

**OVERVIEW OF THE LEGAL AND REGULATORY
FRAMEWORK FOR DOING BUSINESS IN NIGERIA**

PRESENTED AT

**THE SOUTH AFRICA – NIGERIA CONFERENCE
SOUTHERN SUN GRAYSTON HOTEL, SANDTON,
JOHANNESBURG, SOUTH AFRICA
ON SEPTEMBER 18, 2006**

BY

**OSAYABA GIWA-OSAGIE
PRINCIPAL PARTNER
GIWA-OSAGIE & CO.**

**4 LALUPON CLOSE, OFF KEFFI STREET,
S.W. IKOYI, LAGOS, NIGERIA**

TEL: 234-1-2707433, 2806942, 2790466

FAX: 234-1-2703849

www.giwa-osagie.com

E-mail: giwa-osagie@giwa-osagie.com

OVERVIEW OF THE LEGAL AND REGULATORY FRAMEWORK FOR DOING BUSINESS IN NIGERIA¹

INTRODUCTION

Nigeria is Africa's most populous country with a population which is estimated at over 120 million. The country abounds with huge business opportunities and the relatively new democratic dispensation has continued to attract foreign investments into the Country on a daily basis. This phenomenon can be attributed to both the natural and human resources the Country is endowed with.

As a result of the Country's unique nature, there is a need for prospective investors to completely understand the business environment, particularly the legal and regulatory framework for operating within the Country. The Country's businesses are unique in their processes and requirements and there is often a need to be well guided before commencing business operations in Nigeria. Industries such as the Oil and Gas Industry, the Mining Industry, the Telecommunications Industry and all other vibrant industries within the Nigerian economy all have their own rules and regulations which are expected to be strictly adhered to. General regulatory issues such as formal registration for all companies and individuals intending to invest, tax requirements and liaising with government agencies are all issues to which adequate attention needs to be paid.

This paper intends to highlight the key legal and regulatory requirements for doing business in Nigeria. It will among others deal with the following issues:

- ❖ The Business Registration Procedure
- ❖ The Nigerian Investment Promotion Commission (NIPC)
- ❖ Expatriate Quota, Tax Laws and Levies
- ❖ Importation of Capital
- ❖ Repatriation of Dividends
- ❖ Protection for Foreign Investors
- ❖ Exchange Control Regulations
- ❖ Dispute Resolution Mechanisms

BUSINESS REGISTRATION PROCEDURE

The Nigerian government requires that all foreign enterprises wishing to do business in Nigeria must register with the Corporate Affairs Commission (CAC). The CAC is also responsible for the regulation and supervision of companies operating within Nigeria. It acts as a registry for all companies' activities and conducts investigations into the affairs of any company as

¹ Research assistance provided by Miss Folashade Kadir, Associate, Giwa-Osagie & Co.

required.² Until the incorporation of a company as a local entity, a foreign company may not carry out any business in Nigeria³ or exercise the powers of a registered company.

1. FORMS OF BUSINESS REGISTRATION

The following vehicles of investment may be considered for establishing a business enterprise in Nigeria.

- i. **SOLE PROPRIETORSHIP:** This form of enterprise is for use by an individual doing business on his own account. Its statutory requirement is the registration of a business name.⁴
- ii. **PARTNERSHIPS:** This form of enterprise is usually established between joint owners of a business who are personally liable for the obligations and debts of the firm. A partnership may be ordinary or limited.⁵
- iii. **INCORPORATED COMPANIES:** An incorporated company may be incorporated with unlimited liability, limited by shares or limited by guarantee. By the provisions of the Companies and Allied Matters Act (CAMA)⁶, foreign companies intending to do business in Nigeria must be incorporated as a local entity in Nigeria.⁷ Accordingly, it is usual for foreigners intending to do business in Nigeria to incorporate limited liability companies in Nigeria. This type of company limits the liability of its members to the amounts which is unpaid on the respective shares held by them. The advantages of registering a limited liability company include the limitation of the personal liability of its owners, perpetual succession of the company, the possibility of a 100% foreign ownership and the restriction on the transfer of shares.⁸

To register a limited liability company, a minimum share capital of N10,000,000.00 (Ten Million Naira) would be required by a foreign investor. Personal details of the investors would be required and various statutory fees payable. Registration is to be done at the Corporate Affairs Commission (CAC) and may be done by a legal practitioner on behalf of the investor. A certificate of incorporation is issued by the CAC upon completion of the

² See generally, the Companies and Allied Matters Act, Cap. C20, Laws of the Federation of Nigeria, 2004

³ See Section 54 of the Companies and Allied Matters Act

⁴ See generally "Investment in Nigeria", 3rd Edition, September 2002 by KPMG Professional Services

⁵ See generally "Investment in Nigeria", *supra*

⁶ Cap. C20, Laws of the Federation of Nigeria, 2004

⁷ See Section 54 of the Companies and Allied Matters Act and Section 19 of the Nigerian Investment Promotion Commission Act, Cap. N117, Laws of the Federation of Nigeria, 2004

⁸ See generally "Investment in Nigeria", *supra*

incorporation process. Also, companies are expected to comply with the provisions of the Companies and Allied Matters Act (CAMA)⁹ after incorporation. Such provisions include statutory meetings to be held by the company, filing of annual returns and board resolutions and the keeping of statutory books and accounts.

As part of its development efforts, the Corporate Affairs Commission now offers a 24 hours registration service which is known as “special registration” for the registration of companies.¹⁰ With the payment of a higher fee, investors can register a Nigerian company within 24 hours as opposed to the regular registration which takes an average of 5 days.

Although registration is required as local entities by foreigners wishing to do business in Nigeria, foreigners who have been engaged by the Federal Government of Nigeria to execute a particular project; work on a specific individual loan project on behalf of a donor country or organisation; engage solely in export promotion activities or are engineering consultants and technical experts engaged under any Federal Government approved contract with any government of the country or any of its agencies may be exempted from the requirement of incorporation.¹¹

A foreign company may also open a representative office in Nigeria. Such a representative office is however not allowed to engage in any business, conclude any contract or negotiate any letters of credit on behalf of the company. It can only be used as a promotional or liaison office and would also require registration with the Corporate Affairs Commission.¹²

2. REQUIRED REGISTRATIONS, AUTHORISATIONS AND APPROVALS

i. REGISTRATION WITH THE NIGERIAN INVESTMENT PROMOTION COMMISSION (NIPC)

The Nigerian Investment Promotion Commission (NIPC) is an agency of the Federal Government set up primarily to promote and encourage foreign investments in Nigeria.¹³ It serves as a regulatory agency for foreign investors operating in Nigeria.¹⁴

⁹ Cap. C20, Laws of the Federation of Nigeria, 2004

¹⁰ See the Corporate Affairs Commission website on www.cac.gov.ng

¹¹ Section 56 of the Companies and Allied Matters Act

¹² See <http://www.nigeriaembassyusa.org/business.shtml>

¹³ See the Nigerian Investment Promotion Commission Act of 1995

¹⁴ See also www.nipc-nigeria.org

The agency requires that all foreign investors should register with it before commencing business operations in Nigeria.¹⁵ If the Commission is satisfied with all the details submitted by the investor, it shall register the enterprise accordingly. The NIPC Act allows the participation of foreigners in all areas of the economy except areas designated on the “negative list”. Such areas include the production of arms and ammunition; production and dealing in narcotic drugs and psychotropic substances as well as the production of military and para-military wears and accoutrement.¹⁶

The Act allows a 100 percent shareholding by foreigners of investments in Nigeria.¹⁷ There is however an exception in the maritime sector¹⁸ and the petroleum sector, where investments are limited to existing joint ventures or new production-sharing contracts.¹⁹ In practice, it is advisable to have local or Nigerian participation in any company in Nigeria. For instance, the Nigeria International Bank, a member of Citigroup has Nigerians as the Managing Director and Deputy Managing Director. Also, Shell Petroleum Development Company of Nigeria has Mr. Basil Omiyi, a Nigerian, as the Managing Director.

Furthermore, the Commission has recently streamlined the registration procedures for foreign firms in order to further encourage, the inflow of direct foreign investment into the country. It has put in place a one stop shop, which is an investment centre where thirteen (13) government agencies relevant to foreign investment, are brought under one roof in order to provide prompt and efficient services to foreign investors.²⁰

Presently the following government agencies can be found in NIPC’s One-Stop-Shop for the provision of their services:

- i. The Nigeria Investment Promotion Commission (NIPC)
- ii. The Corporate Affairs Commission (CAC)
- iii. The Nigeria Immigration Service (NIS)
- iv. The Nigeria Customs Service (NCS)
- v. The Federal Inland Revenue Service (FIRS)
- vi. The National Office for Technology Acquisition and Promotion (NOTAP)
- vii. The Federal Capital Territory (FCT)
- viii. The National Agency for Food, Drugs Administration and Control (NAFDAC)
- ix. The Central Bank of Nigeria (CBN)

¹⁵ See Section 20 of the Nigerian Investment Promotion Commission Act

¹⁶ See Section 18 of the Nigerian Investment Promotion Commission Act

¹⁷ See Section 17 of the Nigerian Investment Promotion Commission Act

¹⁸ See <http://www.nipc-nigeria.org/FAQ.htm>

¹⁹ See *Doing Business in Nigeria: A Country Commercial Guide for U.S. Companies - U.S. & Foreign Commercial Service and U.S. Department of State*, 2006.

²⁰ See www.nipc-nigeria.org

- x. The Bureau of Statistics
- xi. The Federal Ministry of Solid Minerals Development
- xii. The Federal Ministry of Finance
- xiii. The Standard Organisation of Nigeria (SON)

Among other things, the NIPC also has the responsibilities to:²¹

- Co-ordinate, monitor, encourage and provide necessary assistance and guidance for the establishment and operation of enterprises in Nigeria.
- Collect, analyse and disseminate information about investment opportunities and sources of investment capital and advise on request, the availability, chance or suitability of partners in joint-venture projects.
- Register and keep records of all enterprises to which the NIPC Act applies.
- Maintain liaison between investors and ministries, government departments and agencies, institutional lenders and other authorities concerned with investments.
- Assist incoming and existing investors by providing support services.

The Nigeria- South Africa Chamber of Commerce in Nigeria is also a good point of call for information about investment opportunities in Nigeria.

ii. BUSINESS PERMIT

The Nigerian Investment Promotion Commission (NIPC) Act provides that no person other than a citizen of Nigeria can of his own account or in partnership with any other person, practice any profession or establish or take over any trade or business whatsoever without consent in writing of the Minister of Internal Affairs.²² Such consent takes the form of a “Business Permit” which is obtainable by an application made to the Ministry of Internal Affairs. This can be carried out on behalf of the investor by a legal practitioner operating within the Country.

iii. EXPATRIATE QUOTA POSITIONS

Any company wishing to employ an expatriate to work in Nigeria is required by law to make an application to the Federal Ministry of Internal Affairs for “Expatriate Quota” positions. This is the official permit given to a company which allows it to employ individual expatriates to specifically approved job designations.²³

²¹ See www.nipc-nigeria.org

²² Section 8 of the Immigration Act, Cap. 11, Laws of the Federation of Nigeria, 2004

²³ See <http://www.nigeriaembassyusa.org/business.shtml>

An application for an expatriate quota has to be accompanied by evidence that there are no Nigerian citizens qualified for the position that the expatriate will occupy. Expatriate Quota positions are usually granted for 2-3 years subject to renewal.

iv. COMBINED EXPATRIATE RESIDENCE PERMIT AND ALIEN'S CARD (CERPAC)

The CERPAC is a new method which has been devised by the government to make the process of acquiring a residence permit and an alien's registration certificate easier for foreigners in the Country. The card is obtainable upon the purchase of application forms from the designated sales points. The application is submitted to the Federal Ministry of Internal Affairs which eventually issues the card. The card permits foreigners to reside in the Country with unhindered movement.

v. REGISTRATION WITH THE SECURITIES AND EXCHANGE COMMISSION (SEC)

The Securities and Exchange Commission (SEC) regulates the affairs of the capital market in Nigeria. For companies which may intend to deal with capital market securities, registration is required with the Securities and Exchange Commission (SEC).²⁴

vi. REGISTRATION WITH THE NATIONAL OFFICE FOR TECHNOLOGY ACQUISITION AND PROMOTION (NOTAP)

The National Office for Technology Acquisition and Promotion (NOTAP) was set up by the NOTAP Act of 1995. The Act requires registration in the case of businesses dealing with the transfer of foreign technology, of all commercial contracts and agreements dealing with the transfer of foreign technology into Nigeria not later than sixty days from the execution or conclusion thereof.²⁵

Agreements to be sent to NOTAP include management agreements, trademark agreements and licensing (know-how) agreements. Fee limits are also provided by NOTAP and by the Monetary, Credit, Foreign Trade and Exchange Rate Policy Guidelines issued by the Central Bank of Nigeria. A fee ranging between 2% - 5% of profits before tax shall apply to management services. A fee of 1% of net sales shall apply to trademark agreements while a fee of 1% to 5% of net sales shall apply to licensing agreements.

²⁴ See Section 29 of the Investment and Securities Act of 1995

²⁵ See Section 5(2) of the National Office for Technology Acquisition and Promotion Act, Cap. N62, Laws of the Federation of Nigeria, 2004

The office was set up to monitor the transfer of foreign technology into Nigeria and all other related matters. Beside the registration and monitoring of the execution of contracts dealing with the transfer of technology, it ensures that investors possess the required licences to use trademarks and patented inventions.²⁶

vii. REQUIREMENT OF THE PENSION REFORM ACT, 2004

By the provisions of the new Pension Reform Act of 2004, any organisation having at least 5 employees is required to set up a contributory pension scheme for the payment of retirement benefits of its employees.²⁷ Under this scheme, employers are required to contribute a minimum of seven and a half percent of the employee's monthly emoluments while the employee also contributes a minimum of seven and a half percent of his monthly emoluments to the scheme.²⁸ In addition, employers are to maintain life insurance policies in favour of their employees.²⁹

It is important to note that the employment laws in South Africa are different from the applicable Nigerian Laws. Beside the provisions of the Pension Reform Act, other key employment laws are the Labour Act, the Workmen's Compensation Act, the National Minimum Wage Act and the Factories Act.

There is a requirement of minimum wage which is applicable to an employer employing fifty (50) or more persons³⁰ and employees are protected by law against unfair dismissal. There are also health and safety standards for which factories require a certificate of registration showing compliance.³¹ Other important provisions of these laws include the requirement for staff training,³² the compensation of members of staff who sustain injuries in the course of their employment,³³ the grant of statutory leave to members of staff³⁴ and the prohibition of child labour.

Although registrations with government agencies have become streamlined and with fewer processes, it is advisable for foreign investors to commence all registration required in good time in order to forestall any delays which may stall the commencement of their businesses.

²⁶ See generally, provisions of the National Office for Technology Acquisition and Promotion Act

²⁷ See Section 1 of the Pension Reform Act 2004

²⁸ See Section 9(1)(c) of the Pension Reform Act 2004

²⁹ See Section 9(3) of the Pension Reform Act 2004

³⁰ See Sections 1 and 2 of the National Minimum Wage Act, Cap. N61, Laws of the Federation of Nigeria, 2004

³¹ See Sections 2(2) and 3(2) of the Factories Act, Cap. F1, Laws of the Federation of Nigeria, 2004

³² See the Labour Act, Cap. L1, Laws of the Federation of Nigeria, 2004

³³ See the Workmen's Compensation Act, Cap. W62, Laws of the Federation of Nigeria, 2004

³⁴ See the Labour Act, Cap. L1, Laws of the Federation of Nigeria, 2004

TAXES AND LEVIES

Taxes in Nigeria are levied along the three tiers of government i.e. the Federal Government, the State Governments and the Local Governments. Tax is usually calculated within a tax year and Tax Clearance Certificates issued after payment.

1. TAXES PAYABLE

The Federal Government is responsible for the collection of companies income tax; petroleum profits tax; withholding tax on companies; withholding tax on residents of the Federal Capital Territory (FCT) Abuja; withholding tax on non-resident individuals; value added tax; education tax; capital gains Tax on residents of the FCT; capital gains tax on corporate bodies and non-resident individuals; stamp duties on corporate bodies and residents of the FCT and personal income tax in respect of certain government officials.³⁵

The State Governments are responsible for the collection of personal income tax (Pay-as-You-Earn) for individuals resident in their various states; withholding tax for individuals; capital gains tax for individuals; stamp duties on certain instruments; business premises registration fee; development levy etc. while the Local Governments are responsible for other miscellaneous taxes such as tenement rates, shops and kiosks rates etc.³⁶

A summary of some of the above-stated taxes is as follows:

- i. **COMPANY INCOME TAX:** All companies in Nigeria are required to pay income tax on all profits accruing in, derived from, brought into or received in Nigeria at a rate of 30%.³⁷ All companies incorporated in Nigeria are liable to pay tax on their profits.
- ii. **EDUCATION TAX:** This is charged on the profit of every company incorporated in Nigeria at the rate of 2%. It is assessed by and payable to the Federal Inland Revenue Service.
- iii. **STAMP DUTY:** Stamp duty is charged on written agreements and other relevant documents to which a company is party. This tax is in two forms. The tax may be fixed or based on the value of the transaction.³⁸

³⁵ See the Taxes and Levies (Approved List for Collection) Act of 1998

³⁶ See the Taxes and Levies (Approved List for Collection) Act of 1998

³⁷ See Section 8(1) of the Companies Income Tax Act

³⁸ See the Stamp Duties Act, Cap S 8, Laws of the Federation of Nigeria, 2004

- iv. **VALUE ADDED TAX:** Value added tax is charged and payable on the supply of all taxable goods and services.³⁹ It is chargeable at a flat rate of 5%.⁴⁰
- v. **WITHHOLDING TAX:** Where payment is due to a company in respect of goods or services it has provided, or payment is due to it in respect of dividend, loan interest, rent or royalty, the person making the payment is required by law to deduct a percentage of the payment as withholding tax and remit same to the relevant tax authority. It is payable at a rate between 5% and 10%.
- vi. **PAY AS YOU EARN (PAYE):** For the payment of personal income tax, all employers are required to deduct from the employees' emoluments, personal income tax payable by the employees. The deduction made is then remitted to the relevant tax authority. The tax is payable at a rate between 5% and 25%.⁴¹
- vii. **CAPITAL GAINS TAX:** This tax is payable on gains accruing from the disposal of assets. It is paid at the rate of 10%.⁴²
- viii. **CUSTOMS DUTIES AND TAX:** This tax is charged on goods imported into the country. The rates are as shown in the Customs Duty Rate of the year or years in which the goods concerned are imported into Nigeria. The rates are amended from time to time.⁴³
- ix. **PETROLEUM PROFITS TAX:** Companies engaged in petroleum operations are subject to the payment of petroleum profits tax at the rate of 85% of their taxable income.⁴⁴

Tax registration is required with the relevant government authorities for payment of taxes.

2. MULTI-LEVEL TAXES

There is often a problem of multiple taxes for businesses, at the federal, state and local government levels. Investors are therefore advised to engage the services of professional tax advisors in dealing with this problem.

³⁹ See Section 2 of the Value Added Tax Act, Cap. V1, Laws of the Federation of Nigeria, 2004

⁴⁰ See Section 4 of the Value Added Tax Act

⁴¹ See generally provisions of the Personal Income Tax Act of 1993

⁴² See Section 2(1) of the Capital Gains Tax Act.

⁴³ See also the Customs and Excise Management Act, Cap. C45, Laws of the Federation of Nigeria, 2004

⁴⁴ See generally, the Petroleum Profits Tax Act, Cap. P13, Laws of the Federation of Nigeria, 2004

Recently, the Federal Government issued a directive prohibiting the imposition of multiple taxes in the telecommunications industry. Until this directive is passed into law, compliance with the directive remains uncertain.

3. TAX EXEMPTIONS AND INCENTIVES

There are some laws that provide for a wide array of tax exemptions and privileges for the purpose of encouraging investment. Such tax exemptions are as follows:

i. PIONEER STATUS

The Industrial Development (Income Tax Relief) Act⁴⁵ provides for tax relief to pioneer companies. These are companies operating within certain sectors of the economy which the Federal Government of Nigeria believes are not operating on a scale suitable to the Country's economic requirements.

Certain companies operating within the agricultural, manufacturing, gas utilisation, telecommunications and mining sectors currently enjoy pioneer status. This means that such companies are granted an initial tax for a period of three years, which is renewable for another two years. For example, at the advent of the GSM technology in Nigeria, companies offering GSM services were granted pioneer status for a period of 5 years. Import duty on telecommunications equipment was also reduced during this period from 25% to 5%.

Pioneer status is granted where a company falls within the sectors defined as priority areas by the government. Such areas include the agricultural sector, mining, manufacturing and other areas of new investments. It is at the discretion of the Federal Government and on the basis of the merit of the application. Beside the industry of operation, matters which are taken into consideration before the grant of the status include the following⁴⁶:

1. Amount of underlying capital investment of a company. (This is usually verified by physical inspection and supported by a report prepared by the relevant Federal Ministry)
2. The socio-economic advantages of the company's activities viz a viz the Nigerian economy

ii. PROTECTION FOR FOREIGN INVESTORS

The Nigerian Enterprises Promotion (Repeal) Act of 1995 has abolished any restrictions to the limits of foreign investment in Nigerian enterprises. The

⁴⁵ Cap. 17, Laws of the Federation of Nigeria, 2004

⁴⁶ See <http://www.nigeriaembassyusa.org/business.shtml>

Nigerian Investment and Promotion Commission Act of 1995 which was enacted among other things to encourage foreign investment in Nigeria, guarantees an unrestricted transfer of funds in freely convertible currency, through an authorised dealer (a Nigerian bank) of dividends and profits (net of taxes) attributable to investments in Nigeria. Transfer of payments is also assured in respect of foreign loan servicing and proceeds of the sale or from the liquidation of an enterprise.⁴⁷

By the provisions of the NIPC Act, nationalisation and expropriation of business interests by any government of Nigeria is disallowed, except where such is carried out in the national interest or for a public purpose and this is only permissible under a law which provides for the payment of a fair and adequate compensation to the investor, which is to be paid without undue delay. The investor must also be given the right of access to the courts for the determination of his interest or right and determination of appropriate amount of compensation which he should be entitled to. The NIPC Act also states that no person owning wholly or in part, interest in the capital of any enterprise in Nigeria shall be compelled by law to surrender such interest to any other person.⁴⁸ Furthermore, the Nigeria Government is willing to enter into an Investment Protection Agreement with foreign enterprises wishing to invest in Nigeria.⁴⁹

The recent delisting of Nigeria from the list of Non Co-operative Countries and Territories has also helped to restore investors' confidence in investing in the Nigerian economy.

iii. DOUBLE TAXATION TREATIES

Nigeria has entered into double taxation agreements with the governments of the following countries:

- i. United Kingdom
- ii. France
- iii. Belgium
- iv. Pakistan
- v. Canada
- vi. Romania
- vii. Netherlands
- viii. Czech Republic
- ix. Slovak
- x. Poland
- xi. Philippines
- xii. Japan

⁴⁷ See generally "Investment in Nigeria", 3rd Edition, September 2002 by KPMG Professional Services

⁴⁸ See generally, Section 25 of the Nigerian Investment Promotion Commission Act.

⁴⁹ See www.nipc-nigeria.org

- xiii. China
- xiv. Italy (Shipping and Air Transportation Only)

Withholding tax for rents, dividends, commissions, directors' salaries, rates or any other income derived by the company which is normally calculated at the rate of 10% is reduced to 7.5% where double taxation treaty provisions exist with the country of a foreign company and Nigeria. The double taxation agreements generally cover the following taxes⁵⁰:

- 1. Personal Income Tax
- 2. Companies Income tax
- 3. Petroleum Profits Tax
- 4. Capital Gains Tax

iv. INCENTIVES FOR COMPANIES IN THE MINING INDUSTRY

As a result of Nigeria's untapped range of solid minerals,⁵¹ the Federal Government has consistently tried to attract investment into the Solid Minerals sector of the economy. The current legislation on solid minerals and mining, the Minerals and Mining Act of 1999⁵² in Sections 18 – 23 provide an array of fiscal and other incentives to investors in the solid minerals sector.

However, a new Minerals and Mining Act is currently being finalised by the legislature which is expected to afford greater access to the industry, more fiscal incentives and the further encouragement of the private sector's participation in the industry. Incentives which will be provided under the new Minerals and Mining Act when it is passed into law include:

- 1. Non-payment of capital gains tax in respect of the excess of a stipulated transaction sum
- 2. Non-payment of stamp duty in respect of the excess of a stipulated transaction sum
- 3. Grant of an appropriate number of expatriate quotas and resident permits
- 4. Application of all incentives granted by the Nigerian Investment Promotion Commission (NIPC) Act
- 5. Free transfer of funds through an authorised dealer in respect of payments for loan servicing and remittance of funds in case of sale or liquidation.
- 6. Deduction of a 100% capital allowance of its qualifying capital expenditure in the determination of its total profits.
- 7. Deduction of any initial losses from the assessable profits of the company.

⁵⁰ See "Nigeria Law Digest" by Aelex of Lagos, Port Harcourt and Accra, 2005 Edition

⁵¹ Nigeria has more than 34 types of minerals in over 450 locations all over the Country.

⁵² Cap. M12, Laws of the Federation of Nigeria, 2004

8. Zero rate for Value Added Tax
9. Entitlement to refund of difference between input value added tax and output value added tax
10. Exclusion from the payment of custom duties for mining equipment and materials
11. Exclusion from the payment of Education Tax
12. Establishment of a tax deductible reserve for mine rehabilitation, mine closure costs and environmental protection

v. INCENTIVES FOR LIQUIFIED NATURAL GAS PROJECTS

The Nigerian government intends to develop the gas sector to its full potential, having wasted flared gas for decades in the production of crude oil. To encourage development in the gas section, tax incentives have been provided for companies wishing to embark on liquified natural gas projects. These incentives include:⁵³

1. A reduced applicable tax of 45% as opposed to 85% which obtains for companies engaged in petroleum operations
2. Capital allowance of 33% in the first three years of operation
3. An investment tax credit of 10%
4. A royalty of 7% and offshore tax of 5%

Other incentives which have been made available to companies carrying out gas utilisation operations are:⁵⁴

1. Payment of Companies Income Tax at the rate of 30%
2. An initial tax free period of 5 years
3. 15% investment capital allowance
4. Tax free interest on loans obtainable with the prior approval of the Federal Ministry of Finance
5. Tax free dividends during the initial tax holiday of 5 years

vi. TAX RELIEF FOR EXPORT ORIENTED ENTERPRISES

a. EXPORT PROCESSING ZONES

The export processing zones were set up for the establishment of industries within the zones, which will principally export goods and services produced. The enabling law is the Nigerian Export Processing Zones Authority Act of 1992⁵⁵ and it vests the execution of the programme in the Nigerian Export

⁵³ See <http://www.nipc-nigeria.org/FAQ.htm>

⁵⁴ See <http://www.nipc-nigeria.org/FAQ.htm>

⁵⁵ Cap. N107, Laws of the Federation of Nigeria, 2004

Processing Zones Authority (NEPZA).⁵⁶ Companies operating in any of Nigeria's export processing zones and which do not sell above 25% of their production in the local market enjoy a company's income tax exemption for 12 years.

The company's income tax exemption is also applicable to 100% export oriented enterprises which operate outside an export free zone. Also, companies carrying out approved manufacturing activities in an Export Processing Zone are granted 100% capital allowance on expenditure incurred on its qualifying building and plant equipment. A summary of the incentives available to investors in the export processing zones are:⁵⁷

- Tax reliefs
- Non-application of the tax and foreign exchange laws to operations within the zones
- Repatriation of capital investment
- Unrestricted remittance of dividends and profits
- Unrestricted foreign ownership of enterprises
- Rent free land for construction of factory premises
- 25% of production permissible for sale in the domestic market
- No quotas applicable to products exported to the European Economic Community (EEC) and the United States of America
- Preferential tariffs for goods exported to the EEC
- No import or export licences required
- Duty free import of raw materials

b. OIL AND GAS FREE ZONE

This zone was set up by the Oil and Gas Export Free Zone Act of 1996,⁵⁸ primarily for oil and gas export activities.⁵⁹ The aim was to provide oil and gas service companies with all the required facilities and enabling environment within which to operate. The zone offers a highly competitive range of tax and other investment incentives in order to encourage the growth of business in this sector.⁶⁰ Incentives available for operations in the zone include:

- The possibility of a 100% foreign ownership of enterprise
- Easy repatriation of capital and profits
- Total exemption from VAT and Withholding Tax
- Non-payment of Corporate Tax
- Exemption from import and export tax

⁵⁶ See also <http://www.onlinenigeria.com/agriculture/?blurb=483>

⁵⁷ See <http://www.nigeriabusinessinfo.com/epz.htm> and http://www.nipc-nigeria.org/proc_exp.htm

⁵⁸ Cap. O5, Laws of the Federation of Nigeria, 2004

⁵⁹ See also www.nipc-nigeria.org

⁶⁰ See also http://www.kishtpc.com/Free-En/free_nigeria.htm

EXCHANGE CONTROL REQUIREMENTS

The basic foreign exchange control legislation in Nigeria is the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act of 1995.⁶¹ The Act liberalised dealings in foreign exchange.⁶² By the provisions of the Act, any transaction which is not prohibited by law and is supported by appropriate documentation shall be eligible for the purchase of foreign exchange.⁶³ The highlights of the Act are as follows:

- i. Relaxed controls on repatriation of dividends and capital
- ii. Cancellation of ministerial approval before the procurement and repayment of foreign loans
- iii. Payment for foreign equity investment in various forms (cash, machinery, raw materials etc.)
- iv. Unhindered operation of domiciliary accounts

Permissible instruments being used for foreign exchange transactions include convertible foreign currencies, foreign coins, bank drafts, travellers cheques, foreign bank notes, telegraphic transfers etc.⁶⁴ Foreign exchange transactions are also regularly governed by directives issued by the Federal Ministry of Finance and the Central Bank of Nigeria.

i. IMPORTATION OF CAPITAL

By the provisions of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, an individual or corporate body is to invest in any Nigerian enterprise with capital imported into Nigeria through an authorised dealer.

Subject to the presentation of prescribed documentation, the bank issues within 24 hours, a “Certificate of Capital Importation” upon receipt of the funds of a foreign investor.⁶⁵ This certificate is important for the following reasons:

- It enables the transfer out of Nigeria, of dividends and profits attributable to investments in Nigeria
- It enables payments to be paid outside Nigeria in respect of foreign loan obligations
- It enables the transfer out of Nigeria, of proceeds of a sale or liquidation of an investment in Nigeria

⁶¹ Cap. F34, Laws of the Federation of Nigeria, 2004

⁶² See “Investment in Nigeria”, 3rd Edition, September 2002 by KPMG Professional Services

⁶³ Section 10 of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Cap. F34, Laws of the Federation of Nigeria, 2004

⁶⁴ See Section 2 of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Cap. F34, Laws of the Federation of Nigeria, 2004

⁶⁵ See Section 15(2) of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Cap. F34, Laws of the Federation of Nigeria, 2004

Items such as raw materials, machinery and equipment qualify as capital and a Certificate of Capital Importation may also be issued in this respect. Documents required for the issuance of a Certificate of Capital Importation include a SWIFT/Telex message requiring payment, a board resolution of the Nigerian beneficiary company which authorises the investment, documents evidencing the purpose of the funds etc. For capital which is in the form of equipment, the company will be required to produce documents such as the original clean report of inspection, the original bill of lading, the original invoice of the machinery, the original exchange control documents and all other documents as requested by the bank for the issuance of a Certificate of Capital Importation.

Foreigners also have equal access to credit facilities granted by Nigerian banks.

ii. REPATRIATION OF PROFITS AND DIVIDENDS

The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act guarantees individuals and corporate bodies who invest in Nigeria an unconditional transferability of funds relating to their investment in Nigeria out of Nigeria.⁶⁶ Such fund is expected to have been imported into Nigeria through an authorised dealer who must have issued a Certificate of Capital Importation for the purpose.

Dividend payments are subject to withholding tax of 10%. Although there are no limits on profits distributable as dividend, distributions are not allowed from the capital of the company. For the purpose of remitting dividends and profits, the required banking forms should be obtained and submitted along with other documents such as the company's audited accounts for the year, the company's resolution authorising the payment of the dividend, evidence of tax payment, a copy of the company's certificate of capital importation and a copy of the dividend warrant for the dividend to be repatriated. In the case of loan repayments, the requisite bank form will be needed along with a copy of the relevant loan agreement, a schedule of the loan drawdown as well as a demand note in respect of the loan repayment.

Where capital is to be withdrawn, a copy of the sale agreement, evidence of payment of tax, a copy of the Certificate of Capital Importation, evidence of sale, evidence of valuation of the business conducted by an independent third party and the requisite bank form will be required.

Violations of Nigeria's exchange control regulations constitute very serious offences. It is advisable for foreigners investing in the Country to seek expert

⁶⁶ See Section 15(4) of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Cap. F34, Laws of the Federation of Nigeria, 2004

advice on current exchange control regulations in order not to run foul of them.

DISPUTE RESOLUTION

i. COURT SYSTEM

The Nigerian court system consists of various levels of which the major ones are the Supreme Court, the Court of Appeal, the Federal High Court, the State High Courts and the Magistrate Courts. The magistrate courts are essentially courts of summary judgement having original jurisdiction in both civil and criminal matters. The State High Courts also have jurisdiction in both civil and criminal proceedings and hear appeals from the magistrate courts. The Federal High Court has co-ordinate jurisdiction with the State high courts but is only bound by the decisions of the Supreme Court and the Court of Appeal. The Court of Appeal is the court next in hierarchy to the Supreme Court while the Supreme Court is the apex court of the Nigerian judicial system.

Disputes between corporate bodies are usually handled by the civil courts as business transactions are usually governed by Nigerian statutes. The Federal High Court however has jurisdiction over revenue matters, banking, fiscal matters, aviation matters, admiralty, foreign exchange and suits involving the federal government or its agency.

ii. ALTERNATIVE DISPUTE RESOLUTION

Although the Nigerian court system is deeply engrained as the first choice of dispute resolution, arbitration and conciliation is being encouraged as part of the existing dispute resolution mechanisms. The Arbitration and Conciliation Act⁶⁷ provides a unified and simple legal framework for the fair and efficient settlement of commercial disputes through arbitration and conciliation. The law establishes internationally competitive arbitration mechanisms along with fixed proceeding schedules. Qualified arbitrators as selected by disputing parties arbitrate between disputing parties. International Commercial contracts are subject to arbitration under the Nigerian Act or any other international arbitration rule agreeable to both parties. Disputes arising from foreign investments in Nigeria may be resolved in accordance with the rules of the International Centre for Settlement of Investment Dispute or within such other framework as parties may agree, such as bilateral investment protection agreements.

⁶⁷ Cap. A18, Laws of the Federation of Nigeria, 2004

CONCLUSION

The above is a bird's eye view on the key legal and regulatory framework for doing business in Nigeria. The Nigerian economy and system of government are dynamic and evolving at a rapid rate. The government is also working extremely hard towards eradicating corruption with the establishment of the Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices and Other Related Offences Commission (ICPC) which are statutory bodies charged with prosecuting cases of corruption in the Country. Also, with the recent settlement of a huge proportion of the Country's foreign debt portfolio owed to the Paris Club and the strong ratings from the Rating Agencies, Nigeria is the Country to invest in now. Any disciplined and law abiding citizen will be able to settle into the Nigerian business environment and conduct business satisfactorily. MTN Nigeria, Shoprite, Game and Protea Hotels will bear testimony to this.

I will like to end up by telling you the story of a young man from an Asian Country who decided to take a holiday in Nigeria. Before proceeding on his vacation, he had applied for a bicycle loan which was being processed. Whilst on holiday in Lagos, he was able to get a job with a car, chauffeur and furnished accommodation in Ikoyi, Lagos which is almost as nice as Sandton. At the end of his period of leave, he received an email from his employer informing him that his application for his bicycle loan had been rejected and wanted to confirm when he will be resuming work. Of course, he did not hesitate to send a letter of resignation. If you were the one, won't you do the same? Nigeria is great if you do your home work well. Thank you all.

For further information, please contact Giwa-Osagie & Co. by telephone (+234-1-2707433; 234-1-2790466; 234 1 2806941-2; 234 1 8063029328; 234-1-2707433) by fax 234-1-2703849) or by email (giwa-osagie@giwa-osagie.com).