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‘Counting the Cost’: An Impact Analysis of Nigeria’s Tax Incentive Regime

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Introduction

Since the phased liberalisation of her economy in the late 1980s/early 1990s, Nigeria's government has been intensifying efforts to attract foreign direct investment (FDI). Notably in 1995, the Federal Government (FG) enacted the ***Nigerian Investment Promotion Commission Act***[1] which, amongst other legislation, focused on attracting and protecting foreign investment in Nigeria. In the same vein, the earlier ***Industrial Development (Income Tax Relief) Act***[2] provides income tax relief for 'pioneer industries' and 'products' vide maximum of five (5) year 'pioneer status' (PS) tax holidays.[3]

There has been ongoing debate on the effectiveness of diverse tax incentives[4] offered by developing countries, in quest for global capital, to multinational enterprises (MNEs). Are these incentives worthwhile vis a vis ultimate returns to national economies, or are they an additional conduit for unfair financial flows? These questions become particularly poignant for Nigeria, given her abysmal tax to GDP ratio (at 6.1%).[5]

Note: The authors have revised this article from its original version presented at a *Three Day Virtual Workshop on Corporate Tax Practice and Inequality organised by Copenhagen Business School in June 2020, details available at:* https://www.cbs.dk/files/cbs.dk.

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1. ***Cap. N117, Laws of the Federation of Nigeria (LFN), 2004.***
2. ***Cap. I7, LFN 2004***, hereinafter referred to as ***IDITRA*** was originally enacted in 1970 to modify the operation of ***Companies Income Tax Act (CITA)***, for companies to which it applied.
3. ***Section 10 IDITRA.*** The PS tax holiday is granted (pursuant to application), to eligible domestic and foreign investors in the qualifying sectors (*Pioneer Industries/Enterprises*) for an initial three (3) years, and subject to maximum two extensions of one (1) year each.
4. Unless otherwise indicated, "*tax incentives*" is hereafter used to widely refer to tax exemptions/holidays, duty, fee and levy waivers and concessions, preferential (lower) tax rates, other incentives by way of accelerated capital allowances, investment tax credits, etc.
5. See Tobi Awodipe, ***'Nigeria's Tax: GDP Ratio Remains One of the Poorest in Africa'***, *The Guardian, 24.03.2018*: https://guardian.ng/business-services/nigerias-tax-gdp-ratio-remains-one-of-the-poorest-in-africa/, (accessed 17.06.2020) reporting that "*Financial experts have lamented the country's tax to GDP ratio, describing it as one of the poorest in Africa. The figure … at just 6 per cent is significantly lower than Ghana and Egypt at 16 percent, Morocco at 22 percent and South Africa at 27 percent.*" The article reported proceedings of a tax conference on ***'Understanding Tax and its Effect on Nigerian Businesses'***, organised by the NACCIMA, FIRS and LIRS in Lagos. See also OECD, ***'Revenue Statistics in Africa 2020 - Nigeria Tax-to-GDP Ratio Over Time'***: https://www.oecd.org/tax/tax-policy/revenue-statistics-africa-nigeria.pdf (accessed 20.03.2021): "*The tax-to-GDP ratio in Nigeria increased … from 5.7% in 2017 to 6.3% in 2018. In comparison, the average for the 30 African countries increased by just under 0.1 percentage points over the same period, and was 16.5% in 2018. Since 2010, the average for the 30 African countries has increased by 1.4 percentage points, from 15.1% in 2010 to 16.5% in 2018. Over the same period, the tax-to-GDP ratio in Nigeria has decreased by 1.0 percentage points, from 7.3% to 6.3%. The highest tax-to-GDP ratio in Nigeria was 9.6% in 2011, with the lowest being 5.3% in 2016.*" Incidentally, President Jonathan's administration in 2013 announced it was working with McKinsey & Co to "progressively increase" Nigeria's tax to GDP ratio to 22% by the end of 2015. See Talatu Usman, ***'Nigerian Government Hires Tax Consultants to Increase Revenue Generation', Premium Times, 27.11.2013:*** https://www.premiumtimesng.com/news/150450-nigerian-government-hires-tax-consultants-increase-revenue-generation.html (last accessed 20.03.2021). Also, according to the WB, Nigeria's tax to GDP ratio in 2013 was a dismal 1.48% (compared to 1.53% in 2003): https://data.worldbank.org/indicator/GC.TAX.TOTL.GD. ZS?locations=NG (accessed 17.06.2020).

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This research paper seeks to examine various tax incentive regimes across sectors in Nigeria whilst interrogating Nigeria's economic performance resulting therefrom. Additionally, this paper will opine, based on analytical observations of such performance, whether going forward, there is a business case for continuing, or otherwise tinkering with, such tax incentives.

Background: Setting the Context

To preface our discourse on tax inequality, it is prescient to acknowledge that countries try to attract FDI from the global investment community, through tax incentives or concessions. Governments undertake various investment promotion strategic actions, including enacting legislation, roadshows/summits, etc to convince potential foreign investors of the attractiveness of their jurisdiction as an investment destination. These incentives could be offered to compensate for the local/national/regional challenges of doing business or could sometimes result from lobbying efforts of international financial institutions as part of their loan terms.[6]

These tax incentives could be categorised, based on: (a) cost (in form of tax credits and accelerated depreciation allowances); or (b) profit (in the form of tax holidays or reduced tax rates).[7] Additionally, they could be focused on certain priority sectors including business type, size and location, offering full or partial waivers or exemptions.[8]

There have been two schools of thought on the impact of these incentives on the economy of investment destinations. One argues that *such incentives are necessary to attract investment and compensate for infrastructural deficit and harsh business environment in which MNEs do business in-country*. An exponent, Professor Joosung Jun argues that *investment incentives have been instrumental in the development of countries such as Malaysia, Ireland, Singapore, South Korea and Taiwan*. In the same vein, countries with evasion pressure and a large pool of informal sector operators could utilise tax incentives to encourage informal firms to register and formalise their business operations.[9]

6. Saila Naomi Stausholm, ***'Rise of Ineffective Incentives: New Empirical Evidence on Tax Holidays in Developing Countries'***, *SocAr Xiv, 2017:* https://osf.io/preprints/socarxiv/4sn3k/ cited in Markus M., et al., ***'Comparing Tax Incentives Across Jurisdictions: A Pilot Study'***, *Tax Justice Network, 03.01.2019:* https://www.taxjustice.net/wp-content/uploads/2018/12/Comparing-tax-incentives-across-jurisdictions_Tax-Justice-Network_2019.pdf (accessed 30.05.2020).
7. Mustapha Ndajiwo, ***'Are Tax Incentives in Nigeria Attracting Investment or Giving Away Revenue?'***, *Tax Justice Network, 14.08.2018:* https://www.taxjustice.net/2018/08/14/are-tax-incentives-in-nigeria-attracting-investment-or-giving-away-revenue/ (accessed 30.05.2020).
8. *Ibid.*
9. Joosung Jun, *'Tax Incentives and Tax Base Protection in Developing Countries'*, *United Nations ESCAP April, 2017:* https://www.unescap.org/sites/default/files/S3_Tax-Incentives-and-Tax-Protection-Base.pdf (accessed 30.05.2020).

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The other school posits that the cost of tax incentives far outweighs any inherent benefit to the economy. Thus, *"despite their continuing popularity almost everywhere, tax incentives are usually redundant and ineffective: they reduce and complicate the fiscal system without achieving their stated objectives. Even to the limited extent that some incentives are effective in inducing investors to behave differently than they would have done in response to market signals, the result is often inefficient, diverting scarce resources into less than optimal uses."*[10]

Some researchers referencing a 2016 World Bank (WB) report on South Africa's tax incentives, observed that the foregone revenue from the incentive can be a multiple of the amount invested, which invariably puts the government in an untenable position of 'subsidising' the business - effectively holding the short end of the stick.[11] According to the WB: *"overall tax incentives encouraged an additional investment of 2.1 billion rand each year between 2006 and 2012. [...] The revenue foregone as a result of the lower tax as a result of the tax incentives is about 4.5 billion rand each year over the seven-year period. [...] In terms of jobs, the tax incentives have resulted in 34,000 additional jobs. However it has not come cheap costing an average of about 116,000 rand of revenue foregone for each job,"*[12]

Nigerian Tax Incentives Regulatory Framework

The Nigerian tax incentives regulatory framework is discoverable in various tax and other legislation, as well as regulatory policy documents such as the ***National Tax Policy***.

A. National Tax Policy 2017

It is every sovereign's prerogative to decide the manner of taxing both individuals and corporates within its jurisdiction, in order to meet its funding needs. This is often reflected in the government's tax policy document which is periodically reviewed to take account of evolving realities, in achieving improvements. The ***National Tax Policy (NTP) 2017*** is the most current document, Nigeria having issued her first ***NTP*** in 2012.[13] Previously, tax policy had to be deciphered from disparate sources, such as individual pieces of tax legislation and where applicable, assumptions under the ***National Development Plans***.[14] Given Nigeria's over reliance on petroleum earnings, it was not until recently that tax itself began to be given its deserved pride of place as a major source of public revenue.

The ***NTP 2017*** noted some factors bedevilling Nigeria's tax system, viz: *"… lack of robust framework for the taxation of informal sector and high network individuals, thus limiting the revenue base and creating inequity; fragmented database of taxpayers and weak structure for exchange of information by and with tax authorities, resulting in revenue leakage; inordinate drive by all tiers of government to grow internally generated revenue which has led to the arbitrary exercise of regulatory powers for revenue purpose; lack of clarity on taxation powers of each level of government and encroachment on the powers of one level of government by another; insufficient information available to taxpayers on tax compliance requirements thus creating uncertainty and non-compliance… "*[15] The foregoing shows that a comprehensive policy direction is essential to increase the country's revenue yield.

10. Richard M. Bird, ***'Tax Challenges Facing Developing Countries'***, *Rotman Institute for International Business Working Paper Series IIB Paper No 12. (2008)* cited in Estian Calitz et al, ***'The Impact of Tax Incentives to Stimulate Investment in South Africa'***, *Stellenbosh Economic Working Paper: 19/13, p.3:* https://ideas.repec.org/p/ays/ispwps/paper1306.html (last accessed 20.06.2020).
11. Markus M., et al., ***'Comparing Tax Incentives across Jurisdictions: A Pilot Study'***, *Tax Justice Network, 03.01.2019:* https://www.taxjustice.net/wp-content/uploads/2018/12/Comparing-tax-incentives-across-jurisdictions_Tax-Justice-Network_2019.pdf (accessed 30.05.2020).
12. World Bank, ***'South Africa: Sector Study of Effective Tax Burden and Effectiveness of Investment Incentives in South Africa'***, *Firm Level Analysis, 2016, 51:* http://www.taxcom.org.za/docs/Sector%20Study%20of%20Effective%20Tax%20Burden%20in%20South%20Africa%20-%20Part%202%20-%20September%202016%20(updated).pdf (accessed 05.05.2020).
13. The ***NTP 2017*** is available online at: https://pwcnigeria.typepad.com/files/fec-approved-ntp---feb-1-2017.pdf whilst its predecessor ***NTP 2012*** is available at: http://admin.theiguides.org/Media/Documents/NATIONAL%20TAX%20POLICY.pdf (both last accessed 20.03.2021)
14. See for example, Rattan J. Bhatia and Peter Engström, ***'Nigeria's Second National Development Plan: A Financial Analysis'***, *IMF Staff Papers, Vol. 19, No. 1 (March 1972), pp. 145-173 at 146:* https://www.jstor.org/stable/3866443?read-now=1&seq=2#page_scan_tab_contents (accessed 20.03.2021).
15. ***Para. 1.4 NTP 2017.***

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The **NTP 2017** was cognisant of the potential benefits from tax incentives but cautioned on need to pay "attention to details" as part of strategic government action. According to ***Para. 2.2.1(v) and (vi) NTP, 2017***: *"…any incentive to be granted should be broad, sector based, tenured and transparent. Implementation should be properly monitored, evaluated, periodically reported and kept under review. Revenue forgone from tax incentives or concessions should be quantified against expected benefits and reported annually. Where the benefits cannot be quantified, qualitative factors must be considered…"*[16]

Since the **NTP 2017** was issued by the FG, one would expect it to be a (or "the") key critical guiding document underlying government's strategic tax initiatives. Whilst the **NTP 2017** is not tax legislation, it should at least be morally binding on the government, given the foreseeability that the public (especially investors) could look at same as a reasonable predictor of government action in respect of taxes and tax reforms.[17] The country-wide relevance of the **NTP** (considering Nigeria's federal set-up), should not be in doubt.

In the same vein, ***Para. 2.2.5 NTP 2017*** highlighted that *incentives when granted to companies should be sector based (targeting sectors where government wants to stimulate growth)*, ***and not directed at entities or persons***. The **NTP** further recommends that incentives should not be arbitrarily terminated except as provided in the enabling legislation. The process of granting or renewing such incentives, waivers or concession should be transparent and compliant with statutorily prescribed procedure.

Thus, the Ministry of Finance charged with the coordinating and monitoring the implementation of the **NTP 2017** need to take strident steps in ensuring that incentives are only granted upon the cost-benefit analysis of potential grant of such incentives.[18]

B. Companies Income Tax (CIT) and IDITRA

The **Companies Income Tax Act (CITA)**[19] is the principal tax legislation for non-upstream companies. Companies in Nigeria are now liable to pay CIT rates at 0%, 20% and 30% dependent on their size (by turnover classification); prior to the **Finance Act No. 1 2020 (FA1 2020)**[20] a 30% rate applied generally, except for minimum tax which was not solely profit based.[21] On its own part, the ***IDITRA*** which is deemed part of ***CITA***, enacts departures from the ***CITA's*** general provisions in order to give effect to PS and other incentives.

In a bid to stimulate investment across diverse sectors of the economy, ***CITA*** makes provision for exemptions, deductions, capital allowances (CA), and investment credit amongst others to companies operating in Nigeria. Whilst ***section 23 CITA (Profits exempted)*** embodies the most comprehensive exemptions from CIT,[22] *the question may be asked whether the exemptions were not discriminatory?*

16. *Cf.* with ***Para 3.5 (Pioneer Status/Tax Holidays, pp.40-41) NTP 2012***: *"Horizontal equity is a key condition for fairness in a tax system. Under this concept, similar companies are treated similarly under the provisions of the tax laws. A Tax Holiday (or Pioneer Status) may violate horizontal equity as it involves giving a company or sector preferential treatment over other companies or sectors. It is also difficult to administer and therefore complicates the tax system. However, whilst some tax incentives should generally be avoided, there are some specific sectors which the Government may wish to accord priority. The justification for this is that, those sectors have potentially large benefits to the entire economy. Where the Government has identified such priority sectors, it would be beneficial to provide tax holidays to facilitate the growth and development of these sectors.* ***This fulfils the requirements stated in the National Tax Policy that tax holidays must only be granted where they would be of benefit to the entire economy****. The following key sectors should be accorded priority in the grant of tax incentives: Energy Sector (Power, Oil and Gas), Mining. Railways/Roads, Education, Health, Aviation, Exports, Agriculture.* ***There must, however be strict compliance with legislative provision for granting tax holidays and it should be restricted to instances, where there are overwhelming reasons for the grant****."* (Emphasis supplied).

17. The FIRS uses ***Information Circulars*** to clarify tax positions. The Courts have however held that such circulars cannot amend substantive provisions, they are neither binding on, nor create any estoppel against the FIRS. Furthermore, the Courts are not beholden to the ***Circulars***, but insist on forming their own views based on its analysis of the relevant tax provision. See for example, ***Halliburton v. FBIR 6 All NTC 55, at 75-76.*** It is however expected that the government will act in accordance with the ***NTP 2017***, having been approved by the highest executive organ, the Federal Executive Council (FEC). States' alignment is also presumed, given that the Joint Tax Board ((JTB) comprising the FIRS and its State counterparts) would have endorsed same prior to adoption by the FEC.

18. *Ibid*, ***Para. 5.2***.

19. ***Cap. C21, LFN 2004.***

20. Nigeria enacted two ***Finance Acts*** in 2020. The first, erroneously self-titles itself ***"Finance Act 2019"*** (see ***section 57***), because it received presidential assent on 13th January 2020, and therefore only became an ***Act*** from that day, not in 2019. It commencement date is also expressly stated as 1st January 2020. Furthermore its title in the Gazette is ***No. 1 of 2020***. Consequently, the second ***Finance Act 2020*** which was signed into law on 31st December 2020 is hereinafter referred to as ***FA2 2020***.

21. ***Section 16(c) FA1 2020*** (substituting a new ***section 40 CITA***).

22. Notable amongst the tax exempt income under ***section 23 CITA*** are returns on foreign investment *brought into Nigeria through government approved channels*. A commentator has argued that it is high time diaspora remittances into Nigeria were also taxed, to bring in more funds to government, given the sheer volumes. See Chuks Okoriekwe, ***'Options: Plugging Nigeria's Perennial Revenue Gap through Diaspora Taxation'*** *LeLaw Thought Leadership Insights, August 2019*: https://lelawlegal.com/add111pdfs/Chuks-Okoriekwe-Options-Plugging-Nigerias-Perennial-Revenue-Gap-through-Diaspora-Taxation1.pdf (accessed 23.01.2021). To answer the discrimination question, see generally the profits/income exempt list in ***section 23 CITA*** as amended by ***FAs 1*** and ***2 2020.*** For example, whilst the charitable causes/institutions related exemptions (excepting on businesses carried on by such charities) may be unassailable, and arguments can be made in favour of pro-small business exemptions and incentives, there may be 'fairness' reservations about items like interest on deposit accounts of non-resident corporates (***23(1)(l)***) and interest on foreign currency domiciliary accounts ***(23(1)(m))***.

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For example, ***section 11 CITA*** originally provided for up to 100% tax exemption on long term foreign loans, whereas local lenders did not enjoy the same benefit. Does this mean that local loans were generally not as valuable? Another discriminatory treatment is see in FIRS acceptance of interest free or concessionary interest loans by foreign related lenders, but will challenge such loans between two related resident corporates, because the local lender must deal at arm's length so it can be subject to WHT on the interest.[23]

However, although the ***FA1 2020*** amendments have whittled down foreign loan exemption benefits;[24] the impact would also still need to be measured. Resulting pertinent questions could relate to: *how less attractive will Nigeria be to foreign lenders, or are they likely to price the reduced WHT benefits into loan terms? In the latter event, would we not be losing via the left hand, what we gained through the right?*

Also, one is mindful of the presumed policy underpinning the original attractive tax treatment of foreign loans is to get external capital in to boost economic activities, as local funds are already in-country and are consequently not eligible as potential *"beautiful bride"* to be attracted, or that they respond to a different set of incentives.

There is also another discriminatory element in the Nigerian tax regime against local lenders: *WHT on income and rent to non-residents is*

final tax, unlike for local lenders and lessors. This can be contrasted with equal treatment afforded both local and foreign equity investors *as dividends for both is franked investment income not subject to further Nigerian tax.*[25] However, the apparent unequal treatment of foreign interest income can be explained away on the ground that the foreign lender will likely still be subject to tax in its home country; at best it may get a credit for the Nigerian WHT on the interest income against its home country tax liability. So overall, maybe the Nigerian lender is not as disadvantaged as we think.[26]

New thin capitalisation rules introduced by ***FA1 2020*** seems to target MNEs, further restricting their transfer pricing (TP) arrangements. To the extent that loan terms are competitive, related party lending is allowed, but *deductibility in case of foreign connected lender is now curtailed by the requirement that allowable interest deduction must not be above the excess interest threshold – **30% of EBITDA**, and the interest expense cannot be carried forward for more than five (5) years, totalling maximum six (6) years of deductibility*.

This thin capitalisation requirement discourages debt financing in favour of equity on two fronts. First, it limits the amount of allowable tax expense and length (period of deductions), such that any amounts above the thresholds will be lost to the Nigerian borrower.[27] In addition, the Nigerian borrower in breach of this rule will be liable to 10% penalty and interest at CBN's minimum rediscount rate, plus spread to be determined by the Minister on any adjustments made by the FIRS relating to excess interest charged during the year.[28]

23. The flip side of this is that in line with the absence of group tax relief and the principle that each corporate must be taxed separately, low foreign loan interest rate to a Nigerian affiliate reduces the interest expense that would be deductible for tax purposes, thereby resulting in higher taxable profits by the Nigerian affiliate. For related local lender and borrower, the FIRS may have an issue with uncompetitive loan terms, especially where the borrower is in a loss situation, and the lender profitable as this means that WHT may either be lost (if loan is interest free) or reduced (if concessionary).
24. *Cf.* ***CITA's Schedule 3,*** pre and post ***FA1 2020*** amendment. For example, under the new ***Schedule 3 CITA,*** the maximum WHT exemption is now 70% instead of 100% for loans above 7 years with at least 2 years' moratorium. *"Moratorium"* has now been defined and *"repayment period"* makes clear prepayments will attract pro rata adjustments of the benefits.
25. See ***sections 78(4) and 79(4)*** vs ***80(4) CITA*** on interest, rent and dividend respectively.
26. Note that foreign lenders may enjoy the same benefits as local lenders in respect of certain sectors like agriculture and small business. See ***section 23 CITA*** as amended by ***FAs 1*** and ***2*** and related discussions in this article.
27. See ***section 25 FA 2019*** introducing new ***Seventh Schedule CITA***. The new ***CITA*** provisions will now be superimposed on leading caselaw decisions allowing deductibility of related party interest expense. However, the amendments arguably do not affect upstream lending arrangements.
28. Note that lender's residence in DTT country confers preferential WHT deductions at 7.5% (instead of 10%) and ability to utilise Nigerian tax credits in its home country. However (for example), by ***Article 11(8) Income Tax Treaty between Nigeria and United Kingdom of Great Britain and Northern Ireland***, interests on loan contracted not on *bona fide* commercial grounds but with the sole aim of taking the treaty benefits will be disallowed.

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Instructively, only operators in the banking and insurance sectors are the ***CITA*** taxpayers exempt from these restrictions – *can other sectors not justifiably allege this is discriminatory against them?*[29] Arguably, the provisions are also not applicable to upstream companies.[30]

Still on WHT, the ***Personal Income Tax (WHT) Regulations*** prescribe 5% WHT deduction on professional and consultancy fees payable to partnerships and individuals *vis a vis* 10% to corporates under its counterpart, the ***CIT (WHT) Regulations***. Given that such WHT has cash flow implications (since WHT deductions will be available to the payee as credit against their ultimate tax liability), *is such preferential WHT rate that enables partnerships enjoy better cash flow exemplary of tax inequality?* The answer is arguably no, because presumably partnerships and individuals (sole proprietors) need all the help they can get since they are more in the informal sector.

Strict provisions on allowable, non-allowable deductions and restrictions on loss utilisations/carry forwards are also means to further tax equality.[31] Undoubtedly, whilst all these provisions have social and economic implications; how have they been instrumental in income redistribution? How effective have they been in ensuring that companies that are better positioned to pay more tax actually do so? This is also against anecdotal evidence that MNEs, resident blue chips and high networth individuals (HNIs) "enjoy" tax advantages, because they are able to afford the services of leading tax planning/ transaction structuring advisers, who potentially deliver 'better' tax 'optimisation' outcomes. They also have resources to pursue tax appeals, and are less likely to be intimidated by the Revenue *vis a vis* small time players.

Whilst the four year limitation on loss carry forwards has generally been repealed since 2007 (albeit only repealed for the insurance sector *vide* **FA1** and **2 2020**),[32] there is still restriction on ability to charge losses in one line of business against profits in another (especially unrelated) line of business.[33] Such restriction may be justified on the ground that a conglomerate will enjoy unfair advantage over a single line of business competitor, absent such restriction.

Another illustration could be found in statutory provision for capital allowances (CA) to displace group or company specific depreciation policies: the ***Second Schedule CITA*** made provision for CA by way of initial, investment and annual allowances. The CA rates range from 0% to 95% depending on the qualifying expenditure. Also, CA provisions have been used to encourage gas utilisation and deescalate gas flaring that represents unfortunate wastage of precious resources, with dire environmental consequences.[34]

Recent regulatory and judicial responses have included emergence of the FG's ***Gas Flare Commercialisation Programme (NGFCP)*** and treating gas flare penalties as no longer tax deductible.[35] S***ection 12 FA2 2020*** has laid down the gauntlet, amending ***section 27 CITA*** to clearly state that penalties and fines imposed by legislation are no longer tax deductible (*vide* the new ***section 27(k) CITA***); the same approach is evident in the ***Petroleum Industry Bill 2020*** currently under consideration by the National Assembly.

29. *Cf.* with the hugely discriminatory tax treatment of insurance companies that was recently overturned by Finance Act 2020 amendments to the ***CITA***. ***Section 6 FA*** amended ***section 16 CITA*** to enable insurance companies enjoy indefinite loss carry forwards, instead of being constrained by a 4 year limitation that all other CITA taxpayers had been released from since 2007.
30. See Afolabi Elebiju, ***'Nigeria's Finance Act 2020 Tax Amendments – Should the Oil and Gas Sector Be Nervous?'*** *LeLaw Thought Leadership, March 2020:* https://lelawlegal.com/add111pdfs/Nigeria-Finance-Act-2020-Oil-Industry-Impact.pdf (accessed 12.03.2021).
31. See for example, ***section 24 CITA*** on allowable deductions. See also ***SPDC v. FBIR [1996] 8 NWLR (Pt.466), 256.***
32. The repeal provision of ***CITA (Amendment) Act No. 2007*** omitted the insurance sector. ***Section 9 FA2 2020*** amends ***CITA's section 16*** to provide for minimum tax payable by insurance companies (almost on similar terms as other companies, see ***section 13 FA2 2020*** amending ***section 33 CITA***: 0.5% of *"gross premium"* and *"gross income"* for non-life and life underwriters, *vs* 0.5% of gross turnover, less franked investment income. However in all cases, there is a 0.25% safe harbour for tax returns filed and due for years of assessment between 1st January 2020 and 31st December 2021, both dates inclusive. Thus, the 0.5% minimum tax rate becomes applicable thereafter. Essentially, ***FAs 1*** and ***2 2020*** has progressively improved the general minimum tax benchmarks of ***section 33 CITA,*** which were considered punitive to businesses.
33. These provisions have also been enforced unequivocally by the courts. In ***FBIR v. Adenubi (2012) 8 TLRN,*** the Supreme Court held that the losses sustained from one source of income could only be deducted from profits earned at a future date from that particular source of income. It provides: *"subject to the provision of subsection (4) of this section, there shall be deducted – (a) the amount of a loss which the Board is satisfied has been incurred by the company in any trade or business during any preceding year of assessment."*
34. See ***section 39 CITA.*** For detailed discussion generally, including consideration of recent amendments to the gas utilisation incentive provisions, see Afolabi Elebiju and Daniel Odupe, ***'Cessations and Destinations: Issues in Gas Flare Commercialisation in Nigeria'***, *LeLaw Thought Leadership Reflections, February 2021:* https://lelawlegal.com/add111pdfs/TLR-Cessations_and_Destinations_3.pdf (accessed 15.03.2021).
35. See details of the ***NGFCP*** at: https://ngfcp.dpr.gov.ng/ (accessed 12.06.2020); and of associated initiatives such as ***Producers' Associated Gas Utilisation Project*** in Elebiju and Odupe (***supra***), including discussion of the new judicial approach (even prior to ***section 12 FA2 2020***), to tax treatment of gas flare penalties.

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The introduction of ***section 19(2) CITA*** *vide* ***section 7 FA 2020,*** which essentially removes excess dividends tax (EDT) provisions – whereby dividends declared by companies having nil or lower taxable profits than dividends declared are taxed as if the dividends is taxable profits – has also been hailed as furthering tax equality and removing disincentive to investment. This is because EDT application, more often than not, represented double taxation – for example, where dividends is declared out of retained earnings (already taxed in prior year(s)), or out of franked investment that is not supposed to be subject to further taxation, or even out of tax exempt income.[36]

Section 22 CITA, provision empowering the FIRS to disregard/adjust transactions it perceives as artificial or fictitious for tax purposes is usually more relevant in related party context. ***Section 21 CITA*** provision on deemed dividend distributions for purposes of imposing withholding tax (WHT) thereon, where profit making or cash rich closely held companies (with less than five shareholders) fail to declare dividends, can also be regarded as a means of leveling the tax playing field. This is moreso as such shareholders could be indirectly earning 'returns on investment' through related party transactions such as service contracts, the fees of which would be deductible expense for the company.

There is no group tax relief provisions in Nigeria – every entity is taxed separately. This further reduces the scope for "*profit shifting*" within the group to the detriment of single company competitors.[37] Under Nigerian law, the only way a company may access the tax losses of another is by mergers and acquisitions (M&A) transactions – unlike some jurisdictions where tax losses may be purchased and utilised by a company to reduce its taxable profits.[38]

As stated, the ***IDITRA*** was enacted to attract investment to certain sectors of the economy. Under the ***IDITRA,*** *where the President is satisfied that an industry is not been carried on in Nigeria on a scale suitable to the country's economic development or it is expedient in the public interest to encourage the development or establishment of any industry in Nigeria*, he may publish a list of such pioneer industries and pioneer products.[39]

Pioneer enterprises (operators in "*pioneer industries*" or producers of "*pioneer products*"), upon application and fulfilment of the requisite requirements (including qualifying expenditure)[40] are issued a pioneer certificate and they enjoy an initial three year tax holiday, subject to maximum of two one year extensions each. Thus, they enjoy a tax relief period of a cumulative of five years.[41]

36. See some historic EDT articles by Afolabi Elebiju: ***'Oando Plc v FIRS: Excess Dividends Tax Revisited'***, *ThisDay Lawyer, 07.10.2014, p. 12;* ***'Excess Dividends Tax: The Unfinished Business',*** *ThisDay Lawyer, 26.11.2013, p. 7; and* ***'Rethinking Nigeria's Excess Dividends Tax',*** *ThisDay Lawyer, 20.11.2011, p. vii).*
37. Some countries like the United Kingdom (UK) provide for group tax relief, subject to stipulated requirements. See PWC, ***'United Kingdom Corporate - Group Taxation',*** *12.01.2021*: (accessed 20.03.2021). Nigeria has further disallowed "*any tax or penalty borne by a company on behalf of another person*" (new ***section 27(1)(l) CITA*** as amended by ***section 11 FA2 2020***). Note also, our earlier discussion about Nigerian tax law (and FIRS) attitude to related party foreign nil interest or concessionary loans to Nigerian affiliates *vis a vis* between related party residents.
38. Can it be said that the ***CGTA*** seem to permit "*tax loss harvesting*" on sale of capital assets (whereby losses on sale of an asset can be offset against gains on another asset), in Nigeria? The answer seems to be in the positive, based on a community reading of the provisions of the ***CGTA.*** See for example ***section 2(2)***: "*shall be chargeable* ***... on the total amount of chargeable gains accruing to any person*** *in a year of assessment* ***after making such deductions as may be allowed*** *under this Act in the computation of such gains*"; and ***section 3:*** "*... all forms of property shall be assets for the purposes of this Act...*" See also ***section 11 (Computation of capital gains). Section 5 CGTA*** does not affect our view because it only restricts the ability of ***one person*** to deduct chargeable losses "*from gains accruing to* ***any [other] persons*** *on a disposal of such asset.*"
39. ***Section 1 IDITRA.***
40. Chuks Okoriekwe, ***'Pioneer Status' Tax Incentive in Nigeria: A Commentary on Recent Developments and Implications for Businesses'***, *ThisDay Lawyer, 12.09.2017, p.7; LeLaw Regulatory Alert, September 2017:* https://lelawlegal.com/index.php/page/blogs/136 (accessed 07.03.2021).
41. ***Section 10 IDITRA.***

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C. *Nigeria LNG (Fiscal Incentives Guarantees and Assurances) Act*[42]

This legislation was enacted to provide investment protection assurances and fiscal incentives to the shareholders of the Nigeria LNG Limited (NLNG),[43] given the scale of their investment, and to NLNG itself. Conferring a ten year PS (tax holiday, commencing on its *"production day"*) on the NLNG, it is an uncommon example of project specific legislation, compared its cousin, the ***Deep Offshore and Inland Basins (Production Sharing Contracts) Act***[44] (***PSC Act***) that was geology, rather than project, specific. Given the varied benefits the NLNG has brought to Nigeria (gas utilisation, forex earnings to Nigeria and consistent impressive dividend payout to shareholders, direct and indirect employment, technological and management skills development, corporate social responsibility projects, etc), it

may be hard to argue that Nigeria did not get a good deal for her incentives to NLNG.[45] Litigation such as ***NDDC v NLNG***[46] tested the inviolability of the provisions against exemptions from levies and taxes, but same was upheld.[47]

D. Finance Acts 2020's Tax Incentives and Other Amendments: Inequality and Other Impacts

In a way, the two ***FAs 2020*** have tried to respond to the oft stated concern that tax incentives need to be continually measured and reviewed for increased effectiveness, in order to enhance the prospect of timeously meeting policy goals.[48] For example, in some cases, they have introduced provisions narrowing the incentives or seeking to curtail their potential abuse.[49] In addition to references elsewhere in this article, we will highlight some examples of ***FAs 2020*** interventions below.

42. ***Cap. N87, LFN 2004.***
43. See ***section 2*** which displaces ***section 10 IDITRA***, albeit includes a proviso that the tax relief period shall terminate after the 5th year, upon the stated sales price benchmark. In the event, NLNG enjoyed the full 10 year tax holiday.
44. ***Cap. D3 LFN 2004*** as amended.
45. The ten year tax holiday on NLNG's profits have tended to eclipse other multifarous (and therefore significant) incentives under the ***NLNG Act***. These included full deductibility of interest expense, and deeming of same to have accrued for tax purposes immediately after the end of the tax holiday ***(section 5). Section 6*** is a treasure trove of incentives: interest income to foreign lenders on the project being exempt from Nigerian tax; dividends paid during the tax free period also tax exempt and displacement of ***CITA's*** WHT (deduction and remittance) provisions; exemption from Nigerian tax liability on offshore provision of works or services to the project by non-residents; transfer of shares or any other interest in NLNG exempted from CGT if between/amongst *"connected persons"*; NLNG's shipping company subsidiary(ies) were to be exempt from ***section 14 CITA*** provisions on the taxation of shipping companies; inapplicability of the ***National Shipping Policy Act, Cap. N75 LFN 2004*** requirements (***section 17*** of which charged shipping companies a 2% levy on gross earning on outward and inward cargo) to NLNG, its contractors, sub-contractors, customers or NLNG's shipping affiliates. Further, ***section 7*** comprehensively exempted NLNG, its contractors and subcontractors from customs duties and allied fees and charges for necessary importations for the project, disapplication of the ***Pre-Shipment Inspection of Imports Act*** and related CBN import documentation procedures to the project, and no export duties, taxes or levies shall apply to LNG exports or other NLNG's hydrocarbon products. By ***section 8***, NLNG was relieved from restrictions on setting off accumulated CA accumulated during the tax holiday against its assessable profits thereafter. Finally, ***section 9 (Guarantees and assurances)*** provides for a comprehensive ***Schedule 2*** with respect to the NLNG and its shareholders.
46. ***(2009) 1 TLRN 25*** (FHC); ***(2011) 4TLRN 1*** (CA).
47. For a review of the appellate decision, see Afolabi Elebiju, ***'NDDC v Nigeria LNG: Echoes and Lessons'***, *'Taxspectives', ThisDay Lawyer, 20.03.2012, p.7;* also available at: https://lelawlegal.com/add111pdfs/NDDC-v-NLNG-Echoes-Lessons1.pdf (accessed 20.03. 2021).
48. See excerpts from a commentary on ***FA1 2020*** (Afolabi Elebiju, *'Nigeria's Finance Act 2020 Tax Amendments - Should the Oil and Gas Sector Be Nervous?', (supra, pp1-2)*: *"Finance Act 2020: A Mixed Grill? A sector like agriculture ("agricultural production") just got more favourable tax treatment (potential cumulative 8 year tax holidays (for new businesses?) vide* ***section 9 FA 2020*** *(introducing* ***new 23(1)(1C) CITA****)). Insurance industry's disadvantaged tax toga has been removed:* ***sections 5 and 6 FA 2020****. Real Estate Investment Trusts (REITS) have now formally received a new lease of life:* ***section 9(a) FA 2020 (new section 23(1)(s) CITA)****. However, some others particularly the Nigerian oil and gas industry may feel hard done by, vide the new* ***FA 2020*** *provisions.*
Removal of Withholding Tax (WHT) Exemption on Upstream Dividends: Starting with the obvious one: ***section 24 FA 2020 has now repealed section 60 ... (PPTA) that exempted upstream dividends from withholding tax (WHT), unlike 'regular' dividends. The 10% additional tax exposure (or 7.5% for shareholders resident in a country having double taxation treaty (DTT) with Nigeria), will definitely impact project economics****, for example, the financial modelling of upstream assets investors/acquirers during the recent assets divestiture by IOCs. It is now definitely a factor in assessing prospective deals, and in deciding whether or not to invest."* (Emphasis supplied). Incidentally, the ***section 23(1)(1C)*** introduced by ***FA1 2020*** has now been deleted by ***section 10(b) FA2 2020***. Part of the provision showing that the FAs intend to be keeping pace with the business world is ***section 22 FA2 2020*** which includes a new ***Para 1(j), Part II Second Schedule CITA*** as part of *"qualifying expenditure"* (on which companies can claim CA), *"capital expenditure that is incurred on the development of acquisition of software or other such capital outlays on electronic applications."*
49. Such as: (a) ***section 11 FA1 2020*** that disallows amongst others, ***"any expense incurred in deriving tax exempt income"*** (emphasis supplied; part of new ***section 27(1)(h) CITA);*** (b) the new ***section 23(1)(o)(i)***, tax exemption of small companies does not relieve them of statutory tax registration and filing requirements, and there is exposure to applicable penalties for breach of compliance requirements, irrespective that their *"profits are below the tax paying threshold"*; (c) proviso to ***section 23(1)(q)*** in respect of tax exemptions on profits of Nigerian exporters, *"if the proceeds of such exports are used for the purchase of raw materials, plant equipment and spare parts"*, such *"that tax shall accrue proportionately on the portion of such proceeds"* that are not so utilised; (d) ***section 23(1A)*** clarification that tax exempt status does not relieve WHT compliance (deduction and remittance) on rent, interest and dividend payment by such exempt companies to third parties. This provision was previously ***23(1)(n) CITA*** but was deleted and reinserted as ***23(1A)*** by ***section 9 FA1 2020.*** Items *(b) – (d)* above were enshrined courtesy of ***section 9 FA1 2020***. Also, ***section 14 FA2 2020*** *inter alia* provides for a new ***section 39(1)(3) CITA*** such that the ***section 39*** gas utilisation incentive *"does not apply with respect to any company that has claimed an incentive for trade or business of gas utilisation under any law in Nigeria, including the [PPTA] or the incentives under the [IDITRA] in respect of the same qualifying capital expenditure."* Another example is ***section 23 FA2 2020*** (new ***section 1(7) IDITRA***) which qualifies the up to 6 year tax holiday (inclusive of maximum two renewals of one year each, being subject to satisfactory performance), to small or medium sized companies engaged in primary agricultural production, that *"such company cannot be granted similar tax holiday incentive under any other Act in force in Nigeria."*

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Firstly, in support of the Micro, Small and Medium Enterprises (MSMEs), widely touted as the engine room of the economy,[50] ***FA1 2020*** grants *"small companies"* (with less than ₦25 million gross turnover), total CIT exemption, including from minimum tax[51] whilst *"medium-sized companies"* (with gross turnover of between ₦25 million and ₦100 million are now to pay CIT at 20%, instead of the generally applicable 30%.[52] By the new ***section 23(1)(o)(ii) CITA*** (*vide* ***section 9 FA1 2020***) dividends received from small manufacturing companies in the first five years of their operations are also tax exempt. Similarly, small companies are relieved from VAT compliance/reporting obligations – of registering for VAT, or charging, collecting and remitting VAT on their invoices.[53]

CGT compliance by way of filing self-assessments is now twice yearly, on disposal of chargeable assets before 30th June and 31st December respectively (***section 2 FA2 2020***, inserting a new ***section 2(3) CGTA***); compensation for loss of office above ₦10 million is now subject to CGT and the CGT liability must be deducted and remitted to the relevant tax authority within timeliness of the ***PAYE Regulations*** under the ***PITA*** (***section 4 FA2 2020*** amending ***section 36 CGTA)***. These provisions means that the rich are being called to contribute more to the public fisc, as should be the case. On the flip side, individuals earning less than the National Minimum Wage are exempt from tax.[54]

Interest income on loans granted for *"primary agricultural production"* (comprising primary crop, livestock, forestry and fishing production respectively) are now tax exempt provided that - the moratorium is not less than twelve months and interest rate is not more than the base lending rate at any time (***section 6 FA2 2020***, amending ***section 11 CITA***).[55] Another notable sectoral incentive (even more beneficial than PS) is that *small and medium sized companies in primary agricultural production are eligible for up to 6 years' tax holiday* (4 years in the first instance, and additional maximum 2 years, subject to satisfactory performance): ***section 23 FA2 2020*** inserting new ***section 1(7) IDITRA***. Space constrains fuller discussion of other ***FA1*** and ***2 2020*** tax incentives.[56]

50. According to the National Bureau of Statistics (NBS), MSMEs generated 59.65 million jobs as of December, 2017. See NBS, ***'Micro, Small and Medium Enterprises (MSME) National Survey 2017 Report'***, *11.07.2019*: http://www.nigerianstat.gov.ng/download/967 (accessed 12.06.2020).
51. Small companies are also exempt from the 2% of assessable profit as Tertiary Education Trust Tax: ***section 34 FA2 2020*** (amending ***section 1(2) TETFund Act***).
52. See ***sections 14(b) FA1 2020*** and ***16 FA1 2020*** inserting new ***sections 33(3)(b)*** and ***40 CITA*** respectively. Similarly, where a medium-sized company pays its tax 90 days before the due date, it shall be entitled to a bonus of 2% (compared to 1% for other companies) on the amount of tax paid which shall be available as a credit against its future taxes: ***section 18(c) FA1 2020*** (amending ***section 77 CITA***). These MSME incentives are significant, given the multiple taxation suffered by businesses in Nigeria, including MSMEs for which they could be existential. It also represents the FG's hope that incentives will help nurture MSMEs growth into larger and profitable businesses that would pay more tax in future; a case of giving up some tax income now, to earn more in the long term. Finally, subsequent Covid-19 pandemic scenario has made the incentives (especially ***FA1 2020*** which was pre-Covid), prescient. For a discussion on multiplicity of taxes in Nigeria, see Afolabi Elebiju, ***'Eating the Frog of Multiplicity of Taxes'***, *'Taxspectives', ThisDay Lawyer, 21.10.2014, p15*; also available at *LeLaw Thought Leadership page*: https://lelawlegal.com/add111pdfs/ Eating-Frog-of-multiplicity-of-taxes.pdf (accessed 08. 02.2021).
53. By ***section 38 FA1 2020*** (inserting new ***section 15 VATA, such small companies must be those*** with taxable supplies of less than N25 million (either singularly or cumulatively) in any calendar year. For detailed discussions on the underlying policy considerations and allied issues, see Afolabi Elebiju and Ayo Fadeyi, ***'Issues and Dimensions: Nigerian VAT and the Informal Sector'***, *(chapter contribution to forthcoming CITN Indirect Tax Faculty publication)*.
54. See ***sections 30 and 31 FA2 2020*** (amending ***sections 37 and 108 PITA*** respectively). Also, ***section 29 FA2 2020*** (amending ***section 33 PITA)***, allows for deductibility of premiums paid on life insurance of the taxpayer or his/her spouse.
55. The erstwhile beneficiary of ***section 11(2)(a) CITA*** exemption was *"agricultural trade or business"*; thus, the incentive has now been restricted.
56. By ***section 10 FA2 2020*** (amending ***section 23 CITA***), real estate investment companies now enjoy *tax exemption on dividend and rental income even if they do not distribute 75% of such income* (itself an amendment introduced by ***section 9 FA1 2020***). Per ***section 38 FA2 2020*** (amending ***1st Schedule CETCA***), *is discrimination inherent in reduction of tariffs on cars and tractors (from 30% and 35% to 5%), whilst on buses and trucks it is from 35% to 10%?*; Import duty exemption for commercial airlines in Nigeria in respect of *"their aircrafts, engines, spare parts and components, whether purchased or leased"* (***section 39 FA2 2020***, amending ***2nd Schedule CETCA***) is to enable aviation be more supportive of other sectors of the economy. By the same token, commercial aircrafts, their engines and spare parts are now VAT exempt (amended ***Part 1, 1st Schedule VATA (Goods Exempt)***); and commercial airline tickets and hire, rental or lease of agricultural equipment for agricultural purposes are also VAT exempt (amended ***Part 2, 1st Schedule VATA (Services Exempt***). Influenced by Covid-19, ***section 11 FA2 2020*** (*vide* new ***section 25(7)-(9) CITA***) provides for deductibility of pandemic, natural disaster type donations.

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E. Nigerian Investment Promotion Commission Act (NIPC Act)[57]

The **NIPC Act** established the NIPC as the investment promotion agency of the FG; it is to co-ordinate and monitor all investment promotion activities of the FG;[58] ***section 22*** empowers the NIPC to negotiate, in conjunction with appropriate government agencies, specific incentive packages for the promotion of investment as it may specify for the purposes of promoting identified strategic or major investment. NIPC may also issue guidelines and procedures, which specify priority areas of investment and prescribe applicable incentives and benefits, which are in conformity with government policy.[59] In practice, the NIPC administers the PS tax incentive for eligible applicants or beneficiaries (regarding renewals).

The **NIPC Act** also contains investment guarantees on offshore remittances of capital and investment returns, as well as guarantees against expropriation and dispute settlement procedures: ***sections* 24-26**.

F. Nigerian Export Processing Zones Act/Oil & Gas Export Free Zones Act

Nigeria joined the list of export free trade zone countries in 1986, in a bid to enhance her competitiveness for global FDI. The ***Nigeria Export Processing Zone Act (NEPZA)***[60] empowers the President upon the recommendation of the NEPZ Authority to designate such area as he thinks fit to be an export processing zone (EPZ).[61] Although the EPZ may be operated and managed by a public, private entity or a combination of both, the main purport of the Zone is the exemption of EPZ enterprises *"from all Federal, State and Local Government taxes, levies and rates"*, as well as from *"foreign exchange regulations"*.[62] However, if they export into Nigeria (the customs territory), Nigerian tax consequences will follow such transactions.[63] Similar incentives were provided for operators in the oil and gas sector through the ***Oil and Gas Export Free Zones Act (OGEFZA)***.[64]

Given these incentives, it is prescient to contrast same with the potential gains to the economy in terms of job creation. It has been observed that: *"... a lack of data hinders proper evaluation of the FTZ regime. It is hard to measure the contributions of FTZs in Nigeria due to lack of reliable data on the performance of FTZs. The paucity of data constrains well informed economic decisions ... absence of data curtails government's ability to analyse the impact of its FTZ's regulatory strategy and leverage lessons therefrom on next steps."*[65] Thus, whilst the Zones have attracted some capital inflows into Nigeria, the overall impact on the economy (direct and indirect), are yet to be fully appraised.

Instructively, ***sections* 58** and **59 FA2 2020** has amended the **NEPZA** and **OGEFZA** to further curtail potential abuse of the incentives: *the fiscal exemptions are now subject to tax filing compliance requirements.*[66] This is a good example /manifestation of FG's go forward plans of annually using the ***Finance Act*** to make necessary changes, promptly.

57. ***Cap. N117, LFN 2004.***
58. See ***section 4*** for detailed listing of NIPC's functions.
59. ***Section 23 NIPC Act.*** See discussion of NIPC's role in administering PS in Chuks Okoriekwe, (***supra***).
60. ***Cap. N107, LFN 2004.*** Its ***sections 2*** and ***4*** created the NEPZ Authority (NEPZA) to administer EPZs in Nigeria; empowers NEPZA to supervise and co-ordinate all the functions of public and private sector organisations operating within EPZs, and dispute resolution amongst them. Pursuant to ***sections 9*** and ***10,*** NEPZA grants all requisite permits, licences and approvals to enterprise within the EPZs. All EPZ approved enterprises are required to submit at such intervals as may be prescribed, ***such statistical data and such information and returns as regards the sales and purchases and other operations of the enterprise***: ***section 19***.
61. ***Section 1(1) NEPZA.***
62. See the *in pari materia* provisions of ***sections 8 and 18(1)(a) NEPZA*** and ***OGEFZA*** respectively. See also ***section 23(1)(s) CITA*** which exempted the profits of FTZ or EPZ enterprises from CIT, provided that 100% *"production of such company is for export otherwise tax shall accrue proportionately on the profit of the company."*
63. ***Section 8 NEPZA.*** For detailed discussion of the EPZ/FTZ incentives regime, see Afolabi Elebiju, ***'Free Trade Zones & Nigeria Tax Regime'***, *CITN MPTP presentation, Ibadan, 25.06.08:* https://www.slideshare.net/ slideshow/embed_code/key/Bkvn9hpIhdlsTY (accessed 12.06.2020); Frank Okeke and Ayo Fadeyi, ***'Nigeria Free Trade Regime: Frequently Asked Questions (FAQs)',*** *LeLaw Thought Leadership Insights, November 2018:* https://lelawlegal.com/add111pdfs/FTZ.PDF (accessed 12.06.2020); Uzeme Olomu-Agbodo, ***'Free Trade Zones in Nigeria: Contentious and Burning Issues':*** https://www.academia.edu/16085453/ (accessed 12.06. 2020).
64. ***Cap. O5, LFN, 2004. Section 2 OGEFZA*** established the OGEFZ Authority. It is essentially the equivalent regulatory agency to NEPZA, primarily responsible for all FTZs that relate to the oil and gas industry in Nigeria: ***section 5 OGEFZA***.
65. Afolabi Elebiju and Franklin Okeke, ***'Journeys: Current State Assessment of Nigeria Export Processing/Trade Zones Regime'***, *LeLaw Thought Leadership Insight, April 2020, p.7:* https://lelawlegal.com/add111pdfs/FTZ(1).pdf (accessed 07.03.2021).
66. "***Section 18(1)*** of both legislation has been amended in *pari materia* with the insertion of a new ***section 18(1)(a)***: *'exemption from taxes, levies, duties and foreign exchange regulations in accordance with section 8 of this Act, always subject to the provisions of the Banks and Other Financial Institutions Act 2020, provided that all companies registered and operating in the Zone shall comply with the provisions of section 55(1) of the [CITA] and render returns in the manner prescribed therein to the [FIRS] and all penalties prescribed in the [CITA] and the [FIRSEA] that may apply in the event of non-compliance with 55(1) CITA shall apply to such companies in the event of failure to comply.' " "It is noteworthy that NRCs (non-resident companies) can technically be in FTZs and not be regarded as being in Nigeria, since Nigeria is 'customs territory'; they can bypass* ***CAMA's*** *requirement for local incorporation by registry an FTZ Enterprise (FTZE) within the relevant FTZ."* See Afolabi Elebiju, ***'Rendezvous'*** (***supra,*** *at p.8*).

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G. Petroleum Profits Tax Act[67] (PPTA) and Deep Offshore and Inland Basins Production Sharing Contracts Act (PSCA)

The ***PPTA*** regulates the taxation of upstream operators in the oil and gas sector. It imposes a PPT at 65.75% for the first five years and 85% thereafter on chargeable profits.[68] Given the intensive capital requirements of the sector, the ***PPTA*** recognises the need to incentivize investments.

Section 10 PPTA provides for allowable deductions of expenses *"wholly, exclusively and necessarily incurred"* for the purpose of petroleum operations.[69] Also, where a company incurs expenditure on associated and non-associated gas utilisation, ***sections 11 and 12 PPTA*** provides incentives in the form of investment and capital allowances. It is noteworthy however, the imminence of the proposed new fiscal regime under the ***Petroleum Industry Bill 2020 (PIB)*** which seeks to increase government take whilst attracting more investments.

The ***PSCA*** equally provides incentives for upstream companies operating or investing in assets in Nigeria's Deep Offshore and Inland Basins. Originally, the ***PSCA*** was enacted to provide legislative cover with retrospective effect for the tax incentives agreed by government to investors in Nigeria's deep offshore acreages in the early 1990s. The incentives were influenced by the strategic need to grow Nigeria's petroleum reserves, the capital intensive/high risk nature of the ventures given their geology, and to some extent, the negotiating skills/experience of the MNEs (oil majors) *vis a vis* the Nigerian government.

Essentially, there was 50% PPT for PSCs (more favourable than the 65.75%/85% general PPT rate), lower royalty rates (based solely on water depths) including 0% royalty for water depths exceeding 1,000 metres, sequential allocation of oil produced into Royalty Oil, Cost Oil, Tax Oil and Profit Oil, being *"the balance of available crude oil after deducting"* the earlier three tranches. Contractor recovers operating costs through Cost Oil, and its Profit Oil, whilst NNPC receives the Royalty Oil, Tax Oil (for both parties) and its Profit Oil. Profit Oil ratios were weighted in Contractor's favour and gradually reduces in NNPC's favour as production increased. Pre and post 1st July 1998 PSCs were also granted 50% Investment Tax Credit (ITC) or Investment Tax Allowance (ITA) respectively; the former being more favourable – directly reducing the amount of tax payable, whilst the former reduces the taxable profits.

The ***PSCA*** also contained provision that PSC terms would be revised after fifteen (15) years from the commencement date, and every five (5) years thereafter, and in any event, once crude oil prices exceed US$20 per barrel, to make the PSCs *"economically beneficial"* to the FG (***section 16***). The fact that the FG neglected to do so for almost two decades that the threshold was exceeded, is an infamous example of inaction that inadvertently produced tax inequality,[70] and actually was the *raison detre* for the litigation in ***A-G Rivers State & 2 Ors. v. A-G Federation.***[71]

The ***2019 PSCA*** amendment was arrived at as a less objectionable *modus operandi* of revising PSC fiscal terms, albeit not retrospectively. By the new ***sections 16A and B***, the Minister of Petroleum Resources shall cause NNPC to call for review of PSCs every eight (8) years; and *"any person who fails or neglects to perform any obligation imposed by any provision of"* the PSCA risks a fine of at least ₦500 million or at least five years' imprisonment or both, upon conviction. But revision does not make it impertinent to still ask the question: *"was the PSC fiscals not itself a discriminatory tax regime against shallow water operators?"*

67. ***Cap. P13, LFN 2004.***
68. ***Section 21(1)(2) PPTA.***
69. For a detailed discussion, see Afolabi Elebiju and Atinuke Agboluaje, ***'Rethinking Deductibility of Interest on Affiliate Loans by Upstream Companies under Nigeria's Petroleum Profits Tax Act'***, *1 TLJN (April 2012), pp 15-32; LeLaw Thought Leadership Insights, August 2019:* https://lelawlegal.com/add111pdfs/Tax-Deductibility. pdf (accessed 12.06.2020).
70. This was through lost revenues by an increased government take. See ***'How FG Lost ₦7 Trillion Due to Non-Review of the PSA Act – Senate'***, *PM News 02.10.2019:* https://www.pmnewsnigeria.com/2019/10/02/how-fg-lost-n7-trillion-due-to-non-review-of-the-psa-act-senate/ (accessed 08.06.2020).
71. Unreported ***Suit No. SC964/2016,*** judgment of 17th October 2018. The Attorneys-General from three oil producing States sued the FG for the economic loss they suffered as a result of the FG not reviewing the ***PSCA*** which made requisite provision for periodic review when the price of crude oil exceed $20 per barrel and every five years. See for detailed commentary, Afolabi Elebiju, Chuks Okoriekwe and Oluwatofarati Adewole, ***'PSC Contractors Get Ready! Fiscal Implications of the Supreme Court Decision in A-G Rivers State & Ors. v. A-G Federation SC964/2016'***, *LeLaw Thought Leadership Insights*, March 2020: https://lelawlegal.com/add111pdfs/PSC_CONTRACTORS.pdf (accessed 07.03.2020).

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The various effort to improve government's position regarding PSCs can be seen in the gradual revisions to fiscal terms and stabilisation provisions of PSCs: generally the 1993 PSCs were more generous to investors than 1998 and subsequent PSCs. It was not until 2019 that the FG amended the **PSCA** with a view to increase government take by increasing royalty rates for respective water depths, abrogating 0% royalty and having a price reflexive mechanism, imposing mandatory review of PSC terms at periodic intervals, etc.[72] However, royalty was reduced for Inland Basin operations to encourage more inland oil exploration.

Evaluations: Cost vs Benefit Analysis/'Abuse' of Tax Incentives

Businesses are often focused on maximising profit, often resorting to tax optimisation practices through adroit tax planning – utilising tax loopholes, including available tax incentives.[73] Experience has shown that some beneficiaries of tax incentives overlay rigorous tax planning objectives with a view to further reduce their tax exposure or 'extend' the incentives.

At every turn one cannot escape the question: what has been the impact of tax incentives on the economy? This becomes more poignant as Nigeria grapples with budgetary funding challenges. Incentives in the Nigerian telecommunications sector have proven that they could help turn around the country's ailing economy.[74] Consequently, there should be a near scientific basis for the grant of incentives. It is still believed that these tax incentives have not achieved commensurate benefit to Nigeria's economy but rather increased corporate payout to the shareholders of these MNEs.[75]

The recent inclusion of additional 27 new sectors and products in the list of pioneer industries and products in 2017, exemplified by the issuance of the ***Application Guidelines for Pioneer Status Incentives (AGPSI)*** underscores the need to walk the balance between foregoing tax revenues and stimulating economic development, especially given the FG's budget deficit pressures.[76]

Before the recent ***AGPSI*** reforms in the administration of PS, it was marred with arbitrary exercise of granting powers by the Executive, inconsistently with the provisions of ***IDITRA,*** the enabling law. This was the case when some beneficiaries were awarded straight five year PS tax relief as opposed to the (statutory) initial three years, subject to two maximum one year renewals, upon fulfilling renewal conditions.[77] The new ***AGPSI*** which provides greater transparency for administering PS is therefore a welcome development. Nonetheless, it is important to carry out regular review of all the PS' grants to ascertain their effectiveness and ensure that the conditions of grant are being met and particularly the cost-benefit analysis of such grants are in the favour of the government.

72. Iyobosa Uwugiaren and Omololu Ogunmade, ***'More Revenue for Nigeria as Buhari Assents to PSC Amendment Bill',*** *ThisDay, 05.11.2019:* https://www.thisdaylive.com/index.php/2019/11/05/more-revenue-for-nigeria-as-buhari-assents-to-psc-amendment-bill/ (accessed 07.06.2020).
73. For a detailed discussion see generally, Ayooluwatunwase Fadeyi, ***'Tax Planning: Walking the Thin Line between Tax Avoidance and Tax Evasion'***, *BDLegal Business, 29. 03. 2018, p.26; LeLaw Thought Leadership, March 2018:* https://lelawlegal.com/add111pdfs/Tax_Planning_Payment_Ayo.pdf (accessed 20.03.2021).
74. Oxford Business Group, ***'Telecoms Growth in Nigeria Supported by Reforms and Infrastructure'***, *ICT Chapter from* ***'The Report Nigeria 2019'***: https://oxfordbusinessgroup.com/overview/paving-way-reforms-listings-and-infrastructure-support-mobile-growth (accessed 12.06.2020); see also, Afolabi Elebiju, ***'Promoting Country Competitiveness Through Sectoral Reforms: Case Study of Nigerian Mobile Telecommunications Sector, 1999 – 2006'*** (*MentorHouse, 2014*).
75. See for example, ***'Abuse of Tax Incentives, Multi-taxation are Impediments to Taxation – CITN'***, *News Agency of Nigeria (NAN), 20.08.2020:* https://www.dailytrust.com.ng/abuse-of-tax-incentives-multi-taxation-are-impediments-to-taxation-citn.html (accessed 08.06.2020).
76. See Chuks Okoriekwe, ***'Pioneer Status Tax Incentive in Nigeria'***, (***supra***).
77. See Fatai Folarin and Seye Arowolo, ***'Pioneer Status and the Return of the 3-Year Rule: Weep Not Taxpayer'***, *Deloitte Inside Tax, 2015:* https://www2.deloitte.com/content/dam/Deloitte/ng/Documents/tax/inside-tax/ng-pioneer-status-and-the-return-of-the-3-year-rule.pdf (accessed 08.06.2020).

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'Exacerbations': Tax Planning and Transfer Pricing by Multinationals

It is beyond argument that companies are established to run businesses with a view to maximising profit for the benefit of their shareholders. It is also trite that tax planning is permissible, unlike its cousin, tax evasion.[78] In drawing the distinction between the two, the CoA in ***7Up Bottling Company Plc v. LSBIR***[79] stated that: *"Whereas tax avoidance is permissible, tax evasion on the other hand, is illegal; and gives rise to penalties and in some cases imprisonment. This is implicit in the provisions of the statute which are quite detailed."*

Thus, the onus is on the legislature to ensure that tax legislation leaves little room for ambiguities, because in such event the ambiguities are to be resolved in favour of the taxpayer.[80] This established principle is 'common-sensical' because tax laws are penal/ expropriatory in nature, in favour of the Revenue.

In the same vein, MNEs also engage in TP, to further optimize their tax exposure.[81] Tax law is cognisant of the reality, and sometimes the inevitability of, TP arrangements, because of the law of comparative advantages. It would be absurd of tax policy to discourage group operating efficiency just for the sake of it. However, TP could be exploited to foster base erosion and profit shifting (BEPS). It is noteworthy that the FG has evolved various means to curb BEPS, especially through the ***Income Tax (Transfer Pricing) Regulations 2018 (TPRs 2018)*** and the **FAs 1** and **2 2020** discussed further below.

Whilst taxpayers, especially MNEs, continue to explore inventive ways to minimise tax obligations by employing astute tax planners, the Revenue has always been empowered to strike down *"artificial or fictitious transactions"*.[82] Against the background that MNEs enjoy 'inequality' through access to, and capacity to pay, leading advisers who can design more competitive or even aggressive tax plans, the Revenue's challenge of same typically leads to the tax dispute resolution. In a sense, this helps to even out the tax playing field. Furthermore, the burden of proof whenever the Revenue challenges a transaction as artificial or fictitious, is on the taxpayer.

78. As was espoused by Lord Sumner in ***Levene v. IRC [1928] AC 217*** that: *"… it is trite law that His Majesty's subject are free, if they can, to make their own arrangements, so that their cases may fall outside the scope of the taxing Acts. They incur no legal penalties and, strictly speaking, no moral censure if, having considered the lines drawn by the legislature for the imposition of taxes, they make it their business to walk outside them…"* Also, in ***Ayrshire Pullman Motor Services v. CIR 1929, 14 TC 754*** it was held that: *"Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of the Inland Revenue or his fellow taxpayer may be of his ingenuity, he cannot be compelled to pay an increased tax."* The CA case of ***Ahmadu v Gov. Kogi State [2002] 3 NWLR (Pt. 755), 502 at 522*** followed the lines of thought in ***Russell v. Scott [1948] 2 All ER 1 at 30***.

79. ***[2000] 3 NWLR (Pt. 650) 565 at 591.***

80. The Federal High Court in ***Citibank Nigeria Limited v. FIRS (2017) 30 TLRN 40, at 54-55*** followed settled case law in holding that: *"A law which imposes pecuniary burden is … subject to the strict construction. All charges upon the subject must be imposed by clear and unambiguous language because in some degree they operate as penalties.* ***Thus, the subject is not to be taxed unless the language of the statute clearly impose the obligation. The language of statute must not be strained in order to tax a transaction which had the legislature thought of it would have been covered by appropriate words.*** *In a taxing legislation, therefore one has to look merely on what it clearly said. There is no room for any intendment. There is no equity about tax,* ***no presumption at all and nothing is to be implied…***"

81. Here, there is inter-company transaction such that profit attributed to a particular base (usually where the profits are generated with high tax exposure) are shifted profits to low tax jurisdictions where little or no tax is paid on the income received in those jurisdictions.

82. See generally ***section 22 CITA.*** According to a commentator, *"The above provisions of* ***section 22 CITA*** *are replicated in pari materia as* ***section 20 CGTA; section 15 PPTA*** *and* ***section 17 PITA****. This shows the pervasiveness of the taxman's intent to deal with 'artificial' transactions. It is pertinent to note that* ***section 22(d) CITA*** *(and equivalents) provides for resolution of divergent views between FIRS and the taxpayer through the tax objection and appeal process….It would seem that currently, the Nigerian anti-avoidance regime is panoply of disparate provisions….What makes transactions artificial? It clearly should not be because the transaction is novel, or perceived as complex….Despite this panoply, our anti-avoidance provisions when compared with other jurisdictions seem to be elementary, and may require comprehensive review: Nigeria needs its own 'modernised' GAAR….Postscript: After the original publication of this article in February 2012, the* ***Income Tax (Transfer Pricing) Regulations No. 1, 2012*** *was issued by FIRS, with a commencement date of 1st August 2012."* See Afolabi Elebiju, ***'Why Our Anti-Avoidance Tax Provisions Need Review',*** *Taxspectives, ThisDay Lawyer, 07.02.2012, p.12;* also available online at *LeLaw Thought Leadership page:* https://lelawlegal.com/add111pdfs/Why-Nigerian-Tax-Avoidance-Provisions-Need-Review1.pdf (accessed 20. 03.2021).

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Regulatory Responses:
Income Tax (Transfer Pricing) Regulations 2018

One of the mechanisms by the Revenue to curb BEPS wherein MNEs, through inter-company transactions reduce their tax base in Nigeria, was the ***Income Tax (Transfer Pricing) Regulations 2018 (TPRs 2018).***[83] ***TPRS 2018*** is a more aggressive successor to the inaugural ***TPRs 2012.***[84] The ***TPRs*** aims to ensure that Nigeria is able to tax appropriately, economic activities undertaken by taxable persons in (and from) Nigeria, including with related persons whilst also providing a level playing field for both MNEs and independent enterprises carrying on business in Nigeria.[85]

A key underpinning is that transactions must be on competitive terms or done at arm's length.[86] The fallouts from Nigeria's inaugural TP case, ***Prime Plastichem Nigeria Ltd. v. FIRS,***[87] decided by the Tax Appeal Tribunal (TAT) means that taxpayers need to take their TP compliance obligations (robust preparation and filing of requisite TP documentation within stipulated timelines), very seriously. This is moreso that the penalties for default under ***TPRs 2018*** has substantially increased, relative to under ***TPRs 2012***. We envisage increase in Nigerian TP litigation going forward as the Revenue intensifies TP enforcement efforts, including their responsive actions to Covid-19 pandemic induced changes to TP arrangements by taxpayers.

National Office for Technology Acquisition and Promotion (NOTAP)

The National Office for Technology Acquisition and Promotion (NOTAP) was established pursuant to ***section 1(1) NOTAP Act.***[88] It is charged with amongst others, encouraging a more efficient process for the identification, selection and local utilisation/assimilation of foreign technology, ensuring that Nigerian counterparties to technology transfer agreements do so on fair terms, and general regulatory oversight over such agreements.[89]

Thus, agreements *"with technological quotient"* involving non-residents for technical, management and consultancy services, use of trademarks, licenses and other intellectual property rights, etc. are registrable with NOTAP, in line with ***NOTAP's Revised Guidelines for Registration and Monitoring of Technology Transfer Agreements in Nigeria 2011's*** prescriptions on fee bands, contract duration and renewal conditionalities, Nigerian governing law and dispute resolution.[90]

NOTAP registration is particularly important because of non-access to foreign exchange (*via the Import and Export (I&E) Window*) to pay non-resident service fees; and the Nigerian beneficiary would be unable to tax deduct fee payments on unregistered agreements.[91] In addition to NOTAP registration being a key documentation requirement to repatriate service fees, banks are also mandated to confirm the remittance of Value Added Tax (VAT) and WHT thereon.

83. ***Statutory Instrument (SI) No.10 of 2018***, available online at: https://www.proshareng.com/admin/upload /report/11581-RevisedTPRegulations-proshare.pdf (accessed 03.05.2020). The ***TPRs*** is largely influenced by the Organisation for Economic Co-operation and Development (OECD) anti-BEPS framework.
84. For a detailed discussion of the ***TPRs 2012***, see Afolabi Elebiju, ***'Transfer Pricing in Nigeria: The New Reality'***, *Templars tax training presentation, 11.12.2012:* https://www.slideshare.net/AfolabiElebiju/transfer-pricing-in-nigeria-the-new-reality (accessed 07.01.2021).
85. ***Reg. 2(a)*** and ***(d) TPRs 2018***.
86. See ***Reg. 4(1) TPRs 2018:*** *"Where a connected person has entered into a transaction or series of transactions to which these Regulations apply, the person shall ensure that the taxable profits resulting from the transaction or transactions are ascertained in a manner that is consistent with the arm's length principle."* For a transaction or series of transactions to be consistent with the arm's length principle, ***Reg. 5(1) TPRs 2018*** further provides that one of the following TP methods: the Comparable Uncontrolled Price (CPU); the Resale Price (RP); the Transactional Net Margin (TNM); the Transactional Profit Split (TPS) or any other method which may be prescribed by Regulations from time to time, must be adopted.
87. ***(2020) 51 TLRN 1.***
88. ***Cap. N62, LFN 2004.***
89. ***Section 4 NOTAP Act.*** According to two commentators, *"Agreements with non-residents involving transfer of technology to Nigerian companies must be approved by [NOTAP]… In this regard, NOTAP carries out detailed analysis of their provisions to ensure that the Nigerian beneficiary company is getting a good deal, all things considered. Registration and renewal of such agreements are subject to prescriptions in NOTAP Act and Guidelines, irrespective of terms agreed by the parties. Applications for registration of technology quotient service agreements with NOTAP must be supported with requisite documentation."* See Afolabi Elebiju and Daniel Odupe, ***'Doing Business in Nigeria: An Aide Memoire to Regulatory Compliance and Optimal Entry Strategy for Foreign Investors'***, *LeLaw Thought Leadership Insights, December 2018, p.4:* (accessed 20.03.2021).
90. ***Section 4(d), NOTAP Act. NOTAP's Revised Guidelines 2011*** further prescribed fees chargeable by licensors, managements, etc. for their services in Nigeria. Also, such service contracts are tenured and renewal is subject to meeting regulatory requirement by NOTAP where it is satisfied that the technology being transferred is beneficial to the Nigerian counterpart, and not locally available.
91. This is pursuant to ***section 7 NOTAP Act*** which makes offshore payments of service fees subject to NOTAP registration of the agreement. Incidentally ***section 27(i)*** which disallowed *"any expense of any description incurred outside Nigeria for and on behalf of any company except of a nature and to the extent that the [FIRS] may consider allowable"* has been repealed by ***section 11 FA1 2020***. It is submitted that ***section 7 NOTAP Act*** and other CITA provisions including disallowance of penalties and fines provide sufficient ammunition to the FIRS. See also ***section 27(g) CITA*** as amended by ***section 11 FA1 2020***: it disallows expenses incurred within or outside Nigeria between related parties, except to the extent of consistency with the ***TPRs 2018.***

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Ultimately, NOTAP regulatory requirements act as counterweight to MNEs' efforts on transaction flows outside Nigeria by ensuring that only *"commensurate fees"* (relative to benefits conferred) are paid by Nigerian clients. More particularly, the NOTAP process indirectly serve as a means to check potential tax inequality from related party transactions.[92] It is incontestable that illicit financial flows has been a bane of many African countries, including Nigeria.[93]

Conclusion and Recommendations - ***Balancing Act: Tax Incentives and Catalysing Economic Growth in Nigeria***

To create a balancing act between the need to attract investment through tax incentives, which should in turn foster real economic growth, it is prescient to regularly examine the cost-benefit analysis of such incentives on the economy. According to commentators, such cost benefit analysis could be sectoral or done on a sampling basis for example, by picking major corporate beneficiaries and comparing and contrasting results.

Also, which is more efficient: cost-based incentive or profit-based incentive? Where particular approach(es) to tax incentive is found to be more beneficial in attaining the country's economic growth, tax policy directive should thus be focused on ensuring preference for such approach. This is moreso that it has been forcefully argued that overtime, tax incentives in themselves are revenue losers and should be offset with an increase in other revenue or decrease in expenditure.[94]

Some obvious positive examples of tax incentives yielding *prima facie* outsize returns to the Nigerian economy could be seen in the transformational growth of Nigerian cement and telecoms sectors. From recently being a net importer of cement, Nigeria is now a net exporter and leading producer. For example, Dangote Cement's Nigerian revenues have principally funded its massive continental expansion, securing its place as Africa's largest cement producer and an increasingly significant foreign exchange earner for Nigeria.[95]

In telecoms, tax incentives were instrumental in convincing some operators like MTN and Econet Wireless to take a bet on Nigeria, whilst others like Vodacom flinched. The return on investment exceeded their wildest expectations and MTN's Nigerian operations is a prime driver of overall group revenues and profits, whilst telecoms tax contribution to public coffers has also been significant. MTN's foray into Nigeria enable it leapfrog Vodacom as leading African operator and contributed to significant African and Middle-East expansion.

92. For example, NOTAP currently disallows Nigerian subsidiaries (NigSubs) from paying royalties for use of Parent Company (ParentCo)'s name and trademarks where ParentCo holds at least 75% equity stake in the NigSub: ***Para 4.2.5 NOTAP's Revised Guidelines***. This is understandable, given that the NigSub is actually ParentCo's business, from which it will still earn dividends. This was not previously the case, thereby: (a) providing an additional avenue for outflows from Nigeria; and (b) conferring advantage on ParentCo (through NigSub's lower taxable profits), to the detriment of a Nigerian competitive without a ParentCo to whom it pays royalties for licensing rights.

93. See excerpts from Afolabi Elebiju,' ***Rendezvous: Implications of Tax Provisions of Nigeria's Finance Act (No.2) 2020 for Non-Residents',*** *LeLaw Thought Leadership Reflections, January 2021, p.9 (and related footnote 36 therein):* https://lelawlegal.com/add111pdfs/TLR_AE_-_FA2_2020.pdf (accessed 20.03.2021). *"Given the historic bad press on illicit financial flows by NRCs, it is prescient for them to take note of tax regulatory developments in Nigeria with a view to working compliance processes into their Nigerian business strategy, in order to obviate regulatory and reputational risks." "See Chijioke Nelson, 'Nigeria Reports Multinationals' Tax Evasion to Global Body', The Guardian, 20.02.2018:* https://guardian.ng/news/nigeria-reports-multinationals-tax-evasion-to-global-body/ *(accessed 18.01.2021);* Oluseyi Awojulube, *'FIRS: Nigeria Lost N5.4trn to Tax Evasion by Multinationals in 10 Years', The Cable, 12.01.2021:* https://www.thecable.ng/firs-nigeria-lost-n5-4trn-to-tax-evasion-by-multinationals-in-10-years *(accessed 18.01. 2021). See also excerpts of Dr. Akin Adesina's speech (referred to in footnote below) that: 'Profit shifting, base erosion and tax avoidance by multinational corporations form a huge part of 'Africa's missing taxes'; and account for a large share of the over $60 billion illicit capital flows that Africa loses annually. If companies invest in Africa, they should pay taxes in Africa. Governments should use Business Investment Treaties and Avoidance of Double Taxation to strengthen these incentives. If a company works in Nigeria, benefits from Nigeria, it should pay taxes in Nigeria.' "*

94. Estian Calitz, et al. (***supra***), *p.10.*

95. See Dangote Cement, ***'Overview of Operations':*** https://www.dangotecement.com/operations/overview/_#:~:text=Dangote%20Cement%20is%20Africa's%20leading,%242.2%20billion%20and%2024%2C000%20employees.%20 (last accessed 19.03.2021). Correctly describing itself as *"an emerging force in global cement production"*, the website stated: *"Dangote Cement is Africa's leading cement producer with operations in 10 African countries, revenues in excess of US$2.2 billion and 24,000 employees. We are a fully integrated quarry-to-customer producer with production capacity of up to 45.6 million tonnes per annum (Mta) across Africa at the end of 2017." See also* ***'Dangote Exports Clinker Abroad, Boosts FG's Forex Drive',*** *BusinessDay, 15.06.2020:* https://businessday.ng/real-sector/article/dangote-exports-clinker-abroad-boosts-fgs-forex-drive/ (accessed 19.06.2020).

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In telecoms, tax incentives were instrumental in convincing some operators like MTN and Econet Wireless to take a bet on Nigeria, whilst others like Vodacom flinched. The return on investment exceeded their wildest expectations and MTN's Nigerian operations is a prime driver of overall group revenues and profits, whilst telecoms tax contribution to public coffers has also been significant. MTN's foray into Nigeria enable it leapfrog Vodacom as leading African operator and contributed to significant African and Middle-East expansion.

More importantly, the 'enabling' impact of these investments in cement and telecoms especially - unlocking the potential of other sectors, have contributed in helping to diversify the economy and creating impressive success stories/case studies out of Nigeria.[96] They also exemplify the positive 'spillover' or 'downstream' effects of tax incentives on local investments. Incidentally, concerns have still been expressed whether Nigeria gave away the family heirloom (gave excess value) in return for these (cement and telecoms) sector landscape transforming investments. Same discussions have also come up regarding NLNG.[97]

Meanwhile, the 'returns' by way of taxes and levies,[98] helping to deepen the Nigerian capital market (thereby enabling public participation in sector upsides),[99] direct and indirect employee numbers, human capacity development, etc further strengthens the case for cost benefit analysis. Without empirical analysis, it would always be a matter of conjecture whether Nigeria is overextending itself or otherwise on incentives. The other advantage of such prospective studies, ahead of tax concessions vs investment decisions is that they obviate the possibility of future investment disputes arising from host nation 'seller's remorse', pursuant to *"obsolescing bargain"*.

96. For a detailed historic account of Nigerian telecoms sector transformation from an antiquated under-performer to a one time fastest growing telecom market in the world, see generally, Afolabi Elebiju, ***'Promoting Country Competitiveness Through Sectoral Reforms: Case Study of Nigerian Mobile Telecommunications Sector, 1999 – 2006'*** *(MentorHouse, 2014)*.

97. See for example, Collins Olayinka and Sulaimon Salau, ***'Nigeria Loses ₦650b to NLNG Tax Holiday',*** *The Guardian, 20.01.2016*: https://guardian.ng/news/nigeria-loses-n650b-to-nlng-tax-holiday/ (accessed 25.03. 2021). Excerpts hereafter confirms need for proper pre-investment studies and the fact that there are always two sides to a story transparency: *"Tax incentives by the [FG] to the [NLNG] has deprived the nation of about $3.3billion or ₦650 billion at an exchange rate of ₦197 to the dollar from 1999 when it began operations, according to a report. The report by ActionAid titled* ***'Leaking Revenue-How a Big Tax Break to European Gas Companies has Cost Nigeria Billions'****, criticised the tax exemption arrangement, and extension arguing that even with a normal five-year tax holiday, the NLNG would still have been profitable. Meanwhile, the NLNG has faulted the report, arguing that the tax arrangement was in line with the Nigerian constitutional provisions. The firm also said under the arrangement 'the Nigerian government's initial $2.5billion investment, bolstered by the associated tax incentives, has so far yielded over $33billion in the form of dividends, taxes and feed-gas purchases for the country over the last 16 years, with an estimated additional $5billion accruing through corporate spend on local goods and services during the same period.'The exemption, according to Action Aid costs the country a total of $141 million or about N27.8 billion. 'Details of the loss through the dubious tax arrangement showed that the Nigerian government lost a minimum of $1,668 million (about N328.6 billion) in revenues through the share of tax the Shell BV should have paid for the period. Another $977 million (about ₦192.5 billion) was lost through Total, in addition to $677 million about (₦ 133.4 billion) through ENI, based on calculations from the NLNG annual accounts,'…*

In response, "the NLNG Spokesperson, Tony Okonedo, said … : 'The origin of NLNG dates back to 1965. Successive administrations at the Federal level worked assiduously with several [IOCs] for almost 25 years before NLNG was finally formed in 1989. This highlights the difficulties associated with setting up a project of this magnitude in a challenging business environment like Nigeria. In the face of global concern and mounting pressure on the state of gas flaring in Nigeria, the Nigerian government sought to encourage investment in the utilisation of the country's abundant gas resources. It would be instructive to recall that at the time, LNG was still a very new technology in Africa. Indeed, the establishment of NLNG made Nigeria the first country in Sub-Saharan Africa to possess such new technology and the second such country in all of Africa'. According to Okonedo, the incentive regime, which is a useful tool in attracting investments in projects of this nature, was also quite instrumental to the rapid growth of NLNG, which was built up to a six train facility from the initial investment for only two trains, as the construction of the additional trains was funded, mainly, by approximately $3 billion of returns generated from the project during the tax break period. The current total valuation of the now six train plant is $16 billion.

He stressed that the concept of a tax holiday period is not an unusual practice in the global business community, citing that Angola has notably offered as much as 12 years tax holidays to encourage investments in their LNG industry, while other countries like Oman, Malaysia, Qatar and Trinidad have offered up to 10 year tax holidays to attract LNG investments. He added that even more generous tax incentive schemes currently exist in free trade zones across the country. Okonedo explained further that, 'at the expiration of the tax holiday period for NLNG, the company did not have taxable profit for the 2010 to 2012 financial years due to unrelieved capital allowances on qualifying fixed assets acquired during the pioneer period. The capital allowances were duly applied in line with the provisions of the NLNG Act and [CITA]'… Meanwhile, he stated that NLNG paid Education Tax in the sum of $65.08million, $107.04million and $118.59million for the 2010, 2011 and 2012 financial years, respectively. 'The reality is that the Nigerian government's initial $2.5billion investment, bolstered by the associated tax incentives, has so far yielded over $33billion in the form of dividends, taxes and feed-gas purchases for the country over the last sixteen years, with an estimated additional $5billion accruing through corporate spend on local goods and services during the same period. These are all in addition to the $16billion worth of productive assets now domiciled in Nigeria,' he stated."

98. For example, the Nigerian telecoms industry has made significant contributions to tax revenues through CIT; VAT; 2% of assessable profits as Tertiary Education Trust Fund tax; 2.5% and 1% of net revenue as annual operating levies payable to the NCC by network and non-network operators respectively; 1% profit before tax as NITDA levy (***section 12 NITDA Act No. 28 of 2007***), import duties, penalties (an operator recently had a single penalty exposure of ₦330 billion), environmental levies, employee taxes and other indirect contributions; 0.005% of the net profit as levy to the Police Trust Fund, etc. ***Section 36(2) FA2 2020*** has now also stipulated that telecoms services will be subject to excise duties at such rates that the President may prescribe; this would be another track of contribution to tax revenue by the sector.

99. According to news reports, Nos. 1-4 of the top 10 most capitalised stocks that accounted for 83% contribution to the NSE as at 24th December 2020 were Dangote Cement (20.59%), MTN Nigeria (16.06%), Airtel Africa (15.79%) and BUA Cement (10.02%). See ***'Ten Most Capitalised Stocks Account for 83% Contribution to the NSE'****, Proshare, 01.01.2021*: https://www.proshareng.com/news/Capital-Market/Ten-Most-Capitalised-Stocks-Account-for-/54991 (accessed 25.03.2021).

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Notably, it was also recently reported that the FIRS opposed the grant of FTZ status to some prospective applicants. Coupled with absence of quality data, that was a signal that the FIRS doubts that Nigeria's FTZ policy has delivered on its promises; and signalling that maybe the FG should be more circumspect in granting FTZ status to applicants.[100]

Given the high stakes nature of incentives *cum* their economic benefits to the country, it is hoped that the FG will pay more attention to empirical data and utilise requisite modelling in evaluating the performance of its tax incentives scheme with a view to making necessary tweaks in order to enhance their contribution towards attainment of strategic national objectives.[101] The National Bureau of Statistics (NBS) should champion the data analytic initiative as a component of informed economic policy decision making by the FG.

The promise to enact ***Finance Act*** annually, such that tax amendments therein can be cognisant/responsive to changes in the business environment, and which the two ***FAs 2020*** (signed in January and December for 2020 and 2021 respectively) have done, is a step in the right direction.[102]

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100. For detailed discussion, see Afolabi Elebiju and Frank Okeke, ***'Journeys'*** *(**supra**, at p. 11)*.
101. The impact analysis could be done biennially or in four year cycles and could provide basis for amendment of the tax laws amongst other steps, to minimise all forms of tax inequality. It is submitted that the ***NTP*** could be more forceful in prescribing measurement benchmarks and related timelines so Nigeria does not become a net loser *vide* her tax incentive regime.
102. As noted by a commentator, *"The **FA2 2020 Tax Amendments** shows the FG's serious intent of making Nigerian tax law start keeping pace with (global) business realities. Not that there is any choice in this regard anyway, given the significant pressure to raise funds for public spending. The digital economy is getting bigger and more pervasive by the minute, and the FG loses out on the action, at its peril. As noted in this writer's review of **FA1 2020**, the annual enactment of **FAs** will be to the Nigeria public fisc's advantage, as the FG can make necessary scope, focus and policy adjustments in response to developments in the business universe."* See Afolabi Elebiju's ***'Rendezvous' article*** *(**supra**, p.9)*.

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