Thought Leadership Insights

Doing Business in Nigeria:

An *Aide Memoire* to Regulatory Compliance and Optimal Entry Strategy for Foreign Investors

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> Government's Intent To Attract Foreign Investment Is Exemplified By Business Landscape Improvement Initiatives Such As Establishment Of The PEBEC

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Nigeria's potential to become one of the biggest players in the global economy has been long acknowledged: with her huge population cum ready market, skilled workforce, substantial natural endowments, including fertile arable land, conducive weather, rich and diverse cultural milieu, amongst others. Nigeria's democratic system of government, free enterprise economy, fairly developed (common law) legal system, and West African market access through ECOWAS (Economic Community of West African States) are also positives which investors will find attractive.

With ongoing initiatives of the Federal Government (FG) especially the ***Economic Growth and Recovery Plan (EGRP),*** and the conscious efforts to tackle institutional challenges hampering ease of doing business, Nigeria hopes to improve its standing in emerging market rankings. Government's intent to attract foreign investment is exemplified by business landscape improvement initiatives such as establishment of the *Presidential Enabling Business Environment Council* (PEBEC) to set in motion strategic action steps aimed at improving Nigeria's investment attractiveness.[2] Nigeria's feat as one of the top 10 global reformers in the World Bank's *2018 Ease of Doing Business*[3] is a positive development which proves that the country could yet pull her weight as a 'MINT' country.[4]

PEBEC's work has resulted in Nigeria's improved rating but obviously, *"it is not yet uhuru"* - more sustained work needs to be done, to consolidate on gains. FG's EGRP is hinged on diversifying the economy, and both local and foreign investments are being actively encouraged. Infrastructure remains a huge hotbed of opportunities, not to talk of solid minerals, agriculture, ICT and other sectors. *Given the increasingly positive horizon, what are the key points of interest for foreign investors?* This article takes a ladle into these issues focusing on the regulatory framework and entry strategy structuring possibilities.

Regulatory Framework

In addition to sectoral laws, the major statutes regulating foreign investment in Nigeria are: ***Companies & Allied Matters Act (CAMA),***[5] ***Nigerian Investment Promotion Commission Act (NIPCA),***[6] and ***Foreign Exchange (Monitoring and Miscellaneous Provisions) Act (FEMMPA).***[7] Applicable

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1 We acknowledge with gratitude, the input of our former colleague, Neme Ezenwa, to the early draft of this article.

2 See *LeLaw, June 2017 Regulatory Alert*, ***'Executive Order on Ease of Doing Business in Nigeria: Knuckling Down to Get Business Done',*** available at: http://lelawlegal.com/pdf/LeLaw%20Regulatory%20AlertJune%202 017 %20(3).pdf, (last visited on 14.12.18).

3 The World Bank Group, ***'Doing Business 2018 Fact Sheet: Sub-Saharan Africa',*** http://www.doingbusiness .org/content/dam/doingBusiness/media/Fact-Sheets/DB18/DB18-FactSheet-SSA.pdf, (last visited on 14.12.18).

4 More recently Nigeria also jumped 10 places in the World Economic Forum's ***Global Competitiveness Index*** (2018), https://www.vanguardngr.com/2018/10/nigeria-ranked-115-in-global-competitiveness-index/ (last visited on 23.10.2018).

5 ***Cap. C20, Laws of the Federation of Nigeria (LFN) 2004***

6 ***Cap. N117, LFN 2004***

7 ***Cap. F34, LFN, 2004***

> Foreign Investors Need To Be Armed With A Well Thought-out Entry Strategy... Leveraging Legal, Regulatory And Commercial Input From Local Professional Advisers

sectoral legislation also come into the mix, for example, in the upstream oil sector: the ***Petroleum Act,***[8] ***Petroleum Profits Tax Act,***[9] ***Oil Pipelines Act;***[10] in the banking sector, ***Banks and Other Financial Institutions Act,***[11] ***Central Bank of Nigeria Act,***[12] amongst others.

Entry Strategy Start Up Compliance Considerations

Foreign investors need to be armed with a well thought-out entry strategy. Such would leverage legal, regulatory and commercial input from local professional advisers. For example, background research for in-depth *"sector knowledge"* is critical: the regulatory and competitive landscape, *"stay awake"* issues and being abreast of sector developments. Also, where partnership or co-investment with Nigerian citizens (corporate or individual) is contemplated, it is important to conduct due diligence and ensure that the prospective partners' track record, business and personal relationships, values and skills would not only align, but represent synergistic value to the (joint venture (JV) parties') relationships. All the foregoing knowledge would help in crafting optimal transaction structuring, which is important for long term sustainable operations and profitability of the proposed venture.

Foreign companies can only do business in Nigeria through Nigerian subsidiaries or affiliates. Branch registration is not allowed. Consequently, local incorporation is generally mandatory (***sections 54 CAMA*** and ***19(1) NIPCA)).*** Whilst *section 56 CAMA* provides for exemptions from incorporation that is not applicable to the typical foreign investor, *section 19(1) NIPCA* is emphatic that: *"an enterprise in which foreign participation is permitted under section 17 of this Act, shall not commence business, except it is incorporated or registered under the [CAMA]."* For a variety of reasons, the most common corporate vehicle that foreign investors use is the closely held, private limited liability company.

Often due to: (a) ***section 54 CAMA*** prohibition against foreign companies carrying on business directly in Nigeria; and (b) sectoral or other requirements, partnerships involving foreign investors are mostly of the incorporated JV model. Of course, especially for portfolio investors, listed public companies may be the preferred vehicle. In addition, since portfolio investment without more does not amount to *"carrying on business"* in Nigeria, such investors are generally relieved of meeting start-up compliance requirements. Also, only companies incorporated in Nigeria can obtain Nigerian sectoral licenses/approvals/ regulatory authorisations to operate upstream and downstream assets, as banks, telecoms operators, etc.

The typical start up compliance will entail the following steps:

(a) Nigerian Subsidiary (NewCo) Incorporation: Nigerian companies' incorporation is under the oversight of the Corporate Affairs Commission

8 ***Cap. P10, LFN 2004***
9 ***Cap. P13, LFN 2004***
10 ***Cap. 07, LFN 2004***
11 ***Cap. B3, LFN 2004***
12 ***Cap. C4, LFN 2004***

(CAC), Abuja. Recent changes have streamlined the incorporation process for quicker and more qualitative service delivery.[13] Foreigners[14] can own Nigerian companies 100% and can invest in same sectors as Nigerians (***sections 17** and **19(2), NIPCA***), albeit local content provisions may confer preferential status on wholly or majority owned Nigerian companies.

(b) Tax Registrations:

After incorporation, the company registers for taxes (companies income tax (CIT) and Value added Tax (VAT)), with the Federal Inland Revenue Service (FIRS) and obtains a Tax Identification Number (TIN), and initial Tax Clearance Certificate (TCC), which is a documentation requirement for many regulatory approvals. NewCo will also register with the relevant State Inland Revenue Service (SIRS) in States where it has operations or employees, for personal income tax (PIT) compliance purposes of its employees. Respective tax filings and payments are to be done within prescribed timelines.[15]

(c) Capital Inflow and Outflow

Section 24 NIPCA and ***Section 14(4) FEMMPA*** guarantees foreign investors unrestricted transferability of dividends or other investment returns (net of applicable taxes) from Nigeria. Such investors must have obtained Certificate of Capital Importation (CCI) or Certificate of Loan Capital Importation (CLCI) evidencing importation of capital representing their investment. By ***Section 15 FEMMPA***, an authorised dealer is required to within 24 hours of capital importation, issue CLCI/CCI to an investor who imports foreign currency (forex) or capital.[16] CCI/CLCI is a documentation requirement for procuring forex to remit capital and investment returns from Nigeria. CBN, in April 2017, opened a special forex window for investors and exporters to boost liquidity in the forex market and ensure timely execution and settlement for transactions.

Effective September 2017, the CBN commenced the deployment of Electronic Certificate of Capital

13 Bayo Amodu and Olushola Bello, **'*Ease of Doing Business: CAC's Giant Strides in Business Registration*'**, *Leadership Newspaper, 29.08.2018* http://leadership.ng/2017/08/29/ease-business-cacs-giant-strides-business-registration/, (last visited on 27.04.18).

14 Ninety (90) days is now the timeline for the completion of corporate income tax audits with the Federal Inland Revenue Service (FIRS). Five separate incorporation forms have been consolidated into one single Form (CAC Form 1.1), thereby making it easier for applicants to complete the registration form. There is also a reduction of cost of registering a private limited liability company with a NGN1 million authorised share capital from N19,500 to N15,500. An electronic integrated platform has been introduced whereby Tax Identification Numbers (TIN) are automatically generated by the FIRS upon completion of new registrations.-*PEBEC 2018 Making Business Work Report*, https://easeofdoingbusinessnigeria.com/images/Documents/ PEBEC-Annual-Report-June-2018.pdf, (last visited on 14.12.2018).

15 The date for filing and payment Due Date for Value Added Tax (VAT) and Withholding Tax (WHT) is 21st day of the Month following the Month of transaction. Remittances of *Pay As You Earn* (PAYE) is 10th Day of the Month Following the Month of deduction. For companies having 31st March, 2018 as Accounting Year End, 30th SEPTEMBER, 2018 is the due date for filing: Companies Income Tax (CIT); Capital Gains Tax (CGT); Education Tax (EDT); and National Information Technology Development Levy (NITDL) as applicable.

16 ***Section 41 FENMPA*** defines capital as all cash contributions, plant, machinery, equipment, building, spare parts, raw material and other business assets, other than goodwill.

Importation (eCCI) platform in a bid to enhance transparency and efficient processing of foreign investment. The eCCI is to replace the hard copy CCI normally issued in respect of all capital inflows either in form of cash or machinery/equipment.

Generally, it is forbidden to conduct local transactions in forex.[17] Nigerian companies can however open and maintain forex domiciliary (dom) accounts, which they can freely operate for the purposes of their business. Exporters are also permitted to open and operate offshore accounts, but are mandated to repatriate their export proceeds to their Nigerian dom accounts within 90 days for oil exports and 180 days for non-oil exports.

(d) Importation Guidelines:

By the ***Federal Ministry of Finance Revised Import Guidelines, Procedures and Documentation Requirements Under the Destination Inspection Scheme in Nigeria December, 2017 (The Guidelines)***, intending importers must process e-Form 'M' through any authorized dealer bank (ADB) whether or not payment (outflow) is involved, and attaching requisite documents.[18] The ADB will process the Form M/Pre Arrival Assessment Report (PAAR); ***the Guidelines*** aims to avert unnecessary port delays. The ADB reviews/validates the Form M and sends it to the Nigerian Customs Service (NCS) which accepts or rejects it when not properly completed or lacking some information and/or documents.[19]

The Addendum to ***the Guidelines*** made certain clarifications on relevant provisions of the Guidelines to ensure seamless implementation, enforcement and compliance with ***the Guidelines***.

(e) Foreign Technology Acquisition Compliance Requirements

Agreements with non-residents involving transfer of technology to Nigerian companies must be approved by ***National Office for Technology Acquisition and Promotion (NOTAP)*** pursuant to the ***NOTAP Act***[20] and ***NOTAP's Revised Guidelines for Registration and Monitoring of Technology Transfer Agreements In Nigeria***. 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.

(f) Sectoral Permits & Approvals:

Under specialized categories where services of professionals are required, registration with the professional body must be obtained. For example, where a foreign company intends to offer engineering services in Nigeria, registration with the Council for Regulation of Engineering in Nigeria (COREN) is required. Also, at least one of its shareholders holding minimum 55% shares must be registered with COREN.

Companies seeking to provide services in the Petroleum industry are required to obtain a permit from the Department of Petroleum Resources (DPR). Manufacturers will amongst others obtain regulatory approvals under the ***Factories Act,***[21] to have their products certified by Standard Organization of Nigeria (SON) and National Agency for Food and Drug Administration and Control (NAFDAC) respectively.

(g) Employment

Every company employing expatriates must comply with *the **Immigration Regulations 2017***[22] regarding permits and approvals.[23] Foreign employees are subject to entry-visa and work permit requirements one of which is the application for the *Combined*

17 With exceptions being made for some sectors: the oil and gas industry, maritime, aviation, operators in the Free Trade Zones and some government agencies. See further, T. Chikwendu and C. Okoriekwe, ***'Anti-Dollarization Policy: Managing Reality – Issues and Discontents'***, available at: http://www.lelawlegal.com/pdf/LeLaw%20-%20Anti%20Dollarisation%20Article.pdf,, (last visited on 14.12.18).

18 Such as the Insurance Certificate, Proforma Invoice, Product Certificate.

19 See ***'Step by Step Guide for Imports in Nigeria'*** - http://nigerianports.gov.ng/import-export-guidelines-3/, (last visited on 26.04.18).

20 ***Cap. N62, LFN 2004***

21 ***Cap. F1, LFN 2004.***

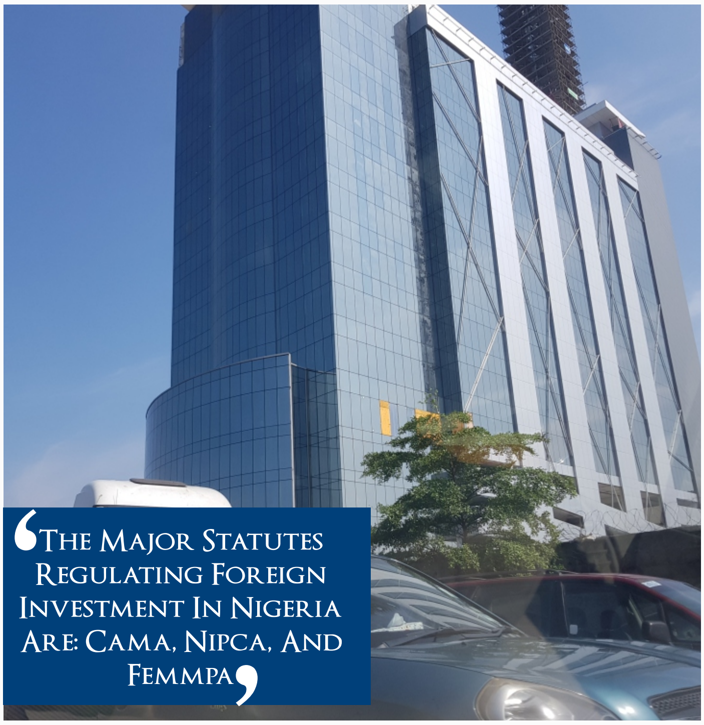
22 Made pursuant to ***Immigration Act, Cap. I1, LFN 2004.***

23 The regulatory policy is that expatriates may only be employed for positions/roles in areas where there is a dearth of qualified Nigerians.

Expatriate Residence Permit and Aliens Card (CERPAC) which is issued for three (3) years and could be renewed for 3 years. The NIPC pursuant to its investment facilitation and regulatory liaison role and in line with its One Stop Investment Centre (OSIC) facilitates obtainment of the permits from the Ministry of Interior as it does for processing applicable incentives.

Applicants for EQ and other Immigration permits are required to meet minimum capital requirements, for example, the minimum share capital for a business permit to be granted is ₦10 million.[24] *Expatriate Quota (EQ)* sets the specific number of authorised EQ for long term employment. The EQ may be Permanent Until Reviewed (PUR) status in the case of Managing Director/CEO. 'Nigerianisation' is a conscious policy of EQ administration that discourages employment of expatriates to fill positions for which qualified Nigerians are available, and also to enhance local capacity development by requiring that there should be Nigerian understudies for each EQ position granted; applicants are also expected to have succession-planning in place for eventually filling such EQ positions with Nigerians.

Employers are required to comply with Nigerian employment law related provisions. The ***Labour Act***[25] applies to only low level unskilled workers, hence the contract of employment governs employment relationships. Employers are also required to make employee related contributions, including: (a) *Industrial Training Fund (ITF) deductions* of 1% of annual payroll to the ITF;[26] (b) *Pension contributions* of at least 10% of each employee's monthly salary (in



addition to the employee's own pension contributions of at least 6%) to the employee's pension fund administrator (PFA);[27] (c) Group Life insurance for employees with minimum cover of at least 300% of each employee's annual salary; and (d). 1% of total monthly payroll into the Employees' Compensation Fund (ECF).[28]

(h) Tax & Investment Incentives

General and, depending on sector, specific tax incentives are available in Nigeria. Some of the tax incentives are as follows:

I. The Pioneer Status Scheme: This exist pursuant to ***Industrial Development (Income Tax Relief) Act (IDITRA)***[29] and provides for three years tax holidays,

24 The Nigerian Immigration Service, ***Revised Guideline(s) on Business Permit and Expatriates Quota,*** available at https://portal.immigration.gov.ng/pages/about, (last visited on 14.12.18). It has also been argued whether the grant of business permit (BP) is still required in Nigeria, given the liberal investment environment typified by provisions of ***NIPCA*** which, being a subsequent legislation to the ***Immigration Act (IA)***, should therefore be regarded as impliedly repealing ***Section 8 IA's*** requirement for business permit. Under the ***IA***, without BP, foreigners could not operationalize their incorporated Nigerian entities; notably other legislation like ***Nigerian Enterprises Promotion Decrees*** restricting foreign participation in some sectors of the economy have been repealed***. NIPCA's*** reference to BP is in substance the registration certificate issued by NIPC. Furthermore, although ***NIPCA*** mandates foreign owned companies to register with NIPC before commencing business, there is no sanction or enforcement provision. In practice, such companies register because of the need to access investment incentives or to enjoy investment protection. The Ministry of the Interior enforces the BP provision of the ***IA*** (now doubtful) by tying it to EQ – to obtain EQ, applicants need to provide same documentation as BP plus Evidence of imported machinery, License/Permit/Certificate from relevant Government Agencies/department, Evidence of work at hand and proposed expatriate salary – ***Revised Guideline(s) on Business Permit and Expatriates Quota,*** available at , (last visited on 14.12.18).

25 ***Cap. L1 LFN 2004***

26 **By virtue of *Section 6 ITF (Amendment) Act 2011,*** employers with five or more employees or with a turnover of up to N50 million are required to contribute one percent of its total payroll in respect of each calendar year. Employers may get up to 50% refund of their contributions if they satisfy ITF that they have adequate training programmes.

27 This is required of every employer having three or more employees by virtue of ***section 4(1) Pension Reform Act No. 2, 2004 (PRA)***.

28 Pursuant to ***section 33(1) Employee's Compensation Act, Cap. E7A, LFN 2010***

29 ***(IDITRA), Cap. I7 LFN, 2004***

extendable for two additional years for sectors/industries that the government considers strategic to attract new or increased investment.[30] The Pioneer List currently has 69 'Pioneer Industries'.[31]

ii. Tax Exemptions: By ***Section 23* CITA**, certain income or profits of companies are exempted for tax.[32] The interest on foreign currency domiciliary accounts are not taxable.

iii. Double Taxation Treaties (DTTs): Nigeria has DTTs[33] which enables residents of countries having DTT with the nation to enjoy tax benefits, such as is lower withholding tax (7.5% vs. 10%) rate deduction dividends, royalties and interests. Routing investment through vehicles in DTT countries is a good tool.

iv. Tax Free Interest on Foreign Loans: In certain circumstances, interest payable on foreign loans are exempt from tax under ***section 11(6)* CITA**. Interests on long term foreign loans depending on tenor are also eligible for partial or 100% WHT exemption.[34] Foreign investors can route their investment through a DTT resident entity and also utilise long term foreign loans to optimize their investment related WHT exposure.[35]

> NIGERIA IS RELENTLESS IN FACILITATING THE RIGHT ENVIRONMENT FOR BUSINESS AND PROVIDING ECONOMIC INCENTIVES TO DRIVE GROWTH IN THE COUNTRY

30 See *LeLaw, September 2017 Regulatory Alert*, ***'Pioneer Status' Tax Incentive in Nigeria: A Commentary on Recent Developments and Implications for Businesses***, available on http://lelawlegal.com/pdf/LeLaw-Regulatory-Alert-September-2017-Pioneer-Status-Commentary-on-Recent-Developments.pdf, (last visited on 08.10.18).

31 See NIPC, ***'List of Pioneer Industries and Products 2017'***, at: https://www.nipc.gov.ng/mdocs-posts/list-of-pioneer-industries-and-products/, (last visited on 14.12.18)

32 Some of the tax exemptions includes: (a) dividend received from small companies in the manufacturing sector in the first five years of their operation; (b) dividend received from investments in wholly export oriented businesses; (c) the profits of any Nigerian company engaged in exportation provided the export proceeds from such export are repatriated to Nigeria and are used exclusively for the purchase of raw materials, plant, equipment and spare parts; (d) company whose supplies are exclusively inputs to the manufacturing of products for export provided that the exporter shall give a certificate of purchase of the inputs of the exportable goods to the seller of the supplies power to exempt.

33 Nigeria currently has DTTs with United Kingdom and Northern Ireland, Belgium, Canada, China, Czech Republic, France, Netherlands, Pakistan, Philippines, Romania, Slovakia, and South Africa. Other DTTs (e.g. with Mauritius, Spain, Sweden) are not yet ratified and therefore legally inoperative even though current regulatory practice is to give effect to them.

34 See 3rd *Schedule CITA*, 3rd Schedule provides for varying degree of tax exemption depending on the repayment period and grace period.

35 Apart from those specifically mentioned, sectoral tax incentives include the regime for solid minerals under the ***Minerals and Mining Act, Cap. M12, LFN 2004***; accelerated capital allowances (e.g. under gas utilisation incentives of ***sections 39 CITA and 11 PPTA***); Investment Tax Credit (ITC) or Petroleum Investment Allowance (ITC) for pre and post 1998 PSCs pursuant to s***ection 22 PPTA***, For several other tax incentives, and detailed discussion, see Ayo Fadeyi: ***'Tax Planning: Walking The Thin Line Between Tax Avoidance And Tax Evasion,'*** available on http://lelawlegal.com/pdf/Tax%20Planning_Payment_Ayo.pdf (last visited on 14.12.18).

Nigeria has a well-developed judiciary and given its historic affiliation with England, operates the common law legal system. Many of the common law and equity principles have become codified. Arbitration is also gaining ground as a means of settling commercial disputes. Notably, Nigeria's *grundnorm*, stipulates that the foreign policy objectives shall include respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication.[37]

(I) Notable Local Content Rules:

Whilst foreign investors are free to participate in all sectors of the economy that Nigerians could invest in, there are sectoral local content rules that could impact foreign investors.[36]

(j) Dispute Resolution

Section 26 NIPC Act provides for a layered dispute settlement process regarding for foreign investments: (a) mutual discussions towards amicable settlement, (failing which); (b) the aggrieved foreign investor can resort to arbitration within the framework of any applicable bilateral or multilateral treaty; or (c) any other machinery for settlement of investment disputes agreed by the foreign investor and Nigerian government.

Conclusion

Following the liberalization of Nigeria's investment regime in the mid-1990s, and her emergence from 'pariah nation' status after the advent of democratic rule in 1999, government continues to champion efforts to attract foreign investment and also harness local funding. Improving Nigeria's competitiveness has become a strategic goal, and several transformational sector reforms like in the telecommunication sector, has yielded success stories.[38]

The multifarious challenges Nigeria faces for example, infrastructural gap, housing deficit, mono-economy (over reliance on petroleum revenues), provision of services to her 200 million strong citizenry, represents opportunities for bankable investments. As foreign investors become attracted

36 See for example, ***Clause 11.3 Guidelines for Nigerian Content Development In Information and Communications Technology (ICT) 2013:*** requiring multinationals to submit a local content development plan to regulatory agencies for their platforms and products as part of requirements for registration within Nigeria and pre-qualification for any government project. ***The Nigerian Oil and Gas Industry Content Development Act, Cap. N124A, LFN 2004 (Local Content Act or LCA)*** provides for preferential treatment for locally incorporated majority owned Nigerian companies. *Broadcasting*: The Nigeria Broadcasting Code (6th ed., 2016) p, 13 stipulates that "*Broadcasting in Nigeria shall be at least 70% owned and operated by Nigerians.* In **shipping, *Sections 3-6, The Coastal and Inland Shipping (Cabotage) Act, No. 5 of 2003,*** restricts the use of foreign-owned or manned vessels for coastal trade in Nigeria. Regarding **aviation, *Section 33 (1a) Civil Aviation Act (CAA), Cap. 51, LFN 2006*** prescribes that only Nigerian citizens or a company with its principal place of business within Nigeria, controlled by Nigeria nationals can be granted aviation sector operating permits/licenses.

37 ***Section 19(d) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).***

38 See Afolabi Elebiju, ***'Promoting Country Competitiveness through Sectoral Reforms: Case Study of Nigerian Mobile Telecommunication Sector, 1999-2006'***, MentorHouse 2014.

to Nigeria's investment opportunities, they will need professional guidance and handholding in designing and realizing their Nigerian business strategy. Sometimes the presence or otherwise of such guidance, or the quality of it could spell the difference between success and failure of foreign investor's Nigerian business strategy.

Nigeria is relentless in facilitating the right environment for business and providing economic incentives to drive growth in the country. One approach towards achieving this through availability of investment incentives to drive a boost in technological innovation, reduce unemployment, revitalise exports, increase government's non-oil revenue, and achieving fiscal balance. Some big wins so far have been the ease in starting a business focusing on company registration and filings, property registration, immigration services, tax payment and getting credit. Sustained efforts is important in consistently signaling to the global investment community that *"Nigeria is ready for business"*![39]

39 ***Section 106*** defines a Nigerian Company as *"a company formed and registered in Nigeria… with not less than fifty percent equity shares by Nigerians"*. ***Section 3(1) LCA*** stipulates that *"Nigerian independent operators shall be given first consideration in the award of"* these opportunities.