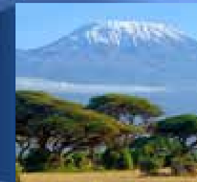
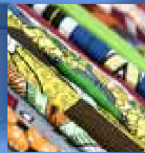
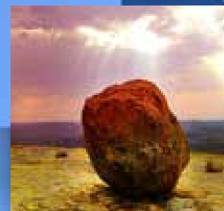
AFRICA

A Legal Guide for Business Investment and Expansion

NIGERIA







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1. What role does the government of nigeria play in approving and regulating foreign direct investment?

Due to the economic benefits that accompany Foreign Direct Investment (FDI), the Nigerian government strives to attract FDI by operating a liberal foreign investment regime. Globally, Nigeria is viewed as Africa's largest market, and has over the years remained one of the largest recipients of FDI in Africa. The government has introduced constructive laws and policies directed at ensuring that foreign investors have easy access to the Nigerian market.

The primary body responsible for encouraging and promoting foreign investment in Nigeria is the Nigerian Investment Promotion Commission (NIPC), which was established by the Nigerian Investment Promotion Commission Act 1995 ("NIPC Act"). By virtue of the NIPC Act, foreigners enjoy unlimited freedom to engage in any enterprise either wholly or in partnership with Nigerians. However, foreign investors and Nigerians are prohibited from participating in certain sectors of the economy considered to be on the negative list as defined under Section 31 of the NIPC Act.

To do business in Nigeria, foreign investors are required to incorporate a Nigerian company with the Corporate Affairs Commission (CAC) pursuant to the Companies and Allied Matters Act Chapter C20 Laws of the Federation of Nigeria 2004 (CAMA). Such a company is required to have a minimum share capital of N10,000,000 (Ten Million Naira). It should, however, be noted that certain sectors have a minimum share capitalisation requirement that could be more than N10,000,000 (Ten Million Naira). In such instances, the foreign investor would be required to satisfy the capital requirement for the sector in which it intends to invest. Following its incorporation, the NIPC Act provides that the company should be registered with the NIPC prior to commencing business. In addition, foreign investors are required to obtain a business permit (for the business) and expatriate quota (for its foreign personnel) from the Ministry of Interior pursuant to the Immigration Act 2015.

Notably, certain regulated sectors of the Nigerian economy require prospective business entities, in addition to the above, to obtain various licences and/or approvals irrespective of the composition of its membership. These sectors include banking, insurance, broadcasting, power generation and distribution, oil and gas, mining, telecommunications and aviation.

Barring these regulated sectors, foreign investors may freely invest in any sector of the economy but only after fulfilling the registration requirements.

Another important legislation affecting FDI in Nigeria is the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act Chapter F34 Laws of the Federation of Nigeria 2004 (Forex Act). By virtue of the Forex Act, foreign investors can freely import capital through any of the licenced banks classified as authorised dealers by the Central Bank of Nigeria (CBN). They are also at liberty to repatriate the capital and any return on investments.

2. Provide advice on best entry strategies to employ in nigeria and common corporate structures used.

The best entry strategies for foreigners seeking to establish corporate structures in Nigeria are:

- A company
- A free trade zone enterprise

COMPANY

Foreign investors wishing to do business in Nigeria must do so by incorporating a Nigerian company at CAC as provided by CAMA. This is the most common structure used for FDI in Nigeria. The company may be public or private and the liability of its members could be limited by shares, limited by guarantee, or unlimited.

Many companies in Nigeria are either private or public companies limited by shares, with the former being preferred as it easier to maintain effective control over the entity and it is subject to less regulatory requirements than a public company. However, the law prescribes for instances where a company is required to be a public company. For example, if a company aspires to be quoted on the Nigerian Stock Exchange, it must be a public company.

A company is required to have its registered office in Nigeria and can undertake any type of legitimate business activity as contained in its Memorandum of Association.

FREE TRADE ZONE ENTERPRISE

A Free Trade Zone Enterprise (FZE) is one licensed to operate within designated Free Trade Zones (FTZs) in Nigeria. By their very nature, FZEs are designed to attract FDI. A foreign

investor is free to set up an enterprise in an FTZ without the need to incorporate a Nigerian company at the CAC.

The Nigerian Export Processing Zones Authority (NEPZA) is the government body empowered to regulate FTZs in Nigeria. Industries permissible in FTZs include petroleum products, cosmetics and other chemical products, metal products, machinery and pharmaceutical products.

Nigeria has a total of 32 FTZs of which 14 are operational and 18 currently at various stages of construction. The operational FTZs include Calabar Free Trade Zone, Kano Free Trade Zone, Lekki Free Zone, Tinapa Free Zone and Resort, and Olokola Free Trade Zone.

FTZ entities enjoy various benefits, advantages and incentives which include 100% foreign ownership of investment, 100% repatriation of capital, profits and dividends, waiver on all expatriate quotas and waiver of all imports and export licences. The profits of an entity established within a free trade zone are exempted from tax where 100% production of such entity is for export, otherwise tax shall accrue proportionately on the profits of the entity.

3. How does the nigerian government regulate commercial joint ventures between foreign investors and local firms?

The Nigerian Government allows foreign investors to engage freely in joint ventures with local entities within the confines of Nigerian law. The principle of freedom of contract applies to commercial joint ventures in Nigeria. This means that the Nigerian Government will not interfere where parties validly enter into a commercial joint venture.

However, it is pertinent to note that certain regulated sectors of the economy provide limitations regarding the level of control and number of shares a foreigner may possess in entities operating within these sectors. Effectively, Nigerian membership in business ventures in these regulated sectors must reach a certain percentage before a licence and/or approval will be granted to do business within those sectors. These sectors include:

- Banking – Maximum of 10% foreign ownership
- Insurance – Maximum of 20% foreign ownership
- Oil and Gas – Maximum of 49% foreign ownership
- Broadcasting – Maximum of 49% foreign ownership

Consequently, any commercial joint venture between a Nigerian and a foreign investor in any of the above sectors must adhere to the stated limitations.

4. How does the nigerian government regulate proposed activities by foreign investors and are there any areas of the economy where they are prohibited (e.G., Natural resources, energy, telecommunications or real estate)?

Under Nigerian Law, activities by foreign investors are regulated by legislation enacted to govern such participation. Some of such legislation includes the Companies and Allied Matters Act (CAMA) which requires that foreign investors desirous of doing business in Nigeria must incorporate a local company in Nigeria. The Nigerian Investment Promotion Commission Act also requires that such entities need to register with the Nigerian Investment Promotion Commission (NIPC) and obtain a business permit from the Ministry of Interior prior to commencement of business.

Foreign investors are not allowed to have a place of business in Nigeria prior to incorporation. However, they are permitted to have an address for the receipt of notices and other documents as matters preliminary to incorporation.

Furthermore, foreign investors are prohibited from investing in sectors considered by the Nigerian government as being on the negative list. These sectors include:

- Production of arms and ammunition;
- Production of and dealing in narcotic drugs and psychotropic substances;
- Manufacture of military/paramilitary wears and accoutrements;
- Participation in coastal and inland shipping.

5. How do labour statutes regulate the treatment of local employees and expatriate workers?

Nigerian labour law is generally sourced from common law and the Labour Act, Chapter L1 Laws of the Federation, 2004 (Labour Act). These laws govern the entire relationship

between an employer and an employee, and provide a framework stipulating the terms and conditions of employment which are usually contained in the contract of employment.

Section 91 of the Labour Act defines a worker as "any person who has entered into or works under a contract with an employer, whether the contract is for manual labour or clerical work or is expressed or implied or oral or written, and whether it is a contract of service or a contract personally to execute any work or labour."

The implication of this is that the Labour Act does not apply to employees who are exercising administrative, executive, technical or professional functions, as the terms of their employment will be based on the common law and the conditions of the contract of employment.

Under Nigerian labour law, the duration of every type of employment, except those for which tenure is protected by statute, is dependent on the contract between the employer and the employee. Either the employer or the employee may terminate a contract of employment upon giving the notice provided for in the contract of employment. Where the contract of employment does not stipulate a notice period, the Labour Act provides that the notice period shall be as follows:

- One day, for a contract that has continued for a period of three months or less;
- One week, where the contract has continued for more than three months but less than two years;
- Two weeks, for a contract which has continued for a period of two years but less than five years;
- One month, for a contract which has continued for five years or more;

Notwithstanding the above, either the employer or employee may waive his right to notice or accept payment in lieu of notice.

With respect to the employment of expatriates, Nigerian law requires that an employer must seek the consent of the Federal Ministry of Interior by applying for an expatriate quota. The quota permits the company to employ foreigners to occupy specifically approved job designations, and it also specifies the validity period of the designations provided for on the quota.

6. Capital availability and access considerations in nigeria – any major capital, infrastructure or labour constraints to be aware of and strategies to mitigate?

CAPITAL CONSTRAINTS

Foreign investment in Nigeria may take the form of either FDI, which refers to the ownership by a foreigner of productive assets, or Foreign Portfolio Investment (FPI), which involves the purchase of shares in a Nigerian company by a foreigner. In either case, foreign investors are permitted to fund their investments through foreign exchange imported into the country. Such foreign exchange must be imported through a bank that is authorised by the Central Bank of Nigeria (CBN) to operate as an authorised dealer. The bank through which the money was imported, upon prior notification by the Company regarding the inflow of the funds, then issues a Certificate of Capital Importation (CCI) to the investor. The CCI serves as evidence of the foreign exchange (FOREX) imported into the country and also enables the investor to repatriate profits from his investment to his home country.

There have been restrictions imposed by the CBN on the use of FOREX for local transactions consummated in Nigeria. This along with other factors in the money market has affected the demand and supply of Forex in Nigeria. The CBN is however making efforts to mitigate some of these constraints.

INFRASTRUCTURE CONSTRAINTS

There are no infrastructure constraints in Nigeria of which foreigners need to be aware.

LABOUR CONSTRAINTS

Nigeria has a population of roughly 182 million and in 2016, the country recorded an unemployment rate of about 13%. In light of the unemployment problem, Nigerian statutes tend to favour employment of Nigerian citizens by foreign owned companies. A foreign owned company desirous of engaging expatriates is required to apply to the Minister of Interior Affairs for expatriate quota slots. Although there is no limit on the number of expatriate quota slots for which the company may apply, the application procedure includes a programme for the training of Nigerians to eventually succeed the expatriates employed. The oil and gas sector is more restrictive on the issue of employment of non-nationals.

Foreign companies operating in this sector are required to include duration of employment in their expatriate quota applications. They are in addition required to hire only Nigerian citizens at the junior staff level; while and in the hiring and award of contracts, Nigerians are required to be given first consideration.

Apart from the foregoing requirements, expatriates must obtain the Combined Expatriate Residence Permit and Aliens Card (CERPAC) to permit them to live and work in Nigeria.

7. What types of taxes, duties, and levies should a foreign investment in nigeria expect to encounter?

COMPANIES INCOME TAX

By virtue of the Companies Income Tax Act (CITA) as amended in 2007, all companies in Nigeria are liable to pay companies income tax on their global profits accruing in, brought into, derived from or received in Nigeria. The rate of tax imposed is 30%.

It should be noted, however, that profits of statutory, charitable, ecclesiastical, educational or other similar associations are not liable to company income tax, so far as the profits that such organisations receive are not derived from trade or business, and are distributed among the members, trustees or shareholders of such a company, association or organisation.

Generally, all expenses by the company wholly, exclusively, necessarily and reasonably incurred in the production of the assessable profits of the company are deductible. Capital allowances are also deductible in respect of plants, machinery and buildings, etc. which are procured in the cause of business.

Personal Income Tax: Companies are mandated by the Personal Income Tax (Amendment) Act 2011 (PITA) to deduct and file Pay As You Earn (PAYE) returns of its employees with the Federal Inland Revenue Service (FIRS). Failure to file PAYE returns exposes a company to a fine of N500,000 (Five Hundred Thousand Naira).

PETROLEUM PROFITS TAX (PPT)

The PPT is a tax imposed on companies which carry out petroleum operations in Nigeria. The rate of tax is specified as follows:

- 65.75% of the chargeable profits for companies in the first five years of operation.
- 85% of the chargeable profits for companies after the first five years of operation.
- 50% of the chargeable profits of companies who have Production Sharing Contracts with the Nigerian Government.

VALUE ADDED TAX (VAT)

The VAT is a tax imposed on the net sale value of non-exempt, qualifying goods and services provided by a company. Every company is expected to register with the tax authority within six months of its incorporation for VAT purposes.

Failure to register with the tax authorities attracts a fine of N5, 000 (Five Thousand Naira) upon conviction and every director, manager, secretary, or other officer of the Company would also be severally liable and subject to the same penalty. If the company still fails to register with the tax authority after one month, the premises where the business is being conducted are liable to be sealed up.

The company is to charge VAT on the goods and services it provides which are not exempted under the act. VAT is set at a rate of 5% of the net sale value of the goods and service provided.

EDUCATION TAX

An education tax of 2% is imposed on the assessable income of all corporate entities registered in Nigeria.

Capital Gains Tax

Capital Gains Tax is imposed on the capital gains derived from the sale or disposal of assets chargeable under the Capital Gains Tax Act. The rate of tax imposed is 10%. However, if the proceeds from the sale of the asset are reinvested into acquiring a capital asset of a similar nature, the company will be exempt from paying Capital Gains Tax.

STAMP DUTIES

Stamp Duty is imposed on instruments executed by individuals and corporate entities in Nigeria. The rate of stamp duty to be paid on instruments varies.

TECHNOLOGY DEVELOPMENT LEVY

Corporate entities such as internet service providers, telecommunication companies, banks, pension managers, insurance companies, and other financial institutions (within a specified turnover range) are required to pay this levy to support the nationwide development of technology infrastructure and capacity.

WITHHOLDING TAX

This is not a separate type of tax but an advance payment of income tax. Except for interest, rent, dividends and directors fees, most withholding tax rates on payments on earned income are imposed at the rate of 10% for corporate bodies and 5% for individuals. The amount representing withholding tax is deducted by a party from payments made to another contracting party. This tax, when deducted and withheld, is required to be remitted periodically to the relevant Inland Revenue Service.

A withholding tax payment, as a tax credit, is used by the other party as an offset against its tax liability when filing its year-end tax returns. The applicable laws on withholding tax in Nigeria are Sections 78 - 84 of the CITA and Sections 69 – 75 of the PITA.

8. What are the main ip law provisions likely to be most relevant to inbound investors and/or foreign imports and their distributors (e.G. Trademark protection, licensing, other)?

Intellectual property rights such as trademarks, copyright, and patent and designs are afforded protection under Nigerian law. The relevant statutes are the Patent & Designs Act Chapter P2 Laws of the Federation of Nigeria 2004, the Trademarks Act Chapter T13 Laws of the Federation of Nigeria 2004, and the Copyright Act Chapter C28 Laws of the Federation of Nigeria 2004. To benefit from the protection under the extant laws, intellectual property rights (except copyright) must be registered with the Trademarks, Patent and Designs Registry of the Federal Ministry of Industry, Trade and Investment which is the body charged with the responsibility for registering intellectual property rights.

Contracts/agreements for the transfer of foreign technology by a non-resident company to Nigerian parties are to be registered with the National Office for Technology Acquisition and Promotion (NOTAP) as a pre-condition for obtaining and repatriating foreign currency. Some of the agreements required to be registered include licensing agreements, franchises, and management and consultancy services agreements. The contract/agreement to be registered must specify the services to be provided and/or the process or product being licensed. The relevant legislation is the NOTAP Act Chapter N62 Laws of the Federation of Nigeria 2004.

9. If a commercial dispute arises, will local courts or will international arbitration offer a more beneficial forum for dispute resolution to foreign investors?

Over the years, the process of resolving disputes through the Nigerian courts has become complicated, expensive and rather protracted primarily due to the increase in the cases processed through the judicial system every year. These challenges hamper the expeditious dispensation of justice, and so the need to overcome them means that litigants are increasingly seeking alternative methods of dispute resolution such as arbitration.

Arbitration appears to provide a more beneficial forum for dispute resolution to foreign investors. This is mainly because arbitration promotes party autonomy i.e. parties to the arbitration agreement can select the laws and rules that will govern the arbitral proceedings.

In addition, arbitral proceedings, unlike litigation, are usually private and confidential and parties agree to be bound by the decision of an arbitrator whose said decision is final and legally binding on all parties. Arbitral proceedings are typically faster and the arbitrators usually possess the necessary expertise to deal with any complex issues in dispute. Bearing in mind that parties to a commercial contract are more concerned with securing a speedy method of resolving any dispute that may arise in the course of the transaction, arbitration would be a more beneficial forum for dispute resolution to foreign investors.

10. What laws and business practices are peculiar to nigeria?

There are a number of laws and regulations governing foreign investment in Nigeria, depending on the specific sector. Some of these laws and regulations are as follows:

- Companies and Allied Matters Act Cap C20 Laws of the Federation of Nigeria 2004 (CAMA) – Every foreign company wishing to do business in Nigeria must incorpo rate a separate entity in Nigeria for that purpose, unless the company or proposed business qualifies for exemption under the statute. Also, every company must have at least directors and two shareholders.

- Nigerian Investment Promotion Commission Act 1995 (NIPC Act)– Companies with foreign shareholders are required to register with the NIPC and obtain a business permit from the Ministry of Interior to enable foreign shareholders to participate in the company i.e. hold shares in the company.
- The Nigerian Oil and Gas Industry Content Development Act 2010 (popularly referred to as the "Local Content Act") – By virtue of the Local Content Act, Nigerians are given priority to participate in the oil and gas industry. The Local Content Act prescribes minimum thresholds for the use of local services and materials and seeks to promote the employment of Nigerian staff in the industry.
- Central Bank of Nigeria (CBN) Regulation TED/FEM/FPC/GEN/01/010 dated June 23, 2015. The CBN recently issued a directive banning some imported goods and services from the list of items that can utilise foreign exchange in the Nigerian money market. The CBN policy implies that importers of the listed items can no longer purchase foreign currency from the official window to pay their foreign suppliers. Examples of banned items include toothpicks, tableware, textiles, kitchen utensils and wooden doors.

II. What are the regulations, protocol, and practicalities around public procurements and financing in nigeria?

The relevant legislation for public procurement in Nigeria is the Public Procurement Act 2007 (the PPA). The PPA applies to the procurement of goods, works and services carried out by:

- the Federal Government of Nigeria and all procurement entities; and
- all entities outside the foregoing description that derive at least 35 per cent of the funds appropriated or proposed to be appropriated for any type of procurement described in the PPA from the Federation's share of the Consolidated Revenue Fund.

The PPA is regulated by the National Council on Public Procurement (the Council) and the Bureau of Public Procurement (BPP).

Besides the PPA, other laws and regulations are applicable to public procurement procedures in Nigeria. These include the Infrastructure Concession Regulatory Commission (Establishment, etc.) Act, 2005 (the ICRC Act) and the Federal Government of Nigeria Financial Regulations, 2000. However, the PPA has precedence over the afore-mentioned law and the regulations on issues of public procurement.

For procurements in excess of $5,000,000 (Five Million Dollars), the approval of the BPP and Nigeria's Federal Executive Council will be required.

The PPA stipulates that the contracting authority is to be governed by principles of honesty, accountability, transparency, fairness and equity. Furthermore, to avoid any conflict of interest, the PPA bars the involvement of a bidder in the preparation of a tender procedure, and provides that anyone found guilty of this offence will be sentenced to five years' imprisonment.

PROCEDURE FOR PROCUREMENT

The prevailing procedure used in the public procurement of all goods, works and services is the open competitive bidding process. Under this process, the procuring entity effects public procurement by offering to interested bidders equal opportunity and information to present the goods and works required.

Other procedures that may be adopted in special cases are as follows:

- The Two-Stage Tendering Process: This may be used by contracting authorities in certain situations. An example of such an instance could be where the tender was rejected by the contracting authority under an open competitive bidding procedure or where the contracting authority desires to enter into a contract for the purposes of research, experiment, study or development. In such cases, the process for open competitive bidding is to be conducted in two stages. The first stage is to send an invitation to suppliers or

contractors to submit initial tenders containing their proposals without a tender price. The second stage would involve an invitation to suppliers whose tenders have not been rejected, requesting them to submit their final tenders with prices.

- The Restricted Tendering Process: This process involves inviting only a limited number of suppliers to bid. It is used where the goods, services or works are available from a limited number of contractors or suppliers, or the cost and time required to evaluate and examine a vast number of tenders is not proportionate to the value of the goods, works or services to be procured. In such a case, quotations are to be obtained from at least three unrelated contractors.
- Direct Procurement: This process is adopted in limited situations including where the works, goods or services are only available from one supplier or where one supplier has exclusive rights in respect of the goods, services or works and no reasonable alternative exists. In such a case the contracting authority is permitted to procure the goods, services or works by obtaining a quotation from that single/sole supplier/contractor.

FINANCING

Project finance models in Nigeria take various forms depending on a wide range of factors including the relevant procuring entities (i.e. federal or state governments, ministries or departments or agencies, etc.), the value or size of the project, the revenue generation model and the applicable legal or regulatory framework. Common models include developmental leases, concessions, build-operate-transfer, build-transfer, and build-own-operate-transfer project models.

12. What kind of actions should investors take to avoid corrupt practices in nigeria?

The challenge of corruption in Nigeria remains one of the most debilitating issues facing the country. Investors can, however, avoid corrupt practices by ensuring that their local companies comply with the anti-fraud and anti-corruption laws of the country and also ensuring that internal audit units are established to monitor compliance. Some of the extant Nigerian laws include:

- Money Laundering (Prohibition) Act 2011 (MLPA) - This Act prohibits the laundering of the proceeds of any crime or illegality. It requires that all institutions put preventive mechanisms in place to ensure compliance with the provisions of the Act. Financial Institutions (FI) and Designated Non-Financial Institutions (DNFI) are to develop programmes to combat the laundering of criminal proceeds by designating compliance officers at management level, training employees regularly, and establishing an internal audit unit to ensure compliance with the measures taken to enforce the provisions of the Act.
- Economic and Financial Crimes Commission (Establishment, etc.) Act 2004 (EFCC Act) – Under this Act, the Economic and Financial Crimes Commission (EFCC), the Nigerian law enforcement agency is empowered to investigate financial crimes such as money laundering, advance fee fraud, counterfeiting, futures market fraud, illegal charge transfers, computer credit card fraud etc.
- Corrupt Practices and Other Related Offences Act 2003 (ICPC Act) - This Act establishes the Independent Corrupt Practices and Other Related Offences Commission (ICPC) which is the apex authority tasked with the responsibility of fighting corruption and other related offences. The ICPC has vested powers to educate, prevent, detect, investigate and prosecute all offences under the Act. For example, any person who corruptly gives or confers any property or benefit of any kind to a public officer for a favour to be done by such public officer is guilty of an offence and liable to seven (7) years imprisonment.

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