and making Africa e-competent, there is a need for foreign investments in this high technology sector.

The energy sector also has a high potential for attracting foreign investors to make energy more available for the development of the continent, given particularly the availability of sources of hydro, thermal and gas generated power supply in Africa. The effect of transport on trade and investment is important. This is given attention at paragraphs 114 and 115, and investment opportunities exist in airlines, road, rail and sea transportation.

Since African societies are largely rural and agrarian, the agricultural sector is prioritized. It is stated that, "improvement in agricultural performance is a prerequisite of economic development on the continent. The resulting increase in rural peoples' purchasing power will also lead to higher effective demand for African industrial goods."[37]

To be sure, there is a need for large-scale farming, agricultural specialization, produce preservation and management that could open much room for foreign investors. This in turn could generate value- added products, better trade, and manufacturing. NEPAD states are urged to focus on land management and development by irrigation, develop rural facilities to and provide institutional support.

3.5. Proposals for Capital Flows and Market Access

NEPAD emphasizes the attainment of the Millennium Development Goals, especially in the area of poverty reduction.[38] It requires domestic and external capital mobilization for this purpose. Increased savings, a more effective tax collection and rationalization of government expenditure are identified as domestic resources.[39] Debt relief is sought from foreign creditors like the Paris Club. It is also proposed that there be engagement with other donor countries in respect of overseas development assistance and the way such is utilized.[40]

Market access is emphasized. As Hossain has noted,[41] developing countries suffer from weakness in the market for their commodity exports: buyers are concentrated while sellers are numerous, widely dispersed and poorly organised. These countries receive only a small portion of the ultimate price which is paid for their primary commodities since they lack control over processing, shipping and marketing. The NEPAD Agenda suggests the diversification of production to add value particularly in the agricultural and minerals sectors. Small and medium enterprises are seen as areas into which investments could be channeled to achieve this.[42]

Rural development, improved land tenure and the enhancement of agricultural credit are proposed to raise investment in agriculture and to

bring about diversified produce and value added. As for mining, improved information and regulatory frame-works are urged to attract investors. Efforts are concentrated on obtaining accreditation and standards for products from the manufacturing sector. Tourism is also identified, particularly adventure tourism, such as safaris, and cultural tourism.

Other measures proposed to ensure market access include the promotion of the private sector in which foreign investment thrives through entrepreneurial development programmes, strengthening of trade and professional associations and chambers of commerce, and the encouragement of government and private sector dialogue.[43] Improvement in intra-regional trade within Africa and trade terms negotiations in multilateral bodies such as the World Trade Organisation are seen as important. Foreign initiatives such as AGOA and 'Everything But Arms' which favour trade and investment must be pursued. The latter is a proposal approved by the European Union Council of Ministers in 2001 to allow all products except arms from the underdeveloped world into the European Union free of duties and quotas.

3.6 Leadership Structure of NEPAD

A Heads of States Implementation Committee made up of the five promoters of NEPAD, that is Algeria, Egypt, Nigeria, Senegal and South

Africa, and two each for each of North, West, Central, East and South Africa identifies the strategic issues to be researched, planned and managed; sets up mechanism for reviewing progress in achievement of agreed targets; and implements past decisions and addresses problems arising therefrom.[44]

There is also a Steering Committee[45] comprising of the representatives of the promoters alone or with those of the regional representatives. It functions as the executive arm. Finally, the Secretariat in South Africa is responsible for administration, logistics and co-ordination. The Heads of States Forum mentioned in paragraphs 75 and 85 of the NEPAD Agenda is a general open forum for Heads of States parties to NEPAD.

3.7 Status of NEPAD

This is important in several ways. While the AU is the supreme political organization in Africa and arose clearly by treaty the same cannot be said of NEPAD. NEPAD does not have total support even among African leaders: Gambia's President Yahya Jammeh does not support it. Even President Wade, a promoter, thinks some of its functions such as the peer review mechanism play down the significance of the AU and should be transferred from NEPAD to the AU.[46]

The NEPAD Agenda does not in international law amount to a treaty. While paragraphs 1, 48, 49, 53, 71 and 73 credit it to African leaders, and while responsibilities are placed on African Heads of State and Government by it, there is no internal evidence of identification of these leaders or their states, or of signature and other indicia of a treaty. It is not peremptory but exhortatory, wishful and apologetic in presentation. Left in the realm of moral suasion, NEPAD depends for effectiveness on goodwill and acceptance.

Nonetheless, it must be acknowledged that international law knows of many great documents similarly presented. This is done usually to put forward new norms and to set standards. They are the so-called soft laws[47] and nations have reacted to them favourably, and used the reactions of others to them in judging good governance and progress. The United Nations Millennium Declaration which sets forth the Millennium Development Goals is an example – indeed it obviously influenced NEPAD going by the contents of the NEPAD Agenda, particularly paragraphs 46, 49 and 68 which provide internal evidence of such influence.

NEPAD and the AU are inextricably mixed and references to AU/NEPAD in the media seem safe. This is because the functions which NEPAD expatiates are really those enacted in the Constitutive Act. There is no

theme in the NEPAD Agenda which is not in the Constitutive Act. The former dilutes what is condensed in the latter. The matters assigned, for instance, to the Executive Council and the Specialized Technical Committees under the Constitutive Act are those dealt with by Part V of the NEPAD Agenda and it seems safe to say that if Nigeria as a member of NEPAD and the AU commits personnel to a Specialized Committee which deals with the same matters as NEPAD, the duplication of efforts would be obvious. Would AU and NEPAD maintain different working groups for agriculture, irrigation and rural development both of which will ultimately report to the Head of States in both bodies? NEPAD is better operated as the mechanism for the actualization of the AU development goals so that the AU can enforce the objectives of NEPAD.

A temptation arises to recommend a reconsideration of the NEPAD Agenda to make it peremptory. It would find support in the United Nations' act of transforming the 1948 Universal Declaration of Human Rights which was "not a legal instrument"[48] by some binary fission into two legally enforceable covenants in 1966: the International Covenant on Economic, Social, Cultural Rights, and the International Covenant on Civil and Political Rights which are. Such an approach would ignore a basic premise of international law which is consent. No treaty would bind a state which is not a willing party to it. Articles 51 and 52 of the 1969 Vienna Convention

on the Law Treaties invalidate treaties obtained by force. So a state has a sovereign right to or not ratify a treaty.

While a state's ratification of an international instrument is necessary for her to be bound by it, a universal ratification is not necessary to validate it. The United States has not ratified the Third United Nations Convention on the Law of the Sea but it is nevertheless in force. In a difficult situation such as this, diplomatic or political action is employed. Senegal is a very strong member of AU/NEPAD despite the misgivings of her President on the peer review mechanism. There is certainly merit in the peer review mechanism being administered by the AU first because most African countries are members and secondly because the Constitutive Act already permits interference in member states' domestic affairs in appropriate cases. AU may be encouraging public participation if there is that confidence that inputs which go into the mechanism would finally be considered by the AU. It would profit the continent if the Constitutive Act were amended so as to enable the Pan-African Parliament carry out the review on the request of the Assembly of the Union to which it should report its findings.

NEPAD is criticized as 'top down', that is, it is conceived and left at the level of the top political structure. This is valid. Laws (or programmes of

action as in the case of NEPAD) are often ineffective owing to under provision of the necessary requirements, such as adequate preliminary survey, communication, acceptance, and enforcement machinery.[49] The NEPAD Agenda has not been removed from the elitist realm of heads of states, foreign governments and development partners and made a grassroots programme. The kind of enlightenment and campaign which was used against apartheid such that the entire continent was stirred against it is necessary against under-development, which is the concern of NEPAD.[50]

NEPAD must be made topical and made so in a sustained way in the mass media, schools, labour circles, through rural extension workers and non-governmental organizations. In such a case even in the Gambia its need will be accepted because it is not just a government programme but a way out of under-development. It is the overall success of NEPAD that would persuade a reluctant country such as the Gambia. NEPAD may use civil society groups as a bypass to carry the message to her citizens.

3.8 Summary of the Investment and Economic Possibilities for Nigeria under NEPAD

As a participating country Nigeria can take advantage of the NEPAD emphasis on sub-regional trade and development and integration with eventual African integration. As the dominant country of one of the five

sub-regions recognized, that is West Africa, with the headquarters of ECOWAS, she could work with other countries to promote the ECOWAS objectives further. Increased economic interaction is being facilitated by the activities of chambers of commerce and individual undertakings. The NEPAD Business Group in Nigeria has emerged to seek and secure trade and investment opportunities outside the country.

The same could be said for Trans-African trade which is also stressed in the NEPAD Agenda. Appropriate relationships between the NEPAD Business Group and the chambers of commerce with corresponding bodies in other African states are opened up. Private sector enhancement by privatization, deregulation and commercialization also open room for investment. The economic geography of Nigeria and her population and market give her so many advantages over other African countries if there is earnest work to improve infrastructure and good governance and eliminate corruption as stressed in the NEPAD Agenda.

As a promoting country and Chair of the Head of States Implementation Committee, Nigeria has been in the forefront of NEPAD/AU action on debt relief under the NEPAD Agenda and has had audience with development partners particularly the G.8 countries during their summit at Atlanta USA, Kananaskis Canada, Genoa Italy, and Gleneagle Scotland. This in its turn

has generated debt relief possibilities particularly with the British Prime Minister Tony Blair's ascendance to the G.8 Countries and European Union chairmanships. Action by NEPAD has generated or added to world sympathy for the heavily indebted countries, with debt relief improving their credit ratings and investment possibilities. Likewise NEPAD encourages the realization of AGOA benefits for African countries.

Apart from ECOWAS trade and investment, trans-African trade, debt relief, and relations with development partners, the NEPAD Agenda stresses joint action on better trade terms with the developed countries. AGOA is already a landmark initiative while the realization of the European Union's 'Everything But Arms' with NEPAD pressure could improve trade investment possibilities, if there is a better tariff regime for African Countries.

Specific sectors are identified and prioritized under NEPAD. In Nigeria, mining and agriculture, apart from oil and gas, offer great possibilities for investments while information and communication technology – the great engine of globalization – and the transport sector offer great investment possibilities to African and other foreign investors. The largely underdeveloped and unlinked railway and lack of modern coaches and a

standard operating system; unused airports; privatization of the sea ports are opportunities in the transport sector.

As Nigeria makes her investment environment healthy by various laws, policies and programmes, a proper propagation of NEPAD would stimulate foreign investments. NEPAD itself is in a sense Africa's own 'millennium development goals' and it has influenced Nigeria's own development goals. The specific measures in place in Nigeria to promote investment under NEPAD are stated in the National Economic Empowerment and Development Strategy (NEEDS) programme, which is considered in detail in chapter five.

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CHAPTER 4

FOREIGN INITIATIVES AND ACTIONS

4.0 Foreword

The foreign initiatives treated in this chapter are those from the developed countries, outside Africa, particularly the initiative of the United States under the *African Growth and Opportunity Act, 2000 (AGOA).* Some attention is also given to the nascent British initiative under the *Commission for Africa.*

4.1 African Growth and Opportunity Act (AGOA)

4.1.1 The African Situation as Background to AGOA

'The poverty and backwardness of Africa stand in stark contrast to the prosperity of the developed world'.[1] The continent hosts some of the world's poorest nations, and the statistics presented by African leaders bear this out.

> In Africa, 340 million people, or half of the population, live on less than US $1 per day. The mortality rate of children under 5 years of age is140 per 1000, and life expectancy at birth is only 54 years. Only 58 percent of the populations have access to safe water. The rate of illiteracy for people over 15 is 41 per cent. There are only 18 mainline telephones per 1000 people in Africa, compared with 146 for the world as a whole and 567 for high–income countries.[2]

They also admit that

> Africa is home to major endemic diseases. Bacteria and parasites carried by insects, the movement of people and other carriers thrive, favoured as they are by weak environmental polices and poor living conditions. One of the major impediments facing African

> development efforts is the widespread incidence of communicable diseases, in particular HIV/AIDS, tuberculosis and malaria.[3]

In the area of trade, the director general of the World Trade Organisation said of poor countries of which many African nations are part, that such countries are caught in a vicious circle: they need foreign investments but can offer little to attract such investments; in order to break out of this circle, they need to export but their exports face formidable barriers: agricultural tariff still average over 40%, and some rise above 300%; beside these are many non-tariff barriers, quotas, technical regulations, and health and safety standards. According to him, the 49 least developed countries representing 10.5% of the world population have less than 1% of world exports.[4]

Another aspect of the trade imbalance was identified by Sue Brandford thus:

> Forty years ago the UK, the US and the other industrialized nations dominated multilateral negotiations, getting their way on almost all the main issues. Indeed, there were good reasons for developing countries not to take part in the main trade talks, held within the auspices of GATT (General Agreement on Tariffs and Trade, the forum set up by the Breton Woods Conference in 1944 for setting the rules of world trade), because most of the leading export goods produced by developing countries – agricultural products and textiles – were excluded from the talks. This meant that, while developing countries would come under pressure to open their markets to manufactured goods from the industrialized world, they would get nothing in return.[5]

While the World Trade Organisation has succeeded GATT as the forum for dealing with world trade matters, it is not free from criticism. Madeley,[6] for instance, criticizes it as being concerned with trade liberalization and trade dispute resolution whereas issues affecting the least developed countries such as the pricing of primary commodities are beyond these two and need attention; that the Organisation assumes that it is countries that trade whereas it is really individuals and chiefly transnational corporations that do and the Organisation has no mandate to regulate them. This criticism is fair and strong. It is also notorious that the strong position of the developed nations within the Organisation on agricultural subsidies and intellectual property shows an inherent unequal relationship amongst members.

A final point that must be made about the Africa situation necessary for an appreciation of AGOA is on the bad human rights records of many African countries and lack of respect for the rule of law; frequent political crises and difficulty in governmental succession; and poor operation of democratic institutions in practice.

AGOA is the United States' response. It is the formula through which her conscience finds expression on such multiplex and variform matters as market access for African produce, removal of tariff and good governance.

4.1.2 Overview of AGOA

The law referred to as AGOA is really a part of an Act of the Congress of the United States passed in January 2000 known as the *Trade and Development Act of 2000*. It was signed into law on 18 May 2000 by President Bill Clinton. This Act is in six parts formally referred to as titles, with each title (or part) dealing with specific items.

Title 1 of the Act on Extension of Certain Trade Benefits to sub-Saharan African Countries, consisting of subtitles A, B and C (each of which respectively contains seven, seven and eleven sections) is what is authorized by subsection 101 to be known under the title, African Growth and Opportunity Act. It is not an independent Act, but part of an Act, the same Trade and Development Act of 2000 which in Title II also conferred trade benefits on countries in the Caribbean Basin.[7]

AGOA under subtitle A revealed the findings of Congress prompting the enactment of the Act; states the policy it aims to effect; defines the eligibility requirements for beneficiary countries; and creates a consultative forum. It requires the President of the United States to make yearly reports to Congress and indicates the beneficiary African countries. These matters are dealt with in sections 101 to 107 respectively.

Subtitle B deals with trade benefits, while subtitle C deals with economic development related issues such as agriculture, HIV/AIDS and debt relief.

The Office of the United States Trade Representative and the United States Agency for International Development have issued a guide on AGOA in October 2000 known as the *African Growth and Opportunity Act Implementation Guide* (Implementation Guide) which expatiates on AGOA, answers some frequently asked questions and contains other information not contained in AGOA.

Nigeria is included in the definition of sub-Saharan African countries (or such cognate terms) at section 107 of AGOA and pursuant to the power vested in the President of the United States to do so, has been designated on 2 October 2000 as eligible to benefit from AGOA.[8] The present study therefore proceeds with Nigeria's particular eligibility in view, though AGOA is enacted in a general sense to benefit designated African countries in the same way.

4.1.3 Policy Considerations under AGOA

The willingness of the United States to offer assistance to sub-Saharan African countries rests on the considerations and policies involved. The considerations in the nature of preambles are stated as "findings" at section

102 of AGOA, while the policy is stated at section 103. Owing to the inveterate error of supposing that AGOA is about trade alone, it is necessary to categorise these matters.

Matters of Trade and Commerce. Items 1, 2, 4 and 8 in the statement of policy by Congress contained in section 103 of AGOA are on encouraging increased trade and investments, reducing tariff and non-tariff barriers and other obstacles to trade, negotiating reciprocal and mutually beneficial trade agreements and the possibility of establishing free trade areas between the United States and eligible sub-Saharan African countries. These are undoubtedly influenced by those findings of Congress set out as items 7,8,9 and 10 which state the positive effects of increased trade and investments through private sector development, direct investments, removal of barriers to trade and capital flows, and overall economic development.

Matters of Growth and Development Items 3, 5, 6, 7, 8 and 9 in section 103 relate to regional integration in sub-Saharan Africa, expansion of small businesses, women entrepreneurship through private sector growth, development of civil societies and political freedom, establishment of a trade and cooperation forum, and securing the accession of sub-Saharan African countries to the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public

Officials in International Business Transactions. Again, the findings of Congress in items 1, 2, 3, 4, 5 and 6 of section 102 recite the need for sustainable development and growth, the availability of human and natural resources, improved political and growth indices and the need to further advance these.

It needs to be stated that these are not pure or clear categorizations. Apart from the obvious overlap between some of them, it is also possible to open a third category of Matters of American Interests which could be sifted from items 4, 7 and 10 of section 102 and items 7, 8 and 9 of section 103. It is notorious, for instance, that civil society organizations are a bypass for the expression of American views on matters to be pressed on the host society and government.[9]

Other development concerns which require consideration on their own are those set out in subtitle C. They are on banking and financial assistance, agricultural and environmental concerns, and HIV/AIDS.

4.2 Eligibility Provisions AGOA

Two forms of eligibility are clear under AGOA: the eligibility of a particular country and the eligibility of particular products for AGOA benefits, which may be respectively called Country and Product Eligibility.

4.2.1 Country Eligibility

Section 104 sets out the relevant provisions.[10] Section 104 (a) lists the criteria to be used by the President of the United States in designating a country as a beneficiary while section 104(b) requires the President to terminate this designation by providing that "(b) CONTINUING COMPLIANCE – If the President determines that an eligible sub-Saharan African country is not making continual progress in meeting the requirements described in subsection (a)(1), the President shall terminate the designation of the country made pursuant to subsection (a)." On the strength of this subsection Central African Republic, Eritrea and Cote d'Ivoire have at different times been removed from the list of eligible countries.[11] The point to stressed is that AGOA expects that an eligible would keep in being those criteria she had satisfied in order to have been eligible in the first place.

The criteria are set out in the following sub-sections: subsection (a)(1) which highlights six sets of matters which the beneficiary country should have established or is making progress toward establishing; subsection (a)(2) demands that the country "does not engage in activities that undermine United States national security or foreign policy interests"; and subsection (a)(3) in its turn demands that the country "does not engage in gross violations of internationally recognized human rights or provide

support for acts of international terrorism and cooperates in international efforts to eliminate human rights violations and terrorist activities." Subsection (a)(2) and (3) appear plain enough, so attention is given to subsection (a)(1) which sets out six criteria.

CRITERION A

For Nigeria to remain eligible, having been so designated on satisfying the eligibility criteria she must operate "a market-based economy that protects private property rights, incorporates an open rules–based trading system, and minimizes government interference in the economy measures such as price controls, subsidies, and government ownership of economic assets."

The matters here relate to deregulation, commercialization, guarantees and assurances on the security of investments and property rights.[12] The important thing to stress is that there is no requirement that government may not interfere, but that interference should be minimized.

CRITERION B

The requirement here is for Nigeria to uphold "the rule of law, political pluralism and the right to due process, a fair trial, and equal protection under the law." Political pluralism is affirmed by the existence of many political parties in Nigeria. This was further judicially affirmed by the Supreme Court in *Independent National Electoral Commission V. Balarabe*

Musa[13] which interpreted section 222 of the Constitution of the Federal Republic of Nigeria 1999 (the Constitution) to permit all political parties which satisfy its requirements to be registered without hindrance. The other items here are met by the provisions of Chapter IV of the constitution, particularly sections 35 and 36 on personal liberty and fair hearing respectively.[14]

CRITERION C

This requires that Nigeria should eliminate trade and investment barriers to the United States and grant national treatment, protect intellectual property and offer mechanism for resolving bilateral trade and investment disputes.

International economic law recognizes various standards such as the most favoured nation, national, identical treatment or reciprocity, open door, equitable treatment, preferential treatment, good neighbourliness, and the international minimum standards.[15] The point of the National Standard or National Treatment is the absence of discrimination between the treatment of nationals of the host state of a foreign investment and a foreign investor. It is clear though that the standard of national treatment is taken with clear qualifications. Brownlie [16] posits that the investor cannot demand political rights as of right in the host country and must take the local law as he finds it in relation to the regulation of the economy. The guarantee on security of

property rights from expropriation by section 44 of the Constitution is without discrimination in favour of Nigerians. The Investment Promotion Commission Act which has been discussed before[17] also gives assurances without discrimination in favour of Nigerians.

The demand for national treatment is the price of the preferential treatment inherent in the relationship between the United States and a beneficiary country like Nigeria under AGOA. The AGOA benefits are extended to beneficiary sub-Saharan African countries alone and not to other United States trade partners. The most favoured nation standard can not be used by non beneficiaries such as North America Free Trade Area States, for instance, to claim them, or like treatment as is given the beneficiary countries. While the stress is on the standard of national treatment, it is apparent on reading AGOA that other standards are involved too. Reciprocity is expected by Congress, for example in its support for "negotiating reciprocal and mutually beneficial trade agreements, including the possibility of establishing the free trade areas that serve the interests of both the United States and the countries of Sub-Saharan Africa" in section 103(4). Again when the benefits are considered, section 112(b)(1), (3) and (3) clearly shows that some textile products which may enter the United States from a beneficiary country would have had a United States element either in the form of "fabrics wholly formed and cut in the United States" or

of "yarn originating …in the United States". Any view of AGOA as an altruistic legislation must be subject to the reality that while through AGOA the United States extends a preferential treatment, she does expect a national treatment for American investors and reciprocity from beneficiary countries.

Complaints of breaches of intellectual property rights have not been a strong issue in United States/Nigerian trade relations as in United States relationship with Asian and South American countries such as Brazil, China and India. As to resolution of bilateral trade and investment disputes, appropriate measures are provided in the Nigeria Investment Promotion Commission Act.[18]

CRITERION D

It is required that Nigeria put in place economic policies to reduce poverty, increase health and educational facilities, expand physical infrastructure, promote the development of private enterprise and encourage the formation of capital markets. Detailed consideration of these and other criteria would be undertaken in chapter 5. Suffice it to say that apart from AGOA, NEPAD also demands this, and some measures and laws have been put in place by government such as those on Child Rights, the National Programme on Poverty Alleviation, the Universal Basic Education

Programme, among others consideration of which are reserved for chapter 5.

CRITERION E

Nigeria is required to put in place a system to combat corruption and bribery. How far she has gone in this respect has been considered in chapter 1.[19]

As to signing and implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, AGOA makes it facultative, not mandatory, in the use of the expression "such as". This Convention was adopted on 21 November 1997 and came into force on 15 February 1999.[20] Beside the promoting OECD states, Argentina, Brazil, Bulgaria, Chile and Slovenia have ratified it. Being a non-OECD state, for Nigeria to accede to it she must be prepared under its Article 13 to be a full participant in the OECD Working Group on Bribery.[21] The Convention in essence criminalizes the bribery by a person in country A of a foreign public official in Country B. Article 1 provides that:

> Each party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business, or other improper advantage in the conduct of international business.

The same article defines a “foreign public official as “any person holding a legislative, administrative, or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including a public agency or public enterprise; and any official or agent of a public international organization.”

CRITERION F is essentially on recognition of workers’ rights in terms of association, work conditions, safety and the like.

The foregoing constitutes the criteria for a sub-Saharan African country’s eligibility. Obviously the President of the United States was satisfied that Nigeria had met them, in large, before designating her as eligible and for her continuing eligibility.

4.2.2 Product Eligibility (or Trade Benefits)

Product eligibility holds the interest of those who applaud AGOA, but it has no room for street naïveté. The provisions of AGOA dealing with trade benefits, that is subtitle B consisting of sections 111 to 117, are means to convey not only the charity of United States but also to protect the deep consideration of her own interest, and these did not escape the draughtsman who with admirable skill succeeded in setting out very detailed provisions involving references with a cryptic hand that conceals the determination to

protect American economic interest from harm that may arise from her generosity. Nigeria needs this attitude in her relationship with the many countries in Africa to whom she a benefactress.

After the sense of AGOA, it would be proper to characterize product eligibility in two ways: non-textile and textile products, the first covered by section 111 and the second by sections 112 and 113.

Non Textile Products

In order to confer trade benefits under AGOA on beneficiary countries, AGOA at section 111 (a) amends the Trade Act of 1974 of the United States of America by inserting a new section, section 506A, after the existing section 506 of the Trade Act. Section 506A of the Trade Act as amended by section 111(a) of AGOA is in two subsections. Section 506A(a) authorizes the President of the United States to designate a country as eligible for the trade benefits in section 506A(b) if that country in terms of sections 104 and 107 of AGOA has satisfied the country eligibility requirements of AGOA and continues to comply with the said requirements. In this sense, subject to the powers of the President to terminate the eligibility of any country, a country that is designated by the President under section 104 of AGOA is qualified for the trade benefits set out in section 506(A) (b) of the Trade Act of 1974.

Section 506(A)(b) of the Trade Act confers preferential tariff treatment for certain articles on a qualified country such as Nigeria. The substance of the provision may be outlined thus:

1. The President may provide duty free treatment for any article described in section 503(b)(1)(B) to (G). The article must have been grown, produced or manufactured in a beneficiary country. This in effect confers on Nigeria benefits available under the Generalised System of Preferences (GSP) programme of the United States whereby preferential treatment in accorded imports from Nigeria by making them duty-free, subject to other qualifications.

   The operative words are that the article must be "the growth, product, or manufacture" of Nigeria. Nonetheless, they are not an open sesame despite the extensive list of potentially eligible articles,[22] as "the GSP program excludes from this extensive list of products duty-free treatment for textiles, apparel, watches, footwear, hand bags, luggage, flat goods, work gloves and leather wearing apparel, and certain electronic, steel and glass products as well as other products that are deemed import sensitive." [23]

2. The article must not be "import-sensitive". So important an exclusionary term as this is not defined in AGOA. The

interpretations that can be ventured are that it is first analogous to the surge control mechanism in the case of textile products [24] where the President may intervene to avoid a glut of the product to the injury of the American economy. It may also include a situation where it may be necessary to protect domestic producers or at least to consider their concerns as in the notorious sensitivity of the United States steel industry to competition from abroad. Left open in this way, medico-biological, environmental, and even political or industrial causes may be relied on, as, for instance, where the import of cocoa is protested on grounds of alleged use of slavery or child labour or payment of poor wages.

3. Rules of Origin requirements must be satisfied. These deal with source, conveyance and value content. First the article must be as said before grown, produced or manufactured in Nigeria as an eligible country. Secondly, it must have been imported directly from Nigeria into the United States. If the shipment is routed through another country it would still be considered direct if it did not enter the commerce of that country while en route the United States.[25] These requirements forestall any possibility that merchandise may be obtained from non-AGOA beneficiary countries where they are

cheaper and exported to the United States to take advantage of the zero-duty treatment available.

The value content is obtained when

> The sum of (a) the cost or value of materials produced in one or more beneficiary countries plus (b) the direct cost of processing performed in these countries is not less than 35 percent of the appraised value of the product when it enters the United States. Up to 15 percentage points of that 35 percent may be derived from U. S. parts of materials used to produce the product in a beneficiary sub-Saharan Africa country or countries.[26]

The appraisal is done by the United States Custom Service, usually at the transaction value or the price actually paid for the article when it was sold for export into the United States and all costs that be directly allocated to the growth, production or manufacture of the item in issue.

To summarise the trade benefit of non-textile article in sentence: an article which is not import sensitive, when imported directly into the United States will attract zero tariff if it is grown, produced or manufactured in an AGOA–eligibility country, such as Nigeria, provided that the cost of the material and the direct cost of processing it is not less than 35 percent of the value of the article when it enters the United States.

Textile Products

In AGOA, the United States yields ground on its notorious protectiveness over her textile industry. By section 112, six textile groupings enumerated at section 112(b) may receive preferential treatment where the textile and apparel articles falling within them are imported directly into the United States from a beneficiary sub-Saharan African countries free of duty and free of any quantitative limitations" or quota. This is much too simple, because AGOA, as shall be seen later, justifies the imposition of limitations under the surge mechanism.

To appreciate the trade benefit enacted for textiles under AGOA three points must be understood.

1. The item must of course be from a beneficiary sub Saharan African country such as Nigeria.
2. It must fall within any of the six textile groupings.[27]
3. The provisions against transshipment must be observed

The first category is clear, the second and the third fall for discussion.

<u>The Six Textile Groupings.</u>

1. APPAREL ASSEMBLED IN BENEFICIARY COUNTRY. The article is assembled in one or more beneficiary countries "from

fabrics wholly formed and cut it in the United States", or "from yarns wholly formed in the United States". The emphasis here is on the use of United States materials.

2. APPAREL CUT AND ASSEMBLED IN BENEFICIARY COUNTRY. This is like the first grouping with the addition that the article is assembled in one or more beneficiary countries "with thread formed in the United States". In the first the item is cut in the United States and assembled in the beneficiary country; in the second the item is cut and assembled in the beneficiary country using thread formed in the United States.

3. APPAREL ASSEMBLED FROM REGIONAL AND OTHER FABRIC. The item may be wholly assembled in one or more beneficiary countries from fabric wholly formed in one or more beneficiary countries from yarns originating in the United States or one or more beneficiary countries. This grouping admits the use of either United States or beneficiary countries fabrics. It is, however, unlike the first two which is based on United Stats materials subject to limitations.

    i. Such imports can only range between 1.5 percent and 3.5 percent of the aggregate square metre equivalents of all apparel articles imported into the United States. The

percentage is gross of all imports from all AGOA beneficiary countries, not from each. Accordingly, to profit from it a "first come, first served" basis is urged. [28]

ii. Whereas it is required that the fabric has a United States of beneficiary country origin, this is waived until 30 September 2004 for lesser developed beneficiary countries, that is countries with a gross national product per capita of less than US $1500 a year in 1998 measured by the World Bank.

iii. Where there is a surge in import of the article as to cause serious damage or threat to the domestic industry producing the like article in the United States the President may suspend the duty-free treatment. This is done on the advice of the Secretary of Commerce after investigation and representations.

4. SWEATERS KNIT–TO SHAPE FROM CASHMERE OR MERINO WOOL. Here the material, cashmere or wool, is exclusive, and the knitting must be done in a beneficiary country. Where cashmere is used it should be the chief material; and where it is merino it should constitute not less than 50 percent of the materials.

5. APPAREL WHOLLY ASSEMBLED FROM FABRIC OR YARN NOT AVAILABLE IN COMMERCIAL QUANTITIES IN THE UNITED STATES. These are items in short supply in the United

States, and in this sense could be assembled, cut, knit-to-shape in the beneficiary country from materials obtained neither from the United States nor from the beneficiary country. It is the craft or industry that is encouraged. Silk is an example.

6. HANDLOOMED, HANDMADE, AND FOLKLORE ARTICLES. Products of this sort from a beneficiary country which certifies them as such to the President of the United States are qualified. The dye pits of Kano and Abeokuta and individual weavers in the Nigeria could profit from this.

The use of foreign items, that is items not from the United States or beneficiary states, in finishing an article will not disqualifying it from AGOA benefits if such items are findings and trimmings or minimal. Buttons, zips, labels, hooks, and such like are the items involved.

Some adjustments have been made to the foregoing as well as to the entire time frame of AGOA. The Trade Act of 2002 raised the 3.5% bar in category 4 to 7% and allows knit-to-shape items with components from the United States or other beneficiary African country, or which uses yarn from another beneficiary African country in category 4. This amendment has come to be known as AGOA II. Also the AGOA Acceleration Act of 2004

known as AGOA III extended the time frame of AGOA to 2015 and specifically the time frame in category 3 in respect of lesser developed beneficiary countries to 30 September 2007.

Trans – shipment

Section 113(a) of AGOA makes the "no duty, no quota" preferential treatment on textiles conditional on six factors:

1. The adoption of an effective visa system [29] and procedures to prevent unlawful transshipment of the articles and use of counterfeit documents;
2. The enactment of legislation or regulations that would permit the United State Customs Service to investigate allegation of transshipment in a beneficiary in a beneficiary state;
3. A timely reporting system to the same Custom Service of imports and exports of covered articles;
4. Cooperation with the United States on action to prevent circumvention;
5. Causing producers and exporters to keep records; and
6. Providing documentation to the United States Customs Service on country of origin.

These are to be complied with by Nigeria as a beneficiary country. The documentation on country of origin relates to production records, place of production, number and identification of machinery used in production, number of workers employed and certification by both the manufacturer and exporter.

The United States Customs Service will provide technical assistance to beneficiary countries on developing and implementing a visa system, train their officials on anti-transshipment measures and also send verification teams to such countries. Importers are also obliged to comply with the customs procedure of the United States.

The definition of transshipment extends its meaning beyond actual shipment but strikes at the vice to be prevented.

> Transshipment has occurred when preferential treatment for a textile or apparel article under this Act has been claimed on the basis of material false information concerning the country of origin, manufacture, processing, or assembly of the article or any of its components. For purposes of this paragraph, false information is material if disclosure of the true information would mean or would have meant that the article is or was ineligible for preferential treatment under section 112. [30]

"When transshipment occurs, the benefits of AGOA accrue to others outside of sub-Saharan Africa, taking away jobs and opportunities from

Sub-Saharan African countries and people and diminishing the benefits eligible sub-Saharan countries receive from AGOA." [31]

4.2.3 Others Initiatives of AGOA

AGOA initiates other matters beside tariff and quota. "Congress declares that free trade agreements should be negotiated, where feasible, with interested countries in sub-Saharan Africa, in order to serve as the catalyst for increasing trade between the United States and sub-Saharan Africa and increasing private sector investment in sub-Saharan Africa."[32] The President of the United States is empowered to enter into negotiations and develop plans for actualizing this objective.

AGOA also deals with the issue of debt relief recognizing that debt is a major impediment to economic growth and poverty reduction and that previous efforts and emphases such as rescheduling and the Heavily Indebted Poor Countries Initiative have not brought about desired results.[33]

AGOA also identifies other development related issues where the United States could offer assistance to beneficiary countries, which are

1. Executive assistance on trade liberalization, financial and fiscal reforms, inter-firm linkages between American and beneficiary countries firms among others. [34]

2. Creation of additional equity funds by the Overseas Private Investment Corporation in support of development projects in beneficiary countries, with women entrepreneurs and innovative investments being points of emphasis.[35]
3. Expansion of the Export-Import Bank's financial commitments in beneficiary countries. [36]
4. Expansion of the United States and Foreign Commercial Service, to provide counsel on matters of trade, tariff and market access to improve American business presence in beneficiary countries. [37]
5. Donation of air traffic control equipment that is no longer in use, including appropriate related reimbursable technical assistance. [38] The basis for this overtly discriminatory air safety standards between American and beneficiary countries air spaces is not expressed but recipient of such equipment must be wary.
6. Increase in the activities of the Development Fund for Africa to facilitate the development of a receptive environment for trade and investment in beneficiary countries and encourage development issues. [39]
7. Assistance, including American private sector assistance, on the HIV/AIDS crisis in Africa. [40]
8. Measures to improve agricultural practices and to check desertification in Africa. [41]

4.3 Does AGOA offer Nigeria 'Growth and Opportunity'?

The difference between the United States and British plans for Africa is clear in the emphasis of the former on extracting some promises on democracy and good governance from beneficiaries. This trend which has been pointed out before in chapter 2 appears starkly in AGOA. The demand for political pluralism, the rule of law, and other eligibility requirements from Nigeria in section 104 of AGOA cannot be assessed as being to Nigeria's injury. It rather pushes her development. Even if Nigeria had not qualified for AGOA, or does not manage her affairs well as to benefit from it, still as a country aiming at growth and development she cannot ignore the requirements, as they are development catalysts.

AGOA challenges Nigeria to compete, identify opportunities and to develop 'best practices'. The opportunities created by AGOA are left open, jointly for all beneficiary countries and it does not allocate them per beneficiary. The challenge then is for Nigeria to identify trade, market access, investment, preferred products and priority areas in AGOA and to take advantage of them. A clear example is section 112(b)(3) of AGOA which enacts a percentage range of between 1.5 and 3.5 for textile articles assembled from regional fabrics. The percentage is for all beneficiary countries and could be exhausted without Nigeria's participation. On the other hand she may give attention to the growth, production and

manufacture of AGOA eligible products and in one act develop local enterprises, encourage investments in them and have access to the United States' market.

The sophisticated and inherent requirement of rule-observance in AGOA evokes a bivalent response. Difficult as the statute is there is that to applaud in it which Nigeria could learn from. The provisions contain reference to procedures of the United States Customs Service, rules of the North America Free Trade Agreement Area, other trade-related laws as to prevent a thoughtless rush into dreams of AGOA benefits. It is plain that without a mastery of the rules nothing can be gained from it. In itself it creates room for trade counseling and cognate services to be offered. Rule-observance which is indispensable in advanced issues of development needs to be mastered by Nigerians and Nigerian institutions. AGOA directly challenges the Nigerian Customs Service, maritime and related services operators to practice rule enforcement and Nigerians to imbibe rule observance. Record keeping is demanded by AGOA, for instance in section 113(a) on an effective visa system before Nigeria could get preferential treatment for her textile exports. The same insistence on rule adherence could profit the money and capital markets, the Standard Organisation of Nigeria, among others.

NEPAD presses the need to emphasize standards by African countries in order for their products to gain acceptance in international markets. [42] The opportunity to get articles which are grown, produced or manufactured in Nigeria into the American market under AGOA means that an institution like the Standard Organisation of Nigeria would have to insist on compliance with standards that would gain acceptance for items made or produced in Nigeria.

Section 112 of AGOA which provides market access for textiles from Africa allows for a situation where Nigeria may relate with another beneficiary country in products manufacture. This encourages regional integration to which Nigeria is favourably disposed under her Constitution and by her membership of the African Union and NEPAD which emphasizes this. This in an encouragement for her to reach outside her borders whether to invest there or to invite investors from there.

AGOA also directs attention appropriately to areas which Nigeria has to really emphasize: the protection of intellectual property and trade dispute resolution. It may be argued that the United Stats is only keen on protection of American patents, trade marks and other intellectual property in Nigeria but that would ignore the fact the Nigeria's development cannot be divorced from her intellectual capacity, the product of which needs to be

protected by the same Patent or Trade Marks Registries. Similarly trade and investment dispute resolution mechanisms need to be improved on and if this challenge is taken commercial activities which are impatient with litigation would be the better for it.

To profit from AGOA, information and extension services must be improved. Without guidance for instance the ordinary Nigerian, even the well educated, may not know his way about AGOA. This then raises the need for counseling services. These areas of opportunity also have to be pointed out to Nigerians to invest in or develop by the provision of extension services.

It is a clear objective of AGOA to enhance Nigeria's development by encouraging investment in the growth, production or manufacture of items which can be shipped duty free and without, generally, a restriction on quota into the United States. The investments may be local or foreign, provided Nigeria is the host country. In effect foreigners or foreign capital may be involved in the identified areas. The National Directorate of Employment, agricultural banks and related institutions could campaign for interest in them and incidentally, even directly, confront poverty and rural development. The demand for a 35 percent value-added on an article on

arrival in the United States means there is room for agribusiness and small-scale manufacturing. [43]

Finally AGOA directs the United States Overseas Private Investment Corporation to increase loans, guarantees, and insurance that support projects in Nigeria, including projects by women entrepreneurs and also to encourage the expansion of her Export–Import Bank, apart from a President and Cabinet level trade forums. These will assure American exporters and investors of support for them in their trade and investment interactions in Nigeria.

AGOA, however, is attended by some difficulties. It is still, like NEPAD, urban and kept within enlightened circles in Nigeria. The opportunities must be identified to the many that dwell in the rural areas, for they are those who grow and produce, even if manufacturing is urban. This has some connection with the bivalence identified before, which is opportunity matched against sophistication and difficulty. The ordinary investor would need counsel on product eligibility and customs procedures for particular products. Chambers of Commerce may have the advantage of enlightened guidance but the generality of Nigerians would not.

The second point is that it may be objected to on nationalistic grounds. It has the air of a patronizing law proceeding from a super-legislature. The eligibility requirements are dictates and taken with provisions such as those requiring access for the United Stats Customs Service to enter Nigeria for investigations offer evidence of little regard for Nigeria's sovereignty.

There is some difficulty in reconciling the offer in AGOA with the American attitude on the matter of subsidy, except on the premise of not postponing American interest. Africa has not been able to make gains on the issue of subsidies by America and Europe to their farmers in trade talks. (Incidentally, these countries press for removal of subsidies very much on African countries in development programmes). The observation by Dr. Sachs is thus valid that "if American and European subsidies continue then the cotton farmers… of Africa are impoverished",[44] creating a baffling paradox in spite of AGOA.

The final point is that AGOA is fast–paced. It is an eight-year programme[45] (2000 to September 2008) and that period is not enough to have structures and education on ground about it. To expect that action taken on appropriate areas would have ripened to enable beneficiaries harvest from AGOA within this period is rather unrealistic. It is amazing that agricultural and agribusiness programmes are expected to have fully matured within

this period. An extension is necessary. It can nonetheless be said that AGOA offers Nigeria opportunities for growth, and increases in trade and investment activities despite these.

4.4 The American Interest in AGOA

AGOA is a vehicle of America's charity but it is not offered without some consideration of her interests, some of which clearly appear in it. First, it encourages the use of American products especially textiles and accessories. Secondly, it aims to open Africa to American businessmen. They may even invest in the growth, production and manufacture of eligible products in beneficiary countries. Thirdly, it seeks free trade agreements and seeks to take advantage of regional integration efforts in Africa. Finally, it seeks better political ties, a continent not hostile to American interests, and cooperation against terrorism and narcotics.

4.5 THE COMMISSION FOR AFRICA

This is included as a parenthesis in this study because of the affinity in the concerns of NEPAD, AGOA and the Commission for Africa, and their influence on development generally and foreign investments particularly.

The Commission for Africa was inspired by Sir Bob Geldof the rock singer already famous for his Live Aid concert in 1984 in response to the famine in Ethiopia. Creating the Commission, the British Prime Minister Tony Blair said he expects that it will "come up with specific solutions in relation to development, conflict resolution, governance and economic questions that allow us to gather international support behind the Commission's recommendations."[46] It was inaugurated in the spring of 2004 and has been described as a sort of Marshall Plan for Africa,[47] notwithstanding skepticism that Britain and other G8 countries have not fulfilled previous promises.[48]

The Prime Minister who had insisted that Africa is a scar on the world's conscience and promised that "Britain will raise by 2006 its commitments to development aid to Africa £1 billion a year and its overall levels of assistance to all countries by 50%"[49] actually included Africans and other opinion leaders as commissioners. The 17 commissioners include: Gordon Brown and Hilary Benn, the United Kingdom's Chancellor and Secretary of State for International Development respectively, Bob Geldof, Prime Minister Meles Zenawi of Ethopia, President Benjamin Mkapa of Tanzania, K. Y. Amoako (head of United Nations' Economic Commission for Africa), Michel Camdessus (French President Jacques Chirac's Africa Personal Representative) and Senator Nancy Kessebaum

of the United States. He aims to take advantage of Britain's presidency of the G8 countries and leadership of the European Union in 2005 to press the Commission's agenda, [50] which are

> First, to support the best of existing work on Africa, in particular the New Partnership for Africa's Development (NEPAD) and the African Union, and help ensure this work achieves its goals.
> Secondly, to help deliver implementation of existing international commitments toward Africa.
> Thirdly, to offer a fresh and positive perspective for Africa and its diverse culture in the 21st century, which challenges unfair perceptions and help delivers changes.
> Finally, to understand and help fulfill African aspirations for the future by listening to Africans.

The Commission notes six principal thematic areas: the economy, natural resources, governance, peace and security, human development and culture, and public participation. It is expected to submit a report in mid-2005.[51]

Hilary Benn posits that if the Commission gets the world trade talks moving again, "the benefit that would flow from this to developing countries would be worth, on some estimates, three times the value of all the aid the rich world currently gives" to Africa.[52] In terms of debt relief for which the Commission became instantly popular with the African Union, NEPAD, antiglobalizationists and others, Chancellor Gordon Brown proposes relief to the tune of US $100 billion.[53]

If the Commission succeeds on debt relief, aid and trade reforms it would have succeeded remarkably in helping Africa on to her feet. It falls on Nigeria to watch the Commission and take advantage of the initiatives it would generate on these matters in order to be able to make out a case for, or qualify herself for, benefits therefrom.

REFERENCES

1. NEPAD Agenda, paragraph 2

2. Ibid, paragraph 4

3. Ibid, paragraph 128

4. Moore, M., 'The WTO and Developing Countries: *Developments,* 3rd Quarter, 2001, p. 11

5. Brandford, S., 'Learning the Rules of World Trade', *Developments,* 4th Quarter, 2002, p. 31

6. Madeley, J., 'Trade – What kind of Organisation?', *Developments,* 3rd Quarter, 2001, p. 12

7. The Trade and Development Act of 2000 permits Title II extending trade benefits to the Caribbean countries to be cited differently and independently, like AGOA, as the "United States – Caribbean Basin Trade Partnership Act".

8. See Annex 1 of the AGOA implementation Guide (Implementation Guide) and also http://ww.agoa.gov/eligibility/country_eligibility.html (Site visited on 29/4/04)

9. When during his 1997 tour of Africa President Bill Clinton did not visit Nigeria owing to frosty relations between the United States and Nigeria, he had audience with the leadership of the Civil Liberties Organisation a Nigerian non-governmental organization in Ghana. The tour was a prelude to AGOA.

10. The text of section 104 which is rather lengthy is shown in the Appendix to this work.

11. Information obtained at website in note 8 supra.

12. See section 1.3.3 of chapter 1 and 2.2.3 of chapter 2

13. [2003] 10 WRN 1. The Supreme Court declared that once a political association fulfils the six conditions in section 222 of the 1999 Constitution, the Independent National Electoral Commission is

constitutionally bound to recognize it as a political party. This led to more parties participating in the 2003 elections than there were in 1998.

14. The said sections are equipollent with Amendments, IV, V, VI, and VIII of the Constitution of the United States.

15. Schwarzenberger, G., Manual of International Law, 5th ed., London, Stevens & Sons, pp. 110, 111; Brownlie, I., Principles of International Law, 3rd ed., 1987 Oxford,. Oxford University Press, pp 523 – 528.

16. Brownlie, op.cit, p.524

17. See Section 1.3.3 of chapter 1

18. Section 26, Nigeria Investment Promotion Commission Act, cap N117, Laws of Federation of Nigeria 2004.

19. Note 17, supra

20. See Meadows, F., 'OECD Bribery Convention Five Years On: How is it Working and How is it Monitored?' *Business Law International*, Vol. 5 No. 3, September 2004, pp 371 – 384

21. Apart from the 30 OECD countries, Argentina, Brazil Bulgaria, Chile and Slovenia have ratified the Convention. See Meadows, op. cit., p. 373.

22. See Annex 2 to the implementation Guide.

23. Implementation Guide, p. 11

24. Cf section 112(b)(3)(C) of AGOA

25. Implementation Guide, p. 7

26. Section 506A(b)(2) of the Trade Act of 1974 of the United States; Implementation Guide, p.13.

27. Section 112(b) of AGOA

28. Implementation Guide, p. 9.

29 This is explained at page 8 of the Implementation Guide. It ensures that goods for which the benefits are claimed are in fact produced in the beneficiary country.

30 Section 113(b)(4) of AGOA.

31 Implementation Guide, p.18.

32 Section 116(a) of AGOA.

33 Ibid, section 121.

34 Ibid, section 122.

35 Ibid, section 123.

36 Ibid, section 124.

37 Ibid, section 125.

38 Ibid, section126.

39 Ibid, section 127.

40 Ibid, sections 128 and 129.

41 Ibid, sections 130 and 131.

42 Paragraph 162, NEPAD Agenda.

43 Ibid, at paragraphs 156 and 158 for a similar emphasis.

44 Dr. Jeffrey Sachs, Special Adviser to the Secretary-General of the United Nations on the Millennium Development Goals made this point in an interview, for which see *Developments*, 4th Quarter, 2004, p. 12.

45 See sections 106, 112(1) and 114 of AGOA.

46 See *Developments*, 1st Quarter, 2004, p.27.

47 See BBC *Focus on Africa, April* – June 2005, p. 46.

48 See William Mervin – Gumede, *BBC Focus on Africa*, July – September 2004, p. 29; and Marlene Barrett, *BBC Focus on Africa*, April – June 2005, pp. 46 & 47.

49 Tony Blair, at the World Summit on Sustainable Development at Johannesburg in 2002: see *Developments*, 4th Quarter, 2002, p. 18.

50 *Developments*, 4th Quarter, 2004, pp. 4 & 5

51 Ibid.

52 *BBC Focus on Africa*, July – September 2004, p. 28

53 *BBC Focus on Africa* April – June 2005, pp. 46 & 47.

CHAPTER 5

EFFECT OF FOREIGN LAWS AND INITIATIVES

5.1 Introduction

Having committed herself to regional integration, deregulation, and other ideals of the African Union (AU) and the New Partnership for Africa's Development (NEPAD), a provincial legal regime could not be depended on to sustain them in Nigeria. It may be thought that this is the case because she is underdeveloped, but such a view would be wrong, because even the United Kingdom upon accession to the Treaty of Rome in 1972 found herself bound to make continual changes in the administration of her company law,[1] for instance, beside other areas. Developments in the legal system driven by Nigeria's membership of the AU and NEPAD are unavoidable for several reasons. First, AU/NEPAD emphasizes development in certain sectors by member countries; secondly, the diverse legal systems require that some uniform rules be made or directions given by a body in the manner of the United Nations Conference on International Trade Law, for instance on specific matters; thirdly, there is the perpetual need to have investment friendly laws; finally, globalization engenders imitation, even in legislation, whether seriously thought out or not.

AGOA on the other hand makes direct demands which require adjustments in the legal system of Nigeria and also prods her to take action in certain areas. The demand for economic deregulation and the nudge in the direction of poverty alleviation and human rights are examples of both cases.

This chapter examines Nigeria's response. It is obviously impossible to put all her statutes against NEPAD and AGOA to discover harmony but stress would be laid on the sectoral priorities of NEPAD, matters that concern foreign investments more directly, legislation that is conducive to AGOA and also actions, administrative or political, taken by Nigeria that are appropriate for NEPAD and AGOA.

5.2 Certain Issues in Nigerian Law in the Context of NEPAD.

5.2.1 The Problem of the Foreign Company

Under the provisions of the Companies and Allied Matters Act (CAMA) (which have been examined in chapter 2) only companies incorporated in Nigeria may carry on business in the country, unless they fall within the limited exceptions provided at section 56 of the CAMA.[3] It may be thought that, on pure logic, if a foreigner is at liberty under the Nigerian Investment Promotion Commission (NIPC) Act to invest freely in Nigeria, a foreign company being a legal entity, albeit juristic, may have a similar liberty.

That would ignore the complex rules governing directorship, meetings, capital, and accounting, among others which are applicable universally to companies; and a desire to attract foreign investments would not justify a change in the demand by section 54 of CAMA on foreign companies having the intention of carrying on business in Nigeria to be incorporated in Nigeria.

The validity of the demand may not however support the procedure for obtaining exemption which involves applying through the Secretary to the Government of Nigeria after which the matter is then considered by the Federal Council of Ministers. There is no clear reason for bringing the issue of the exemption to such high authorities which are not only politically busy but not particularly experienced in company matters. The criteria of exemption having been identified at section 56 of CAMA the matter could be dealt with by the Minister of Commerce in the same way that the Minister of Internal Affairs through the Immigration Service deals with questions of expatriate quota and business permits or in which appropriate bodies administer the incentives regimes. This should expedite action in relevant cases, and encourage foreign companies in Africa intending to carry on business in Nigeria over a fixed period or for fixed objects and leave a political body such as Council of Ministers to concentrate on good

governance. It is suggested that section 56 of the CAMA may be amended to reflect this suggestion.

5.2.2 Cross Border Mergers and Acquisitions

Questions of reconstruction, mergers and takeovers which are very topical because very relevant in a globalized world are regulated in Nigeria under the Investments and Securities Act 1999 (ISA) which has repealed Part XXII of CAMA.[4] The scope of this work does not extend to examining the applicable rules, but it is recognized that cross-border acquisitions may be desired by foreign investors as a means of realizing their investment interests as for instance when a bigger South African bank intends to acquire a target bank in Nigeria.

It is clearly provided at section 99(3) of ISA that notwithstanding anything to the contrary contained in any other enactment, every merger, acquisition or business combination between and among companies shall be subject to the prior review and approval of the Securities and Exchange Commission. Regulation No 231 of the Securities and Exchange Commission Rules and Regulations made under ISA require that applications for proposed mergers, acquisitions or business combination should be done in three stages: pre-merger notice, formal approval and compliance with post approval requirements. The point to be stressed is that when section 99(3)

of ISA allows merger, acquisition or combination between or among companies, it certainly does not contemplate any of these companies being foreign, but those incorporated in Nigeria. To view it otherwise would be to make section 54 of CAMA of no effect. This then creates a situation whereby a foreign company desiring to acquire a Nigerian company must first register a Nigerian company, except in cases where control is not its objective in which case it may invest in its share thus clearly bringing the distinction between foreign direct investments and portfolio investment into further clarity.

The impossibility of a direct merger between a Nigerian and a foreign company is not peculiarly Nigerian, as companies are governed by the laws of their respective nationalities[5] and as such legal mergers are only possible between companies incorporated in the same jurisdiction.[6] If cross border business tides as a result of NEPAD the requirement of incorporating a Nigerian company before the process of merger will be an expedient which foreign direct investors may employ. In cases where the business is capital intensive, for example banking that requires a high capital base, the foregoing procedure may not be followed. Rather, shares may be acquired first in the Nigerian company followed by an insidious acquisition of control through shareholders' and boardroom politics. Other means may be available.[7]

5.2.3 E-Transactions

Business unlike law in Nigeria has responded to the electronic revolution in a globalized world, creating a cleavage. This is undesirable particularly as investors may be uncomfortable in the knowledge that the local law does not recognize the means they have employed to get funds or capital into Nigeria. The banking sector illustrates the issue clearly. As Alem[8] observed:

> …the appropriate legal frame work for e-banking and financial services probably constitutes one of the most critical and important element in a country's infrastructure. Indeed, and notwithstanding the fact that most banks and financial institutions are already providing a considerable proportion of their services though the use of new technologies, the number of users of e-banking or financial services will largely depend on existing domestic and international legal support provided by laws and regulations.

He goes on to say that such users will only feel comfortable using new electronic services if they are aware of a defined legal framework that will enable them to identify their rights and obligations with the least possible uncertainty. It is also his view that banks have concerns about the legal framework, the absence of which may restrict their initiative.[9]

These observations, though made with reference to the Arab world, describe well the Nigerian situation, particularly with reference to the bankers' situation under Nigeria's adjectival laws. Nigeria's evidence law

for instance requires a very formal procedure when proof of an entry in a banker's book is in issue under section 97 of the Evidence Act.[10] The evidence currently offered by bankers is a computer print-out of the transactions in the account and not a mass of ledger cards appropriate decades before! But this usually meets with the objection that it does comply with the requirements of section 97 (2) (e) for admitting secondary evidence. The jurisprudence of the superior courts bears this out.

In *Yassin v. Barclays Bank DCO,*[11] the Supreme Court of Nigeria, per Lewis, JSC said that:

> if one divides up in section 96(2)(e) [now section 97(2)(e)] the matters which must be proved this shows that to admit a copy of banker's book it must be established that:
> 1. the book in which the entries copied were made was at the time of making one of the ordinary books of the bank, and
> 2. the entry was made in the normal and ordinary course of business, and
> 3. the book is in the custody and control of the bank, and
> 4. the copy has been examined.
>
> The evidence in item (4) can be given by any person who has made the necessary examination, but the evidence for items (1), (2) and (3) must be given by a partner or officer of the bank concerned either orally or by affidavit.

The decisions which followed have usually adhered to this statement of the law, though in two cases[12] the Supreme Court has suggested that it recognizes the modern trend in banking relating to the use of the computer. These, however, are dicta and do not mean a departure from the earlier

authority. The view of Prof Osipitan[13] based on one of them, *Anyaebosi v. R. T. Briscoe Ltd*[14] where as he admitted, "the court did not decide on the primary status of the document in question" (a computerized statement of account) and on the dictum of Onalaja, JCA, in *Ogolo v. I.M.B. Ltd*[15] that "commercial and banking operations in the keeping of accounts has changed to computer which makes Nigeria to be modernized and in keeping with computer age which system is so notorious that judicial notice of it can be taken under section 74 Evidence Act" as well as on section 2 of the Evidence Act to posit that "technology generated documents can appropriately be admitted as primary documents" is thus entirely unsafe.

The Court of Appeal in the recent case of *Nuba Commercial Farms Ltd v. NAL Merchant Bank Ltd*[16] refused a computer print-out as evidence based on the principles in *Yashin v. Barclays Bank DCO.*[17] Other cases such as *Yesufu v. ACB*[18] and *Unity Life and Fire Insurance v. IBWA*[19] show that the courts do not recognize computer print-outs as primary documents and subject them to the rigid standard enunciated in *Yashin v. Barclays Bank DCO.*

The need for legislation to bring the law into accord with current reality[20] cannot be over emphasized in the situation described above, seeing that electronic transfers of fund and cognate transactions would be relied on to

facilitate mobilization of capital for investments. This illustration from the banking sector shows the difficulty applicable in other respects where modern technology is far ahead of Nigerian law.

5.2.4 Administration of Intellectual Property Laws

Admittedly, there are laws on trademarks, patents and designs, and copyrights in Nigeria.[21] The due administration and enforcement of these laws have not been successful. Fakery and piracy are commonplace, books are reproduced and sold openly; likewise names, appearances of finished products by the original makers, and drugs are not spared. Serious as it is as a domestic issue it is to be imagined that difficulties with foreign investors and nations would arise. The United States of America, for instance, is always having problems with Brazil, China and India on this issue and apparently the unauthorized use of intellectual property by these countries do result in quality products which cannot be said for Nigeria. Enlightenment is thus necessary for the public, the regulatory agencies, the Federal High Court which is vested with jurisdiction in this area and entrepreneurs. The lack of seriousness in this area is apparent in diminishing output of serious intellectual work, the manual approach to its business by the patents registry at Abuja where heaps of dusty, aged and violated files are on office floors and the brazenness with which pirated or copied works are displayed.

5.2.5 The Time Factor in Incentives

Instances of incentives applicable to specific industries such as natural gas and solid minerals and general incentives such as those under the Industrial Development (Income Tax Relief) Act, the Nigerian Investment Promotion Commission Act and the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act have been considered.[22] These were all in place before NEPAD and AGOA. As enacted they seem, generally speaking, to go beyond catalyzing the emergence of investments in identified areas or generally.

One remarkable problem is that some of these incentives, of which the ones relating to natural gas and the Nigerian exports processing zones are notorious,[23] are enacted as perpetual with no time bar or with a long duration. In effect investors in the industry would continue to enjoy them long after they have established profitable undertakings. This creates, unfortunately, modern times equivalents of the notorious mineral or land concessions of former times.

On the other hand, the United States of America's practice under AGOA offers an example of how incentives may be given with time limitation as the concessions under it are until 2008.[24] It is a better example in that opportunity to review the operation and extend the tenure if necessary

becomes possible. It removes also accusation of uncertainty and bad faith that could be made by foreign investors were Nigeria to rethink and alter the incentives which have been enacted as perpetual.

The relatively higher development of Nigeria in relation to other Africa countries, her population and market, and her natural resources operate more in the mind of investors than her incentives regime. As Hadari has argued,[25] incentives may create loss of important budgetary resources to host countries because many of the concessions are not needed in order to invest abroad. In the oil and gas industry in Nigeria the relevant factors are availability and quality. Market and not incentives has expanded the telecommunication industry in Nigeria.

5.3 NEPAD Priorities and Nigerian Law.

The NEPAD Agenda identifies five priority areas: infrastructure, especially information and communication technology (ICT) and energy; human resources, including education, skills development, and reversing the brain drain, health; agriculture, and access to the markets of developed countries for African exports.[26] The infrastructure emphasized in the NEPAD Agenda consists of roads, railways, highways, airports, seaports, waterways, telecommunication, ICT, energy, and water and sanitation.

The state of the law may be a hindrance or a catalyst in the specified areas but it is not to be expected that legislative action alone would bring about the desired foreign investments. Practical measures are essential; these are in the main outlined in the National Economic Empowerment and Development Strategy (NEEDS) of Nigeria. As far as legislation is concerned, however, there are many provisions relevant to the priority areas some of which are discussed subsequently.

5.3.1 Infrastructure

Apart from the Nigerian Investment Promotion Commission Act 1995 (NIPC Act), the Acts relating to privatization and the deregulation process are particularly significant in encouraging foreign investments and opening up the NEPAD priority areas for development. The Act governing privatization and deregulation is the Public Enterprises (Privatization and Commercialization) Act.[27] Having highlighted its provisions[28] it is sufficient to say that it creates the Bureau of Public Enterprises as a body corporate in sections 12 and lists out its functions all of which relate to privatization in sections 13 and 14. The Bureau of Public Enterprises has power to incorporate into limited liability companies under the CAMA all enterprises to be privatized or fully commercialized under the Act establishing it where such enterprises are not already incorporated. To appreciate the import of this it is necessary to note that the enterprises listed

for privatization and commercialization in the schedules of the Act are involved in NEPAD's priority areas.

Now the enterprises for partial privatization include Nigerian Telecommunications Plc (telecommunication) National Electric Power Authority and oil refineries (energy) and mining companies, while those for full privatization include motor assembly companies like Peugeot Automobiles of Nigeria, cargo handling companies, boat building and marine transportation companies. As for commercialization, Nigerian Railway Corporation and Nigerian Airports Authority would be partially commercialized while the ports would be fully commercialized. Since foreign investment is possible in all the sectors identified by NEPAD under the present Nigerian legal dispensation, it seems safe to expect that improvement arising from the injection of foreign capital, skill and management capability would follow. This would be in harmony with NEPAD's objectives. It should be remarked that the mass of incentives pointed out to foreign (even local) investors would not in real terms be of more benefit than the existence of infrastructure. A dedicated programme of privatization would free the affected industries for foreign investment and also meet NEPAD's objectives. Since statutory corporations are affected, legislative action would be necessary of course to repeal or amend the Acts

which set them up. These statutory corporations have hitherto been responsible for providing and managing the emphasized infrastructure.[29]

In the area of communication, opportunities to invest in that sector are created by the Nigerian Broadcasting Commission Act, No 38, of 1992[30] (NBC Act). The areas involved are many including sound television or cable broadcasting and an intending investor obtains a licence by applying to the National Broadcasting Commission (the NBC) which is a body corporate created under section 2 of the Act. It is the President of Nigeria who grants the licence after receiving the recommendation of the NBC. Only a Nigerian or a body corporate registered under CAMA can apply for a licence.[31] As enacted, the Act does not encourage foreign investments as it provides that the majority of the shares in a company formed for the purpose of carrying on communication business must be held by Nigerians.[32] Since, however, the subsequent enactment of the NIPC Act, section 9 of the NBC Act must be taken to have been impliedly repealed by sections 17 and 18 of the NIPC Act which permit foreign investors free range of investment and without any limitation except in areas in the 'negative list' specified at section 32 of which communication is not.[33] Usually a latter Act which is intended to amend or repeal a previous one does so expressly. Where a subsequent Act makes provisions materially different on a matter covered by a former Act without expressly amending

it the resulting difficulty may be resolved by assuming that Parliament in its sovereignty intended by the subsequent one to lay down a new norm. The fact that the NBC refers the grant of licences to the President through the Minister of Information and does not directly grant them may be justified on the need to ensure the high premium placed on 'responsible journalism,' to use a popular phrase from government circles. Even if this is so ministerial oversight should be sufficient and an amendment to give the minister (and not the President) power to grant licences should be effected. To take care of these short comings in the NBC Act an amendment or a re-enactment in the manner of the Communications Act which is considered below is necessary firstly to bring it in tune with the investment regime of the NIPC Act whereby the nationality basis of shareholding is done away with and secondly to confer power to grant licences on the Minister base on the recommendation of the NBC.

Another even more relevant Act is the Communication Act, 2003.[34] This Act established the National Communications Commission (NCC) with a range of objectives: to create a regulatory environment for the supply of telecommunication services and facilities, and to promote fair competition and efficient market conduct; to facilitate the entry into markets for telecommunication services and facilities of persons wishing to supply such services and facilities; to ensure technical standards and promote the

development of Nigeria's telecommunication capabilities, industries and skills, among others.[35] The functions of the NCC agree with the objectives.[36] They include responsibility for economic and technical regulation of the privatized sector of the telecommunication industry; promotion of competition in the telecommunication industry; facilitation of entry into the market for such services of persons wishing to supply services and facilities; and studies into space technology and management of utilization of satellite facilities for the benefit of Nigerian operators and users. The Act makes provisions with regard to qualification to operate in the telecommunication industry. The NCC shall from time to time determine and cause to be published a regulation on its licensing processes specifying, among others, the persons or class of persons who are eligible to apply for licences.[37] The requirements for obtaining a licence from the NCC are stated in the Act, but just as noteworthy for the purpose of foreign investment is the lack of restriction on nationality ground. It is in accord with the spirit of the NIPC Act. That this is correct is borne out by the fact that two leading licensed operators in the industry MTN and Econet were from South Africa and Zimbabwe respectively. On the basis of the NIPC Act also an individual foreign investor could operate in the industry whether from Africa or else where.

The NCC has power to grant individual or class licences for the operation and provision of communication services.[38] These services include installation of terminals; operation of public payphones; private network links employing cable, radio or satellite within Nigeria; public mobile communication; value added network service; repair and maintenance; and cabling, among others. The NCC relies on it to license operations in the internet, voice mail, cyber cafes and cognate services.

The Act is the closest to a comprehensive law on ICT in Nigeria.[39] It cannot be entirely comprehensive because some problems thrown up by the communications revolution such as internet fraud, spamming, privacy, intellectual property, and others are universal and are best treated by multilateral conventions.

Investment opportunities and incentives in the oil and gas (energy) sector have been discussed before.[40] The partial privatization of the electricity sector and the full privatization of petroleum marketing multiply the opportunities for investors from NEPAD countries.

As far as the infrastructure sector is concerned, it can be said in sum that a faithful and thorough implementation of deregulation under Nigerian law would invite foreign investment whether from NEPAD member states or

elsewhere into these sectors where statutory corporations have hitherto held much criticized monopolies. Stakeholders' participation, one of the modern trends noted in chapter 2, would continue to be important in generating ideas for developments in the sector as well as reception of policies.

5.3.2. Human Resources Development

Notable laws are those establishing the universities, polytechnics, research institutes, and other higher institutions. In the sense that they deal with human development there is no shortage of legal provisions in this area. Indeed what is stressed by many is appropriate policy with regards to funding, autonomy and the like issues.

Nascent legal developments include the Child Rights Act, 2003[41] and the Compulsory, Free Universal Basic Education Act[42]. Carefully considered, the first is a totally unnecessary piece of legislation since its provisions merely repeat those already in chapter IV of the Constitution of the Federal Republic of Nigeria 1999 and the African Charter on Human and Peoples' Rights (Ratification and Enforcement Act) 1983 and begging for observance. It is idle legislative industry to attempt to separate child labour and exploitation from the poverty and ignorance that make them topical. The second Act aims to ensure compulsory minimum education up to the junior secondary level for Nigerian children.

The net effect of these would be to make available human resources for the development of Nigeria and to meet the Millennium Development Goals. The other issues thrown up in the NEPAD Agenda such as reversing the brain drain and skills acquisition are matters of policy, though of course, laws such as the National Directorate of Employment Act[43] may be found which seek to address the issue.

5.3.3 Other sectors: Health, Agriculture and Market Access

Foreign investment opportunities are not restricted to Nigerians in the health and agriculture sectors and their overall development rests more on policy than legislation. Foreign medical personnel seeking to establish in Nigeria must of course satisfy the requirements of the laws regulating practice of their profession. The question of market access requires partnerships within Africa and the rest of the world between Nigeria and other countries.

5.4 Nigerian Law and AGOA

The position was adopted while dealing with country eligibility under AGOA that the President of the United States of America was apparently satisfied that Nigerian's legal measures were sufficient for the purposes of section 104 of AGOA.[44] AGOA also appropriately recognizes that the adoption of proper policies may count for much (more, possibly than

formal legislation) in some of the qualification criteria. This is apparent in section 104(1)(D) where it demands appropriate policies to reduce poverty, increase the availability of health care and educational opportunities, among others.

If, because AGOA has made certain demands, there is recourse to legislation, Nigeria's statutes should bourgeon into an unwieldy mass in which novelty should look like substance. What was said of the Child Rights Act is true of Anti-corruption laws reincarnated with new names. The view is taken here that so far as AGOA is concerned, if one considers its primary concern which is agriculture and agribusiness, there are quite a lot of legal measures which are sufficient to work harmoniously with AGOA.

In the area of manpower for the purpose of providing rural and extension services the Agricultural and Rural Management Training Institute established by the Agricultural and Rural Management Training Institute Act[45] has the responsibility of providing detailed identification of management training needs in agricultural organizations and of technical employees in the rural sector of the economy and developing training programmes to meet these needs.[46] The use to which the products of the Institute are put depends on government. It is not improper to expect that

they would be able to communicate developments and opportunities in agriculture to the rural populace in Nigeria whose produce are eligible under AGOA.

In terms of organization, the various states have their laws on co-operative societies, like the Federal Government.[47] The advantage of this in terms of access to banking and finance from an institution like the Nigerian Agricultural Cooperative and Rural Development Bank and tax exemption needs to be pointed out to the rural populace, otherwise facilities which are primarily intended for them for the purpose of poverty alleviation would rather benefit urban entrepreneurs who may have no real connection with agriculture or the real (productive) sector.

The Agricultural Credit Guarantee Scheme Fund Act[48] establishes a fund for the purpose of providing guarantees by any bank in relation to the repayment of the interest and principal of loans granted for agricultural purposes.[49] The Fund is liable to the tune of 75% of the borrower's gross liability up to a maximum of N100,000 for an individual or N1 million for a co-operative society or a body corporate.[50] Agricultural purpose is defined in the schedule to be any purpose connected with the establishment of management of plantations for production of rubber, oil palm, cocoa, coffee and similar product; cultivation or production of cereals, tubers, fruits,

cotton, beans, nuts, vegetables, pineapples, banana and plantain; livestock and fishery; and provision of farm machinery and hire. It also includes value added undertakings such as processing of produce. This accords with AGOA objectives.

On standards, which is very important where produce export is concerned, two laws, the Export of Nigerian Produce Act[51] and the Export Produce (Federal Powers) Act[52] empower the minister in charge of agriculture to prescribe grades and standards of quality for any produce intended for export.[53] There is no doubt that the minister will not ignore world standards with respect to the commodity in doing so. While these Acts encourage export, the Export (Prohibition) Act No 7 of 1989[54] prescribes life imprisonment for exportation of certain agricultural produce. They include beans, cassava tuber, maize, rice, yam tuber and their derivatives. This Act is not in tune with today's reality and is inconsistent with the intendment of other Acts and should be repealed.

Regarding export finance generally, which is relevant under AGOA, the Export (Incentives and Miscellaneous Provisions) Act No 18 of 1986[56] created three funds: the Export Development Fund (EDF), the Export Expansion Grant Fund (EEGF) and the Export adjustment Scheme Fund (EASF). Funds in the EDF shall be used to provide financial assistance to

private sector exporting companies to cover part of their initial expenses in respect of export promotion activities.[57] The activities include training, advertisement, export, market research, and participation in trade fairs and trade missions. The EEGF employs its funds to provide cash inducement for exporters who have exported a minimum of N50,000 worth of semi-manufactured or manufactured products to enable them increase export volume, diversify export products and increase coverage.[58] This is relevant under AGOA in that it stresses value-addition and exportation. It also benefits individuals unlike the EDF which is for corporations. The EASF is intended to serve as a supplementary export subsidy, or as an additional fund for dealing with high cost of production arising mainly from infrastructural deficiency and other factors beyond the exporter's control.[59] The three funds are under trustees which include the Nigerian Export Promotion Council and representatives of the ministries of finance, trade (now commerce), industries, planning (now in the Presidency), the Manufacturers Association of Nigeria and the Nigerian Association of Chambers of Commerce, Industries, Mines and Agriculture.

It is apparent from the foregoing that there are relevant laws and all that is required is to draw attention of the target persons to them. The legal mechanisms to encourage production, manufacture and export of Nigerian goods under AGOA should be used.

5.5 THE NATIONAL ECONOMIC EMPOWERMENT AND DEVELOPMENT STRATEGY (NEEDS)

The Office of the Economic Adviser to the President has issued a document, *NIGERIA: National Economic Empowerment and Development Strategy NEEDS* (the NEEDS Document) in March 2004 in which is set out a strategy for building "a solid foundation for the attainment of Nigeria's long-term vision of becoming the largest and strongest African economy and a key player in the world economy".[60] The NEEDS Document expresses this Strategy in four parts made up of eleven chapters, beside a prefatory executive summary and annexes. The four parts deal with the macroeconomic framework of NEEDS, reforming government and institutions, growing the private sector, and the social charter and implementation strategy.

It is outside the scope of this work to review NEEDS, but certain aspects of it which more particularly indicate government plans or policy on the issues of foreign investments, NEPAD and AGOA would be relied upon. It is accepted despite this that, as pointed out in chapter 2 on modern trends, obviously non-economic issues such as poverty alleviation, women and children's rights and the environment, may have impact on the relationship between Nigeria and her development partners as to affect foreign investments. This was obviously understood by the authors of NEEDS as

they dealt with the bureaucracy, corruption, justice delivery, poverty, health, privatization, among many issues. NEEDS is Nigerianised NEPAD with the advantage of definitiveness.

Regional integration and Nigeria's commitment to NEPAD is stressed.[61] Existing constraints are acknowledged but the NEEDS Document puts forward strategies such as regular trade fairs in the West African sub-region, promotion of direct investment by Nigerians in other African States, teaching of French or Portuguese in Nigerian schools, and promotion of regional trade associations. On trade development, the strategy is to promote an export-led growth which takes advantages of globalization and external trade opportunities.[62] The opportunities in AGOA would in that case be relevant.

Other themes like poverty alleviation and human rights which are common to NEPAD and AGOA are considered in the NEEDS Document. It is acknowledged that poverty reduction is "the most difficult challenge facing Nigeria and its citizens. It is also the major hurdle that must be overcome in the pursuit of sustainable social and economic growth".[63] Accordingly implementation of the free, compulsory Universal Basic Education law, curriculum adjustment to incorporate technical, vocational and ICT components, university autonomy, among other strategies are proposed for

the education sector, while major strategies on health delivery include the implementation of the National Health Insurance Scheme, action to improve productive health and to combat HIV/AIDS and malaria and the strengthening of local governments' capacity in public health management. There are also strategies for employment generation, housing and women and youth empowerment.

NEEDS intends "to restore Agriculture to its former status as a leading sector in the economy in terms of its contribution to GDP, supply of raw materials, employment generation, source of export, local consumption and hence food security".[64] An annual minimum growth rate of 6% per annum in agriculture as well as the achievement of US $3 billion in agricultural export by 2007 are among stated targets. One of the strategies to be employed include "taking advantage of the various concessionary arrangements within the WTO, EU–ACP, and the AGOA, NEPAD and the huge market in the West African sub region".[65]

Having accepted that the state of infrastructure "is far from the expectations of the average investor in the Nigerian economy" and that this inhibits investment and increases the cost of doing business", privatization is relied on to ensure effectiveness.[66] Specific strategies are outlined for the transport and power sectors. On the question of privatization itself,

Annexure 1A lists the government businesses for privatization and liberalization. These are in the petroleum, industry and manufacturing, power and infrastructure and the services sectors.

As indicated earlier a comprehensive review of NEEDS is impossible in this work, but it fairly deals with all that is relevant as far as foreign investments, NEPAD and AGOA are concerned. These are set out not only in clear terms, but the strategies are shown with reference to specific challenges, proposals and goals. Where legislative intervention is thought necessary to facilitate the implementation of NEED, the law in issue, the target institution or sector and the reform component are shown.

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3. Ibid, section 56 (1) and (2)

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5. See Bank of Ethiopia v. National Bank of Egypt (1937) Ch. 513; Carl Zeiss Stiftung v. Rayner and Keeler Ltd (No 2) (1967) 1 A.C.853

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8. Alem, M, 'E-Banking and Other Financial Services: Regulatory Development in Selected Arab Countries,' *International Business Lawyer*, February 2002, Vol. 3 No 2, p.80

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16. (2001) 16 NWLR (pt 704) 510

17. Supra, note 11

18. (1976) 4 S. C. 1, 12 – 13

19. (2001) NWLR (pt 713) 610, 625

20. Kuwait, for instance. Sec Alem, M, supra, note 8

21. These are regulated by the Trade Marks Act; Patents and Designs Act; and the Copyright Act, caps T13, P2 and C22 respectively, Laws of the Federation of Nigeria 2004.

22. See section 1.3.3 of chapter 1

23. Section 2 of the Nigerian LNG (Fiscal Incentives, Guarantees and Assurances) Act, cap N87 Law of the Federation of Nigeria 2004 provides a 10 years tax holiday for the company. The benefits available to approved enterprises under section 18 of the Nigeria Export Processing Zones Act cap, N 107 Laws of the Federation of Nigeria 2004 carry no time bar.

24. See sections 106 and 114 of AGOA.

25. Hadari, Y., 'The Role of Tax Incentives in Attracting Foreign Investments in Selected Developing Countries and Desirable Policy', *The International Lawyer,* Spring 1990, Vol. 24, No 1, P. 121.

26. NEPAD Agenda, paragraph 97

27. Cap P. 38, Laws of the Federation of Nigera 2004.

28. See section 1.3.3 of Chapter 1

29. Electricity, telecommunication, railway, the seaports, inland waterways, etc. were under statutory bodies with enabling Acts.

30. Cap N20 Laws of Federation of Nigeria 2004

31. Ibid, section 9 and Schedule 2

32. Ibid, section 9

33. Production of arms and ammunition, narcotic drugs, military and paramilitary accoutrements, etc are specifically mentioned.

34. Act No. 19 of 2003

35. Ibid, section 2

36. Ibid, section 4

37. Ibid, section 33

38. Ibid, section 32

39. Criticism of the former Act No 75 of 1992 (now repealed by Act No. of 2003) for which see in the *MPJFIL*, Salu, A., 'Cyberlaws – Its Application and Enforcement in Nigeria' October 1998, Vol. 2 No 4. p.10; Ajakpovi, M, 'Deregulation of the Nigerian Telecommunication Industry', January 1999 Vol.3 No 1, p. 119; and Adewopo, A,' The Foundation of Telecommunications Regulations', July 1999, Vol.3 p. 546 as to the nationality basis of licensing has been taken care of in the new Act

40. See section 2.2.3 of Chapter 2.

41. The Act is not consolidated in the 2004 Laws of the Federation which have Acts passed not later than that year.

42. Act No 8 of 2004

43. Cap. N 28 Laws of the Federation of Nigeria 2004

44. See section 4.2.1 of chapter 4

45. Cap A. 10 Laws of the Federation of Nigeria 2004

46. Ibid, section 3

47. Cooperatives are on the concurrent legislative list. See cap. N98 Laws of the Federation of Nigeria 2004. Kaduna State for instance has a Cooperative Societies Law for which see Cap. 37, Laws of Kaduna State 1991.

48. Cap. A. 11 Laws of the Federation of Nigeria 2004

49. Ibid, section 1

50. Ibid, section 6

51. Cap. E 20 Laws of the Federation of Nigeria 2004

52. Cap. E 21 Laws of the Federation of Nigeria 2004

53. See section 3 of cap. E 20 and section 2 of cap E 21 Laws of the Federation 2004 for the respective provisions.

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55. See Ibid section 2 for the penal provision and the schedule for the prohibition items

56. Cap E 19 Laws of the Federation of Nigeria 2004

57. Ibid, section 4

58. Ibid, section 5

59. Ibid, section 6

60. NEEDS Document, first paragraph of the Executive Summary, unpaged.

61. Ibid, p. 90

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63. Ibid, p 95

64. Ibid, p 77

65. Ibid, p.78

66. Ibid, pp 67 and 68

CHAPTER 6

CONCLUSION

6.1 Summary

The last decade of the 20th century witnessed significant legal developments in Nigeria in relation to the management of her economy. Poor economic performance, the pressure of accepting or finding alternatives to the prescriptions of Breton Woods Institutions, the fall of communism and the powerful and fast–paced wind of globalization challenged her faith in existing economic measures notable nationalization, indigenization and centralization. Matters were not helped by military dictatorship, a notoriously inefficient bureaucracy and the stigma of corruption even in financial institutions. While holding on to power contrary to the wave of democratization elsewhere in Eastern Europe and Africa, the military dictatorships of Generals Ibrahim Babangida and Sani Abacha by decrees actually altered the economic status quo in several respects.

The legal provisions have been seen in this study to fall into categories. First, there were successive laws which gradually liberalized foreign exchange control, beginning with the Second-Tier Foreign Exchange Market Act of 1986 and culminating in the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act of 1995 which permitted unconditional

transferability of funds, the holding of domiciliary accounts in foreign currency, and protection against disclosure of source of foreign exchange, among others. Secondly, were de-indigenization laws which gradually widened the scope of alien participation in economic activities in Nigeria, hitherto restricted, until full alien participation was made possible under the Nigerian Investment Promotion Commission Act of 1995. The view is universal that these two Acts in 1995 were at once the death knells of control and the annunciation of de-regulation. Thirdly, were the laws on privatization and commercialization of public enterprises which had the potential to admit many government owned business ventures into the market with access to private capital and expertise. Fourthly, there were laws to fight corruption such as those on Advance Fee Fraud, Money Laundering and fraud or mismanagement in financial institutions.

For all their merits, it is difficult to conclude that the different measures were arranged into a systemic whole. They remained episodic chapters and reactions to specific vices. The new democratic government in Nigeria was able however to bring everything into a system under its National Economic Empowerment and Development Strategy whereby a planned approach to the realization of specific objectives was presented. It was also under the democratic dispensation that NEPAD and the African Union were created with their emphasis on regional economic integration. The

government of the United States of America in 2000 also opened up the American market to certain Nigerian produce thereby directing attention to investment in those areas, that is agriculture and agribusiness, while the British Government offered assistance in the area of debt-relief thereby improving the credit rating of Nigeria.

The sovereign power of Nigeria to follow one course or the other was emphasized in the context of her constitution and of international law. Thus decisions on deregulation and privatization, membership of the African Union and NEPAD and to submit to the qualification criteria of the African Growth and Opportunity Act are seen as exercise of her economic sovereignty in the same way that her past decisions on nationalization and indigenization were. Certain trends and influences which affect the exercise of the sovereign power were also emphasized. In this sense decisions on foreign investments were not entirely then original or particularly Nigerian but filled with content or taken in response to developments outside Nigeria as well.

6.2 Findings

In the course of the examination of relevant legal provisions certain findings were made. It was observed early that there is no such thing as a Nigerian foreign investment law as there is for instance an Act regulating

immigration. Even if such a code were possible it would lack comprehensiveness as general laws on domestic commercial relations would not be part of it. Nonetheless there are areas where the diffusion of laws could be avoided. A quick example is the repetitive incentive provisions. More is said on this later. Another is found in the regulation of agricultural matters. The Export (Incentives and Miscellaneous Provisions) Act of 1986 and the Agricultural Credit Guarantee Scheme Fund Act could have been one Act as they deal with production and export incentives, while on the ground that the Export of Nigeria Produce Act and the Export Produce (Federal Powers) Act deal with the standards of agricultural produce for export they also could have been one Act. It was also observed that the Export (Prohibition) Act of 1989 which forbids the export of scheduled produce is inconsistent with export promotion and the objective of government under AGOA and NEPAD.

It was pointed out in chapter 2 while considering emerging global trends that meta-legal factors have great play on foreign investments. Thus environmental factors and non–participation by stakeholders may affect major industrial undertakings, and contracts entered into without these considerations may meet with difficulties. Happily sections 7 and 8 of the Minerals and Mining Act, No. 34, of 1999 have recognized this by providing for community compensation “during the continuance of the

lease" where a mining lease is granted where the host community had been active. The pure contract and law approach of the previous years did not help matters in the oil and gas sector.

Regarding incentives it is observed that they are available even in profitable industries such as oil and gas. Secondly government measures do not take the time factor seriously into consideration. In this sense the retention of provisions allowing incentives for pioneer industries decades into Nigeria's independence is unfortunate. With the legislation of the Venture Capital (Incentives) Act No 89 of 1993, the provisions on pioneer industries ought to have been done away with but they are made applicable. In AGOA the government of the United States of America clearly showed that it would make the benefit endure for eight years when the Act was first enacted. The third point is on the possibility of excess or multiplicity of incentives. Approved enterprises in the export processing zones are under the Nigeria Export Processing Zones Act No. 63 of 1992 exempted from all federal, state and local taxes. May they take advantage of the benefits in the Exports (Incentives and Miscellaneous Provisions) Act as to financial assistance, for instance? A fourth point has to do with legislating incentives for particular industries. This would imply that the possibility of still more legislative intervention cannot be ruled out if, by a twist of world trade, there is boom in a particular area, say in the palm oil trade. The whole incentive regime is

whimsical. With a poor tax gathering system taxation is not a hindrance to investment in Nigeria and total or generous waivers is sheer loss of revenue.

The enlightenment process on foreign investments generally and on NEPAD and AGOA is poor. It remains doubtful whether outside enlightened urban circles there is any awareness of NEPAD and AGOA, yet agricultural production is mainly rural in Nigeria. The expressed goal of poverty alleviation is missed therefore. Similarly the provisions on venture capital may not be known to budding entrepreneurs for whom they were designed. There is thus a need for improvement in the information service of agencies of government in the areas concerned.

Economic transactions nowadays employ modern technology. This reliance on electronic and other technology–based media is a challenge which Nigerian law has not confronted, leaving a cleavage. E-transactions are analyzed and required to conform with the standard of manual, verbal or handwritten transactions as the law stands in Nigeria and there is accordingly a need for urgent remedial action.

The question of placement of responsibilities has also arisen and been noted in the course of this work. On venture capital projects it was doubted

whether the Ministry of Finance should determine the status of new ventures and not the Ministry of Industries while licensing and approval in some cases have been seen to have been given to political and not more professional bodies or persons. This has been shown to be the case regarding the grant of exemption to foreign companies in Nigeria and the licensing of broadcasting companies.

Two observations are stressed regarding NEPAD. The first is as to duplication. It is thought that certain groups created by the NEPAD are similar to bodies established by the African Union in which case there would be duplication since they report also to the same persons. This is the case where the matters assigned to the Executive Council, and the Specialized Technical Committees under the Constitutive Act of the African Union are the same as those dealt with under Part V of the NEPAD Agenda. The second is that the commendable peer review mechanism is administered by the Chairman of NEPAD's Heads of State and Government Implementation Committee, an executive body, and not by the Pan–African Parliament.

The findings specifically set out here and those which had been mentioned before in the course of this study would necessitate legislative intervention or policy change in Nigeria to enhance her foreign investment drive.

6.3 Recommendations

Commendable efforts have been made by the Nigerian government in relation to foreign investments especially in the areas of external solicitations, deregulation, the fight against corruption and improved credit rating. There remains however challenges which have to be addressed and some of them have been noted in this work. The recommendations which follow are meant to contribute toward meeting the challenges.

6.3.1 Effective Co-ordination of Foreign Investment

There are quite a number of institutions involved with different or interlocking roles in foreign investment. Ministries, parastatals, the Central Bank of Nigeria, the Nigerian Investment Promotion Commission, and a host of others including tax bodies operate in this area and it is necessary that there be some centralized co-ordination of their efforts. It is in this sense that it is recommended that the Federal Government should consider creating a Committee on Foreign Investments which will bring together these different institutions of government in order to co-ordinate their efforts, while at the same time serving as a form for reviewing the progress made and making recommendation from time to time. It is also recommended that since institutions and persons who are equals would be involved, the Committee should be headed by the Vice President of Nigeria to avoid any problem of supremacy. In the United States of America, their

Committee on Foreign Investments is headed by their President but in Nigeria the Vice President should do so as he already heads the National Economic Council created by section 153 of the Constitution of the Federal Republic of Nigeria, 1999 which has responsibility to advise the President concerning the economic affairs of Nigeria and in particular on measures necessary for the co-ordination of the economic planning efforts of the various governments in Nigeria. The committee should be a statutory body like the National Council on Privatization.

6.3.2. Harmonization of Certain Laws

The National Assembly has a great responsibility to ensure that the existing laws do not stand in the way of progress in the growth of foreign investments in Nigeria or in the promotion of local industries the products of which will be sold abroad for much needed foreign exchange. In this sense an Act like the Export (Prohibition) Act of 1989 should be repealed outright since it is contrary to the export promotion drive of the government of Nigeria and the purpose of AGOA in that it prohibits the export of certain produce. If there is an increased demand for a particular produce in the international market as to affect domestic consumption it is better to see it as a challenge and even as an opportunity to encourage enterprise in its production rather than prohibiting its exportation. It is also necessary that certain laws which have the same goals be harmonized either by a

codification or by repeal and a re-enactment as one. Thus laws like the Agricultural Credit Guarantee Scheme Fund Act and the Export (Incentives and Miscellaneous Provisions) Act should be re-enacted as one Act sine they deal with encouragement of agricultural production and export incentives. Similarly the Export of Nigerian Produce Act and the Export Produce (Federal Powers) Act should be made one Act since they deal with the standards of agricultural produce for export. Where this may affect the substance or presentation of the law, it is recommended that such laws be consolidated in the same way that the Companies Act, 1968, the Business Names Act, 1963 and the Lands (Perpetual Succession) Act, 1958 were brought together as the Companies and Allied Matters Act, 1990, each Act forming a part of the new Act.

6.3.3. Information and Extension Services.

The need for information and extension services cannot be overemphasized. Information and education on government measures should not be kept and made available to those who seek them only. There should be bulletins informing the public and target groups, employing varied methods according as whether they are in the rural or urban areas, enlightened or not. There is no reason why the National Directorate of Employment should not educate participants in the National Youth Service Corps under its Entrepreneurship Development Programmes on the Venture Capital

(Incentives) Act as it is relevant for them. At the same time a manual on relevant considerations in initiating projects may be issued. Regarding agriculture, extension services need to be carried out with renewed vigour so that Nigeria could profit from AGOA. Having noted in the course of this work the sophistication of AGOA, government should issue information on its benefits, eligible products and agencies in Nigeria which could be reached for assistance in case of need.

6.3.4. The Challenge of Technology

Two aspects of the challenge of technology on foreign investments need redress. The first has to do with e-transactions. Further detailed study particularly by the government of Nigeria is necessary to know how to respond appropriately and urgently to it. In the digital age any impatience with manual processes is reasonable, and impediments and difficulties arising from subjecting such transactions to out-moded laws require urgent legislative intervention. Such conventions as may exist on the matter should be examined for possible domestication. Since the NEPAD Agenda gives emphasis to information and communication technology the need for a suitable regulating law become even more important.

The second aspect is the need to hasten the shift from manual to technology-based processes in all areas having to do with foreign

investments. Relevant bodies should be on the internet. The Patents and Trade Marks Registry has been criticized, for instance, for its manual procedures in this computer age. Any other agency or body like this should urgently computerize for easier access to information and to hasten transactions.

6.3.5. Power to Grant Licences, Approvals and Exemptions.

Where the criteria for granting licenses, approvals, exemptions or the like have been laid down by law, subjecting applications to delays which arise from conferring the power to grant them on persons who are not the usual administrators in the areas where they are needed should be avoided. It is appropriate that the President of Nigeria be the person to grant citizenship by registration or naturalization since these are political matters but to make him grant broadcasting licences when there is the National Broadcasting Commission and an information minister overweighs the President's office with avoidable businesses. In this regard, it is recommended that certain laws be amended to confer powers on persons other than those who currently exercise them. Thus section 56 of the Companies and Allied Matters Act, 1990 should be amended to give the supervising minister of the Corporate Affairs Commission power to grant exemption to foreign companies wishing to transact business in Nigeria from registering as Nigerian companies instead of the current law which requires them to apply

to the Federal Executive Council through the Secretary to the Federal Government. In the same vein, the grant of broadcasting licences should be by the National Broadcasting Commission or the Minister of Information and not the President. The National Broadcasting Commission Act, 1992 should be amended to reflect this recommendation. Also section 9 of the same Act should be amended to bring it in tune with the Nigerian Investment Promotion Commission Act, 1995 by permitting foreign investors to invest in broadcasting in Nigeria.

6.3.6. Infrastructure and Enabling Environment

The emphasis of NEPAD on infrastructure cannot be too highly commended. It is submitted that these and a healthy investment environment count more than incentives. A willing foreign investor may be discouraged by the extra facilities he has to provide such as electricity generation, transfer of malice by the host community from the government to him owing to marginalization, corruption, an inefficient bureaucracy and a poor services sector even when there are incentives enough. It is recommended that government should focus on these factors in the spirit of NEPAD and other developmental programmes.

6.3.7. Incentives, National Interest and other Related Matters

Much has been said in this work on incentives with particular emphasis on the generosity in granting them. For how long will an Act like the Industrial Development (Income Tax Relief) Act continue in being, particularly after the enactment of the Venture Capital (Incentives) Act? It is recommended that the former Act be repealed because the latter captures in a modern sense what is in the former. This should eliminate multiplicity of legislation on encouraging innovative ideas and projects relevant to industrialization. The criticism of the Venture Capital (Incentives) Act is that it makes the Federal Inland Revenue Service the judge of the criteria of innovativeness of the enterprise in issue. The Act should be amended to let the ministry in charge of industries decide this. A certificate from this ministry then becomes a basis for applying for tax relief.

A fixation with certain industries as being the important ones for the purpose of investment and on which incentives are dumped should be discouraged. The Chinese are in Nigeria interested in many things at once, and even Thailand anxious about possible loss of Nigeria's patronage for her rice has indicated interest in rice farming in Nigeria, warning that nothing is trivial. Telecommunication and film production are new areas which are doing well without incentives.

While considering AGOA it was noted that the charity of the government of the United States of America did not prevent her protecting her interests at the same time. AGOA encourages the use of American materials, fixes a duration for the applicable incentives, and as regard textile imports permit American authorities to intervene when there is 'import sensitivity' or when there is going to be a 'surge' in imports into the United States of America from Africa. The lesson to be commended to the Nigerian government is that its primary duty is to Nigeria despite all desire to deregulate, liberalize or open up the economy.

Without the benefit of statistics it is difficult to say whether AGOA has in fact led to growth in exports but it cannot be denied that working toward that possibility is on the whole good for Nigeria's foreign investment and growth objectives. Where however it is realized that exports into the United States of America through AGOA has not been substantial, Nigeria should team up with beneficiary African countries to press for extension of the 2015 termination year using the AGOA forums.

6.3.8. Peer Review and NEPAD

It is recommended that the Peer Review mechanism of NEPAD be administered by the Pan-African Parliament of the African Union instead of the office of the Chairman of the Heads of State and Government

Implementation Committee of NEPAD which currently administers it. This would make it more open, objective and independent. To this end Nigeria should press for an amendment of the Constitutive Act of the African Union to incorporate this recommendation.

NEPAD should be operated as an initiative of the African Union. The goals are the same; the operators are the same, that is the Heads of State and Government mainly; there is only the difference that NEPAD has separate institutions. The merit of Heads of State and Government sitting as the Assembly of the Union of the African Union and then sitting under the Heads of States Forum of NEPAD to discuss the well-being of Africa is hard to see. Below these are lesser separate bodies with the same roles. Since NEPAD is an initiative, an agenda, a programme, there is the need for African leaders to harmonize all shades of opinions or differences regarding it so that the structures of the African Union could be used in administering it. Universal acceptance by all African leaders of NEPAD would help this harmonization but then it is not a rule or practice in international affairs that all must agree before a thing can be done. There are cases of countries acceding to conventions later than others.

6.4. Concluding Remarks

How far and how thorough Nigeria is prepared to go in her foreign investments efforts are two vital but different questions. Looking at the reforms and reviews in the past two decades, there is no doubt about the will to go far. As for thoroughness, she grapples with it in the area of policy as NEEDS exemplifies, but in the area of legal reform, it is not global: that is considering all relevant laws as a whole before legislating changes. This is why some laws still stand which are plainly contradictory of or at least not harmonious with newer laws made to bring about changes.

While admitting that there are several areas where detailed further study is required, it is in all modestly urged that these findings and recommendations may enhance Nigeria's drive for increased foreign investments.

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APPENDIX

(See section 4.2.1 and note 10 of Chapter 4)

SECTION 104 OF AGOA ON COUNTRY ELIGIBILITY

SEC. 104.ELIGIBILITY REQUIREMENTS.

(a) IN GENERAL,.- The President is authorized to designate a sub-Saharan African country as an eligible sub-Saharan African country if the President determines that the country-

(1) has established, or is making continual progress toward establishing–

A) a market-based economy that protects private property rights incorporates an open rules-based trading system, and minimizes government interference in the economy through measures such as price controls, sub- sidies, and government ownership of economic assets;

B) the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law;

C) the elimination of barriers to United States trade and investment including by–

(i) the provision of national treatment and meas- ures to create an environment conducive to domestic and foreign investment;

(ii) the protection of intellectual property; and

(iii) the resolution of bilateral trade and invest – ment disputes;

D) economic policies to reduce poverty, increase the availability of health care and educational opportunities, expand physical infrastructure, promote the development of private enterprise, and encourage the formation of cap-ital markets through micro-credit or other programs;

E) a system to combat corruption and bribery, such as signing and implementing the Convention on Combating Bribery of Foreign Public Officials in International Busi-ness Transactions; and

F) protection of internationally recognized worker rights, including the right of association, the right to orga-nize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health;

(2) does not engage in activities that undermine United States national security or foreign policy interests; and

(3) does not engage in gross violations of internationally recognized human rights or provide support for acts of inter-national terrorism and cooperates in international efforts to eliminate human rights violation and terrorist activities.

(b)CONTINUING COMPLIANCE. If the President determines that an eligible sub-Saharan African country is not making continual progress in meeting the requirements described in subsection (a)(1), the President shall terminate the designation of the country made pursuant to subsection (a).