Chapter 2

Investment policy in Nigeria

This chapter provides an overview of Nigeria's legal framework for investment. It examines the quality of the country's investment policies and the level of legal protection granted to both domestic and international investors. It covers the admission, regulation and protection of foreign direct investment and ascertains whether the principle of non-discrimination features in investment-related laws. It also looks into the rules for expropriation, the framework for protecting intellectual property rights and the legal regime for land property rights. The adjudication of commercial and investment disputes, including through arbitration, is another building block of the investment policy framework at both federal and state levels. The chapter also analyses Nigeria's investment treaty practice and provides options for a strengthened and well-balanced treaty policy.

2.1. Legislative and regulatory framework for investment in Nigeria

The quality of investment policies directly influences the decisions of all investors, be they small or large, domestic or foreign. Property protection and non-discrimination are investment policy principles that underpin efforts to create a sound investment environment for all. Policy coherence has the strongest impact on the investment environment and standards for investment protection and openness must be of wide applicability to international as well as domestic investors – including small- and medium- sized enterprises (SMEs). Transparency is another key principle for fostering a favourable environment for investment. Transparency reduces uncertainty and risk for investors and the transaction costs associated with an investment, and facilitates public-private dialogue. Alongside with macroeconomic factors and infrastructure, governance and regulatory issues determine the quality of a country's investment climate.

Impediments to the establishment of an enabling investment climate in Nigeria include governance and infrastructure issues as well as overreliance on the petroleum sector. Despite a rather comprehensive legal framework, Nigeria's investment climate still requires substantial improvements to improve its reputation as a safe investment destination.

Challenges that must be addressed by Nigeria in its endeavour to improve its investment policy partly relate to the current lack of legibility of the legal framework for investment. Nigeria does not have an investment policy statement, which is only the visible phenomenon of a deeper issue of lack of clarity in government policies. The difficulty to access information, coupled with some confusion in government policies has resulted in uncertainty and confusion among prospective investors. Nigeria is endowed with a fairly comprehensive but inconsistent regulatory environment, whose effectiveness is hampered by bottlenecks that commonly cause delays in the enactment of announced legal reforms. Frequent policy changes have also impeded the predictability of the regime. The government has however taken encouraging steps to address its most crucial investment policy challenges through initiatives to better secure contractual and property rights and to settle commercial disputes in a more efficient manner.

Major shift towards openness: One of the most liberal regimes for investment in Africa

During the 1970s, Nigeria, then endowed with strong foreign reserves, embarked upon a policy of indigenisation of its industries and introduced stringent limitations of foreign participation in Nigerian enterprises with the enactment of the Nigerian Enterprises Promotion Decrees of 1972 and 1977.

Starting in the late 1980s, the government, obliged to look for new drivers of growth to address the collapse of oil revenue and public investment, undertook a reversal of policy and made strong regulatory improvements for the admission of foreign investment into Nigeria. Progressive opening of the economy was needed to face the external debt, and Nigeria in turn shifted towards one of the most liberal investment regimes in Africa.

The *Privatisation Act* 1988 and the *Public enterprises (privatisation and commercialisation) Act* (1989) marked the beginning of the divestment of government share in national enterprises.

The enactment of the *Nigeria Investment Promotion Commission (NIPC) Act*, in 1995, represented a further milestone in the liberalisation reform process. *NIPC Act* repealed two pieces of law that imposed a strict control on foreign investment and restricted dealings in foreign exchange and foreign investment: the *Industrial Development Coordination Committee Decree* No. 36 of 1988 and the *Nigerian Enterprise Promotion Decree* of 1972. Under the *NIPC Act*, foreigners can invest and participate in the operation of any Nigerian enterprise without any restriction, except for the petroleum sector that remains governed by a specific, more restrictive regime. The enactment of the *Foreign Exchange Monitoring and Miscellaneous Provisions (FEMMP) Act,* meanwhile, repealed the *Exchange Control Act* No. 16 of 1962 that imposed significant restrictions on exchange transactions. The *FEMMP Act* complements the *NIPC Act* by easing restrictions in foreign exchange dealings and creating an autonomous Foreign Exchange Market. It opened up the Nigerian capital market to foreign portfolio investment: any foreign exchange purchased from the Market may be repatriated from Nigeria without any further approval. Foreigners are thus allowed to invest in, acquire, dispose of, create or transfer any interest in securities and other money market instrument in foreign or local currency. Any person may also invest in securities traded on the Nigerian capital market or through private placements in Nigeria.

The *NIPC* and the *FEMMP Acts* therefore marked a shift from control to liberalisation and promotion of foreign investment and aimed at freeing up investment in Nigeria and creating an enabling climate for investment.

The *NIPC Act*, which was then amended in 1998, is the primary legislation governing investment in Nigeria. It applies to both domestic and foreign companies investing in Nigeria. It is a cross-sectoral legislation that also aims to encourage inflow of foreign investments in all sectors of the economy. The law is clearly geared towards the promotion and the liberalisation rather than the substantive protection of investment. There is no compendium grouping all investment-related laws and regulations, but the NIPC has issued an investment guide to provide some information on investment opportunities and procedures.

The Act sets out the basic functions and powers of the Nigerian Investment Promotion Commission, which undertakes both promotion and regulation activities (see Chapter 3). By virtue of Article 23, the Commission has the mandate to issue guidelines and procedures that specify priority areas of investment and, accordingly, prescribe incentives and benefits in conformity with government policy.

Box 2.1. **Investment-related laws in Nigeria**

The main laws and Decrees of relevance to the conduct of investment activities are the following:

- Nigerian Investment Promotion Commission Act 16 of 1995
- Foreign Exchange and Miscellaneous Act 17 of 1995
- Companies and Allied Matters Act 1990
- Nigerian Export Processing Zones Decree No. 63 of 1992

These are complemented by Sector Specific Acts and other laws and decrees that relate to investment activities, such as:

- *Nigerian Communications Act* 2003 for the telecommunications industry,
- *Electric Power Sector Reform Act* 2005 for the electricity industry;
- *Nigerian Tourism Development Corporation Act* 81 of 1992 for the tourism, etc.
- *Nigerian Investment Promotion Decree* of 1995
- *Foreign Exchange (Monitoring and Miscellaneous) Provisions Decree* No. 16 of 1995 (FEMMP Act)
- *Oil and Gas Export Free Zone Decree* No. 8 of 1996
- *Public Enterprises Promotion and Commercialisation Decree* of 1998
- *Investment and Securities Decree* No. 45 of 1999
- *Petroleum Act* 1969
- *Nigerian Content Development in Oil and Gas Industry Act* of 2009
- *Nigerian Minerals and Mining Act* of 2007
- Nigerian Minerals and Mining Regulations 2011
- *Nigeria Extractive Industries Transparency Initiative Act* of 2007
- *Central Bank of Nigeria Act* of 2007

Establishment of companies in Nigeria

By virtue of the *NIPC* Act, an enterprise in which foreign participation is permitted is required to register with NIPC and can buy the shares of any Nigerian enterprise in any convertible foreign currency; and foreign investors in an approved enterprise are granted free transferability of funds through an authorised dealer and in a freely convertible currency.[1]

Meanwhile, after registration with NIPC, the establishment of enterprises is governed by the provisions of the *Companies and Allied Matters Act* (CAMA) that requires prospective investors to register with the Corporate Affairs Commission (CAC), under various forms of companies: public or private liability company, etc. (see Chapter 3).

Foreign investors must then obtain appropriate business permits and register with the Securities and Exchange Commission (for investment in listed activities only) to conduct business in Nigeria. By virtue of CAMA, some foreign companies can be invited by the federal government to establish themselves in Nigeria, and as a result, are exempted from the incorporation. After incorporation of foreign companies, the registration process is the same as for Nigerian companies. Applicants to registration with NIPC have a right of judicial recourse to compel the Commission to register the company.

Further clarification of allocations between CAC and NIPC is seen as a priority among the two agencies' staff. The NIPC is exclusively mandated to deal with the promotion and facilitation of investment in Nigeria as a destination for foreign investors, while CAC is equally in charge of the registration of all companies, both local and foreign. But critics have been raised that NIPC did not yet entirely take up its mandate for investment promotion and advocacy. In addition, foreign companies have complained that they have to interact with an excessive number of agencies that have scattered, fragmented capacities. According to both NIPC and CAC, there is also a lack of co-ordination and communication channels between NIPC and CAC regarding the registration of companies. Better communication channels would allow NIPC to identify foreign companies that have not fulfilled the requirement to register with NIPC prior to their incorporation with CAC. Better co-ordination between NIPC and CAC would also be key for promoting business linkages, as CAC can communicate a list of local partners or suppliers to NIPC, which can in turn provide such a network to foreign investors.

CAC initiated a reform process in 2002 and has since then continuously attempted to address the inefficiency of the registration process through the implementation of an electronic registration system. Starting in 2004, all registration services have been carried out electronically, with a view to addressing prosaic hurdles, such as the duplication of registration numbers, the misspelling of business names, etc. The execution of the digitalisation system has however suffered from some lapses and, as a result, the computerisation of the system is not yet achieved. While the in-house phase of the registration seems to be now fully computerised, customers cannot yet submit their registration application online. CAC also started addressing the issue of the cost of registering businesses by reducing capital registration fees to Naira 50 000 for SMEs and by abolishing the obligation for companies to mandate a qualified solicitor to act as an agent to fulfil all registration formalities.

The registration with NIPC is a prerequisite to be entitled to benefit from investment incentives. In addition, foreign investors have to register under the Nigerian Citizenship Law. NIPC has called on the abolition of this extra requirement which does not seem to be justified and might rather have a deterrent effect on foreign investment. In addition to this prerequisite, the registration of limited liability companies (LLCs) requires the approval of the Attorney General Office. According to the CAC itself, this additional requirement creates another bottleneck that further lengthens the registration process. The upcoming amendment is thus expected to insert a three-month time limit for the Attorney General's Office to give its consent, at the expiry of which the "silent is consent rule" would apply.

As for the acquisition of shares in Nigerian companies, it does not require any approval neither registration, but simply needs to be completed through the Nigerian Stock Exchange.

Nigeria is one of the most open economies in Africa

The *NIPC Act* establishes the legal foundation for a very liberal and open investment framework and has abolished any restrictions or limits of foreign shareholding in companies registered in Nigeria. Although it is not explicitly enshrined in the legal framework, non-discrimination is a general principle underpinning laws and regulations governing investment in Nigeria. Except for specific restrictions and local content requirements that apply in the petroleum sector and in public procurement, Nigerian laws do not give preferential treatment based on the nationality of the investor.

The *NIPC Act* allows 100% foreign ownership of firms outside the oil and gas sector, where investment stays limited to joint ventures or production-sharing agreements. Banking and insurance, which were previously only open to joint venture participation, are now open to unlimited equity participation by foreigners. Foreign investors now have full access to local credit markets, which has facilitated access to credit from domestic financial institutions. Foreign investors who have incorporated their companies in Nigeria have equal access to all financial instruments. Some investors consider the capital market, specifically the Nigerian Stock Exchange (NSE), a financing option, given commercial banks' high interest rates and the short maturities of local debt instruments.

Sectoral restrictions

Most of the remaining restrictions to the entry of foreign investors in the country are concentrated in the oil and gas industry, in construction works and in the electricity sector. Laws also restrict industries to domestic investors if they are considered crucial to national security, such as firearms, ammunition, and military and paramilitary apparel. Apart from these particular sectors, there are very few *de jure* barriers to the entry of foreign investors in other areas of the economy. As the oil and gas sector does not fall within the scope of the current review, whose purpose is rather to look into means to ensure a sustainable diversification of the Nigerian economy, restrictions that apply specifically to this sector are not addressed in detail.

By virtue of the *Nigerian Oil and Gas Industry Content Development Act* 2010, specific rules on local content requirement govern the procurement of goods and services by entities operating in the oil and gas sector. Under this law, Nigerian independent operators also receive first consideration in the award of oil blocks, oil field licenses and oil lifting licenses. Local content plans must be introduced by oil and gas operators, subject to prior approvals by the Nigerian Content Development and Monitoring Board (NCDMB). A maximum of 5% of management position may be approved for management positions to be filled by non-Nigerians in oil and gas operations.

As for the construction sector, a bill was presented to the House of Representatives in the course of 2013 to reserve constructions works to Nigerian entities. The same year, the government announced local content measures in the electricity and communications sectors. The Nigerian Energy Regulatory Commission (NERC) has recently published draft Regulations and Guidelines on National Local Development in the energy sector, which would contain local content requirements in respect of goods, services and labour, as well as provisions on mandatory transfer of technology to Nigerian entities.

Lastly, Section 34-I of the *Public Procurement Act* supports a margin of preference for locally manufactured goods during public procurement. Activities covered under the *Coastal and Inland Shipping (Cabotage) Act* No. 5 of 2003 are also subject to specific sectoral restrictions.

Outside of the oil and gas sector, there is no restriction on key personnel employment. Manufacturing companies sometimes must meet local content requirements. Expatriate personnel do not require work permits, but they remain subject to “needs quotas” requiring them to obtain residence permits that allow salary remittances abroad. Authorities permit larger quotas for professions deemed in short supply, such as deep-water oilfield divers. US companies often report problems obtaining quota permits. There is no *de jure* minimum capital requirement for foreign investors, but investment with foreign equity participation must in practice be of a minimum of Naira ten million minimum share capital.

Yet the official position of the government remains very liberal and no direction towards more protectionism has been publicly expressed. Nevertheless, some stakeholders are currently reflecting on the opportunity to increase local content in more sectors in order to further empower Nigerian business. Local content requirements may discourage new investment, increase production costs and distort markets. Alternatively to the introduction of local content elements in more sectors, the government could usefully consider fostering its SME policy through market based strategies, which might more efficiently benefit to local contractors and suppliers.

Legal protection of investment in the NIPC Act

In addition to the regulation and promotion of investment, the *NIPC Act* is, to a lesser extent, an investment protection legislation. It provides for the most important guarantees that investors regard as a prerequisite condition before taking the decision to invest. It protects against unlawful expropriation, and gives a guarantee of free transfer of funds. In the event of a dispute arising between a foreign investor and the government, the Act also opens access to international arbitration forums. It sets out the basic principles of a non-discriminatory access to both foreign and domestic investors, although it does not explicitly embody the principle of National Treatment. But other core protection standards that are commonly found in countries' investment laws and that characterise an open and secure legal framework for investment are absent from Nigeria's investment related legislations, in particular the *NIPC Act*.

Protection against expropriation

The main protection clause provided by the law is the protection against unlawful expropriation. Article 25 states that no enterprise shall be nationalised or expropriated by any government of the federation. Expropriation of an enterprise may be decided by the government only if it is "in the national interest, or for a public interest under a law that grants expropriation against the payment of a fair and adequate compensation". Article 25 also grants judicial determination of the amount of compensation to which the investor is entitled. In accordance with international customary law standards, the law provides that the compensation should be paid without delay.

The guarantee provided by the law seems to also cover indirect expropriation, as it states that "no person who owns, whether wholly or in part, the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other person". Such clause appears to refer to events when the government interferes in the benefits of the investor's property rights by introducing regulatory measures that convert into a taking of property, without any formal transfer of property. This wording is however too vague to provide a strong and firm protection against indirect expropriation. It would be crucial for the authorities to better protect investors against expropriation that result from the enactment of measures of confiscatory nature. Indirect expropriations are indeed the most common form of property taking and are perceived as the most important political risk in host countries by prospective investors.

For promotional purposes, to reassure investors about the fact that Nigeria is a safe investment destination, it might thus be relevant for the government to improve the legal protection against expropriation. It does not mean, however, that the government should legally commit not to expropriate. The government of course should preserve its sovereign right to expropriate or to take fiscal, monetary, or environmental measures that may deter the investor's right to benefit from his property right. But countries often commit to protect investors against the risk of abuse by including indirect expropriation within the guarantee that there will be expropriation or measure having a similar effect only for public purpose, on a non-discriminatory basis, and against the prompt payment of adequate and effective compensation. The government could therefore usefully consider reinforcing and clarifying the wording of the expropriation clause contained in the *NIPC Act* to send a strong reassuring signal to investors that they are protected against confiscatory measures and that compensation shall be granted under due process of law. It could notably define more clearly what constitutes a "national interest" purpose that may justify expropriation decisions (see Section 2.2).

Absence of a Fair and Equitable Treatment guarantee

There is no Fair and Equitable Treatment (FET) accorded to investors. This standard, which in practice is most important to foreign investors, is sometimes contained in investment laws of host countries to address legitimate expectations of foreign investors and incorporates principles of transparency, good faith and guarantees against denials of justice.

Should Nigeria amend its investment legal regime and strengthen the standards of protection granted to investors, it might wish to consider embodying the FET principle to send a positive signal to foreign investors that it provides a safe and enabling investment framework. The authorities should however be well aware that, although the inclusion of the FET standard is widely seen as a good practice, it might however be a risky provision to include as there is no clear definition, in customary international law and in arbitral jurisprudence, of what the FET standard encompasses, and that the notion still has vague boundaries. It remains unclear whether the concept of FET requires treatment beyond what is required by the customary international law minimum standard of treatment.[2] There is however a consensus on the fact that the FET standard incorporates principles of due process of law and of non-discrimination. In the event Nigeria wishes to include a reference to this principle in its investment legislation, it would be well advised to define clearly the scope and content of such concept, in order not to give an excessive leeway to arbitral interpretations of its legal provisions.

Inserting a principle of National Treatment

Likewise, the *NIPC Act* does not explicitly refer to the principle of National Treatment (NT), which ensures that Nigeria, as a host country, would give foreign investors a treatment at least as favourable as the treatment accorded to its domestic investors. Since Nigeria's regulatory framework is already very open to foreign investment and provides a high degree of competitive neutrality between national and foreign investors, it could be relevant, for promotional purposes, to publicise and highlight the openness of the regime by clearly embodying a principle of National Treatment in the legislation. Including this standard would give foreign investors further guarantee that they are protected against distortions in competition. Should the NT principle be affirmed in the law, it would of course come with specific exceptions, such as sectoral limitations or exceptions related to Regional Economic Integration arrangement that provide better treatment to specific partner countries (the so-called "REIO clause").

The insertion of the national treatment principle, which is defined in the National Treatment Instrument of the OECD *Declaration on International Investment and Multinational Enterprises*,[3] as well as in the OECD *Policy Framework for Investment*, as the commitment of a government to treat investments controlled by nationals or residents of another country no less favourably than domestic investments in like circumstances, signals that the government is committed to provide a predictable and non-discriminatory framework to prospective investors. For example, the Lao P.D.R. *Investment Promotion Law*, which governs both domestic and foreign investment, provides that "Investors have equal rights to invest and to have their benefits protected under the laws and regulations of the Lao P.D.R. and international treaties to which Lao P.D.R. is party" (Article 60). The effect of the national treatment standard is to create a level-playing-field between foreign and domestic investors in the relevant market.

No country applies unequivocally the national treatment principle; the scope of the principle, where provided, is always circumscribed by a list of exceptions that must be transparent and clearly defined. The OECD PFI identifies three types of exceptions and restrictions to the National Treatment principle: general exceptions (e.g. protection of national security); subject-specific exceptions (e.g. intellectual property, taxation provisions in bilateral tax treaties); and sector-specific exceptions (e.g. specific industries, such as financial services and transport).

Dispute settlement provision

NIPC Act also contains a dispute settlement clause that governs disputes arising between the authorities and both domestic and foreign investors. By virtue of Article 26 of the Act, investors have the right to resort to conciliation and arbitration to settle any investment dispute against the Nigerian authorities.

The law requires the parties to attempt to settle their dispute through amicable ways before going to arbitral tribunals. In the event the dispute is not amicably settled, domestic investors may bring their case before a domestic arbitration tribunal as specified in the *Arbitration and Conciliation Act*, while foreign investors that are protected under the umbrella of a bilateral investment treaty may benefit from its dispute settlement provision, which usually gives access to international arbitration forums. If the investor does not benefit from the provisions of a particular investment treaty, the parties may mutually agree to settle their case under any national or international arbitration mechanism. The law therefore does not encompass a unilateral consent to arbitration, which is a rather cautious and sensible approach as arbitration can potentially lead to costly awards and proceedings.

It is however questionable whether the commitment to go to international arbitration as provided for in Nigeria's bilateral investment treaties (BITs) gives, in practice, access to international arbitration to foreign investors, as almost half of those BITs have not yet been ratified and thus do not have any legal effect. Nigeria needs to ensure that the BITs referred to in Article 26 (1) a have entered into force in order to give full legal effect to the dispute settlement provision in the *NIPC Act* (see Section 2.4).

Need for more transparent, coherent investment policies and laws

The current lack of clear, medium to long-term investment strategy at national level is mirrored at the legal level, with provisions governing investment being spread across various laws. Investors often complain about the difficulty to access laws that regulate their operations and to have clear information on the current status of laws: whether it is under revision, and if so, at what stage of the amendment process the bill is. These difficulties seem to reflect the current weakness of the co-ordination and communication between the relevant ministries and stakeholders. Policy instability has also been identified as one of the most problematic factors for doing business in Nigeria in the 2013-14 *Global Competitiveness Report*.

To address the complexity and lack of legibility of its investment regime, and although it is already endowed with laws that by and large provide an investment friendly legislative framework, Nigeria could usefully consider designing an all-encompassing investment law, or a compendium of investment-related laws. A new, broader investment law or, alternatively, a code grouping all laws relevant to investors' operations, would not only be a useful tool for clarification, but also for promotion purposes. This would also reflect the strategy of the government to prioritise investment in specific sectors of its economy. This would help to achieve coherence not only among sectoral regulations, but also between the broader economic development strategy and the legislative instruments that implement Nigeria's policy objectives. Another appropriate option that the government could envisage would be to issue a comprehensive investment policy statement, which a necessary first step to improve consistency and transparency of investment-related policies and strategies in the country.

The government has expressed its willingness to design an all-encompassing document that would group all investment regulations and thus reinforce the transparency and coherence of the legislative framework. The Ministry of Justice, within which the Legal Drafting Department is in charge of amending the laws, is cognizant of a lack of legal predictability in the investment legal landscape. Some laws, such as on bankruptcy, on land matters as well as on arbitration, would need an update and are said to be currently amended. It is however sometimes difficult to know what laws are effectively being revised, and which ones have been in a revision process for years with no tangible results.

To address the issue of a fragmented and sometimes outdated legal regime for business and commercial activities overall, the Ministry of Justice is considering issuing a compendium of laws that would gather under a single instrument all laws and regulations relevant to the operations of business and investors. A first step, before undertaking such project, could be to improve the readability and clarity of the legal framework for both government members and investors, be they already established in Nigeria or merely at a prospecting stage. In particular, it would be useful to undertake a review of all on going amendments to get a clear picture of where draft bills currently stand, which in turn would allow for a better awareness, among relevant bodies' staff, about the legislative and institutional framework in force. Only then would it be possible to reap the full benefits, in terms of promoting and attracting investment, of the existing legal landscape. More generally, it is important for the government to make efforts towards further regulatory transparency, which includes consultation with relevant parties, simplifying the legislation and keeping track of all legal changes within a centralised register of law (see Box 2.2). FMITI has taken first steps to address such impediments: its legal directorate recently set up a taskforce, with the assistance of DFID, to undertake a review of all on-going legal amendments.

In parallel with the planned initiative at the Ministry of Justice, the NIPC has drafted a National Sector Specific Investment Policy and Incentive Document**,** which has not been publicly released yet and which aims at

Box 2.2. **Options for implementing regulatory transparency**

- Consultation with interested parties.

The widespread use of consultations reflects a growing recognition that effective rules cannot rely solely on command and control – the individuals and organisations, including from civil society, who have a stake in the rules need to be recruited as partners in their implementation. Consultation is the first phase of this recruitment process. It can also generate information and ideas that would not otherwise be available to public officials. Consultation mechanisms are becoming more standardised and systematic. This enhances effective access by improving predictability and outside awareness of consultation opportunities. There is a trend toward adapting forms of consultation to the stage in the regulatory process. Consultation tends to start earlier in the policy making process, is conducted in several stages and employs different mechanisms at different times. Problems have been noted as well. For example, consultation fatigue – where some organisations are overwhelmed by the volume of material on which their views are requested – has been noted in several countries.

- Legislative simplification and codification

There is increased use of legislative codification and restatement of laws and regulations to enhance clarity and identify and eliminate inconsistency.

- Plain language drafting

OECD work has documented that twenty-three member countries require the use of "plain language drafting" of laws and regulation. Sixteen member countries issue guidance materials and/or offer training programmes to help with clearer drafting.

- Registers of existing and proposed regulation

The adoption of centralised registers of laws and regulations enhances accessibility. OECD work documents that eighteen member countries stated in end-2000 that they published a consolidated register of all subordinate regulations currently in force and nine of these provided that enforceability depended on inclusion in the register. Many countries now also commit to publication of future regulatory plans.

- Electronic dissemination of regulatory material

Three quarters of OECD countries now make most or all primary legislation available via the Internet.

- Review of administrative decisions.

Transparency in the implementation or enforcement of rules and regulations is as important as the transparency of the rules and regulations themselves. Clear criteria and transparent procedures for administrative decisions, including with respect to investment approval mechanisms, and their possible review can serve to bolster confidence in the regulatory framework for investment.

Source: OECD (2006), *Policy Framework for Investment: A Review of Good Practices*, OECD, Paris (based on World Bank, *World Development Report 2005*), *www.oecd.org/investment/investmentfor development/policyframeworkfor investmentareviewofgoodpractices.htm*.

enhancing transparency and consistency in prevailing laws, regulations, and sectoral incentives. For such policy initiative efficiently to provide a coherent view of investment, NIPC would need full support and backing from FMITI, which has, over the past few years, greatly reinforced its role in the investment policy making. Only then could the document facilitate substantial amendments towards further harmonisation. Lastly, there are on-going plans to amend the *NIPC Act* itself. Here again, sound synergies between NIPC and FMITI, as well as a good co-ordination between both NIPC and FMITI and line ministries will be required for the future amendment process to prove successful. To avoid any unnecessary overlap of responsibilities, it is advisable that FMITI takes a clear lead in the formulation of investment policies.

Planned amendments of the NIPC Act

The Act, like a significant number of laws related to investment activities, is expected to be amended in the near future. The revision of the Act would aim to improve the consistency of the overall legal framework, which, as it currently is, does not necessarily suffer from poorly drafted provisions, but rather from a lack of readability and coherence. The umbrella document would not only gather legal provisions governing the protection and regulation of investment activities and protect them against potential policy reversals, but is expected to also group, after assessing their impact, all investment incentives that are currently scattered across a number of sectoral regulations. The authorities could also use the drafting exercise to redefine the allocation of responsibilities across all relevant agencies and ministries.

If the *NIPC Act* were to be effectively reformed, as announced by government officials, the authorities would have to clearly identify governmental priorities; namely, whether the draft law is enacted for promotional ends, or if the need is rather to strengthen the legal guarantees given to investors, in particular with regards to the non-discrimination principle.

There is of course no single formula to draft a good investment law and different options have proven to be equally successful in providing a secure legal framework for investors and in promoting countries as attractive investment destinations. Some countries do have two distinct laws to govern FDI and domestic investment separately, while other have broader, all-encompassing investment laws covering both FDI and domestic investment under the same regime. There is however a trend towards further convergence of the FDI and domestic investment regimes; and an increasing number of countries now enact more holistic investment laws. This option is often perceived as being more likely to treat foreign and domestic investment on an equal footing, based on a principle of non-discrimination. On the other hand, enacting a dedicated FDI law can efficiently act as a promotional tool by sending a strong positive message that the government is willing to attract and protect foreign investors.

Likewise, some investment laws address not only the regulation and protection of investment, but also the promotional dimension of the investment regime. Such laws would typically provide for the institutional framework of investment promotion agencies and would contain investment incentive provisions. This approach is usually regarded as more likely to provide a simple and clear regime for investment, from the regulation of their entry to the guarantees, the incentives and after-care services provided to established investments. But the risk is also greater, when investment promotion provisions are included within the investment law, to water down the core provisions of the laws – namely, legal provisions that provide investors with guarantees against unlawful expropriation and access to dispute resolution systems. Therefore, it might be appropriate to consider reform of the *NIPC Act* by splitting out legislation that provides the institutional set up for NIPC and legislation that provides the regime for investment separately.

Lastly, the existence of an investment law is not in itself a guarantee of a sound investment policy, and some of the most attractive FDI destinations in the world do not have a dedicated investment law (Brazil, US, Singapore, France, like approximately 50% of OECD countries, do not have an investment law and instead regulate investment through various national laws).

For example, Malaysia, whose investment legal framework is widely recognised as sound, protective and transparent, has no comprehensive law governing foreign direct investment and containing general principles for foreign participation in local business. This policy choice has given the government maximum regulatory space to apply its affirmative action policy and to screen FDI to suit economic needs at a given time. In the absence of an all-encompassing foreign investment statute, FDI is regulated under sector-specific legislation. Protection of investors is granted in the Constitution and through ratified bilateral investment treaties. The regulation of FDI includes a broad *Promotion of Investment Act*, which provides a spectrum of incentives to attract FDI, as well as sector-specific legislations.

Enacting an investment law that focuses on investment protection standards and that apply to all sectors may be useful in so far as it improves the clarity of the legal framework and strengthen the protection of investment operations. Having one standing alone piece of legislation is also useful in that it is easier to amend and to implement than various dispersed narrower laws and that it more immediately reassures prospective investors about the security of investment and property. Provided that it does not add another, unnecessary layer of regulation, it can also enhance transparency and consistency of the legal framework.

Need to further clarify the allocation of responsibilities within the implementing institutional framework

The other priority for Nigeria is to improve the implementation of the existing regulatory framework, in particular through the strengthening and rationalising of the various implementing institutions throughout the entire array of investment-related areas that are addressed in this review. The government should make further efforts to minimise turf and ownership issues. There are dispersed decision points, which multiply exponentially the possibility for delays in the reform process. The federal government would also be well advised to undertake further efforts to disseminate better knowledge of its policies and strategies among parastatal agencies and Ministries. There seems to be a lack of knowledge, among stakeholders in Ministries and governmental bodies, about the existing laws and regulations and the on-going amendments, which reflects a broader lack of consistency in the overall investment strategy. To address this, the government could useful issue a comprehensive investment policy. This would help ensuring more consistency across investment-related legislations, as well as increasing knowledge of what the government's investment policy position is.

Institutional competencies to design investment policies are fragmented among the administration and make the overall framework not easy readable. This problem seems to be widely recognised, in the government, as one of the main hurdles to a more effective investment policy framework. There appears to be overlapping ownerships of reform processes. The Federal Ministry of Industry, Trade and Investment (FMITI) co-ordinates the design and supervises the implementation of the policy. NIPC participates in the design, facilitates and implements relevant policies. The National Planning Commission (NPC) is involved in the design, monitoring and evaluation of policies, while the Ministry of Justice is in charge of translating investment policies into laws. This configuration seems to create, in practice, some turf disputes across responsible bodies.

In particular, discussions with stakeholders revealed some confusion in the allocation of tasks between NIPC and FMITI. Although the Ministry is formally mandated to map out the reform of the *NIPC Act*, it seems to be unclear what institution leads *de facto* the reform process and concerns were raised over an excessive ownership of the Act by NIPC and over conflicting roles and responsibilities among agencies and ministries, which appear to be exacerbated by the operation of OSIC. This appears to be due to a lack of clear, long-term investment policy and strategy within FMITI, which has, according to government representatives, only recently taken over the design of a coherent, longer term investment and trade policy. This reflects a broader issue of weak institutionalisation of the economic reform process: in the absence of more empowered institutions, reforms currently need to be individually supported by political personalities in order to be carried to a successful conclusion. More generally, the reformed laws can only be as good as their implementing institutional frameworks, which were repeatedly mentioned as being one of the greatest structural obstacles to an efficient reform of the overall investment climate.

The government reports that it maintains regular dialogue with the Organised Private Sector to ensure adequate buy-in into policy and regulation review or amendment through various platforms such as National Council Meetings and Presidential Dialogues which are all open to stakeholders and foreign investors. However, institutional capacity gaps and overlaps and a lack of standardisation of the administrative work stream seem to constantly create delays in the reform processes. The National Council on Industry, Trade and Investment, steered by FMITI and gathering State Ministries of Commerce, Industry and Investment, parastatals, development partners and private sector representatives, works at sustaining the political momentum for setting up a pragmatic sectoral investment policy framework. The Council acknowledges the absence of co-ordination between the Ministry and some of the parastatals involved in the reform process and called, in its April 2013 meeting, for further harmonisation, standardisation and streamlining of policies and strategies formulated under the umbrella of FMTI to improve the trade and investment environment.

Before undertaking substantial legal and regulatory amendments, the government might thus wish to consider streamlining and strengthening the institutional framework that supports the implementation of investment laws and sectoral strategies. For example, in the event of an in-depth reform of the *NIPC* Act, the allocation of responsibilities between the NIPC and FMITI throughout the drafting process should be made clear, with the ministry having a strong ownership of the outline of the reform.

2.2. Steps taken to improve processes of land ownership registration and other forms of property

Secure, transferable rights to agricultural and other types of land and other forms of property are an important pre-requisite for a healthy investment environment and an importance incentive for investors and entrepreneurs to shift into the formal economy. Well-defined and secure ownership, including effective register of what constitutes public properties, encourages new investment and the upkeep of existing investments. Land titles, for example, give an incentive to owners to promote productivity enhancing investments. Reliable land titling and property registrars also help individuals and businesses to seek legal redress in case of violation of property rights and offers a form of collateral that investors can use to improve access to credit, which is one of the main obstacles to new investment, especially among small and medium-sized enterprises.

Need for strengthening the current land regime

The issue of access to land is identified by the investment community, in particular SMEs and foreign companies, as one of the most significant constraints to doing business in Nigeria. Although the 1999 Constitution states that all citizens have the right to acquire and own immoveable property anywhere in Nigeria, the main law governing access to land is the 1978 *Land Use Act* (LUA), which nationalised all land in Nigeria. The Act provides that all land in each State of the country is vested in the State governor, thus abolishing private ownership of land. It was enacted by the military government with a view to simplify and streamline the previous land regime composed of a multiplicity of customary and statute laws, which were deemed to be a constraint to agricultural development. LUA aimed at standardising rules governing land use and ownership and ensuring easier access to land for government. The purpose of the nationalisation was to maximise the productive use of land by instituting a system of certificates of occupancy.

LUA recognises two categories of occupancy rights: statutory occupancy rights, and customary rights of occupancy. Statutory rights of occupancy are granted for a definite term set out in the certificate and are transferrable with the prior consent of the governor. Recipients of statutory occupancy rights must pay a rent fixed by the State. As for customary occupancy rights, they may be granted by local governments in any non-urban land area for a 50-year term, renewable once. The Act also mandated State Governors to control and manage land allocation in urban areas, while rural land is under the responsibility of various local governments. Urban land is administered by the Land Use and Allocation Committee under the aegis of governors' offices; and a Land Allocation Advisory Committee supports local governments for the management of land in rural areas.

The Act provides that the Governor is empowered to grant statutory certificates of occupancy for a definite term to any individual for any purposes and rights of access to land under his control. It sets out the maximum area of undeveloped land that individuals can hold: no individual can hold more than 0.5 hectares of undeveloped urban land, 500 hectares of non-urban land, or 5 000 hectares of grazing land. Transfer of customary rights requires governor's or local government's approval. Consent of the governor is also required for the transfer of a statutory right of occupancy through mortgage or assignment. In certain circumstances, prior consent of the local government or of the governor is also required for the transfer of customary rights of occupancy. In practice, consent of the state governor can take a very long period of time to be obtained, from weeks to several years, be very expensive and subject to corruption.[4]

The government is fully cognisant of the fact that the 1978 reform failed at modernising the land market and rather impeded its development. LUA has never been fully implemented: very few, among the population, are aware of the application of the LUA and seek to secure their rights through the formal titling system. Since 1978, no more than 10 000 certificates of occupancy were issued by State governments[5] and the overwhelming majority of lands in Nigeria are not yet registered. The huge majority of the population, even in non-rural areas, lives in informal settlements and customary law remains a prevailing characteristic of the land regime in Nigeria. The fact that any transfer of land or mortgages of property subsequent to the acquisition of a certificate of occupancy still require the approval of the governor has been identified as a major drawback of the Act.[6]

Delays in the establishment of Land Use and Allocation Committees, which were to be created by virtue of the LUA, as well as in the issuance of certificates of occupancy have impeded the development of an efficient land market. Another impediment is that heavy fees are often imposed for obtaining governors' consent for assignment or mortgaging. Governors' power to revoke any right of occupancy over land for "overriding public interest" and to secure land transactions has been repeatedly used in an arbitrary manner.

Land disputes are extremely frequent in Nigeria, be it over access to natural resources in the Niger delta, on partition of rural land, or in urban areas between residents of informal settlements and the police executing eviction orders. The nationalisation of land following the enactment of LUA and the resulting increased number of land evictions may actually have increased the number of disputes over land.

States High Courts have jurisdiction over matters relating to statutory rights of occupancy, including the determination of the persons entitled to compensation payable for improvements of land. However, Section 47 of LUA prohibits courts from inquiring into any issue regarding the amount or adequacy of any compensation paid or to be paid under the Act. Disputes over customary rights of occupancy can be brought before both formal and customary courts, except for those which are not in relation with any provision of the LUA, in which case they can only be resolved before customary tribunals. Backlogs of cases, coupled with a lack of trust of the public in the court system are major obstacles to the efficient resolution of land disputes. Securing land ownership requires prompt and credible enforcement of land rights when disputes occur.

The country stands at 185 in the World Bank 2014 Doing Business ranking of 189 economies on the ease of registering property, with no significant progress over the past years. According to the World Bank, it takes an average of 86 days and costs more than 20% of the property value to register its immoveable property in Nigeria.

A large share of land property is not formally registered and informal titles cannot be used as security in obtaining loans, which seriously impedes business development opportunities, especially for SMEs. The vast majority of land rights are still transferred in informal markets. The poor record of land registries and the absence of a detailed cadastre foster the current deficiencies in the identification of available land parcels. As a result, fraudulent land titles are sometimes issued on the same land.

The Small and Medium Enterprises Development Agency (SMEDAN) has also identified the legal environment for land titling as one the priority reform areas of its SME policy. The inefficiency of the titling system affects companies' ability to take securities on their land properties and thud deters their access to credit. As a result, very high interest rates apply to credit. Governor's consent is required to be allowed to take collaterals on lands, an additional procedural burden that affects access to credit, especially for SMEs.

The government has initiated programmes to modernise land registration and administration

Three decades after nationalising land through enactment of the LUA, the government of Nigeria, like many other countries in the region, became aware of the need to undertake an in-depth land reform. The 2007 Seven-Point Agenda included land reforms to boost economic growth through the release of state land for large-scale investments operated by the private sector. The land reform, which will be supported and implemented at state government level, is one of the key pillars of the transformation agenda.

Among other national development strategies that focus on agricultural land issues, the National Economic Empowerment and Development Strategy (NEEDS) and Vision 20:2020 emphasised the need for streamlining the process for land access and transfer.

The government has also taken action to overcome the shortcomings of the current legislative framework through the establishment of a Presidential Technical Committee on Land Reform on 2009. The Committee is mandated, among several terms of reference, to assist state and local governments to establish a land cadastre, to identify individual possessory rights by undertaking a cadastral survey; and to establish an arbitration mechanism for the settlement of land ownership disputes. In collaboration with a wide range of stakeholders, it initiated a nation-wide awareness raising campaign to sensitise to the need for a modern land titling and registration system.

The Committee also drafted a new regulation to enforce the Systematic Land Titling and Registration (SLTR). According to its chairman, Prof. Adeniyi, the main goal of the dialogue initiated with state and local governments is to identify and address legal issues and other constraints that may impede the process of implementing the systematic land titling and registration and to bring in pragmatic solutions that will legitimise the process. One reform proposal already expressed by the Committee is the establishment of sectional land titling, which would enable several persons to get different types of certificates of occupancy from the same land parcel. In the same reform move, President Goodluck Jonathan recently announced the establishment of a National Land Depository that will ensure that all land parcels are properly documented.

Efforts are also underway to modernise the land registration and cadastral systems at State level: all States, including FCT, have been encouraged to establish Geographic Information Management System (GIS) based on the Spatial Data Infrastructure. Already the FCT and Lagos have deplored this system, while other states are already keying-in into the system.

The creation of a National Land Reform Commission that would supersede the Committee is also being considered by the government to maintain the political momentum needed for the implementation of the land reform agenda. To this end, a National Land Reform Commission Bill has been prepared and is expected to be re-presented before Parliament, after a first failed attempt to amend LUA in 2010. The reform of the legal framework relating to land matters has indeed been particularly challenging, partly because of the incorporation by reference of the Land Use Act into the 1999 Constitution. This makes it difficult to modernise the land regime as it requires a constitutional amendment to change the current law.

Although the modernisation of the land administration belongs to the state governments, the federal government will have the responsibility to push the reform process forward and to ensure quick enactment of the draft land bill to further secure land ownership. Among other reform efforts that the government is already fully aware of, it will be crucial to give strong emphasis to improving the land dispute resolution system. Full computerisation of the land titling system will also be needed to efficiently address the endemic problem of fraudulent titling. Land reform requires a full set of measures, including strengthening of the legal and institutional framework, improving the registration system, and a strong governmental commitment to project implementation (see Box 2.3).

Box 2.3. **Thailand's 20-year programme to title rural land**

In 1982, the Thai government began a 20-year project to title and register farmland throughout the kingdom. The aim was to enhance farmers' access to institutional credit and increase their productivity by giving them an incentive to make long-term investments.

Just over 8.5 million titles were issued during the life of the project. Along with those issued outside the project, the number of registered titles increased from 4.5 million in 1984 to just over 18 million by September 2001. Studies conducted during the project show that it met both its objectives: titled farmers secured larger loans on better terms than untitled farmers, and productivity on titled parcels rose appreciably.

The success in Thailand is attributed to several factors;

1. There was a clear vision for the project, a long-term plan to achieve it, and a commitment by the government and key stakeholders to project implementation.
2. A strong policy, legal, and institutional framework was in place for land administration.
3. The project built on earlier efforts to issue documents recognising holders' rights to their land.
4. Registration procedures developed by the Department of Lands were efficient and responsive to public demand.
5. The public had confidence in the land administration system and actively participated in the reform process.
6. The interests that can complicate projects in other countries – public notaries, private lawyers, and private surveyors – were not present.

Source: OECD (2006), *Policy Framework for Investment: A Review of Good Practices*, OECD, Paris (based on World Bank, *World Development Report 2005*), *www.oecd.org/investment/investmentfordevelopment/policyframeworkforinvestmentareviewofgoodpractices.htm*.

2.3. Protection of intellectual property rights

Intellectual property rights give businesses an incentive to invest in research and development and ultimately lead to the creation of innovative products and processes. They also provide holders of such rights with the necessary confidence to share new technologies, including in the context of joint ventures.

The intellectual property rights protection instruments used by governments to encourage investment in research and development include patent and copyright laws. Their effectiveness in terms of encouraging investment in innovative activity depends on how well the rights are enforceable and enforced. Efforts to curb non-compliance are therefore an important feature of any intellectual property regime. As the same time, the intellectual property rights regime needs to strike the right balance between society's interests in fostering innovation and in keeping the market competitive and in sufficient supply.

Nigeria has developed a fairly comprehensive, although not yet fully updated, legal framework for protecting intellectual property (IP) rights. Difficulties rather lie in the weakness and dispersion of the implementing institutions and in the lack of capacity to efficiently enforce the rules in the border police and the customs. The IP system is composed of a multiplicity of institutions that implement the IP legal regulatory framework and operate under various Federal Ministries. The upcoming amendments of the existing legislations, which establish the implementing institutions, could be a timely opportunity to review and rationalise the institutional infrastructure for the protection and promotion of IP rights, and to enforce plans to establish the Intellectual Property Commission. Despite several government announcements to amend IP laws over the past years, there is no clear intellectual property protection strategy yet. The government is however currently preparing a draft Trade Policy document that identifies, as one of the priority areas, the need to further protect IP rights in order to encourage innovation and further attract technologically advanced corporations (see Chapter 4). Box 2.4 below shows some of the benefits of strengthening IP rights for developing countries.

Box 2.4. **The benefits of intellectual property rights in developing countries: The shifting debate**

Traditionally, a limited number of developed countries in which a high proportion of the world's R&D was concentrated were the main "demandeurs" of strong intellectual property rights internationally. Four recent developments are helping to broaden acceptance of the benefits of intellectual property rights. First, more firms in more developing countries are now producing innovative products and thus have a direct stake in the protection of intellectual property rights. In Brazil and the Philippines short-duration patents have helped domestic firms adapt foreign technology to local conditions, while in Ghana, Kuwait, and Morocco local software firms are expanding into the international market. India's vibrant music and film industry is in part the result of copyright protection, while in Sri Lanka laws protecting designs from pirates have allowed manufacturers of quality ceramics to increase exports.

Second, a growing number of developing countries are seeking to attract FDI, including in industries where proprietary technologies are important. But foreign firms are reluctant to transfer their most advanced technology, or to invest in production facilities, until they are confident their rights will be protected.

Box 2.4. The benefits of intellectual property rights in developing countries: The shifting debate *(cont.)*

Third, there is growing recognition that consumers in even the poorest countries can suffer from the sale of counterfeit goods, as examples ranging from falsely branded pesticides in Kenya to the sale of poisoned meat in China attest. Consumers usually suffer the most when laws protecting trademarks and brand names are not vigorously enforced.

Fourth, there is a trend toward addressing intellectual property issues one by one, helping to identify areas of agreement and find common ground on points of difference.

Source: OECD (2006), *Policy Framework for Investment: A Review of Good Practices*, OECD, Paris (based on World Bank, *World Development Report 2005*), *www.oecd.org/investment/investmentfordevelopment/policyframeworkforinvestmentareviewofgoodpractices.htm*.

Nigeria's IP system is composed of a multiplicity of laws and regulations (see Box 2.5) that have not yet been fully brought in line with the WTO's Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement. The institutional framework for IP rights enforcement and administration is made of several bodies and the enforcement mechanisms are thus scattered among various institutions. For example, FMITI is responsible for the administration of industrial property system with the Trademarks, Patents and Design Registry, while Copyrights are administered by the Nigeria Copyrights Commission (NCC), under the aegis of the Ministry of Justice.

Box 2.5. Laws, decrees and international conventions related to intellectual property rights in Nigeria

Main IP laws and decrees:

- Copyright Act 1988
- Copyright (Amendment) Decree No. 42 1999 (1999)
- Copyright (Amendment) Decree No. 98 1992 (1992)
- Patents and Designs Act 1990
- Trade Marks Act 1965
- National Agricultural Seeds Decree 1992
- Patents and Designs (Additional Transitional and Saving Provisions) Order, 1972
- Copyright (Reciprocal Extension) Order, 1972
- Patents and Designs (Convention Countries) Order, 1971

Box 2.5. **Laws, decrees and international conventions related to intellectual property rights in Nigeria** *(cont.)*

These laws and decrees setting up the framework for IP Rights in Nigeria are complemented by a number of IP-related laws and implementing regulations.

As a Member State of the World Intellectual Property Organisation (WIPO), Nigeria has also ratified to following WIPO-administered treaties:

- WIPO Copyright Treaty
- WIPO Performances and Phonograms Treaty
- Patent Co-operation Treaty (May 8, 2005)
- Patent Law Treaty (April 28, 2005)
- Convention Establishing the World Intellectual Property Organization (April 9, 1995)
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (October 29, 1993)
- Berne Convention for the Protection of Literary and Artistic Works (September 14, 1993)
- Paris Convention for the Protection of Industrial Property (2 September 1963)

Nigeria is also in the process of adhering to the Madrid Agreement on international registration of marks, The Nice Agreement on the International Classification of Goods and Services for the Purposes of the Registration of Marks and the Hague Agreement on International Registration of Industrial Designs.

In addition, Nigeria has signed a number of IP-related multilateral and regional treaties, in particular the WTO TRIPS Agreement on Trade Related Aspects of Intellectual Property Rights and the Cultural Charter for Africa, entered into force in 1990.

Copyrights

The *Copyright Act* of 1988 is administered by NCC, within the Federal Ministry of Justice. Based on WIPO standards and US Copyright law, it protects literary, musical and artistic works and provides sanctions for the export, import, reproduce, exhibit, perform, or sell of any work without the permission of the copyright owner. Copyright owners register their works with the NCC. Nigeria's copyright statutes also include the National Film and Video Censors Board Act and the Nigerian Film Policy Law of 1993. As a signatory to the Universal Convention, Nigeria provides national treatment to all other signatories of the Convention.

Trademarks

Trademark, patent and design registration is administered by the Trademarks, Patents and Designs Registry of the Commercial Law Department of FMITI. Once conferred, a patent conveys exclusive rights to make, import, sell, or use a product or apply a process. The *Trademarks Act* of 1965 gives trademark holders exclusive rights to use registered trademarks for a specific product or class of products. There is no specific legislation protecting geographical indications and they are thus administered as part of the trademark law. Patent applications must be made by Nigerian residents only and foreigners must thus file their patent applications through local agents. The Trademarks, Patent and Designs Registry also acts as Tribunal to settle disputes arising out of the operation of the *Trademark, Act*. The Registrar has the mandate to adjudicate over contentious and non-contentious applications. In addition to the powers given to the Registrar, applicants can apply to the Federal High Court to exercise the powers of the Trademarks and Patent Tribunal.

Promotion of technology transfer

The *National Office of Industrial Property Act*, enacted in 1979, regulates the transfer of foreign technology to Nigeria and establishes the National Office of Technology Acquisition and Promotion (NOTAP) under the aegis of the Federal Ministry of Science and Technology to facilitate the acquisition, development, and promotion of foreign and indigenous technologies. The NOTAP Act also provides that adequate clauses should be contained in the technology transfer contracts to ensure the employment, exposure and training of the appropriate Nigerian staff. NOTAP states that due attention should be given, in all technology transfer contracts, to the employment of Nigerians with relevant scientific and technological background to collaborate with foreign experts with a view to gradually take over their responsibilities. Foreign investors are required to submit a comprehensive Training Programme and a Management Succession Programme when registering their technology transfer contracts.

In the context of the implementation of the National Policy on Technology development, NOTAP has progressively shifted from regulatory activities to a more promotional role. This new orientation aims at increasing the flow of technology into the country in order to strengthen industrial development and encourage domestic enterprises to acquire foreign technologies.

With the assistance of WIPO, NOTAP has established a patent information and documentation centre for the dissemination of technological information to end-users. The centre has a mandate to commercialise institutional research and development with industry. NOTAP has also established 30 Intellectual Property Technology Transfer Offices to facilitate the use of the IP system in research institutions and industries. In order to prevent abuse and to discourage patent monopolies and transfer of outdated technology, NOTAP may refuse to register such contracts under certain circumstances, notably if the price is "not commensurate with the technology acquired or to be acquired", or where the "transferee is obliged to submit to foreign jurisdiction any controversy arising out of the interpretation or the enforcement in Nigeria of such contracts".

Steps taken to improve the enforcement of IP rights and step up the fight against IP infringements

The authorities have reinforced efforts to fight IP piracy and counterfeiting of goods and artistic productions as well as to improve the effective promotion of IP rights. The authorities acknowledge a stringent issue of intellectual property rights infringement and violations. Representatives of the business community also raised concerns about a counterfeiting issue that particularly affects pharmaceuticals companies and cripples their ability to evolve on a level-playing-field basis. In response of this challenge, NCC launched in 2004 an anti-piracy initiative, the Strategic Action Against Piracy (STRAP), which focused on enforcement, public enlightenment and rights administration.[7] Steps have also been taken to reinforce the fight against counterfeiting of goods through the effective administration of the Trademarks, Patents and Designs Tribunal, the regular publication of IP Journals and the online publication of IP Applications. The effective protection and enforcement of IP is part of the FMITI's Key Performance Indicators (KPI) and of its Strategic Action Plan, which is intended to develop the Nigerian economy into a knowledge based economy and an IP hub in the West African region.

As part of this effort, the government has also initiated sensitisation campaigns. According to the Draft Trade Policy 2013, the government has started collaborating with WIPO to strengthen Nigeria's IP regime. In particular, it aims at improving the co-ordination and linkages among various IP-related sectors of the economy. These reform steps will culminate in the establishment of an Industrial Property Commission (IPCON). The creation of IPCON is expected to strengthen and streamline the administration of the IP system.

Other bills have been under preparation to bring Nigeria's IP system in line with the TRIPS Agreement, although the reform process seems to have been repeatedly delayed over the past decade. The planned amendments include new provisions on geographical indications and on service marks; new border measures for customs to seize counterfeited goods, and the protection of plant varieties.[8] The Act will also ensure full implementation of TRIPS flexibilities on access to food and medicines. There is indeed a strong political will to preserve Nigeria's policy space while ensuring high standards in IP protection. The draft bill is currently with the Federal Ministry of Justice for vetting before its presentation to the National Assembly. When enacted, the bill will centralise and improve the administration of IP in Nigeria, as well as ensure adequate funding and financial autonomy for IP institutions.

Officials also recognise a lack of capacity training and resources of enforcing institutions and a weak IP awareness in the administration, especially within the police. The NCC has thus taken action and has provided several training programmes, in collaboration with development partners, to strengthen staff capacity in IP-related institutions such as the Nigeria Customs, the Standard Organisation of Nigeria, the National Agency for Food and Drug Administration, the Police and the Federal Ministry of Justice. The government, in its 2012/13 budget, approved the setting up of an Industrial Property Academy, which will provide training in the field of industrial property. Training will extend to enforcing institutions such as the Standards Organisation of Nigeria, the Food and Drug Authority, the Police and the Customs services.

Patents and trademark enforcement remains weak and the enforcement measures are perceived as lengthy and inefficient by companies. Lack of budget, insufficient computerisation and low awareness of IP issues among regulatory agencies staff contribute to the weakness of IP rights enforcement. Companies do not seek IP protection because the current system is largely perceived as inefficient. In the past years however, the NCC and the police have initiated a few high profile actions against IP infringers. But judicial resolution of IP disputes and violations is rare and most cases remain unresolved. There is no specialised IP court within the judiciary and the government has not expressed any willing to establish an IP court.

Lastly, various programmes have also been established, over the past years, to meet IP rights needs of SMEs. SMEDAN is particularly active in this area and has identified the need to raise awareness on IP rights and to better protect SMEs IP rights as one of its priority actions.

2.4. Protection against expropriation

Protection against expropriation without fair compensation is one of the most crucial rights of investors and must be granted in the regulatory framework through provisions establishing transparent and predictable procedures.

Chapter IV, Section 44 of Nigeria's 1999 Constitution contains safeguards against arbitrary expropriation of assets provided for in a clear and detailed provision. It states that compulsory acquisition can only occur against the prompt payment of compensation and it provides a right of judicial or administrative review of the determination of the interest in the property and of the amount of compensation. Article 44 also provides that the guarantee against compulsory acquisition, which implicitly encompasses both direct and indirect expropriation, must not be construed to affect the application of tax regulations, the imposition of penalties, the execution of judgements, etc.

In addition to the Constitutional safeguard that applies to all in a non-discriminatory manner, Section 25 of the *NIPC Act* provides, as further detailed in Section 2.1 above, that *"no enterprise shall be nationalised or expropriated by any Government of the Federation; nor shall any person who owns, whether wholly or in part, the capital of any enterprise be compelled by law to surrender his interest to any other person"*. However, a provision in subsection 2 empowering the Federal Government to acquire any enterprise in the national interest or for a public purpose under an enabling law providing a) the payment of a fair and adequate compensation; and b) the investor's right of access to the court for the determination of his interest or right and the amount of compensation payable is likely to send wrong signals to prospective investors. As discussed above, the expropriation provision of the *NIPC Act* is in line with international customary law principles, but does not specify what constitutes an indirect expropriation (see Box 2.6). Likewise, it does not clearly define what constitute a national interest and a public purpose that justify takings of property.

Box 2.6. **Definition of an indirect expropriation: Canada's Model Foreign Investment Protection Agreement**

Annex A of the 2012 Canada-Czech Republic FIPA clarifies what indirect expropriation means:

1. The concept of "measures having an effect equivalent to nationalization or expropriation" can also be termed "indirect expropriation." Indirect expropriation results from a measure or series of measures of a Contracting Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
2. The determination of whether a measure or series of measures of a Contracting Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
   - the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Contracting Party have an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,
   - the extent to which the measure or series of measures interfere with distinct, reasonable, investment-backed expectations, and
   - the character of the measure or series of measures.
3. Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

Source: www.treaty-accord.gc.ca/text-texte.aspx?id=105128&lang=eng.

As for immoveable property and occupancy rights, Part V of the *Land Use Act*, which aimed at supporting the government in expropriating land, governs the expropriation of land rights by public authorities. It states that "*it shall be lawful for the state governor to revoke a right of occupancy for overriding public interest*" and details what "*overriding public interest*" means, both in the case of a statutory and of a customary right of occupancy. As for local governments, they can take any land for a public purpose, provided that it is a non-urban land, not subject of a statutory right of occupancy, not located within an area compulsorily acquired by the government, and not subject to specific mineral or mineral oil legislation. The *Land Use Act* defines "public purpose" as including: exclusive government use of general public use; development of industries and public works; economic, industrial, agricultural, urban, and rural development; and development for social services such as education. In the event of a revocation of right of occupancy, the holder and the occupier are entitled for compensation for the value at the date of revocation.

The Government of Nigeria has not expropriated or nationalised foreign assets since the late 1970s, but several expropriation cases have been brought before the Supreme Court for compulsory takings by State governments. Compulsory acquisitions of land have been reported to have increased following enactment of the *Land Use Act*. As of 2006, around two million people have lost their land properties to compulsory land acquisition, an important part of which have not received compensation.[9]

An additional layer of protection against unlawful expropriation is provided through BITs which contain, as further discussed below, stronger and more detailed protection against both nationalisation and expropriation. In addition, the country is a signatory to the Multilateral Investment Guarantee Agency (MIGA), which provides political risk insurance guarantees to private sector investors and lenders and protects investments against non-commercial risks, including expropriation.

2.5. Access to justice for investors and alternative dispute resolution

One of the building blocks of a country's investment climate is the ability of its judicial and legal framework to efficiently enforce contractual and property rights and to settle disputes.

Nigeria has a three-tiered legal system composed of English common law, Islamic law, and Nigerian customary law. Common law governs most business transactions, as modified by statutes to meet local demands and conditions.

There is a dual system of Federal and State Courts that merge into one system at the Appellate level. The Supreme Court sits at the pinnacle of the judicial system and has original and appellate jurisdiction in specific constitutional, civil, and criminal matters as prescribed by the Constitution. The Federal High Court has jurisdiction over revenue matters, admiralty law, banking, foreign exchange, other currency and monetary or fiscal matters, and lawsuits to which the federal government or any of its agencies are party. Small commercial disputes are settled at state court level.

The Federal High Court has jurisdiction over most investment related disputes, including those arising out of decisions rendered by the NIPC and State High Courts also have jurisdiction to hear most matters affecting the activities of foreign investors. Sections 25 and 26 of the NIPC Act give investors, both foreign and local, the right to go to domestic courts to challenge expropriation decisions and decisions on the amount of compensation, as well as investment disputes.

A fast track court deals with commercial cases where the amount at issue is above Naira 100 million.

Problem associated with bureaucratic bottlenecks and delay in proceedings

Nigeria ranks poorly in the 2014 World Bank Doing Business on dispute resolution matters; it is placed 136th for enforcing contracts, and 107th for resolving insolvency, losing a few notches compared to the past years. Although a non-discriminatory access to courts is granted to foreign investors, the judicial system is perceived by international observers as slow and ineffective, with unreliable dispute resolution mechanisms.

The court system suffers from a shortage of court facilities and lacks a computerised system for processing documents and managing the caseload. Time taken to obtain judgements undermines the proper functioning of the judiciary. This, combined with an issue of corruption and a lack of budget and staff within the court system, causes a widespread lack of trust in the court system from the business community. Some surveys show that firms perceive the judiciary as being sometimes partial and unable to efficiently enforce decisions. The adjudication process appears to be a lengthy and costly process (World Bank, 2009). Further efforts will be required to keep working on reducing the time it takes to resolve judicial cases, especially at the lower level of the court system.

Various modernisation initiatives have been undertaken to boost judicial efficiency

There are many ongoing reforms within the judiciary to improve the functioning of the judicial system, and the past year has witnessed progress in the time required to obtain judgment. Efforts to improve enforcement of judgments have been sustained through the establishment of the Independent Corrupt Practices Commission and the Economic and Financial Crime Commission. Although there is no division of the High Court that is formally specialised on commercial matters, capacity-building is provided to judges of the Federal High Court to bring them up to date on developments in commercial law.

The current legal framework for resolving insolvency cases is based on an outdated, unsuited law that dates back from the pre-independence period, and debtors and creditors rarely have recourse to them.

A draft *Insolvency Act* is about to be enacted by the National Assembly and is expected to substantially improve the insolvency regime in Nigeria, whose amendment had been stalled for years. The bankruptcy bill, which draws on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-border insolvency, will however only bear fruit if fully implemented.

Discussions with stakeholders have revealed some concerns about the lack of political momentum to push the reform of the legal framework for bankruptcy forward, although all stakeholders are unanimous on the urgent need to amend the current regime. The Drafting Committee already undertook a co-operative effort with the Federal High Court to seek ways to improve insolvency procedures, and started awareness building among courts and relevant agencies staff on the new law and its implementation.

Legal framework for international commercial arbitration

Partly as a consequence of the structural shortcomings of the judicial system, the business community is becoming increasingly aware of the availability of alternative dispute resolution means (ADR) and often prefers to settle disputes out of courts, mainly to shorten the timeframe for solving disputes.

Among ADR, arbitration is the most developed and commonly used dispute settlement mechanism in Nigeria and courts have maintained a pro-arbitration bias in their enforcement cases. Several arbitral institutions, among which many sector-specific bodies, operate within the Nigerian jurisdiction: the Regional Centre for International Commercial Arbitration based in Lagos; the Lagos Court of Arbitration; the Chartered Institute of Arbitrators, Nigeria Branch; the Society for Construction Industry Arbitration; the Maritime Arbitrators Association of Nigeria; and the Arbitration Commission of the International Chamber of Commerce Nigerian National Committee.

The *Arbitration and Conciliation Act* of 1988, which regulates both international and domestic commercial arbitration proceedings, provides for a unified legal framework for the settlement of commercial disputes by arbitration and conciliation. The Act created internationally competitive arbitration mechanisms, established proceeding schedules, provided for the application of the UNCITRAL arbitration rules or any other international arbitration rule acceptable to the parties, and made the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) applicable to contract enforcement, based on reciprocity. It allows parties to challenge arbitrators, provides that an arbitration tribunal shall ensure that the parties receive equal treatment, and ensures that each party has full opportunity to present its case. Notwithstanding the applicability of the Arbitration Act, some states, including Lagos state, have enacted their own arbitration law (see Chapter 6).

The Act thus provides an enabling legislative framework for alternative dispute resolution in Nigeria. Investors may include an arbitration clause in commercial agreements to consent to resolve future disputes by other means than court litigation. In line with the 1985 UNCITRAL Model Law on Commercial Arbitration, any arbitration agreement must be in writing, and the parties must determine in advance a number of criteria for qualifying arbitrators. In the event of a default of appointment, the Act provides guidance on how to select arbitrators. For the conduct of the proceedings, the parties can choose to follow the arbitration rules set out in the first schedule of the Act, the UNCITRAL arbitration rules and any other arbitration rules they have agreed upon. When the parties have not agreed upon the arbitration procedure, the law provides the procedure to be followed.

Although the provisions of the New York Convention have been fully incorporated into domestic law, the enforcement of both domestic and international arbitration awards remains a lengthy and difficult process, not so much for political reasons but rather because of backlog of cases due to the fact that the court system is not yet fully computerised. Despite these structural impediments, Nigerian courts seem to be fairly supportive of arbitral proceedings, and the on-going plans to amend the *Arbitration and Conciliation Act* to bring it in line with the 2008 UNCITRAL Model Law on International Commercial Arbitration should, if successfully completed, reaffirm Nigerian courts' support for arbitration. The judiciary has repeatedly demonstrated its pro-enforcement stance in relation to the enforcement of arbitration agreements and arbitral awards.

Investment arbitration is governed by the *NIPC Act*. By virtue of its Section 26, domestic investors may seek resolution of the dispute through arbitration under the terms of the *Arbitration and Conciliation* Decree of 1998, while disputes between foreign investors and government authorities should be settled by arbitration within the framework of any bilateral or multilateral agreement. All Nigerian BITs also provide for a right to recourse to international arbitration, either through the International Centre for Settlement of Investment Disputes (ICSID) Arbitration exclusively or, alternatively with ad hoc arbitration in accordance with UNCITRAL rules or any other mutually agreed upon rules. Consent to arbitration is unilaterally given to investors through BITs or through petroleum agreements' arbitration clauses. Therefore, section 26 of the *NIPC Act* does not amount to a self-executing consent to arbitration as it is conditioned by the existence of a BIT or an arbitration agreement. To avoid any ambiguity, Nigeria could clarify whether it wishes to give a unilateral consent to arbitration regardless of the investor's nationality or if a separate arbitration agreement is necessary.

Nigeria was the first African country to sign the ICSID Convention, which was given full legal effect in domestic law by the enactment of the *International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act*. The law provides that ICSID awards shall be enforced in Nigeria as if these were awards contained in a final judgment of the Supreme Court if a copy of the award is filed in the Supreme Court by the party seeking its recognition.

Nigeria has been involved in two ICSID cases so far, but both were discontinued before the tribunal rendered its award:

- *Shell Nigeria Ultra Deep Limited* v. *Nigeria*, ARB/07/18 related to a hydrocarbons concession and was registered in 2007. The proceedings were however discontinued by agreement of the parties in 2011.
- *Guadalupe Gas Products Corporation* v. *Nigeria* ARB/78/1 concerned the production and marketing of liquefied natural gas and was settled by agreement of the parties in 1980.

No publicly available arbitral award rendered under a BIT and involving Nigeria has been issued yet and the Nigerian domestic courts have not had yet been called upon to enforce an investment treaty-based arbitral award.[10]

2.6. International co-operation in the promotion and protection of investment

Nigeria has signed many bilateral investment treaties, but still needs to ratify many of them

Nigeria has entered into a number of bilateral investment treaties (BITs), also called Investment Protection and Promotion Agreements (IPPAs), with various countries in order to promote and protect FDI flows. As detailed in Box 2.7 below, Nigeria has BITs with numerous countries, less than half of

Box 2.7. **Bilateral Investment Agreements concluded and ratified by Nigeria as of June 2012 and those signed but not yet ratified**

Bilateral Investment Agreements concluded and ratified

- Finland, signed in 2005, ratified in 2007
- France, signed in 1990, ratified in 1991
- Germany, signed in 2000, ratified in 2007

Box 2.7. **Bilateral Investment Agreements concluded and ratified by Nigeria as of June 2012 and those signed but not yet ratified** *(cont.)*

- Italy, signed in 1990, ratified in 2005
- South Korea, signed in 1998, ratified in 1999
- Netherlands, signed in 1992, ratified in 1994
- Romania, signed in 1998, ratified in 2005
- Serbia, signed in 2002, ratified in 2003
- Spain, signed in 2002, ratified in 2006
- Sweden, signed in 2002, ratified in 2006
- Switzerland, signed in 2001, ratified in 2003
- Chinese Taipei, signed in 1994, ratified in 1994
- United Kingdom, signed in 1990, ratified in 1990

Bilateral Investment Agreements signed but not yet ratified:

- Algeria, signed in 2002
- Bulgaria, signed in 1998
- China, signed in 2001
- Egypt, signed in 2000
- Ethiopia, signed in 2004
- Jamaica, signed in 2002
- Russia, signed in 2009
- Turkey, signed in 2011
- Uganda, signed in 2003

which have been ratified by both parties. Nigeria is also currently negotiating a FIPPA with Canada. FGN signed a Trade and Investment Framework Agreement (TIFA) with the United States in 2000 and has expressed interest in negotiating a BIT with the US.

Nigeria has also ratified a number of regional economic integration treaties, which do not directly relate to the regulation and liberalisation of investment flows:

- The Constitutive Act of the African Union (May 26, 2001)
- The Treaty of the Economic Community of West African States (ECOWAS) (August 23, 1995)
- The Abuja Treaty Establishing the African Economic Community (AEC) (May 12, 1994)

- The Global System of Trade Preferences among Developing Countries (April 19, 1989)
- The Georgetown Agreement (formally establishing the African, Caribbean and Pacific Group of States, the "ACP Group") (February 12, 1976)

The International and Comparative Law Department of the Ministry of Justice is in charge of the negotiation of BITs, as well as of ensuring the consistency between international undertakings and national regulations. In addition, an "Inter-Ministerial Committee on Investment Promotion and Protection Agreements" has been set up a few years ago to undertake a reform in the design of BITs. Among other reform areas, the Committee ambitions to insert a new Preamble into future BITs in order to emphasise the co-operation and promotion aspect of the treaties. The committee also aims at improving the dispute resolution clause by providing for more available arbitration forums, in addition to the already existing possibility to resort to ICSID arbitration. The process is however now at a standstill and the Inter-Ministerial Committee seems not to be active anymore.

Like most African countries, Nigeria faces a serious problem of lack of ratification, which is combined with the issue of expired BITs that have not been renewed or replaced, thus creating legal loopholes in the investment regime. Slightly more than half of the BITs concluded by Nigeria have been ratified and thus have full legal effect. The low rate of ratified BITs is a well acknowledged issue among relevant stakeholders in Ministries. The National Assembly has continually been sensitised on the need to fast-track the ratification of bilateral and multilateral agreements, but the authorities do not seem to have yet taken a proactive stance to further ratify concluded treaties. It would be crucial to boost the ratification process of treaties that are currently deprived of any legal effect, to give them their full legal effect and thus allow the country to benefit from the conclusion of these treaties for attracting more, better quality FDI from partner countries. Box 2.8 below further discusses the benefits of BITs on FDI flows.

Box 2.8. **Do Bilateral Investment Treaties promote FDI flows?**

Investors face risks when investing abroad relating to the treatment they will receive in the host country. In this context, bilateral investment treaties (BITs) have emerged to promote certain standards of treatment for foreign investors. BITs usually provide for non-discrimination through National Treatment (NT), Most-Favoured Nation (MFN) and fair and equitable treatment provisions, as well as security for investors and protection against expropriation. BITs also usually contain provisions on the transfer of funds. Since the mid-1990s, the inclusion of Investor-State Dispute Settlement (ISDS)

Box 2.8. **Do Bilateral Investment Treaties promote FDI flows?** *(cont.)*

provisions in BITs has offered investors recourse to international arbitration to settle disputes with the host country.

To the extent that BITs succeed in making the investment framework and environment of signatory countries more predictable, stable and safe for investors, it is expected that they will help countries to attract more FDI. BITs might also lead to an indirect increase in FDI inflows if they are associated with good institutional quality or signal a country's commitment to reinforce property rights, not only for the treaty partner but for the entire international community.

Econometric studies have examined the relationship between BITs and FDI inflows. Viewed as a whole, results are contradictory, with some recent studies indicating that BITs encourage FDI and others finding little such evidence. Despite data and methodological limitations, these contradictory findings underscore both the importance and the difficulty of doing cost-benefit analysis of BITs (including potential impacts on fiscal positions and on policy making flexibility).

These studies have become more sophisticated over time, narrowing the scope of research to more carefully take into account the conditions under which BITs are expected to have a more pronounced economic effect. One dimension considered is the stage of development of signatory countries. BITs between developed and developing countries are expected more substantially to affect FDI flows than BITs between similar countries.[1] To some extent, this reflects the view that developing countries have difficulty making credible commitments often due to the lack of an enabling environment which increases the risks for investors. The evidence on the promotional effects of BITs on FDI inflows into developing countries is mixed, however, with a few studies finding little or no support whatsoever[2] and others finding a positive relationship. Reverse causation, i.e., the possibility that existing flows of FDI between countries actually lead them to enter into BITs, has also been considered but without any clear results.

Another question is whether BITs substitute for weak investor property rights, political risk, the quality of domestic legal system and respect for the rule of law, or whether they complement domestic institutions in attracting FDI. Governments might be tempted to enter into BITs as a shortcut to improved institutional quality, expecting that they will increase FDI, while refraining from engaging in costly and time consuming domestic reforms. Here again the empirical evidence provides little convincing guidance on the matter. Two studies reviewed here report that BITs sometimes substitute for poor institutional quality,[3] but others find that only countries with relatively strong domestic institutions and lower political risk are likely to benefit from BITs.[4]

Box 2.8. **Do Bilateral Investment Treaties promote FDI flows?** *(cont.)*

More recent studies have begun to take into account the differences in BIT provisions to assess whether BITs with stronger dispute settlement mechanisms or containing market access provisions potentially lead to higher FDI inflows. According to Berger et al. (2010a), BITs with stricter investment protection measures do not necessarily result in higher FDI inflows. With regard to market access rules such as National Treatment at the pre-establishment phase, Berger et al. (2010b) find that investors respond positively to BITs whether or not they contain such measures. The authors find that Regional Trade Agreements containing market access provisions play a significant role in promoting foreign investment.

More anecdotally, a recent survey of General Counsels of the top 200 US multinationals sheds light on why there is a possible loose link between BITs and FDI.[5] The vast majority reported that BITs are not an important consideration in the typical FDI decision and did not view BITs as particularly effective protection against adverse regulatory measures and expropriation. Many were also unfamiliar with BITs. Similar results have been found in larger surveys by the World Bank (2005) and Shrinkman (2011). Even if BITs might not influence investment decisions, they might influence how the investment is structured once the decision to invest is made. Sachs (2009) notes that treaty shopping cases, where a company invests in one country via a third country in order to benefit from a BIT between those two countries, suggest that at least some firms deliberately seek the protection of a treaty.

Despite these ambiguous findings on whether BITs help to attract FDI, developing countries continue to enter into BITs. Sachs (2009) argues that governments sign BITs in the belief that at the very least it will not harm FDI flows and because they are afraid that investors may avoid countries without them. They may also face pressure from companies that have already invested and that wish to protect their assets (including domestic enterprises investing in the other country) or may want to signal that they are willing to bind domestic policies to international agreements. To the extent that these agreements cannot be changed unilaterally, foreign investors will be more comfortable in investing.

Countries should be mindful, however, of the possible costs – monetary, political and reputational – associated with entering into BITs. Monetary costs include the legal costs of defence and possibly major compensation in the event that the country is found liable for treaty breaches, with taxpayers bearing the liability of such costs. A recent OECD survey (2012) shows that legal and arbitration costs for the parties to investor state arbitration have averaged over USD 8 million, with costs exceeding USD 30 million in some cases. Claims for compensation if the country is found liable can run into the

Box 2.8. **Do Bilateral Investment Treaties promote FDI flows?** *(cont.)*

billions of dollars. The reputational costs of noncompliance with BIT commitments can also be severe. Allee and Peinhardt (2011) find that BITs increase FDI flows to signatory countries but only if those countries are not subsequently challenged before ICSID. Upon becoming a respondent in an ICSID case, countries face large declines in FDI inflows regardless of arbitration results. If the case is lost the magnitude of the decline in FDI inflows is larger. The careful evaluation of the implications of a BIT, possibly by high-quality legal advisors from outside the government, should thereby be standard practice before entering into a BIT, as the costs associated with a bad treaty can be very significant, particularly considering that BITs generally remain in force for 10 years and usually continue to be in force for another 10 years after termination.

Signatories also reduce their policy-making flexibility. Signing a BIT implies partially sacrificing some domestic regulatory autonomy as any measure affecting foreign investors can eventually be challenged through the dispute settlement provision included in the BIT. Much depends on the exact treaty language in a BIT and on the ability of host countries to adopt public management practices that promote treaty compliance and, when facing an investor claim, to organise and finance an effective defence. Developing countries often face asymmetries in their bargaining power in BIT negotiations and may have problems implementing government-wide treaty compliance programmes. For these countries, legal risks associated with BITs may be considerable. Traditional BIT proponents that have recently been sued have to some extent rebalanced treaties to accommodate more policy space. BITs also favour foreign investors over domestic ones by providing foreign investors with the possibility of recourse to international arbitration for disputes, to which domestic investors do not have access.

Looking broadly at the full range of studies of the costs and benefits of BITs, BITs appear to play a secondary role in promoting FDI inflows after economic and institutional fundamentals. To the extent that the positive effects of BITs on FDI inflows are conditioned on economic and institutional characteristics, it might often be better to invest in reforms to improve economic fundamentals and institutional quality. Evidence of the positive effects of good institutional quality in attracting FDI inflows is rather consistent.[6] BITs should be considered as a complementary instrument to help sustain momentum for reform, by locking in domestic policies when appropriate, and perhaps even contributing to magnify the effects of economic and institutional policies in attracting FDI. Governments should not rely on BITs as a substitute for long-term improvements in the domestic business environment. Careful evaluation of whether a country is in a position to benefit

Box 2.8. **Do Bilateral Investment Treaties promote FDI flows?** *(cont.)*

from a BIT, given its institutional and economic characteristics, and the risks associated with such a treaty, should be a standard government practice before entering into BITs, as these conditions may determine the success of the BIT in achieving its proposed objectives.

1. Essentially, it is assumed that developed countries, which normally have predictable and stable domestic judicial systems, do not need BITs because investors in these countries feel sufficiently comfortable with the domestic regulatory framework. BITs between two developing countries are usually of a more symbolic nature for several reasons, but new trends in international investment might be change the importance given to these in future research work.
2. Hallward-Driemeier (2003), Tobin and Rose-Ackerman (2005), Aisbett (2007) and Yackee (2007).
3. Busse et al. (2008) and Neumayer and Spess (2005).
4. Tobin and Rose-Ackerman (2005 and 2010) and Hallward-Driemeier (2003).
5. Yackee (2010).
6. For instance: Anghel (2005), Daude and Stein (2007), Arbatli (2011), Walsh and Yu (2010), Battat, Hornberger and Kusek (2011) and Wagle (2011).

Ensuring full consistency between treaty provisions and domestic regulations

Treaties that have been signed by Nigeria so far reflect a repertoire commonly encountered in global BITs. They all provide for the core protection provisions that are seen as prerequisite guarantees by foreign investors. They encompass, as detailed in Table 2.1 below, principles such as the Fair and Equitable Treatment (FET), the Full Protection and security Standard (FPS), the National Treatment (NT), and the Most Favoured Nation treatment (MFN). Exceptions to the MFN and NT standards feature in these treaties with some variations in the content and scope. All the current treaties also give foreign investors access to international arbitration, with very few procedural requirements, in the event of a dispute arising against any government in Nigeria. Nigeria also has a model BIT which serves as a template for individual treaty negotiations.

Nigeria must make sure, when developing its treaty practice with partner countries, that its treaty provisions form a legal framework coherent with its domestic legislation and with the necessary preservation of legitimate national interests. Treaties should not be drafted out of context, drawing on other countries' treaty templates that might not be well suited to Nigeria's developmental policy purposes. When entering into treaty commitments, negotiators should make informed choices on what investment guarantees they provide. They should avoid creating conflict between national legislation and international obligations that supersede the domestic framework and should carefully check for the consistency of their domestic investment legislation with international commitments that would prevail over domestic legislation.

Table 2.1. **Main features of Nigeria investment treaties and potential options for treaty drafting**

Key provisions	General description	Salient features of Nigeria's BITs and recommendations
	Scope issues	
Investment	Defines assets to which the treaty applies, i.e. assets that qualify as protected investments. The scope of the treaty depends on the definition of the term "Investment".	Nigeria's BITs contain a traditional broad definition of investments covered by the treaty provisions. They provide for an open-ended, asset-based definition followed by a non-exhaustive list of covered assets. The material scope of the treaties is broad as it also extends to shorter-term investments that have a higher degree of liquidity and that do not involve management control by the investor. Taking a step further, Nigeria's model BIT even explicitly defines investment as "any kind of asset that an investor owns or controls, directly or indirectly [...]". This suggests that the Model BIT, which however does not apply per se to any particular investment, provides that indirect investments are covered by the treaty provisions. This is in line with the provisions of the *NIPC Act*, which does not either exclude indirect investment from its scope. Should Nigeria wish to further integrate sustainability standards into its investment treaty policy, it could consider limiting the scope of the definition of investment by excluding certain financial assets or transactions that do not entail real acquisitions of interests by a foreign investor. For example, article 45 of the Free Trade Agreement between Mexico and the European Free Trade Agreement states that: *"For the purpose of this Section, investment made in accordance with the laws and regulations of the Parties means direct investment, which is defined as investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof."* Alternatively, the 2012 US Model BIT defines covered investment as follows: "*Investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:* *a) an enterprise;* *b) shares, stock, and other forms of equity participation in an enterprise;* *c) bonds, debentures, other debt instruments, and loans;* *d) futures, options, and other derivatives;* *e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;* *f) intellectual property rights;* *g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;* **Footnotes:** *Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.[…]"*

Table 2.1. **Main features of Nigeria investment treaties and potential options for treaty drafting** *(cont.)*

Key provisions	General description	Salient features of Nigeria's BITs and recommendations
Investor	Defines those persons and legal entities benefiting from the treaty provisions. Nationality of juridical persons for the purposes of BITs is typically determined according to place of incorporation, principal seat of the enterprise, or alternatively, through the notion of control.	Nigerian BITs include a definition of investors that covers both natural and legal persons. As for natural persons, BITs cover those that have the nationality of one of the contracting parties and thus do not retain the criterion of residence, which is sometimes used to extend the scope of the treaty to non-national residents. As for corporations, Nigerian BITs use the criterion of the place of incorporation to define their nationality. Some countries chose to use the criterion of residence over the nationality of investors. In the hypothesis they give a preferential treatment to foreign investors, this option may be used to extend the benefit of such a preferential treatment to nationals living abroad and to attract investment from overseas citizens.
		Admission and treatment
Admission of foreign investment	Provides for relative standards of protection, namely national treatment (NT) and most-favoured-nation treatment (MFN). Determines whether NT and MFN apply at the admission phase, or only at post-establishment stage. Pre-establishment BITs indicate a political commitment to an open investment environment and aim at liberalising investment flows. Although more and more countries are committing to some pre-establishment liberalisation, the most common approach limits protection to the post-establishment phase. The admission of investments is subject to national laws.	Under Nigeria's treaty policy, the protection provisions apply to the post-establishment phase of the investment. That is, FGN does not commit to grant free, non-discriminatory entry to foreign investment and grant standards of protection such as NT and MFN to those investments that have already been admitted under national laws and regulations. Instead, Nigeria refrains from granting foreign nationals and companies an unrestricted right to invest in the territory. Like most BITs concluded globally, Nigeria's BITs have not been conceived to provide foreign investors with a right of establishment, but rather to commit to admit foreign investment in accordance with domestic legislation.
Most-favoured-nation treatment and National treatment	The MFN provision provides investors from the contracting party the best treatment given to investors from any other country. The NT provision grants foreign investors, in like circumstances, treatment no less favourable than the treatment of nationals. Like MFN, NT is a contingent, or relative standard of treatment, as its content varies according to how other investments are treated by the host State.	Nigeria's BITs grant the MFN and NT treatments to foreign investments with respect to the "establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or disposal of investments" (Article 3 of Finland-Nigeria BIT). This wording confirms the post-establishment approach adopted by FGN with respect to the standards of protection provided through BITs. The MFN provision does not explicitly exclude procedural rights of investors. The issue of the scope of the MFN provisions could be given greater consideration by FGN, as it has generated controversy in the wake of the Maffezini case on whether the MFN applies to substantial obligations only or also to dispute settlement procedures.

Table 2.1. **Main features of Nigeria investment treaties and potential options for treaty drafting** *(cont.)*

Key provisions	General description	Salient features of Nigeria's BITs and recommendations
		The current controversy in international jurisprudence shows the importance, for individual countries, to clearly delineate the scope of application of the MFN standard. Regardless of the treaty positions retained by Nigeria, limitations to the application of the MFN clause should be clearly and explicitly stated. In this regard, all of Nigeria's BITs contain, to a varying extent, a number of exceptions to the application of both the NT and the MFN provisions. While, for example, the treaties with Egypt and Sweden include limitations to the standards of treatment with respect only to multilateral agreements, double taxation agreements, free trade areas etc., some treaties go further in limiting the application of the MFN and NT standards. For example, Nigeria- Spain BIT excludes measures taken for reason of public security and order or public health from their scope. That is, such measures cannot be deemed to constitute a less favourable treatment. The United-Kingdom- Nigeria treaty varies in providing that countries may "grant to their own nationals and companies special incentives in order to stimulate the creation of local industries, provided they do not significantly affect the investment and activities of nationals and companies of the other contracting party in connection with an investment". Likewise, the treaty signed with Germany contains an exception to the MFN and NT treatment, in the following terms: "either contracting party may grant to its own investors special incentives for development purposes in order to stimulate the creation of local industries, especially small and medium-sized enterprises, provided that they do not significantly affect the investments and activities of investors of the other contracting party." It is certainly good practice to adopt such a careful approach when providing NT and MFN standards of treatment, which can potentially strongly limit the policy space of host countries. FGN would therefore be advised to continue inserting clear and well defined limitations to their scope, provided that such public purposes measures are taken in good faith, in a non-arbitrary and transparent manner. This would indeed allow FGN to retain some political leeway to issue preferential regulations for development purposes only.
Provision on key foreign personnel	Permits or regulate entry and sojourn of key personnel in connection with the investment	The Model BIT, like all individual treaties signed by Nigeria, provides that the host state should grant authorisations of engaging key technical and managerial personnel of their choice regardless of nationality [...]". This clause does not however prevail over Nigeria's immigration laws and the entry of foreign personnel remains ultimately subject to domestic regulations.
		Investment protection
Fair and Equitable Treatment, Full Protection and Security	Fair and Equitable Treatment (FET), and Full Protection and Security (FPS) are absolute standards of protection, i.e. the required level of treatment is nit contingent on treatment accorded to third parties by the host State.	The majority of Nigeria's BITs provide for the FET and FPS standards of treatment, with some variations in the formulation of the provisions. Such provisions are, in most treaties, including the Model BIT, completed by the guarantee that the "contracting party shall not impair by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals".

Table 2.1. **Main features of Nigeria investment treaties and potential options for treaty drafting** *(cont.)*

Key provisions	General description	Salient features of Nigeria's BITs and recommendations
	FET (which encompass, inter alia, an obligation not to deny justice) and FPS (of which the scope has recently been extended and is therefore uncertain) are almost always provided for in BITs. However, their meaning and the level of protection they grant remain unclear and subject to debate.	When negotiating future BITs, FGN could usefully consider adopting a more detailed language in FET and FPS provisions. Given some difficulties in the interpretation of these notions, and their potential consequences in terms of legal liability towards foreign investors, some countries now use more precise language in the text of the BITs. For example, some recent BITs of the US and Canada provide that FET "*includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process [...]"*. It would be recommended that FGN follow a careful approach when providing these standards of treatment in its treaties, in order to minimize potential controversies as to the content of the standards. Nigeria's Model BIT, as well as the treaties signed with Switzerland and Egypt, contain the following exception to the FET and the FPS standards: "Either contracting party may within the framework of its development policy grant special incentives to its own nationals and companies in order to stimulate the creation of local industries, provided they do not significantly affect the investment and activities of investors of the other contracting party in connection with an investment". Inserting this safeguard provision is certainly a good practice that preserves FGN's policy space to grand incentives to its domestic companies only without violating its treaty commitments. This type of provision, provided that their scope is well and clearly delineated, is likely to increase Nigeria's policy space to enhance the contribution of FDI to national development.
Expropriation and compensation	States have a sovereign right to expropriate under certain conditions. Most BITs condition the exercise of this right on being: • non-discriminatory; • taken under due process of law; • for a public purpose; and • against payment of compensation. Almost all BITs provide for "Hull Rule" type compensation, i.e. a "prompt, adequate and effective" compensation.	BITs signed by Nigeria, as well as its Model BIT, provide for a broad protection against expropriation, which covers both direct and indirect expropriation. In accordance with customary international law principles, they grant that lawful expropriation can occur only if the measure is taken under due process of law, in a non-discriminatory manner, for a public purpose and against the payment of a fair compensation. In accordance with the customary "Hull Rule", compensation is provided to be made in a "prompt, adequate and effective manner". The protection against expropriation granted through Nigeria's BITs is therefore broader that the scope of the expropriation provision in the *NIPC Act*, which does not explicitly refer to indirect expropriation. Nigeria could thus consider aligning the scope of protection provided in its domestic legal framework to what is granted through BITs, in order to further harmonise its investment protection framework and to provide the same protection against expropriation regardless of the nationality of the investor. The government might also wish to better define, in its future BITs, what constitutes an indirect expropriation. There is an emerging trend, in global treaty practice, to clarify in an annex what criteria should be used to determine when an indirect expropriation occurs. A more detailed treaty language, as well as the harmonisation of domestic laws with treaty provisions would indeed grant investors further predictability and legal stability on expropriation matters.

Table 2.1. **Main features of Nigeria investment treaties and potential options for treaty drafting** *(cont.)*

Key provisions	General description	Salient features of Nigeria's BITs and recommendations
Transfer of funds	Provisions of this type reduce – or eliminate – restrictions on monetary transfers arising in connection with investments. Free transfer of funds is a key condition for the proper operation of investments. However, the host country can keep some leeway to administer its monetary and financial policy. This later concern is usually expressed through the inclusion of a list of exceptions.	Nigeria's BITs all grant foreign investors a free and timely transfer of funds related to their investment, in a freely convertible currency, at a specified rate of change and in a reasonable delay. The transfer clause covers all funds related to an investment and several BITs provide for an illustrative list of covered funds. For example, the BIT concluded between Nigeria and the Netherlands contains in its article 5 the following open-ended illustrative list, in line with the most common approach in recent treaty practice: " Transfers include in particular, though not exclusively: a) profits, interest, dividends and other income; b) funds necessary: for the acquisition of raw or auxiliary materials, semi-fabricated or finished products; or to replace capital assets in order to safeguard the continuity of an investment; or for expansion and/or improvement of an investment; c) funds in repayment of loans; d) royalties or fees; e) earnings of natural persons; f) the proceeds of sale or liquidation of the investment." The Model BIT contains a number of exceptions to the guarantee of a free transfer of funds that are not reflected in BITs that have been signed. Namely, the Model BIT provides that the state may "protect the rights of creditors and prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to: a) bankruptcy, insolvency, or the protection of the rights of creditors; b) issuing, trading, or dealing in securities, options or derivatives; c) criminal or penal offences; d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or e) ensuring compliance with orders or judgements in judicial or administrative proceedings." Nigeria could usefully consider include such exceptions to the obligation of granting a free transfer, as set out in the Model BIT, into its future agreements. The provision on the free transfer of funds could also make it clear that the free transfer of funds is granted only after the investor has fulfilled its tax obligations
Umbrella clause	Elevates certain other undertakings by host States into treaty breaches. It can therefore give access to arbitration in the event of a contractual dispute. The umbrella clause grants investors the most favourable treatment resulting from the application of the host state's domestic legislation or international obligations. For example, an umbrella clause can be used to limit performance requirements, providing that the host state is party to some international treaties containing a prohibition of performance requirements (such as the TRIMs Agreement).	Several individual treaties signed by Nigeria contain an umbrella clause that provides that "where the provision of law (...) or obligations under international law (...) contain a regulation, whether general or specific, entitling investments by nationals and companies of the other contracting to a treatment more favourable than provided for by this agreement, such regulation shall to the extent that it is more favourable prevail over this agreement". This provision has a broad scope of application and thus gives ample protection to foreign investors. It should be noted that some countries provide for more restrictive umbrella provisions, while others, including the United States, have deleted the Umbrella clause in their new Model BITs, probably in reaction to a number of investment disputes involving this provision.

Table 2.1. **Main features of Nigeria investment treaties and potential options for treaty drafting** *(cont.)*

Key provisions	General description	Salient features of Nigeria's BITs and recommendations
Denial of benefits	Provides for the right of the State to deny the benefits of the agreement to certain investors. For example, such a clause allows the denial of treaty protection to companies that have no substantial business activities in the State (e.g. a shell company organised under the laws of a Contracting Party but controlled by nationals of a third country), or to companies originating from a country with which the host State does not maintain normal economic relations.	Nigeria, like most countries, did not insert a Denial of benefits clause into its investment treaties.
	Dispute settlement	
Investor-State Dispute Resolution	Arguably the most important feature of a BIT. It enables the investor directly to assert its rights accorded under the treaty.	The Investor-Dispute Settlement clause of Nigeria's BITs provide the State's unilateral consent to resolve such disputes before international arbitration. The choice to go either before a domestic court or before an international arbitration tribunal, be it an *ad hoc* or an ICSID tribunal, may be made by the investors, after a cooling-off period of six months following the failure to amicably settle the case. There is no "fork-in-the-road" provision that would require the investor to make a definitive choice between local remedies and international arbitration. It is a very liberal and favourable approach to international arbitration that gives a significant advantage to foreign investors. Although the approach to ISDS is a very favourable one, the reviewed BITs do not contain very detailed ISDS provisions. Such succinct clauses afford Nigeria little control over potential arbitrations. FGN might want to note the on-going developments, in global treaty practice, of investor-State dispute settlement provisions. Some States provide much more detailed dispute provisions to further their control over arbitral proceedings, to strengthen the consistency of arbitral awards and to promote the legitimacy of investor-State arbitration. The NAFTA Model, for example, provides very detailed guidance for the conduct of the proceedings. An increasing number of treaties also contain a clause to prevent frivolous claims and treaty shopping. Lastly, another increasing trend is to foster the transparency of arbitral proceedings. Nigeria might thus wish to further promote the principle of judicial economy. To this end, it could be useful to set up a mechanism to avoid frivolous claims, i.e. claims that lack a sound legal basis, to better protect the country against potential abuses of the ISDS system. Another mechanism to foster judicial economy and to avoid inconsistent results is to allow the consolidation of claims having a question of fact or law in common, or arising out of the same circumstances.

Table 2.1. **Main features of Nigeria investment treaties and potential options for treaty drafting** *(cont.)*

Key provisions	General description	Salient features of Nigeria's BITs and recommendations
		Investment promotion
Promotion and Facilitation	Commitment to encourage the promotion and facilitation of investment.	Nigeria has a rather traditional approach to the promotion of investment through investment treaties; both in the Preamble and in a dedicated article. It commits, in all of its investment treaties, to encourage and promote investment. Such hortatory approach, encouraging partner countries to a best-endeavour in terms of investment promotion, is expressed in a vague and general wording and does not encompass any specific obligation regarding exchange of information and transparency with mechanisms to implement them. This "best endeavour approach" is taken by the vast majority of existing BITs. GN could adopt a more conducive approach to investment promotion in its treaties and to specify promotional activities that should be undertaken. Measures aiming at promoting outward investment could include actions such as providing information, technical assistance, insurance, and support to aid domestic firms to establish operations overseas. A provision requiring the State parties to exchange information on investment opportunities with a view to increasing investment flows could also be inserted.
Transparency	Promotes investment through the dissemination of information.	Nigeria's BITs do not have a provision on transparency obligations. FGN could reflect on the possibility to include transparency regulations in its future BITs and impose on both host States and foreign investors an obligation of transparency in the exchange of information and in the process of domestic rulemaking.
Special provisions bearing on the protection of the environment, labour market rights, public health national security concerns.	Language referring to specific public policy concerns, notably in relation with responsible business conduct issues.	Crucial emerging issues, such as environmental protection, public health and labour standards, are not yet reflected in Nigeria's treaties. Nigeria could consider inserting more provisions safeguarding fundamental values and preserving its policy space. This is a good practice that is increasingly often reflected in recent BITs. This would allow the authorities to invoke public benefit purposes exceptions without violating their treaty commitments.

When negotiating future investment agreements, it will be crucial to ensure full consistency between the content of protection standards given to investors through treaty provisions and those contained in laws pertaining to investors' activities. To ensure the best level of coherence between Nigeria's development objectives, domestic policies and the content of its international undertakings, government could use an updated treaty template that would serve as a basis for any treaty negotiations and that would adopt a more balanced approach than the existing one. The BIT template could feature key standard provisions and safeguard provisions related to the preservation of environmental, labour and social rights. Its provisions should be checked to be fully in line with Nigeria's wider investment regime and their scope clearly delineated so as to avoid potentially inconsistent, arbitrary and costly arbitration awards.

Preserving Nigeria's policy space while providing high standards of protection to investors

Concluding more BITs may be key to granting foreign investors an adequate level of protection, thus lowering the perceived political risk faced by investors when investing in Nigeria and thereby promoting Nigeria as an investment destination. While in general, investment treaty practice should not be seen as a substitute or shortcut to a good investment climate, clear and well-drafted BITs can be used to address remaining weaknesses in Nigeria's existing domestic regulations. Since the political risk when investing in Nigeria is still perceived as high, and the country is rated as such by numerous rating agencies, investment agreements can play a crucial role to complement domestic rules that are being reformed, and thus to reassure foreign investors. At the same time, as mentioned above, BITs involve trade-offs that should be considered from the beginning: while providing sound protection of foreign investors rights, the government should also ensure that it does not enter into international treaties that unduly restrain its policy space and regulatory autonomy.

Incorporating provisions relating to responsible business conduct into future treaties

Investment agreements concluded by Nigeria can play a primary role in ensuring that investments in Nigeria by multinational enterprises do not violate human rights or degrade the environment, including in the oil and gas sector. The first way is through obligations on the contracting parties themselves related to labour, the environment and human rights. In this way, Nigeria would commit not to lower its level of protection of labour and environmental rights to encourage trade and investment. For example, art. 285 of the EU-Central America Association Agreement states that parties will strive to ensure that their laws and policies provide for and encourage appropriate but high levels of labour and environmental protection and that they will strive to improve these laws and policies. This type of clause would guarantee against potential policy and regulatory reversals. In addition, the provision could prevent potential abuses to use development policies, labour and environmental standards for protectionist trade purposes.

Similarly, the newest Model treaty of the United States contains a full article on labour standards, which provides that each party shall ensure it does not derogate from, offer to derogate from, or fail to effectively enforce its labour laws to encourage investment. This drafting reflects a political willingness to impose firm commitments on these issues, rather than mere best endeavours obligations.

Partner countries can also insert responsible business conduct (RBC) provisions in treaties covering trade or investment. The EU treaty practice, for example, includes two sets of provisions: a human rights clause requiring investing firms to respect fundamental human rights, and a labour and environmental protection clause, contained within a sustainable development chapter. A European Parliament resolution concerning the introduction of RBC elements into trade agreements is described in Box 2.9.

Box 2.9. **European Parliament resolution on CSR in international trade agreements**

In a resolution of 25 November 2010, the European Parliament proposed that future trade agreements negotiated by the EU should include a chapter on sustainable development which includes a CSR clause based, in part, on the 2010 update of the OECD *Guidelines for Multinational Enterprises*. The CSR clause would incorporate the following:

- A mutual understanding by the two parties to promote internationally-agreed CSR instruments.
- Incentives for enterprises to enter into CSR commitments negotiated with all their stakeholders.
- Establishing “contact points” similar to those under the Guidelines to provide information and receive complaints and transfer these to the competent authorities.
- Requiring corporations to publish their CSR balance sheets at least every 2-3 years.
- Requiring enterprises to show due diligence, including in their subsidiaries and supply chains.
- Requiring companies to commit to free, open and informed prior consultation before a project starts.
- A particular focus on child labour practices.

Box 2.9. **European Parliament resolution on CSR in international trade agreements** *(cont.)*

In the event of proven breaches of CSR commitments, the competent authorities would carry out investigations, including sometimes naming and shaming those responsible. The two parties could also encourage transnational judicial co-operation to facilitate access to the courts for the victims and as well to encourage non-judicial redress mechanisms.

Source: European Parliament (2012).

The European Union's bilateral free trade agreements now incorporate a chapter dealing with sustainable development, covering environmental and social objectives and compliance with rules in those areas. The EU free trade agreement with Korea from October 2009 states that "the parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability". In a later FTA between the EU and Peru and Colombia, the parties agree to promote best practices related to responsible business conduct, here referred to as corporate social responsibility (CSR). (European Parliament, 2012).

The inclusion of references to RBC in trade and investment agreements is still a relatively recent practice, which could be germane for Nigeria's future treaty practice. It can be found, for example, in the US-Peru Trade Promotion Agreement 2009, which does not set out mandatory RBC obligations but rather contains, in an Annex to the body of the agreement, a best-endeavour commitment to take into consideration RBC issues when pursuing labour co-operation activities. The Canada-Peru Trade Agreement goes further in this hortatory approach as it also contains references to CSR both in the Preamble and in the Investment Chapter itself.[11] The Canada-Peru Agreement (Article 817) also establishes an institutional mechanism mandated to promote co-operation on RBC. The "denial of benefits clause" could also be used to ensure that foreign companies investing in do not benefit from investment treaty provisions if they violate their RBC obligations.

Nigeria is a signatory to major international arbitration instruments

In addition to its network of BITs, which provide access to international arbitration, Nigeria has committed itself to the most important international conventions for the settlement of investment disputes. Nigeria is a member of the Convention on the Settlement of Investment Disputes between States and

National of Other States (ICSID Convention). Nigeria has also ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which provides a legal mechanism for enforcement of awards that are not rendered under the auspices of ICSID. Foreign arbitral awards may thus be enforced in Nigeria.

Nigeria is also a member of the Multilateral Investment Guarantee Agency. MIGA provides political risk insurance guarantees to private sector investors and lenders and protects investments against non-commercial risks. It has been actively supporting infrastructure investment projects in Nigeria.

Notes

1. *Investor's Guide to Nigeria* ; 6th Edition, Nigerian Investment Promotion Commission.
2. NAFTA Article 1105 limit the FET standard to the minimum standard of customary international law, and NAFTA Free Trade Commission has issued an detailed interpretation of the meaning of the FET; while some arbitral tribunals have interpreted the standard as a stand-alone concept that does not incorporate the minimum standard of customary international law.
3. See *www.oecd.org/daf/inv/investment-policy/nti.htm* and *www.oecd.org/daf/inv/36671400.pdf*.
4. El-Rufai, N.A., "Why Nigeria must revisit Land reforms", 2012, at *http://saharareporters.com/article/why-nigeria-must-revisit-land-reforms-nasir-ahmad-el-rufai*.
5. Mabogunje, A.L., "Land Reform in Nigeria: Progress, Problems and Prospects",
6. Dada, M., "Nigeria: Land reforms – the lingering debate"; *Daily Independent*, October 2010.
7. *www.unesco.org/culture/pdf/anti-piracy/nigeria_cp_en*.
8. WTO, *Trade Policy Review of Nigeria*, Revised document, 2009.
9. USAID, *Nigeria: Land Tenure Profile*, 2010; *http://usaidlandtenure.net/nigeria*.
10. *www.internationallawoffice.com/newsletters/detail.aspx?g=63ec87d9-a8ed-4616-b339-62e5684f94eb*.
11. See Article 810 of the Canada-Peru FTA : *www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/peru-toc-perou-tdm.aspx*.

References

Bartels, L., "Human Rights and Sustainable Development Obligations in EU free Trade Agreements", *Legal Studies Research Paper Series*, University of Cambridge, Paper No. 24/2012, September 2012.

Investment Climate Advisory Services, World Bank Group, *Investment Law Reform: A Handbook for Development Practitioners,* 2010.

Khrushchev U.K. Ekueme, "Nigeria's principal investment laws in the context of international law and practice", *Journal of African Law*, 49, 2 (2005), 177-206.

Mabogunje, A.L., "Land Reform in Nigeria: Progress, Problems and Prospects", at *http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/mabogunje.pdf*.

Maniruzzaman, A.F.M., "National Laws providing for Stability of International Investment contracts", *Journal of World Investment and Trade,* No. 82, 2007.

Obayomi, O., "Nigeria's new investment laws", *Journal of Business Law 1997,* Nov, 593-604.

Obayomi, O., "Nigeria's new investment laws revisited", *Journal of Business Law 2001,* May 209-216.

Odianse-Alegimenlen, O.A., "An appraisal of foreign investment promotion and protection measures operating in Nigeria", *J. of World Investment and Trade*, 2002.

Okafor, B.O.N., "Investment Climate Reform in Nigeria: Challenges and Prospects", *Economic and Financial Review*, Vol. 48/2, June 2010.

Tejuoso, A. and S. Sobowale, "Nigeria", Bradlow & Eschler (eds.), in Legal Aspects of Foreign Direct Investment, 393-412, 1999 Kluwer Law International, London.

UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rule Making*, New York and Geneva, 2007.

United States Agency for International Development, *Nigeria: Property Rights and resource Governance Profile*, 2010.

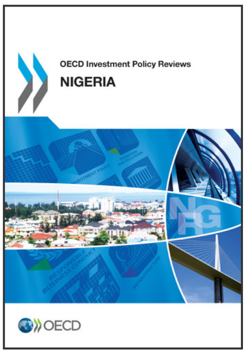
US State Department, *Investment Climate Statement 2013*.

Waelde, T.W. and G. Ndi, "Stabilizing International Investment Commitments; International Law Versus Contract Interpretation", 31 *Texas International Law Journal* (1996), p.215, at p.240.

World Bank Group, Investment Climate Advisory Services, *Investment Law Reform: A Handbook for Development Practitioners*, Washington, DC, 2010, *www.wbginvestmentclimate.org/uploads/Investment-Law-Reform-Handbook.pdf*.

WTO, *Trade Policy Review of Nigeria, 2005, www.wto.org/english/tratop_e/tpr_e/tp247_e.htm*.

WTO, *Trade Policy Review of Nigeria*, Revised document, 2011, *www.wto.org/english/tratop_e/tpr_e/tp347_e.htm*.



From:

OECD Investment Policy Reviews: Nigeria 2015

Access the complete publication at:

https://doi.org/10.1787/9789264208407-en

Please cite this chapter as:

OECD (2015), "Investment policy in Nigeria", in *OECD Investment Policy Reviews: Nigeria 2015*, OECD Publishing, Paris.

DOI: https://doi.org/10.1787/9789264208407-5-en