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Foreword

The OECD Investment Policy Review of Nigeria presents an assessment of the investment climate of Nigeria, including the regulatory and institutional framework for investment. It uses the Policy Framework for Investment to discuss the challenges and opportunities faced by the country in its reform efforts. Covering a wide range of policy areas at Federal level, the report also includes a special chapter on Lagos State focusing on policy options that can be specifically applied at State level. Undertaken within the framework of the NEPAD-OECD Africa Investment Initiative, the Review reflects the growing interest of Nigeria in integrating into the global economy.

The report was prepared in close collaboration with two taskforces established by the Nigerian authorities, one Federal and one in Lagos State, gathering government agencies, the private sector and civil society. A draft version of the Review was discussed at two stakeholders' workshops in October 2013, one chaired by the Minister of Industry, Trade and Investment in Abuja, and the other by the Commissioner for Commerce and Industry in Lagos. The draft Review was also presented to the Nigerian Honorary International Investors Council in London in November 2013, a high-level public-private dialogue platform under the chairmanship of the President of the Republic. A delegation from Nigeria comprising representatives of the Federal and Lagos State governments discussed the Review with the OECD Investment Committee in December 2013.

The Review has been prepared by Alexandre de Crombrugghe, Hélène François and Carole Biau from the Investment Division of the OECD Directorate for Financial and Enterprise Affairs and Nariné Nersesyan from the Centre for Tax Policy and Administration under the supervision of Karim Dahou, Deputy Head of the Investment Division. The report benefited from inputs by Nabil Hamliri, Chung-a Park and Mike Pfister. Secretariat inputs were received from the Competition Division. The Review was supported by the United Kingdom through Growth and Employment in States 3 (GEMS3), a programme funded by the Department for International Development (DFID) and implemented by Adam Smith International. GEMS3 also provided comments on the draft report as well as ground-level facilitation throughout the process.

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Acronyms

AGOA	African Growth and Opportunity Act
ASYCUDA	Automated System for Customs Data
ADR	Alternative Dispute Resolution
AGFA	Associated Gas Framework Agreement
AfDB	African Development Bank
AMCON	Asset Management Company of Nigeria
ANAN	Association of National Accountants of Nigeria
ANE	Association of Nigerian Exporters
BOI	Bank of Industry
BIT	Bilateral Investment Treaty
BOT	build-operate-transfer
BPE	Bureau of Public Enterprises
BPP	Bureau of Public Procurement
BTA	Bilateral Trade Agreement
CAMA	Companies and Allied Matters Act
CAC	Corporate Affairs Commission
CBN	Central Bank of Nigeria
CDM	Clean Development Mechanism
CEMA	Customs and Excise Management Act
CEON	Consumer Empowerment Organisation of Nigeria
CET	Common External Tariff
CINDE	Coalición Costarricense de Iniciativas de Desarrollo
CIT	Companies Income Tax
CITA	Companies Income Tax Act
CMC	Citizens Mediation Centre
CPC	Consumer Protection Council
CSR	Corporate Social Responsibility
CTF	Clean Technology Fund
DBN	Development Bank of Nigeria
DFID	Department for International Development
DFS	Development Finance Schemes
ECOWAS	Economic Community of West Africa States
EDMS	Electronic Document Management Systems
EEG	Export Expansion Grant scheme

ENFP	Enlarged National Focal Point on Trade Matters
EPSR	Electric Power Sector Reform Act
EPZ	Export Processing Zone
ETLS	ECOWAS Trade Liberalisation Scheme
EU	European Union
FCCP	Federal Competition and Consumer Protection Bill (*draft version*)
FDI	Foreign Direct Investment
FEC	Federal Executive Council
FEMMP	Foreign Exchange (Monitoring and Miscellaneous Provisions)
FET	Fair and Equitable Treatment
FGN	Federal Government of Nigeria
FIRS	Federal Inland Revenue Service
FIT	Feed-in Tariff
FPS	Full Protection and Security
FRC	Financial Reporting Council
FMF	Federal Ministry of Finance
FMITI	Federal Ministry of Industry, Trade and Investment
FSA	Federal Support Agreement
FTZ	Free Trade Zone
GDP	Gross Domestic Product
GEMS	Growth and Employment in States
GIS	Geographic Information Management System
HDI	Human Development Index
ICAN	Institute of Chartered Accountants of Nigeria
ICRC	Infrastructure Concession Regulatory Commission
ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and Communication Technology
IFC	International Finance Corporation
IFRS	International Financial Reporting Standards
IISD	International Institute for Sustainable Development
IMF	International Monetary Fund
ITF	Industrial Training Fund
IP	Intellectual Property
IPA	Investment Promotion Agency
IPCIS	Integrated Port Community Information System
IPCON	Industrial Property Commission of Nigeria
IPU	Investment Promotion Unit
IPP	Independent Power Producer
IPR	Investment Policy Review
IPSAS	International Public Sector Accounting Standards
LCA	Lagos Court of Arbitration
LCC	Lekki Concession Company

LCCR	low carbon and climate resilient
LLC	Limited Liability Company
LMDC	Lagos Multi-Door Courthouse
LSDP	Lagos State Development Plan
LSG	Lagos State Government
LSPPP	Lagos State Public Private Partnership
LSTMA	Lagos State Traffic Management Authority
LUA	Land Use Act
MAN	Manufacturers Association of Nigeria
MCI	Millennium Cities Initiative
MDAs	Ministries, Departments and Agencies
MDG	Millennium Development Goal
MEA	Multilateral Environmental Agreement
MFB	Micro-finance Bank
MFN	Most Favoured Nation
MIBS	Manufacture in-bond scheme
MIDA	Malaysian Investment Development Authority
MIGA	Multilateral Investment Guarantee Agency
MoCI	Ministry of Commerce and Industry (of Lagos State Government)
MNE	Multinational Enterprise
MW	Megawatt
MYTO	Multiple Year Tariff Order
NACCIMA	Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture
NAFDAC	National Agency for Food and Drug Administration and Control
NAICOM	National Insurance Commission
NANTS	National Association of Nigerian Traders
NAQS	Nigeria Agricultural Quarantine Service
NASB	Nigerian Accounting Standards Board
NASME	Nigerian Association of Small and Medium Enterprises
NASPA-CCN	National Adaptation Strategy and Plan of Action for Climate Change in Nigeria
NASSI	Nigerian Association of Small Scale Industrialists
NCC	National Copyrights Commission
NCCA	National Commission for Conciliation and Arbitration
NCCN	National Competitiveness Council of Nigeria
NCP	National Council on Privatisation
NCPP	National Council on Public Procurement
NCS	Nigeria Customs Service
NECA	Nigeria Employers' Consultative Association
NEEDS	National Economic Empowerment and Development Strategy
NEPA	National Electric Power Authority

NEPAD	New Partnership for Africa's Development
NEPZA	Nigeria Export Processing Zones Authority
NERC	Nigerian Electricity Regulatory Commission
NESG	Nigerian Economic Summit Group
NESREA	National Environmental Standards and Regulations Enforcement Agency
NIDO	Nigerians in Diaspora Organisation
NIPC	Nigeria Investment Promotion Commission
NIRP	National Industrial Revolution Plan
NLNG	Nigerian Liquefied Natural Gas
NNPC	Nigerian National Petroleum Corporation
NOTAP	National Office of Technology Acquisition and Promotion
NPC	National Planning Commission
NRC	National Railway Corporation
NSE	Nigerian Stock Exchange
NT	National Treatment
NTB	Non-tariff Barrier
NTP	National Trade Policy (*draft version*)
OECD	Organisation for Economic Co-operation and Development
OPPP	Office of Public Private Partnership
OPS	Organised Private Sector
OSIC	One-Stop Investment Centre
PATH	Power Agriculture Transport Housing
PHCN	Power Holding Company of Nigeria
PENCOM	National Pension Commission
PFI	Policy Framework for Investment
PICCDM	Presidential Implementation Committee for Clean Development Mechanism
PPA	Power Purchasing Agreement
PPP	Public-Private Partnership
PPTA	Petroleum Profits Tax Act
PSDC	Penang Skills Development Centre
PSP	Private Sector Participation
PTFP	Presidential Task Force on Power
R&D	Research and Development
RBC	Responsible Business Conduct
REMP	Renewable Energy Master Plan
ROSC	Report on Observance of Standards and Codes
SAP	Structural Adjustment Programme
SEBRAE	Serviço Brasileiro de Apoio às Micro e Pequenas Empresas
SEC	Securities and Exchange Commission
SLTR	Systematic Land Titling and Registration

SME	Small and Medium-sized Enterprise
SMEDAN	Small and Medium Enterprises Development Agency of Nigeria
SOE	State-owned enterprise
SON	Standards Organisation of Nigeria
SPX	Subcontracting and Partnership Exchange
SSA	Sub-Saharan Africa
TFC	Trade Facilitation Centre
TIFA	Trade and Investment Framework Agreement
TPAC	Trade Policy Advisory Council
TRIPS	Trade Related Aspects of Intellectual Property Rights
TRS	Time Release Study
TTC	Trade Transaction Cost
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNIDO	United Nations Industrial Development Organisation
UEEE	Used Electrical and Electronic Equipment
US	United States
USD	United States Dollar
VAT	Value Added Tax
VCC	Vale Columbia Centre
WAEMU	West African Economic and Monetary Union
WCO	World Customs Organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

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Executive summary

Since the return to democracy in 1999, Nigeria embarked upon an ambitious reform programme towards greater economic openness and liberalisation. As a result, gross domestic product (GDP) growth picked up consistently, never going below 5% since 2003. Nigeria has become a top recipient of foreign direct investment (FDI) in Africa, with inflows having surpassed those to South Africa since 2009. The federal government's Transformation Agenda recognises private sector development as the main engine for economic growth and includes bold investment reforms. Growth has however not yet been translated into inclusive development and the investment climate still suffers from severe challenges.

The *Review* acknowledges that Nigeria has one of the most liberal investment regimes in Africa. The investment legal framework is reasonably sound, but dispersed legislative reforms and poor implementation impede its transparency and accessibility. The effectiveness of the regulatory framework is hampered by bottlenecks that commonly cause delays in the enactment of announced legal reforms. Insecurity and supply-side constraints, which are especially binding for small and medium-sized enterprises (SMEs), affect the country's investment attractiveness. The *Review* recommends streamlining the approach to legal formulation, better securing contractual and property rights while striking a better balance between investors' rights and obligations, notably by inserting provisions into international investment agreements to ensure that investors act in a responsible manner. The *Review* suggests moving forward on the amendment of the Model Bilateral Investment Treaty. It also stresses the importance of continuing developing commercial arbitration and further securing access to land to improve the enabling environment for doing business.

The *Review* notes that weak institutional capacities and inter-agency co-ordination hinder successful investment promotion and facilitation efforts. It commends the measures taken by the government to improve the business environment but suggests better aligning FDI promotion with national development objectives. The Nigerian Investment Promotion Commission (NIPC) should reinforce its marketing functions accordingly and perform systematic investor aftercare so as to push investment reform forward.

Business linkages between foreign and domestic companies should be promoted through information dissemination and matchmaking as well as intensified synergies between the private sector and educational policymakers. The *Review* also highlights the necessity to streamline tax incentives for investment, after conducting a credible cost-benefit analysis, and to consolidate these incentives, along with their eligibility criteria, in the main body of tax law to increase transparency.

The *Review* stresses that to strengthen Nigeria's competitiveness on domestic and international markets, enhanced institutional co-ordination under clear leadership from the Federal Ministry of Industry, Trade and Investment is essential. Trade and investment strategies would also benefit from more selective prioritisation of key economic sectors, with a focus on areas where Nigeria can develop the most value-addition and target specific demand-side niches (whether in the large domestic market, the ECOWAS region, or further abroad). In view of the on-going revision of the National Trade Policy, the *Review* recommends reducing ambiguities within the current draft policy regarding non-tariff barriers, trade-related fees and export and import restrictions, and the streamlining of customs procedures.

While Nigeria faces considerable infrastructure bottlenecks, notable headway has been made on making more space for private participation in the energy sector, and on updating the legal framework for infrastructure procurement and public-private partnerships (PPPs). The *Review* takes stock of these recent reforms and their associated risks and challenges, including competition and the role of State-Owned infrastructure operators. It advises introducing more provisions for risk-sharing and contract management within the federal framework, revising distribution of federal and state responsibilities on infrastructure pricing and regulation, and balancing domestic preferences on public procurement with attention to supply-side constraints. The *Review* also suggests moving forward on the enactment of the *Federal Competition and Consumer Protection Commission Bill* while enhancing enforcement powers of the future Competition Authority. It moreover encourages Nigeria to accelerate the enactment of a national code of corporate governance and designing a set of clear, unified rules for governance of State-owned enterprises.

A special chapter of the *Review* is dedicated to the analysis of the investment framework in Lagos State. Lagos is Nigeria's financial, commercial and industrial powerhouse, contributing to about one sixth of the country's total GDP and more than 30% of its non-oil GDP. The *Review* recognises Lagos State as a pioneer in the promotion and use of alternative dispute resolution mechanisms and encourages initiatives that increase awareness of the availability of arbitration mechanisms. Meanwhile, it suggests upholding efforts to ensure efficient functioning of the court system. Accessing land is identified as a serious challenge and it is advisable to maintain the momentum

for reforming and securing the land titling system. The Review suggests modernising the legal framework for land titling and reinforcing efforts to better secure the land titling system. In particular, efforts should be upheld to computerise the land registry, reduce the fees to obtain certificates of occupancy, simplify procedural requirements and enhance transparency in the land titling process.

Investment promotion in Lagos State would benefit from defining an investment promotion programme and clarifying the division of labour among implementing agencies at federal and state levels. The *Review* suggests that the newly created Investment Promotion Unit focus on a limited number of functions, with image building as a priority. Targeting, facilitation and aftercare should centre on a small number of companies operating in priority sectors. The *Review* recommends improving the governance of investment incentives to enhance transparency, limit discretion and increase accountability. In view of maximising FDI impact on domestic businesses, Lagos State government could envisage moving forward on designing an SME plan, promoting business linkages and regularly involving business representatives in human resource development.

The *Review* notes that Lagos State is well ahead of other states in terms of infrastructure investment – especially with a new raft of procurement regulations and guidelines made available in 2013. This new framework addresses elements of risk-sharing and performance management in infrastructure contract design, which could guide updates for federal-level PPP and procurement legislation. Enhancing awareness-raising and public consultation in project preparation and roll-out is also advisable so as to better reduce project risks and facilitate cost-recovery of infrastructure PPPs.

Key recommendations

Federal Republic:

- Streamline the approach to legal formulation, better secure contractual and property rights, and strike a better balance between investors' rights and obligations.
- Amend the Model Bilateral Investment Treaty and continue developing commercial arbitration.
- Better align FDI promotion with national development objectives, reinforce NIPC's marketing functions and encourage business linkages between foreign and domestic companies.
- Conduct a credible cost-benefit analysis to streamline tax incentives for investment and consolidate these incentives in the main body of tax law.

- Better prioritise key economic sectors for trade and investment, and promote openness in the draft National Trade Policy.
- Add provisions for risk-sharing and contract management, revise distribution of federal and state responsibilities on infrastructure pricing and regulation, and balance domestic preferences on public procurement with attention to supply-side constraints.
- Move forward on the enactment of the *Federal Competition and Consumer Protection Commission Bill* and the national code of corporate governance.

Lagos State:

- Modernise the legal framework for land titling and reinforce efforts to better secure the land titling system.
- Define a clear investment promotion programme and focus the Investment Promotion Unit's work on a limited number of functions.
- Move forward on designing an SME plan, promote business linkages and involve business representatives in skills policies.
- Enhance awareness-raising and public consultation in project preparation and roll-out in order to better reduce project risks and facilitate cost-recovery of infrastructure PPPs.

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Chapter 1

The investment background in Nigeria and overview of main policy recommendations

This overview chapter provides a background analysis of the Nigerian economy, the role of private investment in its development and the recent FDI trends. It shows how the country became the preferred destination for foreign direct investment in Africa while also still facing a number of challenges affecting the investment climate. The chapter also summarises the key OECD policy recommendations made at both federal and Lagos State levels that are developed in other chapters of the report.

1.1. Introduction

With a population of more than 170 million inhabitants,[1] Nigeria is home to 18% of Africa's population. It is the most populous country of the continent and was the second largest economy after South Africa until it rebased its Gross Domestic Product (GDP) in 2014. As a result, the country now boasts of having the largest economy in Africa with an estimated nominal GDP of USD 510 billion, surpassing South Africa's USD 352 billion (OECD, 2014). However, Nigeria ranks 12th in Sub-Saharan Africa (SSA) in terms of GDP per capita based on purchasing power parity (USD 5 601 in 2013), slightly above the SSA average of USD 4 856,[2] partly justifying its ranking as a lower middle-income country by the World Bank.

As the world's 10th oil producer with an estimated production of 2.5 million barrels a day, Nigeria is Africa's first oil producer, ahead of Algeria and Angola, and also holds the second highest proven reserves in the continent after Libya. The country joined the Organisation of the Petroleum-Exporting Countries in 1971 and has considerably leveraged on its oil wealth over the past three decades. Foreign Direct Investment (FDI) played a key role in developing the country's oil production capacity, most global oil majors holding significant investments in Nigeria's oil-producing regions.

After decades of military rule, the country has successfully engaged in the path of democracy since 1999. A new constitution was promulgated under General Abubakar (May 1999), the latter handing political power to newly elected President Obasanjo. The political system gained transparency and accountability, as many reforms were undertaken by the civilian administration, including demilitarisation and rebuilding basic state institutions. The first election entailing a civilian-to-civilian transfer of political power was held in 2007, with the election of Umaru Musa Yar'Adua as Head of state. At his death in 2010, Vice-President Goodluck Ebele Jonathan, of the People's Democratic Party, took over as President and was then elected to the same position in 2011. In 2015, peaceful and transparent elections have brought to power the opposition's candidate Muhammadu Buhari.

Nigeria is a Federal state, made up of 36 States and Abuja, the federal capital territory. The country is composed of more than 250 ethnic groups, the most populous and most influential being the Hausa and Fulani (29% of total population), the Yoruba (21%), the Igbo (18%) and the Ijaw (10%). The current Nigerian political system is influenced by ethnic and religious considerations (OECD, 2013).

With its strong fundamentals, the country qualifies as one of the continent's potential economic powerhouses with Lagos being its economic and financial hub. Nigeria's key strengths include its considerable resource endowment, its large population base including a significant percentage of youth (median age was 17.8 in 2014) and its strategic location on the busiest economic corridor of West Africa.

1.2. Structure of the economy and drivers of growth and competitiveness

After obtaining independence from the British Crown in 1960, Nigeria opted for an import-substitution economic policy, coupled with state medium-term planning. The Indigenisation Decrees of 1972 and 1977 restricted foreign ownership in several sectors to encourage local production. The economy went through a phase of strong prosperity and sustained government revenue after the oil boom, which boosted imports and fuelled public spending in State-Owned Enterprises (SOEs), and consequently led to a growing trade deficit and debt spiral. After the oil counter shock, the situation deteriorated steadily over the 1980s. Strong macroeconomic imbalances, such as fiscal deficit, inflation, external debt obligations, as well as structural microeconomic shortcomings, including persistent unemployment, inefficient public sector and low capacity utilisation due to state monopolies, led the country to accept a Structural Adjustment Programme with the International Monetary Fund (IMF) in 1986 so as to be able to negotiate debt resettlement. This agreement marked the beginning of a long period of progressive economic liberalisation. A comprehensive privatisation programme was carried out between 1989 and 1993. Trade was liberalised and fiscal spending limited. Reforms continued with the Industrial Development Coordination Committee Decree of 1989, then the Nigerian Investment Promotion Commission Decree of 1995, which allowed full foreign ownership of companies in most sectors, while providing significant investment protection and promotion measures (see Chapters 1 and 2).

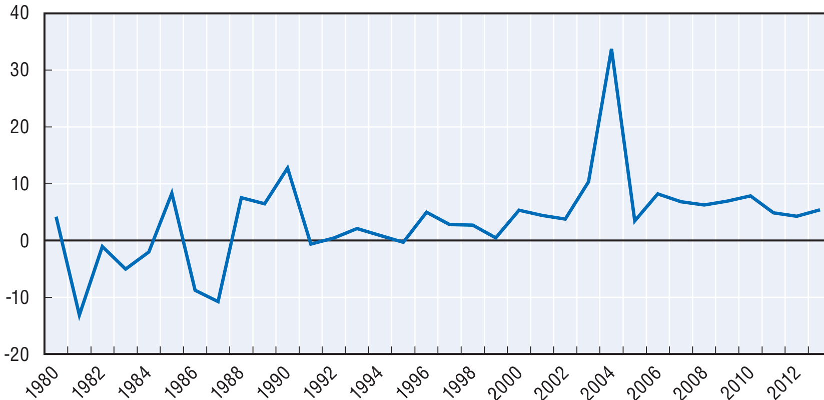
The return of democracy in 1999 gave further momentum to economic reform. In 1999, with the Privatisation and Commercialisation Act, the new government engaged in another round of privatisations to divest from major SOEs and break monopolies in strategic sectors such as telecommunications. In 2003, the National Economic Empowerment and Development Strategy (NEEDS) emphasised the government's commitment to economic reforms in view of achieving inclusive growth and development (see Section 3).

Before 1990, Nigeria's economic situation was uncertain, with GDP growth fluctuating sharply, from -13% in 1981 to almost 10% in 1985. Fluctuations were less severe in the 1990s and growth was stable although it never reached the 5% threshold (except in 1990). It was not until 2000 that GDP

growth picked up consistently, never going below 5% from 2004, except in 2012 (Figure 1.1). Nigeria nowadays records high levels of total investment (or gross capital formation), representing 15% of GDP in 2013, which corresponds to the SSA average and compares relatively well with other large emerging economies such as Brazil and South Africa but is significantly lower than China and Indonesia (Figure 1.2).

Figure 1.1. **GDP growth, 1980-2013**

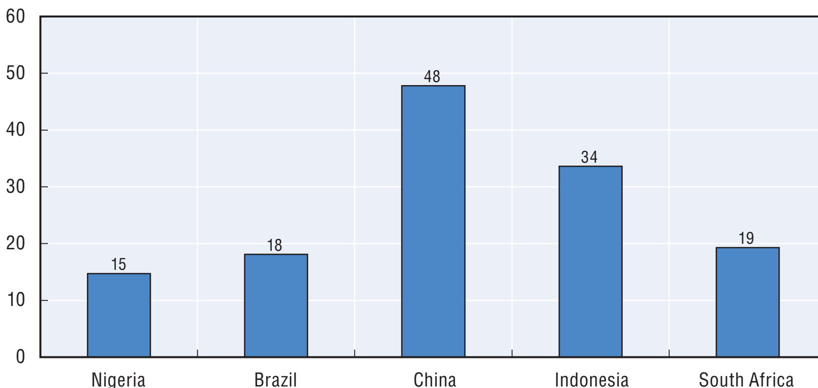
Annual %



Source: World Bank, *World Development Indicators Database* (2014), *http://data.worldbank.org/data-catalog/world-development-indicators.*

Figure 1.2. **Total investment in Nigeria and comparator economies, 2013**

% of GDP



Source: IMF, *World Economic Outlook Database* (2014), *www.imf.org/external/pubs/ft/weo/2014/02/weodata/index.aspx.*

The structure of the economy has evolved significantly in the past years. The share of agriculture and mining and quarrying (including oil) to GDP has

declined, while manufacturing and services have been increasingly contributing to GDP (Table 1.1). Figure 1.3 confirms that growth has been mainly driven by the non-oil sector over the past 5 years.

Table 1.1. **GDP split by sector**

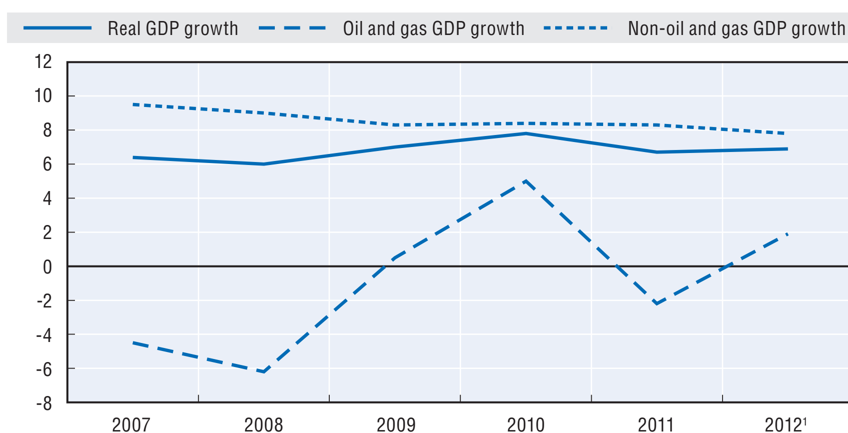
Percentage

	2008	2013
Agriculture, forestry, fishing and hunting	33	22
Mining and quarrying (including oil)	38	15
Manufacturing	2	7
Electricity, gas and water	0	1
Construction	1	3
Wholesale and retail trade, hotels and restaurants	15	18
Transport, storage and communication	3	12
Finance, real estate and business services	6	15
General government services	1	4
Other services	1	4

Source: OECD (2014), *African Economic Outlook 2014*, OECD, Paris, *http://dx.doi.org/10.1787/aeo-2014-en*.

Figure 1.3. **GDP growth components**

%



1. Data for 2012 is forecasted.

Source: IMF, *World Economic Outlook Database* (2013), *www.imf.org/external/pubs/ft/weo/2014/02/weodata/index.aspx*.

The agricultural sector was leading contributor to GDP in 2013, accounting for 22%. The agriculture sector employs two-thirds of the workforce, providing livelihood for about 90% of the rural population. Once the central pillar of the economy (accounting for over 60% of GDP and 90% of exports at the time of independence), agriculture has long been neglected in favour of the oil sector. Nigeria's agricultural production principally serves domestic consumption

needs. Despite its considerable agricultural resources, Nigeria is a net importer of food and agricultural products. Small-scale farms dominate rural landholdings, further highlighting the key role of agriculture in the subsistence of a large part of the population (FAO, 2012). Nevertheless, food imports have recently been declining, from USD 6.7 billion in 2009 to USD 4.35 billion in 2013, then dropping further in 2014 (FRN, 2014).

As regards services, the financial sector has been performing very well since the 2009 crisis, which pushed the government to restructure the sector through liquidity injections, improved prudential supervision and comprehensive asset re-allocation. It is now set to become a key growth driver, as banks hold substantial levels of liquidity, to be potentially lent to the rest of the economy. Lagos is positioning itself as a key financial hub in West Africa with share trading representing 75% of total capital flows into the country in 2011 (see Box 1.1 for

Box 1.1. **Lagos: The country's economic powerhouse**

With a population of 17.5 million in 2006 according to Lagos State Government, Lagos is the country's most populated State, and its capital city Metropolitan Lagos is home to 85% of the State's population. The latter is one of the fastest-growing cities in the world, projected to reach 25 million inhabitants in 2015 and enter the top ten of the world's most populated cities in 2025 according to UN Habitat. It is also Nigeria's commercial and industrial powerhouse, contributing to about one sixth of the country's GDP. Lagos State's GDP was estimated at USD 32 billion as of 2012 (ahead of Kano State, USD 17 billion), making it Africa's 13th economy (ahead of Tanzania), and is set to reach USD 45 billion (about the size of Ghana) after the planned 2014 GDP recalculations (Renaissance Capital, 2013). Key sectors of employment include transportation, wholesale and trade, construction, manufacturing and finance. Moreover, Lagos city's ports and airports are home to about half of the country's maritime and air traffic. The city is a key West African financial hub, with the most important stock exchange in the region in market capitalisation, and receives over 95% of overall foreign capital inflows to the country. Most of the country's MNEs are headquartered in Lagos City, notably the ones operating in the financial sector and manufacturing.

As is the case for other developing countries metropolis, the city's rapid and uneven expansion came along with several challenges. Infrastructure expansion (notably water, transports and waste management) was unable to match the sustained economic and demographic growth. Frequent water and power shortages and traffic congestion stand among the main bottlenecks. Furthermore, the city has not been able to create economic opportunities to everyone. Slum dwellers are increasingly numerous, estimated at 1.6 million

Box 1.1. **Lagos: The country's economic powerhouse** *(cont.)*

people in the 2006 census (these figures are probably underestimated), the most extensive slums being Ajegunle, Mushin and Somolu. Unemployment, underemployment and informal employment remain the mainstream. Lagos figures in the top ten of the most unequal cities in the world according to UN Habitat. Finally, urban and industrial development has several unintended effects on the environment, in terms of air, water and land pollution, and increasing vulnerability to the consequences of climate change, including risks of sea level rise and flooding.

In 2013, the Lagos State government unveiled ambitious long-term plans to transform Lagos into "Africa's model megacity", with a special focus on infrastructure development. Private sector participation in infrastructure is seen as the main lever to increase capacity. 2008 saw the launch of a bus rapid transport system in partnership with private operators. The state government is also partnering with Chinese developers for a light-rail project. Lagos is the only state having a dedicated office for Public-Private Partnerships.

Source: Central Bank of Nigeria, Lagos State government, Renaissance Capital (2013).

an economic overview of Lagos State).[3] Other growing services include wholesale and retail trade, as well as telecommunications. Information and Communication Technology (ICT) is currently among the fastest expanding sectors of the economy, with year-on-year growth of about 25% per year and contributing to about 8.5% of national GDP in 2013. For the fifth consecutive year, Nigeria has thus maintained the lead as Africa's fastest growing telecommunications market according to the Ministry of Communication and Technology.

The industrial sector contributes to about a third of overall GDP. The manufacturing share declined from 6% in 1985 to about 2% in 2011 and then increased again to 7% in 2013. A very large part of industrial output is generated by the extractive sector. Aside from an impressive endowment in oil and gas, the Nigerian soil is also rich in other valuable minerals, such as gold, iron ore and coal.

As one of the world's key oil suppliers (10th global supplier), Nigeria is overwhelmingly reliant on oil production. Oil and gas revenues contributed to 76% of total government revenue in 2011 (IMF, 2013), and the sector contributed to approximately one third of GDP the same year, although its share in total GDP declined since then. Nigeria is classified as a resource-intensive country in Africa,[4] as defined by the IMF. Production is concentrated in the Delta region, where more than half of the country's oil fields are located. However, the country's downstream capacities are still limited, as capacity utilisation of refineries remains low, at 30%; and oil is mainly exported raw, while a major

part of the country's needs in refined fuel and petroleum products are sourced internationally with 85% of the needs in refined petroleum being imported.

Oil and gas GDP growth has been fluctuating over the past 5 years, being negative in 2007, 2008 and 2011, but positive in 2009 and 2012 (Figure 1.3). The relative decline of the sector can be mainly attributed to insecurity. The Niger Delta region has experienced growing political dissensions and violence, which strongly affected production. Oil theft and pipeline sabotage are responsible for the loss of 10% of overall oil production. The 2009 amnesty law opened the path towards pacification, but several cases of violence have been reported in 2012.

Prospects for the oil sector are uncertain. Oil revenues are highly volatile and uncertain given the international context. In particular, demand from the US has decreased by almost 50% from 2011 to 2012 as a result of the 'shale gas revolution' and growing domestic oil production. Simultaneously, competition is also growing as other African countries have ambitious medium to long-term oil and gas production plans. The dramatic drop in oil prices since mid-2014 is a cause of concern for Nigeria: the National Budget for 2015 warns that the international price per barrel in September 2014 (USD 58) was already substantially below the Budget benchmark price for that year (USD 77.5), leading to a considerable budget shortfall. As a consequence, the government is contemplating a series of short-to-medium term revenue and expenditure measures, which should kick in the second quarter of 2015 in view of boosting the country's ratio of non-oil revenues to oil revenues (FRN, 2014).

An in-depth analysis of the policy framework for oil and gas goes beyond the scope of this *Investment Policy Review*. The sector has been suffering from weak responsible business conduct (RBC) in the past decades, which has affected Nigeria's perception abroad and hampered it to fully reap the benefits of its natural endowments. The authorities are encouraged to further engage with the OECD, which proposes policy tools that provide sector-specific guidance to ensure governments and private investors behave responsibly and mitigate the risks associated with investment into sensitive industries. These instruments include, among others, the Guidelines for Multinational Enterprises (see Box 3.8) and the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.[5]

Nigeria's trade position has been favourable and improving over the past years, with a trade surplus amounting to 39% of nominal GDP in 2012, up from 19% in 2010, according to the Central Bank of Nigeria.[6] The country mainly imported manufacturing and transportation machinery (43% of total imports in 2012) and agricultural goods (23%), while oil exports made up more than two thirds of total exports. In 2009, only 2% of Nigerian firms were global exporters (World Bank, 2014). The GDP share of agricultural imports grew threefold in 2011, up from 11% in 2010 to 33% of nominal GDP, as a

consequence of severe climatic incidents and subsequent agricultural output contraction, and then declined over 2012-14. Overall, the country's export volume was on the rise between 2010 and 2012: oil exports grew by 69%, mainly driven by high commodities prices and non-oil exports grew by 79% in the same period. At the same time, total import volumes fell by 15% between 2010 and 2012 and allowed the country to widen its trade surplus, the latter growing threefold during the same period. Nigeria has high levels of global trade integration, thanks to its position of key oil and gas supplier. However, the sector composition of trade reflects the country's strong reliance on oil production and lack of economic diversification, as well as its difficulties in capturing local value-added. The sharp drop in oil prices in 2014 and early 2015 reflects the risk of such reliance, with evident effects on Nigeria's budget as well as current account balance.

Trade links with Asia, especially with China, are strong. China grew to become Nigeria's first supplier, covering 21% of import needs in 2012, up from 15% in 2011, and ahead of the United States. Overall, 41% of Nigeria's import needs are sourced in Asia, notably manufactured and equipment goods. In terms of exports, the country's leading trade partners are the world leading oil consumers. 37% of Nigeria's exports are bought by European countries – the Netherlands, France and Italy being the key partners. The United States (US) is the leading export market for Nigerian products, with a share of 18% of total exports. However, exports to the US lost 11% between 2010 and 2012, reflecting the decrease in US's oil imports as local energy production is growing. Exports to Europe and the US are mainly made of raw oil, sent by oil majors to home countries for refinement and processing. In 2014, Eurozone countries and the BRICS accounted for about 25.8% and 25.3% of Nigeria's crude oil exports respectively (FRN, 2014).

Nigeria has developed economic linkages with its neighbouring countries, especially with Economic Community of West Africa States (ECOWAS) member countries. They include significant formal and informal trade of goods and services, financial sector interconnections, capital flows, labour movements and remittance flows. Nigeria is a pillar of the regional cereal market, providing 73% of the needs of Niger and Chad in cereals; and an important energy provider. It is estimated that 80% of Benin's needs in fuel and gasoline are sourced (formally or informally) from Nigeria (IMF, 2012a). The Nigerian financial sector is also responsible for a large part of cross-border regional activity. Nigerian banks have 75 subsidiaries (as of 2011) across 32 SSA countries. However, Nigeria's exports to African countries represented approximately 11% of the total value of exports, with ECOWAS accounting for 3%, and imports amounted to 8% of the total value of imports, highlighting the potential for growth and economic diversification through increased regional integration. There are ongoing efforts to create a Customs Union by 2015 and

a monetary union in the longer term in West Africa, despite challenges regarding the convergence of inflation, fiscal spending and external reserves (OECD, 2013).

Although growth has been consistent and strong since 1999, it has not necessarily translated into inclusive human development and better living conditions. The human development situation is in dire need of improvement. Nigeria was ranked 152nd out of 187 countries in the 2014 United Nations Development Programme Human Development Index (HDI) report, with a score of 0.504, slightly below the SSA average. Extreme poverty figures are worsening: in 2010, 69% of the population was living below the national poverty line, up from 65.5% in 1996. Inequality indicators have worsened as well, as attested by a rising Gini coefficient of 0.49 in 2014, up from 0.43 in 2004.

Although spending in health and education rose, the country is still far from reaching the Millennium Development Goals (MDGs). Nigeria is likely to achieve the MDGs on primary education, child mortality and maternal health, but not the goals on poverty reduction and access to water (OECD, 2012). Programmes aiming to fight poverty have included the setup of a national microcredit agency, a national poverty eradication programme and several measures to promote entrepreneurship.

Official unemployment reached 24% in 2011, up from 21% in 2010, and 38% for 15-24 year olds. The unemployment rate is one of the highest in the world (171th country in the world for employment), although informal unemployment is more difficult to account for. The labour market's inability to absorb the youth in particular stands among the causes of violence and insecurity in Nigeria. The government intends for diversification to play an important part in job creation: according to the 2015 Budget Speech, diversification efforts generated 1.2 million jobs in 2013 and about 500 000 jobs in the first half of 2014 (FRN, 2014).

Insecurity, with its detrimental effects on economic growth and population well-being, remains high and takes several forms. In the North, religious terrorism and conflicts in some states are raising serious security challenges, and terrorism has extended to Abuja as well in the past years. The Delta region has witnessed high levels of oil-linked terrorism, with a couple of local political groups contesting oil revenue-sharing mechanisms. Although an amnesty law was passed in 2009, several incidents were reported in 2012. Finally, criminality remains high in big cities, Lagos being particularly affected by organised crime.

1.3. Government economic priorities and the role of FDI in Nigeria's economy

Between 1975 and 1995, it was estimated that the federal government of Nigeria (FGN) had invested more than USD 100 billion in public enterprises,

fuelled by ever-increasing oil revenues. But, over the past three decades, the government's economic priorities have progressively shifted towards increasing openness of the economy. The first wave of privatisations started in 1988, in the wake of the Structural Adjustment Programme, with the *Privatisation and Commercialisation Act*. 111 companies were set for divestment, and 88 of them were effectively privatised in 1993. During this first privatisation round, foreign bidders were excluded from all sectors except oil, and very little Foreign Direct Investment (FDI) took place. Nonetheless, as the impulse for privatisation grew stronger, as the country became more open to foreign participation, notably by 1999 with the *Public Enterprises Promotion and Commercialisation Act*. The underlying rationale for this more comprehensive privatisation programme was to: improve the business environment by breaking monopolies and reducing the interface with political circles; free up additional resources for government spending; attract foreign investment; and improve enterprise efficiency.

The second privatisation round, therefore, set up the Bureau of Public Enterprises and the National Council on Privatisation, and authorised the partial privatisation of State-Owned Enterprises (SOEs) in key sectors including telecommunications, electricity generation and distribution, petroleum refining, aluminium smelting, and steel and coal production. During this round over 116 enterprises were privatised between 1999 and 2006 (McKinsey Global Institute, 2010). FGN first divested its stakes in banks, oil marketing and cement; here foreign capital represented 14% of the USD 260 million proceeds. In the following phases government ownership in hotels, manufacturing and public services was partially or totally divested, while foreign bidders were provided with stakes in the cement industry (UK and Norway), steel production (India), and ports (UK). Even if many strategic sectors of the economy remain dominated by SOEs today, privatisation efforts have therefore played a substantive role in increasing FDI flows to Nigeria.

Beyond privatisation alone, the attraction of both foreign and domestic investment across all sectors of the economy has become a central priority on the government agenda. The National Economic Empowerment and Development Strategy (NEEDS, which in 2003 laid down the government's vision for the following decade) committed FGN to reforming governance, ameliorating human capital, and developing agriculture and infrastructure, with special emphasis on private sector participation and foreign investment. In 2009 the NEEDS Strategy was followed by Nigeria Vision 20:2020, a very ambitious and holistic economic development plan aimed at making Nigeria one of the top 20 world economies by 2020 (implying an average growth rate of 13.8% during the time period). This plan's first priority is to diversify away from oil dependence and to increase the contribution of agriculture and manufacturing to output and exports, while increasing linkages between sectors and across geographical

regions. Meanwhile, within the oil sector, emphasis is placed on attracting investment in oil prospection as well as in private refineries and downstream manufacturing. The second goal is to achieve human capacity development, improve the well-being of the population and transform people into sources of growth. Creating an environment favourable to sustainable growth and development is the third priority of NV 20:2020.

In view of achieving diversification, focus is especially placed on agriculture and manufacturing. This objective has since been taken up in other national trade and investment strategies, such as the 2011-15 Transformation Agenda, the National Trade Policy (released first in 2002, and being renewed over 2013), the National Industrial Revolution Plan (NIRP) and the Agricultural Transformation Agenda. As regards agriculture, all of these strategies aim to increase productivity, but also trade and investment linkages and value-addition so as to improve food security. Attracting investment in large-scale mechanised production and reforming land use to allow for land concentration and increased productivity are the first steps towards this objective. Alongside, these national strategies aim to make the agricultural and manufacturing sectors major drivers of growth and exports, with particular emphasis on industries that source their raw materials locally. Within the manufacturing sector, NV 20:2020 thus targets petrochemicals, chemicals, food, textiles, metals, and non-metal minerals, and adopts a cluster-based approach (geographic distribution of these key priorities across six main regions of the country).

Increasing the downstream linkages of agriculture and manufacturing with wholesale and retail trade, as well as the upstream linkages of manufacturing are thus particular priorities for both trade and investment policymaking in Nigeria. Successfully addressing this would potentially allow the country to generate more jobs locally and to retain more value-added, which is currently extremely low across all sectors of the economy – even in oil and gas. Alongside these economic objectives, the social objectives of NV 20:2020 have stimulated a rise in budget spending on health and education; social safety nets are being set up (with a USD 250 million initial funding from the government in 2011) along with a minimum wage and other initiatives to improve access to housing and financing through micro-credit. Education reforms will also become increasingly necessary to tackle the mismatch between industry demand and the supply of skills, through initiatives for youth employment, promotion of entrepreneurship and vocational education.

In light of the above objectives, the four key strategic orientations identified by NV 20:2020 to secure economic diversification and competitiveness are:

1. investment in infrastructure (particularly electricity and transportation, but also water and irrigation for agriculture – with a focus on attracting private sector investment);

2. building capacity in financial markets and increasing credit access to productive sectors of the economy;
3. improving governance and institutional capacity (notably by aligning policy formulation and implementation across federal and state level, and up-scaling the fight against entrenched corruption); and
4. improving the business and investment climate (in particular by adopting a holistic legal investment framework, reversing the trend towards informality, accelerating privatisation of state enterprises, and improve the ease of doing business).

As detailed in Sections 1.5 and 1.6 below, these strategic orientations closely match the central policy challenges identified in this *Investment Policy Review*.

Nigeria's vision for sustainable and inclusive growth over the next decades thus relies significantly on attracting both domestic and foreign investment, especially in infrastructure and the non-oil sectors. Private investment has the potential to increase productivity and its positive spill-overs on the domestic economy. FDI in particular can increase global competitiveness of the host economy through transfers of technologies, knowledge and skills, and by bridging local entrepreneurship and financing gaps. It also has the potential to generate employment and to boost export sectors. However the effects of FDI are contingent on the absorptive capacity of the economy – which in turn depends on the levels of domestic investment and entrepreneurship, human capital (health and education), market size and wealth, quality of infrastructure networks, political stability and institutional capacity, among others (OECD, 2002). Addressing these factors requires a change in the level of involvement of the government, from an instigating role to a catalytic and facilitating one. At both federal and state levels, Nigeria's governing bodies need to orientate and encourage private investment while mitigating key legal, institutional and structural impediments – as addressed in the sections that follow.

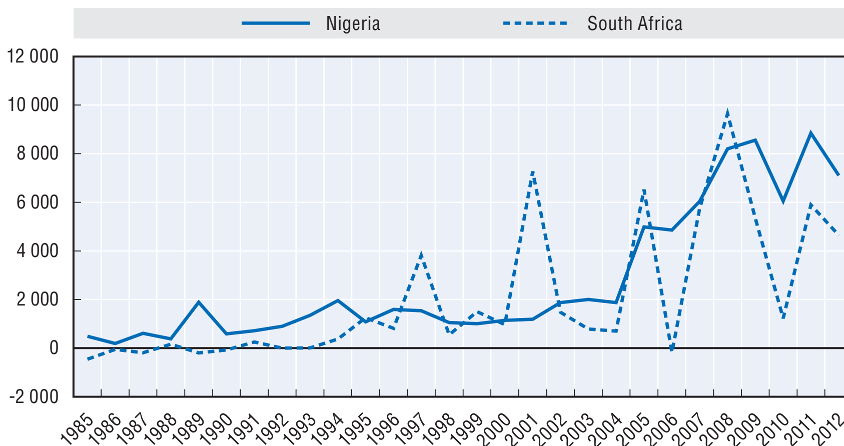
1.4. FDI trends

FDI inflows were limited before the end of the 1980s, as a consequence of limited foreign ownership in several industries and other restrictions to investment, within the framework of the 1970 *Indigenisation Act*. FDI inflows never reached the USD 1 billion annual threshold before 1989, but picked up sharply and consistently after this date. The Structural Adjustment Programme of 1986 and the subsequent economic liberalisation policy unleashed the country's potential as a foreign investment recipient. FDI grew six fold between 1988 and 1989. FDI flow levels were above USD 1 billion annually between 1989 and 2001, and exceeded USD 2 billion in 2002. FDI inflows reached USD 5 billion in 2004 and never went below this level since

then. They reached a record level of USD 8.9 billion in 2011, before falling by 21% to USD 7 billion in 2012 (Figure 1.4). FDI flows to the country have been rising steadily at a compound annual growth rate of 10% between 2005 and 2011, experiencing a momentary decrease in 2010 and 2012 only. In comparison, FDI flows to South Africa, the continent's leading economy, have been much more erratic since 2005. In parallel, Nigeria is the second preferred destination on the continent after South Africa for portfolio flows, which surpassed FDI flows in 2012.

Figure 1.4. **FDI inflows into Nigeria and South Africa, 1985-2012**

USD million

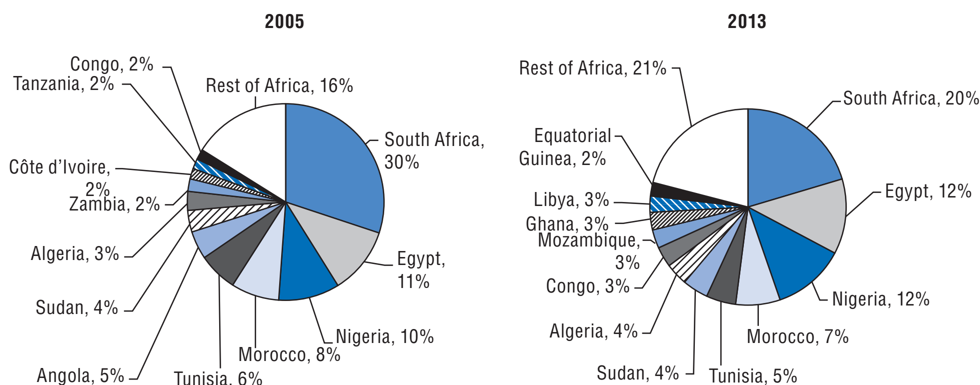


Source: IMF, *Balance of Payments Statistics Database*, *www.imf.org/external/pubs/cat/longres.cfm?sk=19299.0* and *International Financial Statistics Database* (2013), *http://data.imf.org/?sk=5DABAFF2-C5AD-4D27-A175-1253419C02D1*.

Regionally, Nigeria holds 17.5% of SSA's FDI stock as of 2013, up from 14% in 2005; and 12% of Africa's stock, third to South Africa and Egypt (Figure 1.5). Stock levels are about half of South Africa's stocks, the subcontinent's (and continent's) first foreign investment holder, but well above Sudan's FDI stock. FDI stocks have risen significantly since 2005, up from 10% of Africa's stock, at a compound annual growth rate of 16%, faster than the average growth of FDI in Africa (13% between 2005 and 2012). In comparison, South Africa's share of the total stock declined sharply, from 30% to 20% of Africa (Figure 1.5). Nigeria holds approximately 60% of ECOWAS stock.

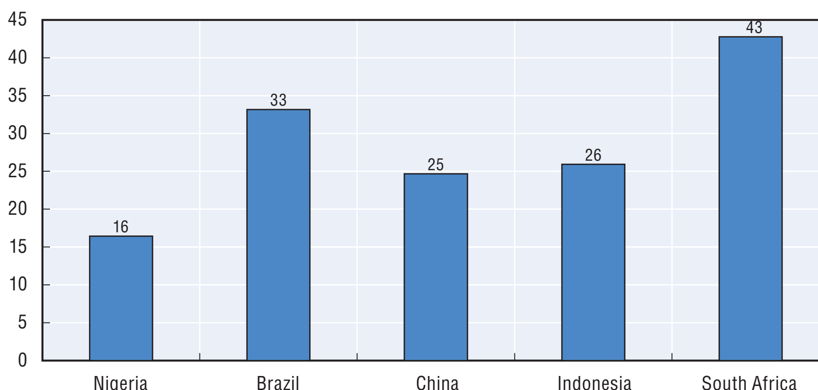
Nigeria qualifies as a top recipient in the subcontinent. When compared to other emerging economies, its FDI stock is however rather low as a percentage of GDP (16% in 2012), below countries such as China (25%), Indonesia (26%), Brazil (33%) and South Africa (43%) (Figure 1.6). This figure has however been affected by the recalculation of Nigeria's GDP, as its previous share was

Figure 1.5. **FDI stock distribution in Africa, 2005 and 2013**



Source: *UNCTAD FDI Database* (2013), *http://unctad.org/en/Pages/DIAE/DIAE%20Publications%20-%20Bibliographic %20Index/ Pub-FDI-Statistics.aspx.*

Figure 1.6. **FDI stock as a *percentage* of GDP in Nigeria and comparator economies, 2012**



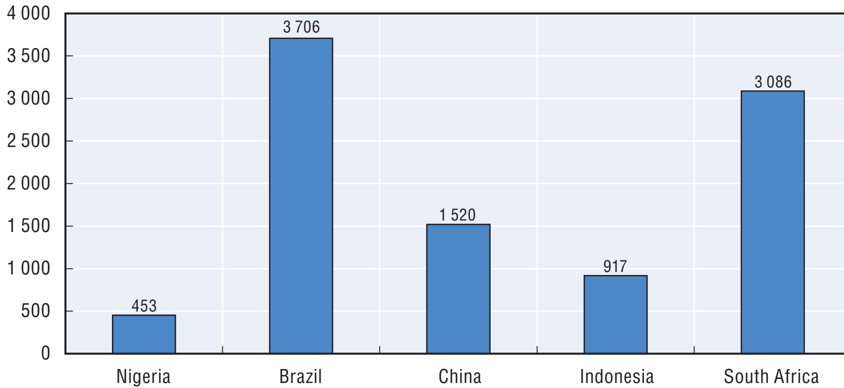
Source: IMF, *International Financial Statistics Database*, *http://data.imf.org/?sk=5DABAFF2-C5AD-4D27-A175-1253419C02D1* and World Economic Outlook database (2014), *www.imf.org/external/pubs/ft/weo/ 2014/02/weodata/index.aspx.*

around 28%. This highlights that, although FDI is a key driver of the Nigerian economy, its attraction performance is yet under its potential.

FDI has still room to increase compared to the country's overall economic potential, as confirmed by Figure 1.7. Nigeria's FDI stock per capita (USD 453) remains low when compared to large emerging economies. It is approximately half of Indonesia's FDI stock per capita, one third of that of China, almost seven times as low as that of South Africa and more than eight times lower than that of Brazil, highlighting Nigeria's immense future FDI attraction potential as well as remaining investment challenges.

Figure 1.7. **FDI stock per capita in Nigeria and comparator economies, 2012**

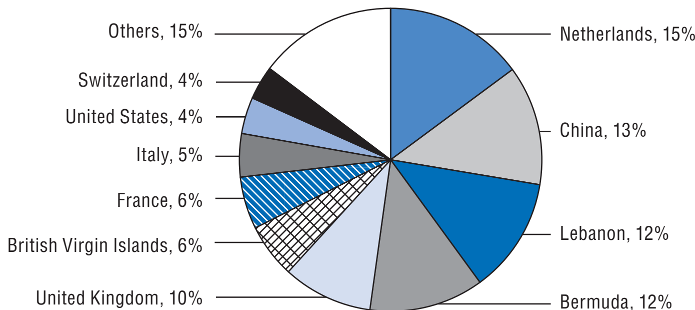
USD



Source: IMF, *International Financial Statistics Database*, *http://data.imf.org/?sk=5DABAFF2-C5AD-4D27-A175-1253419C02D1* and World Economic Outlook database (2014), *www.imf.org/external/pubs/ft/weo/2014/02/weodata/index.aspx*.

In 2012, investor countries in Nigeria were mostly originating from the EU (Netherlands, France, the United Kingdom, Italy), China, Lebanon, Bermuda and the British Virgin Islands, the last two being mainly used as financial intermediates for foreign investment (Figure 1.8). Netherlands, China, France, the UK and Italy's FDI stocks are mainly geared at the oil sector, and include investments by major oil companies Shell, Total and ENI, and other oil and gas servicing/engineering companies.

Figure 1.8. **FDI stock by country of origin, 2012**



Source: *IMF, CDIS Database* (2014), *http://data.imf.org/?sk=D732FC6E-D8C3-44D1-BFEB-F70BA9E13211*.

FDI in the oil sector has been traditionally high and accounts for a large part of FDI stock. The first foreign oil company to be active in the country was Shell, first company to discover oil in the Delta region in 1956. Elf and Agip entered the market in 1962, Mobil in 1968. Between 1973 and 1979, in the wake

of the *Indigenisation Act*, the government's equity participation in oil and gas activities was progressively increased to 80% through the newly formed Nigerian National Petroleum Corporation (NNPC), Shell retaining the remaining 20% and other companies' assets being nationalised. The government – through NNPC – progressively reduced its stakes to 60% nowadays and let foreign majors take an increasing participation in oil activities. Foreign companies established in the oil sector today include: Total, Shell, ENI, Chevron and Texaco. However, investment in the oil sector was stalled amid insecurity and policy uncertainty, as investors seem to be waiting for the outcome of the *Petroleum Industry Bill*, under discussion since 2008. Chevron is expected to auction part of its oil fields in 2013. While Shell and Total have already exited a number of onshore assets and are now focusing on deep offshore oil fields, Chevron is expected to auction off some onshore and shallow offshore assets.

FDI has been historically important in the non-oil sector as well, and is growing. Blue chip MNEs in the manufacturing and services sectors strive to take advantage of Nigeria's strong fundamentals, including its large domestic market size, renewed political stability and growth prospects. Key sectors of investment include: automobile (Peugeot, since 1972), engineering and construction (Lafarge, since 1972), electricity and power generation (ABB since 1977), agribusiness (Unilever since 1973, Heineken since 2000), financial services (Standard Chartered since 1965), chemicals and pharmaceuticals (Akzo Nobel), telecommunications (Etisalat since 2007, MTN since 2001), and marine transportation (shipyards: Damen Shipyards, Sea Truck Group). In telecommunications, South African MTN entered the market in 2001, taking advantage of telecommunications' privatisation, and is now the largest provider in the country. According to the authorities, approximately USD 25 billion have been invested in ICT since liberalisation of the sector began, and the recently developed National Broadband Plan 2013-18 aims to further stimulate this trend with the objective of a fivefold increase in broadband penetration by the end of 2017.

Although FDI volumes have been on the rise since 1999, their economic impact remains difficult to measure. A large component of FDI flows has been directed toward extractive industries, which are highly capital-intensive, and deprived of sufficiently robust backward and inward value chain linkages to result in employment generation and domestic growth. In general, FDI impact has been lower than expected due to the lack of an enabling environment – as addressed in more detail in the following section.

1.5. Investment challenges in Nigeria and Lagos State

Following the 1988 and 1989 Privatisation Acts, which marked the beginning of economic opening, the *Nigeria Investment Promotion Commission (NIPC) Act* of

1995 represented a milestone in the liberalisation reform process. The *NIPC Act* aims to encourage foreign investments in all sectors of the economy and establishes the NIPC as the main body for promoting and facilitating investment to Nigeria.

More recently, national development strategies (National Vision 20:2020 and Transformation Agenda 2011-15) have recognised private sector development as the main engine for economic growth in Nigeria and emphasised the need for adopting government policies and projects to support private investment. The federal government has recently accelerated its efforts in this regard, as demonstrated by the re-structuring of the Federal Ministry of Commerce and Industry in 2011. This has become the Federal Ministry of Industry, Trade and Investment, in recognition of the importance of investment for improving the country's competitiveness and in view of enhancing institutional co-ordination and policy coherence.

Despite these efforts, the country continues to record a poor business and investment climate, as attested by Nigeria's World Bank *Doing Business* ranking of 2015. As 170th out of 189 countries, down from 138th in 2013 but slightly up from 175th in 2014, Nigeria ranks slightly worse than the SSA average (142nd) and significantly lower than South Africa (43rd), Ghana (70th), Botswana (74th) and Kenya (136th). Creating an enabling environment for investment and private sector competitiveness will be instrumental in achieving the growth and poverty reduction targets set in Vision 20:2020. Similarly, on the 2014-15 *Global Competitiveness Index*, the country ranked 127th out of 144 countries, down from 115th in the previous edition (Table 1.2).

Table 1.2. ***Global Competitiveness Report* rankings**

Category	Nigeria's ranking (out of 144 countries)
Institutions	129
Infrastructure	134
Macroeconomic environment	76
Health and primary education	143
Higher education and training	124
Good markets efficiency	87
Labour market efficiency	40
Financial market development	67
Technological readiness	104
Market size	33
Business sophistication	87
Innovation	114
Overall	**127**

Source: World Economic Forum (2014), *Global Competitiveness Report* 2014-2015, Geneva, *www.weforum.org/reports/global-competitiveness-report-2014-2015*.

Generally, Nigeria's growth and investment prospects are constrained by important challenges going beyond the scope of this *Investment Policy Review*. They relate firstly to long-standing insecurity and socio-political tensions, including recent terrorist attacks in the North, criminality throughout the country and instability in the oil-producing Delta region where debate is raging over oil revenue sharing. Secondly, public governance and corruption remain problematic, as illustrated by Nigeria's 136th position out of 175 countries in Transparency International's 2014 Corruption Perceptions Index. Apart from these general socio-political challenges, several policy bottlenecks keep hampering investment in Nigeria.

As highlighted in this *Investment Policy Review*, Nigeria's policy framework for investment could be enhanced through reforms that stretch beyond investment policy. They also touch upon investment promotion and facilitation, trade policy, infrastructure, competition, corporate governance, financial sector development, as well as the issue of co-ordination between Federal and State governments on policy formulation and implementation.

Dispersed policy reforms and poor implementation impede the transparency of the regulatory framework for investment

On the legislative front, Nigeria does not face serious shortfalls in terms of substantive legal protection granted to investors; however the legal framework suffers from a lack of clarity that reflects the absence of a unified investment strategy. The policy formulation process is itself in need of streamlining: delays in enacting announced legal reforms, which are frequent in Nigeria, generate uncertainty and confusion for investors. The possibility for government agencies to formulate draft bills for consideration by their respective ministries and subsequently by the Federal Executive Council (FEC), without requirement of a wide consultative process, creates a multiplicity of bills that sometimes overlap, contradict each-other, or generate turf disputes among various MDAs.

Moreover this approach to legal formulation weighs down the work of the FEC and Ministry of Justice, and heightens the likelihood of delays and obstructions at the National Assembly to the passage of each bill. As a result, several important legal reforms, including the elaboration of a competition law, a national code of corporate governance, and a bankruptcy law, are underway, but drafting processes have often stalled in the past. There is no monitoring of the implementation of investment policies. Efforts to better promote proposed policies and planned reforms are essential, not only *vis-à-vis* potential investors but also among parastatal agencies and Ministries.

The government also needs to improve the implementation of the existing regulatory framework, in particular through strengthening and rationalising

various implementing institutions. For instance, while Nigeria has developed a fairly comprehensive legal framework for protecting intellectual property rights, difficulties lie in the weakness and dispersion of implementing institutions and in the lack of capacity to efficiently enforce rules, notably in the border police and customs. Frequent policy changes and a lack of co-ordination among responsible institutions have also impeded the predictability of investment and trade regimes. The risk of legal loopholes in the investment regime is moreover exacerbated by Nigeria's poor track record for ratification of its bilateral investment treaties.

Another priority reform area is access to land, which is identified by the investment community, in particular SMEs and foreign companies, as one of the most significant constraints to doing business across Nigeria. Access to land is particularly a major challenge in Lagos State, which has among the highest real estate value and the smallest land area in Nigeria. Lack of transparency, high fees in the mandatory approval of State Governor for transfers of land rights, and weakness of the land titling system are some of the main impediments to investment in Lagos State. Land reform across Nigeria will require 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. The priority remains on improving the implementation of the regulatory framework for land, before undertaking an in-depth reform of the land legislation.

Weak institutional capacities and co-ordination hinder successful investment promotion efforts

Challenges also persist on the investment promotion and facilitation front, notably due to weak institutional capacities, poor inter-agency co-ordination and the lack of a coherent inward investment promotion strategy. Elaborating an overarching strategy for improving the business environment in the country would allow it to more efficiently and clearly assign responsibilities among relevant ministries and implementing agencies, and would also help ensure consistency between investment promotion and trade policy objectives (see further below). At present, the federal investment promotion agency – Nigeria Investment Promotion Commission (NIPC) – promotes Nigeria as an investment location, but with insufficient capacity for investment generation in targeted sectors and industries. FMITI needs to define a strategic vision on investment promotion, so as to bring efforts in line with national development priorities and to better target promising sectors for investment generation. Such a strategy would need careful alignment with trade and industrial policies as well as State-level strategies. In Lagos State, specific measures to attract inward investment are not yet articulated and specified, nor are they targeted towards strategic sectors.

The NIPC's marketing, facilitation and advocacy functions also need to be improved and better co-ordinated. For example, aftercare activities are insufficient, despite the fact that their impact on retaining investors is potentially high and that business feedback from aftercare can help NIPC perform its policy advocacy role. In addition, businesses are not consulted on a systematic basis in investment policy design and reform processes. NIPC lacks adequate funding and suffers from poor use of existing funds. It also lacks clear targets against which its performance is measured. Despite the creation of a federal One-Stop Investment Centre (OSIC), co-ordination of business registration remains spread among various government entities, which multiplies entry points for investors and raises administrative as well as time costs. Furthermore, tax incentives for investment are neither sufficiently streamlined nor subject to regular impact analyses. The multiplicity of incentives is also governed by an overly complex legislative framework, rendering their allocation less transparent and more subject to discretion.

These challenges are exacerbated in Lagos State, where the newly created Investment Promotion Unit currently lacks capacities to perform relevant promotional functions and will need robust reinforcement before being able to yield any significant results. Moreover, the federal government has not yet defined a clear model of collaboration between federal and state institutions on promotional activities. The authorities are willing to use Free Trade Zones (FTZs) for FDI attraction purposes, especially in Lagos State. However, FTZs currently tend to give priority to providing tax incentives over quality common infrastructure facilities.

Finally, productive linkages between multinational enterprises (MNEs) and domestic small and medium-sized enterprise (SME) are lacking, in relation with: the insufficient outreach of public policies in support of SME development and micro-entrepreneurs' formalisation both at Federal and Lagos State levels; the lack of adequate backward linkage creation programmes; and limited efforts aimed to address the mismatch between skills demand and supply.

New export niches are necessary to increase competitiveness and boost development

Export competitiveness is generally a challenge for Nigeria and it has yet to find export niches in which to gain in value-added and diversify away from the current focus on supply of raw materials. The World Economic Forum's *Global Competitiveness Index* categorises Nigeria as a stage one factor-driven economy – that is, a net exporter of raw materials that are then processed abroad, as opposed to efficiency-driven and innovation-driven economies. Due to a lack of effective trade facilitation measures and to weak export promotion strategies, existing market access opportunities (both domestically and overseas) have so far been under-utilised, and insufficient attention is given to sectors, such as

agro-allied industries and export manufacturing, that can source their raw materials locally. A cross-cutting and especially critical priority for Nigeria would therefore be to strengthen the strategic, sectoral dimensions of both investment promotion and trade policies; while there is general coherence among these plans, at present their coverage is too broad to effectively contribute to the competitiveness of Nigerian production and exports.

A related challenge is that of ministerial lines of accountability: responsibilities for various policy questions closely related to trade are dispersed under the responsibility of several ministries rather than being under the overarching authority of FMITI. Indeed while FMITI retains responsibility over export permits, the Federal Ministry of Petroleum Resources formulates all policies concerning the marketing of petroleum. Meanwhile the Federal Ministry of Finance formulates and implements measures relating to the elimination or reduction of tariffs and non-tariff barriers, and also oversees the operations of Nigeria's export credit agency (NEXIM). The Minister of Finance moreover has discretion in removing or adding products to the import and export prohibition lists, while the Minister of Agriculture is empowered to regulate the import of seeds and artificial fertilisers, among other goods. This dispersion considerably reduces the agency of FMITI in leading trade and investment policy reform, and also increases the risk of duplicative or even counter-productive policy initiatives undertaken across different ministries.

Moreover, informal trade, cumbersome port and customs administration, and the persistence of considerable non-tariff barriers and export and import prohibitions, significantly add to the cost of doing business. The lack of predictability regarding such trade restrictions is a considerable hindrance for domestic and foreign traders, and an especially strong deterrent for export-oriented FDI. Trade facilitation measures are not sufficiently in line with investment priorities, and the forthcoming National Trade Policy 2013 (still in draft form) may contain contradictions and run counter to the country's advances towards encouraging an open economy. Indeed, rather than emphasising structural reforms in promising sectors of the economy, in its August 2013 version the draft policy wavered between a market-opening stance and a position favouring greater trade restrictions and reliance on preferential trade agreements. These shortcomings in both policy and practice might restrict investment as well as trade, and could severely hamper Nigeria's prospects for long-term competitiveness. Indeed, they would come at a time when Nigeria is finally reaping the benefits of past structural adjustment and liberalisation efforts. These shortcomings may be addressed in a new iteration of the draft Policy which is currently being prepared (as of October 2013); otherwise, changing the country's strategic orientations may jeopardise the ground gained so far, and adversely affect foreign and domestic investors alike.

Other supply-side bottlenecks affect Nigeria's broader policy framework for investment

Nigeria also faces considerable supply-side constraints, which limit the potential of domestic entrepreneurs to latch onto investment opportunities and to engage in value-added production for both local and export markets. These include, among others: limited access to finance, especially for small enterprises; low standards of infrastructure quality in terms of accreditation, certification, and weights and measures despite the work of the Standards Organisation of Nigeria; and inadequate and costly physical infrastructure. Despite government investments, acute infrastructure bottlenecks stand high among the current economic challenges, including in transport, power, telecommunications and water. The country ranked 121st out of 155 countries in the 2012 *Logistics Performance Index*. As acknowledged in National Vision 20:2020, "the current infrastructure base is grossly inadequate in capacity and quality to cater for the anticipated population and economic growth". Increasing infrastructure capacity is all the more crucial in a country striving to promote private sector involvement and exports, as poor infrastructure networks considerably raise business costs and compromise competitiveness in key domestic industries.

Tackling Nigeria's infrastructure bottlenecks requires both significant public sector investment and the effective leveraging of private sector resources. The federal government has actively taken this necessity on board in the power sector: on 30 September 2013 the share certificates of 15 state-run electricity distribution and generation companies were handed over to consortiums of domestic and foreign investors, marking a milestone in the sector's privatisation process. There has also been increasing momentum towards developing infrastructure projects through public-private partnerships (PPPs). This is an area in which Lagos State has been a front-runner, putting in place an advanced legal and institutional framework for infrastructure PPPs; this has been complemented by important efforts at Federal level, including on the project financing front where certain State projects have been supported by Federal guarantees. Nevertheless, gaps remain in the federal framework for infrastructure procurement – some of which are not addressed within the legal regime of Lagos State either. For example, neither federal nor Lagos State legislation (for PPPs as well as traditional procurement) specifically addresses elements of risk-sharing and performance management in contract design. Likewise, procedures for communication and dispute resolution between public and private parties, as well as provisions to facilitate SME participation in procurement bids are mostly lacking. These gaps are evidenced by the revocation of a number of concessions and public infrastructure contracts in recent years, giving rise to numerous litigations (such as the concessions for the Lagos Airport General Aviation Terminal or the Lagos-Ibadan Expressway – see Chapter 6).

As Lagos State Government has some room for manoeuvre in the design of its infrastructure procurement and PPP regime, these shortfalls could be effectively filled by State-level reforms. Another challenge, which is likely to grow larger as PPPs are implemented across strategic infrastructure sectors, concerns public acceptability and understanding of such projects. This factor for instance impeded cost recovery in one of Lagos State's first PPP projects (the Lekki Concession), where road-tolling had to be temporarily suspended as it initially sparked widespread public discontent. All of these legal and institutional challenges would need to be rapidly addressed if Nigeria is to effectively and sustainably leverage private finance towards the development of business-enabling infrastructure networks at Federal and State levels.

Moreover, Nigeria's economy is highly dependent on climate-sensitive and climate-impactful industries, such as agriculture, forestry, and extraction. Natural disasters such as droughts and flooding pose a major threat to agricultural output, and hence to the livelihood of farmers and food security. High levels of pollution have been recorded in the Delta region due to oil and gas exploration and extraction activities, and in the region of Lagos due to the heavy concentration of industries. This calls for taking policy actions on low carbon and climate resilient (LCCR) infrastructure – such as more sustainable forms of energy, transport, and water and sanitation infrastructure. While various policies and plans for climate change adaptation and LCCR investment have been adopted in 2012, remaining challenges are multiple. Policy, legal and institutional frameworks for renewable energy are at their beginning stage and the price of conventional energy (especially petroleum products and electricity) is often subsidised, creating barriers for renewable energies to achieve sufficient levels of market share.

Alongside these infrastructure bottlenecks, doing business in Nigeria has to date also been constrained by the lack of predictable and unified regimes for competition and corporate governance (especially as concerns the corporate behaviour of state-owned enterprises). The absence of a competition law and of effective competition institutions and policies has hampered the entry of new investors on the domestic market, including for the provision of basic infrastructure utilities. Likewise, the lack of sound SOE governance rules has tended to create an uneven playing field for private investors – whether foreign or domestic. These obstacles are all the more challenging for small companies, which are particularly vulnerable to the presence of large incumbents on goods and infrastructure markets. Clear rules for SOE governance (including strong financial reporting standards) can give policymakers a full picture of the state-owned sector, so as to guide decisions concerning which sectors could be usefully open to private investment. Nigeria is currently moving ahead on developing a national code of corporate governance, as well as a competition law, which could usefully address these shortfalls provided that the appropriate

implementing structure is in place – including strong support from and clear lines of accountability with lead ministries.

Finally, the financing bottleneck is also an important impediment to investment in Nigeria. Small investors in particular suffer from banks' risk aversion. Almost exclusive bank preferences for large enterprises and SOEs with proven track records, high interest rates and high collateral requirements, as well as reluctance for long-term lending, constrain credit and tend to crowd SMEs out from the loan market.

1.6. Main policy recommendations for the Federal Republic of Nigeria and Lagos State

The *Investment Policy Review of Nigeria* examines the country's investment policies in light of the OECD *Policy Framework for Investment* (PFI) (Box 1.2). It focuses on the country's investment policy (Chapter 2), investment promotion and facilitation (Chapter 3), and trade policy (Chapter 4). Other areas of the PFI, such as infrastructure policy, competition policy, corporate governance and financial sector development are addressed in Chapter 5. Human resource development is being analysed horizontally. A special chapter is dedicated to the analysis of the PFI in Lagos State (Chapter 6). The latter analyses the State's business climate and suggests policy measures to encourage investment in Lagos State with a special emphasis on infrastructure. A summary of the *Review's* recommendations are presented below.

Box 1.2. **The OECD Policy Framework for Investment**

The OECD *Policy Framework for Investment* (PFI) was developed within the OECD by the representatives of nearly 60 countries, and poses a list of key questions that should be examined by governments seeking to create a favourable investment climate. The objective of the PFI is to mobilise private investment in support of stable economic growth and sustainable development, contributing in this way to the prosperity of countries and their citizens and to combating poverty.

The PFI is not prescriptive. It is a flexible instrument that allows countries to evaluate their progress and identify priorities for action in ten policy areas:

i) investment policy,

ii) investment promotion and facilitation,

iii) trade policy,

iv) competition policy,

v) tax policy,

vi) corporate governance,

Box 1.2. **The OECD Policy Framework for Investment** *(cont.)*

vii) policies for promoting responsible business conduct,

viii) human resource development,

ix) infrastructure and financial sector development, and

x) public governance.

Three principles apply throughout the framework: policy coherence, transparency in policy formulation and implementation, and regular evaluation of the impact of existing and proposed policies.

By encouraging a structured process for formulating and implementing policies at all levels of government, the PFI can be used in various ways, including for self-evaluations, peer reviews, regional co-operation, and multilateral discussions.

A *User's Toolkit* has been developed offering practical guidance on how to implement the PFI. It highlights how the core principles of the PFI influence investment; how the various chapters of the PFI relate to one another and how the PFI can assist in an on-going and iterative process of reform and in fostering public-private dialogue.

Source: OECD, *www.oecd.org/daf/investment/pfi* and *www.oecd.org/investment/pfitoolkit.*

Federal level

Investment policy (regulatory framework)

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 broader legal framework. 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. Further policy options to improve the investment regime include the following:

- Design a more consultative and better co-ordinated process for the preparation of new laws and regulations – including for the implementation of regional legal instruments – so as to diminish the confusion and lack of co-ordination that currently appear to dominate the legal formulation and drafting process. For example, clarify the allocation of responsibilities between the Nigeria Investment Promotion Commission (NIPC) and the Federal Ministry of Industry, Trade and Investment (FMITI) in the *NIPC Act* amendment process. Overlaps of responsibilities should be avoided at all costs and FMITI should further strengthen its ownership in the formulation of investment policies. Similar clarifications could help move forward on the enactment and implementation of various other bills, such as the competition and the bankruptcy bills. More generally, awareness of investment policies and

strategies among Ministries' parastatal agencies' staff should be enhanced and monitoring of existing policies and laws should be undertaken to avoid incoherent implementation of policies.

- Consider incorporating stronger elements of investment protection into the investment legislation. Reinforcing the legal guarantees provided to investors would send a good signal to investors that the government is willing to provide a secure investment environment, ensure legal predictability and mitigate the perceived political risks of investing in Nigeria. In particular, the authorities, when amending the current *NIPC Act*, could insert a provision on expropriation that defines in a more detailed manner the scope of expropriation and the "national purposes" that may justify administrative decisions to expropriate. Although Nigeria represents low risks of expropriation, reinforcing fundamental protection provisions would still be crucial in view of enhancing the rule of law in administrative practice, and might be more effective for improving the overall investment climate than creating privileges for foreign investors. Consider also inserting provisions into future bilateral investment treaties that would better balance investors' rights and obligations, in order to preserve some policy space on labour, environmental and social issues.
- While improving the efficiency of the court system, maintain the current momentum towards the development of commercial arbitration. Awareness on the availability of alternative dispute resolution mechanisms should be raised in the business and legal communities. The creation of commercial arbitration centres should be further promoted, as it is in Lagos State.

Beside investment law strictly speaking, the government would be well advised to move the reform of the land regime forward, as well as to fine-tune its investment treaty policy. In particular, it could:

- Accelerate the computerisation reform of the land registration system and put further emphasis on facilitating the taking of securities on land properties. The government could ensure sustainability of the land reform process by accelerating the creation of the National Land Reform Commission.
- Ensure ratification of bilateral investment treaties (BITs) concluded with partner countries, so as to give these treaties full legal effect. Ratifying BITs, which add an additional layer of protection for foreign investors, could play a positive role in lowering the perceived political risk of investing in Nigeria.
- Use clear and detailed treaty language. While it is necessary to provide strong protection provisions in BITs, it is also important that investment treaties do not unduly restrain the government's policy space and regulatory autonomy. It is thus important to clearly delineate the scope of the guarantees contained in BITs. For example, there should be a clear definition of covered investment, which should highlight, in particular, whether it encompasses

portfolio investment or not. Likewise, the exceptions to the National Treatment clause that relate to the preservation of public interests, notably for environmental and security reasons, should be clearly delineated.

Investment promotion and facilitation

FMITI needs to define a strategic vision on investment promotion, as efforts are currently not consistently in line with national development priorities and do not target specific sectors and industries. NIPC's marketing, facilitation and advocacy functions need to be improved and better co-ordinated accordingly. The federal government could consider the following policy options:

- Prepare a coherent, well-defined inward investment promotion strategy with clear objectives and activities, and reflecting the country's national economic objectives (Nigeria Vision 20:2020, Transformation Agenda, Nigerian Industrial Revolution Plan, National Trade Policy) and the Ministry's economic diversification agenda. FMITI should take the lead and attribute a clear role to each of its parastatals. Also envisage "whole-of-government" efforts aimed at streamlining and refining sectoral development objectives based on the country's comparative and competitive advantages.
- Enhance NIPC's investment generation activities in view of identifying and targeting individual companies, which fit with Nigeria's investment priorities and initiate constructive and proactive relationship-building with these.
- Modernise NIPC's website, make it more informative and eye-catching, and most importantly, update it on a regular basis so as to enhance image building.
- Establish clearer performance indicators on FDI attraction against which NIPC's results can be measured.
- Improve NIPC's aftercare activities by systematically following-up on investors' concerns. Particular attention should be given to investors interested in expanding their operations in Nigeria as well as those that have a high developmental impact. Aftercare should go from concrete activities to meet investors' needs to pushing forward investment reforms through policy advocacy, while also be used to help identify mismatch between labour demand and skills supply.

Investment promotion activities should be accompanied by broader, cross-cutting efforts to enhance the business environment and promote measures to facilitate investment. The following measures could be envisaged:

- Harmonise efforts aiming to improve the business environment within an overarching strategy with clear targets, approved milestones and sound co-operation agreements within the federal government and in collaboration with State governments. Such a "whole-of-government" strategy should obey to – and be supported by – a clear leadership.

- Further improve the One-Stop Investment Centre (OSIC) and accelerate ongoing efforts to establish an electronic system for business registration at CAC. Accompany these improvements with continuous regulatory reforms to quicken and simplify the process of starting a new business. Also strengthen co-ordination and communication between the Corporate Affairs Commission (CAC) and NIPC, so as to avoid overlaps of tasks and increase information sharing. Consider making foreign investor's registration with NIPC optional; this would make it less burdensome for investors willing to use other avenues of registration and could encourage OSIC to propose a quality service to investors.
- Broaden the range of business interlocutors for investment policy design and implementation, including representatives of SMEs, and increase consultations with the Organised Private Sector.

In view of benefiting from FDI spillovers through the creation of productive business linkages, the government should take steps towards strengthening the network of domestic suppliers of MNEs through SME development, cluster approach, proactive linkage creation efforts and human resources reinforcement. It could notably:

- Increase the outreach of public policies in support of SMEs as well as efforts to formalise micro-enterprises. Bear in mind that existing SME support initiatives should complement, not substitute for, active efforts to establish a sound SME investment environment. Continue collecting SME views to better understand the issues affecting them.
- Design a policy that would fruitfully combine industrial, SME and export development and ensure a closer co-ordination within government and between the government and the private sector to successfully develop industry clusters.
- Increase NIPC's involvement – in collaboration with SMEDAN – in linkage creation, notably through information dissemination (e.g. online database of domestic suppliers) and the organisation of matchmaking meetings between foreign investors and SMEs that could act as suppliers or local partners. Ensure that NIPC's role in these undertakings is as proactive, constructive and neutral as possible, since linkage promotion programmes can only function in an environment of trust.
- Accompany educational reforms by private sector efforts so as to increase the supply of skills. In particular, involve MNEs in training measures of existing and potential suppliers so as to foster the creation of backward linkages. Ensure closer co-operation between NIPC and the Federal Ministry of Education. Also develop closer linkages between NIPC and the Nigerian Diaspora.

The Nigerian tax system needs to be simplified and the tax base should be broadened to generate more revenues for development spending. The

technical assistance of multilateral organisations, such as the OECD, could be of use to analyse the effectiveness of tax incentives for investment and to understand whether the expected impact on investment (if any) is achieved at a reasonable price. The federal government of Nigeria might want to:

- Streamline tax incentives for investment and eliminate wasteful tax incentives after conducting a credible cost-benefit analysis of tax exemptions and special tax provisions. Undertake a systematic, institutionalised tax expenditure analysis in view of identifying the revenue losses associated with tax incentives and, consequently, focusing policy makers' attention on the fact that tax expenditures are quite similar to direct spending programmes and compete with other government spending priorities when the government makes budget decisions.
- Consolidate all tax incentives, along with their eligibility criteria, in the main body of tax law to increase transparency of the system and empower the revenue authority in administrating the tax incentives regime. Ensure that the granting/qualification for tax incentives is automatic, according to predetermined, uniform, and clearly declared criteria.
- Enhance co-ordination across different levels of government to improve the transparency of the tax system. Identify and tackle instances of multiple taxation and abuse so as to reduce the overall tax burden on businesses. As a starting point, a complete inventory of all taxes imposed on business and their legal jurisdictions will help to understand the overall tax burden and facilitate the process of tax system simplification.

Trade policy

In order to tap into the complementary nature of trade and investment, Nigeria's policymakers have a role to play in aligning national development strategies and reforms. The institutional and consultation structures encompassing trade and investment policy formulation need careful co-ordination, and trade and investment strategies would benefit from more selective and strategic prioritisation of key economic sectors under clear leadership from the Federal Ministry of Industry, Trade and Investment. Distortions to both trade and investment flows must also be regularly addressed – in particular the policy orientation of the draft National Trade Policy (in its August 2013 form, still pending in early 2015) could usefully be clarified in the next iteration. Rather than introducing new licensing procedures, local content requirements and non-tariff barriers, a greater focus should instead be placed on structural remedies to export competitiveness and investment attractiveness. Trade policymakers in Nigeria would be advised to:

- Narrow down the breadth of sectors covered by Nigeria's trade (as well as investment) strategies; while ensuring that the individual, sector-specific

support measures periodically announced by federal and state governments match these identified sectors. This would enhance the predictability and longevity of sectoral support measures – and thus their effectiveness in terms of both trade generation and investment attraction. Within these sector-specific measures, more attention should also be placed on enhancing the effectiveness and reach of infrastructure networks for large and small enterprises alike (that is in particular, strengthening the Standards Organisation of Nigeria in its activities regarding standards, accreditation, etc.)

- In the revision of draft National Trade Policy, work towards reducing the policy's ambiguities and establishing a clearer stance as regards the potential streamlining of export incentives, the reduction of import tariffs and bans, and the elimination of multiple customs duties. Existing discretion on import and export prohibition lists should notably be reduced, and criteria for the revision of these lists should be transparent and publicly available – in view of enhancing predictability for investors and traders. The next iteration of the draft NTP also presents an opportunity to better tackle tariff dispersion, especially on goods that are easily substitutable, and with the intention of moving towards compliance with the stricter bands of the ECOWAS common external tariff.
- Pursue envisaged efforts to facilitate formalisation of informal trade flows – notably by reducing multiple taxation on cross-border as well as on inter- and intra-state trade, with active involvement from state and local-level governments.
- Clearly assert the leadership of FMITI in steering Nigeria's trade and investment policies (especially in view of efficient roll-out of the draft National Trade Policy). The logic and rationale for oversight of trade-related matters by any other federal ministries (such as the Federal Ministry of Finance's purview regarding export incentives or import duties) should be carefully assessed in the interest of maximum predictability and coherence in trade policy implementation.
- Move forward the revision of the *Customs and Excise Management Act*, notably by: simplifying customs procedures and enhancing their transparency; rationalising the overlaps across various regulatory agencies in addition to NCS – including NESREA, NAFDAC and NAQS; and reducing the number of licenses required from these bodies.

Broader supply-side bottlenecks affecting the policy framework for investment: Infrastructure investment policy, competition and corporate governance

Following the significant headway recently made in the power sector, FMITI and infrastructure ministries, as well as the Federal Ministry of Finance, would

benefit from greater collaboration aimed at reinforcing the legislative and institutional framework for private participation across Nigeria's infrastructure markets. Gaps in implementing capacity, as well as in the legal regime itself, can usefully be addressed in view of securing more long-lived infrastructure contracts which deliver the expected competitiveness and accessibility benefits for end-users. Legal and institutional frameworks at Federal level should moreover be well co-ordinated with those in place at State level, to ensure that infrastructure bottlenecks particular to individual states (such as road decongestion or reliable energy supplies, in a State with the urban density of Lagos for instance) are met. In addition, recent innovations and headway made within the regulatory framework for public procurement in Lagos State could provide useful guidance for updating the equivalent federal regime. The federal government might want to:

- Consider introducing more provisions concerning risk-sharing and contract management (notably establishing performance standards for the private partner) within the legislative framework for procurement and PPPs (or possibly within guidance manuals for policymakers). The regulations and procedures manual released by Lagos State Public Procurement Agency in mid-2013 could provide useful examples in this regard. Available avenues for dispute settlement and contract re-negotiation should also be more explicitly covered. This would help balance the focus of the federal public procurement legislation, which is currently put almost exclusively on the ex-ante procurement and tendering process.
- Consider revising the distribution of federal and state responsibilities so as to allow state governments more discretion in decisions that may impact the success of infrastructure PPP contracts (notably on pricing policies and facilitating cost recovery for basic infrastructure services).
- Extend the positive model of the Lagos Office of PPP to other states in Nigeria, while ensuring high-level capacity and staffing with sufficient private sector experience. Such offices would have a critical role in expanding channels for direct communication between the private partners in PPP projects and civil society (in particular infrastructure end-users) so as to improve public understanding of the rationale behind PPP projects. Such communication channels should also facilitate involvement of end-users in monitoring project performance, and thus help ensure that PPP projects meet community needs.
- Especially in light of the 2014 *Local Industry Patronage Bill* (possibly forthcoming), consider balancing domestic preferences and restrictions on public procurement with attention to supply-side constraints and quality of procurement; while introducing measures to facilitate participation by SMEs as bidders (including addressing their binding capacity constraints – see earlier).

Alongside these generic frameworks for infrastructure development, dedicated policy efforts are necessary in order to make more space for renewable energy in the national energy mix:

- Establish a comprehensive policy framework of legal, fiscal and regulatory instruments to unlock the country's untapped renewable energy potential and achieve an adequate energy supply where renewables can play a role. Clear rules, legislation, and responsibilities of various stakeholders along every stage of the energy flow from supply to end-use are necessary. An enhanced institutional framework can also facilitate the development of cross-sectoral linkages and adequately connect renewable energy to key drivers of the national economy. For conventional and renewable energy expansion alike, federal and state governments will also have to realistically address the financial backing of private investors, as well as the capacity of the existing transmission and distribution grid – both of which have posed severe bottlenecks to the unbundling of the power sector over 2014.
- Create a level playing field in the energy market so that it can accommodate various sources of energy alongside established alternatives. This involves: removing hidden subsidies and internalising external cost within the price of conventional energy; and introducing innovative fiscal and market incentives to encourage renewable energy technology supply companies at the initial stages of introduction. Also carefully assess such incentives' effectiveness in relation to their long-term fiscal costs on the national budget (see recommendations on investment incentives above).

Whether it is in infrastructure markets or across the goods markets in general, the participation of private investors can also be facilitated thanks to predictable and unified regimes for competition and corporate governance. Draft bills to address these shortfalls have been under elaboration for some time, but (especially in the case of competition law) these processes have repeatedly stalled. Policymakers would be advised to strongly push towards enactment of the draft *Federal Competition and Consumer Protection Commission* (FCCP) Bill as well as the draft *National Code of Corporate Governance*. In doing so, the authorities should bear in mind the need to:

- Enhance enforcement powers of the future Competition Authority beyond a 'cease and desist' injunction currently present in the draft *FCCP Bill*; adopt a more restrictive wording concerning eligibility for special authorisations for exemption from the competition law; reconsider the ability of the Authority to accept a variety of in-kind transfers; and include more specific provisions within the Bill to guarantee the independence of the Competition Authority – such as establishing bi-partisan oversight committees to evaluate the work of the authority on a regular basis, or reducing the power of the President in appointing Commission members.

- Harmonise the relevant elements of the *FCCP Bill* with those of the Draft National Trade Policy, especially as concerns the agencies empowered with enforcing competition law and overseeing the linkages between competition and trade policies. Alongside and to accelerate passage and implementation of the *Bill*, leadership of FMITI on competition matters should be clearly established (while safeguarding the independence of the Competition Authority).
- Prepare for smooth implementation of the *FCCP Bill* by elaborating Guidelines and Rules of Procedure for reference by the future Competition Authority as well as by private sector and civil society more broadly. This would raise public awareness on the Bill's provisions, enable enterprises to begin taking remedial action ex-ante, and generally make the *FCCP Act* more "implementation-ready".
- Accelerate on-going efforts, led by the Financial Reporting Council (FRC), to enact and implement a national code of corporate governance. Efforts for enhancing the capacity and enforcement powers of FRC, notably *vis-à-vis* other sector regulators, should be actively upheld. Likewise the commitment towards developing a code for SOEs alongside private enterprises should be maintained, notably by raising awareness about the benefits of SOE coverage.

Lagos State level

In federal states such as Nigeria, reform efforts to improve the investment climate require strong co-ordination between the Federal and State governments. This co-ordination must stretch across all areas of reform, from policy formulation to policy implementation and evaluation. On the one hand, State governments are to some extent bound to legislative, operational and other constraints set at the Federal level; on the other hand, the Federal backdrop in which States are embedded can present good opportunities for State-level innovation, progress, and constructive "peer-learning" across States. State governments must seek to push reform and improvements in the state-level business climate to the greatest extent possible, while avoiding duplication of activities or contradictions in investment laws and policies *vis-à-vis* the federal government. A well-informed State strategy for business climate improvement must target specific reform areas where the State government's room for manoeuvre is greatest, and where gaps at federal level can most realistically be filled by State-level action.

In a dynamic state such as Lagos, such an approach is especially necessary so as to grasp available investment opportunities in agro-business, infrastructure, finance and other critical sectors. With its port access, Lagos can also serve as a platform or hub for industrial transformation, between the hinterland and

international markets. This requires both pro-active investment promotion and facilitation efforts targeted towards specific sectors of the economy, and adequate attention to addressing structural bottlenecks to competitiveness in these sectors (such as the state of enabling infrastructure networks). So as to enhance its policy framework for investment, the Lagos State Government (LSG) could consider the following policy options:

- Continue establishing Lagos State as a pioneer in the development of commercial arbitration, while bearing in mind that such alternative dispute resolution mechanisms are only a good complement – and in no way a substitute – of a sound, efficient judicial system. Continue raising awareness of the use and availability of ADRs.
- Effectively implement the *Lagos State Urban and Regional Land Planning Law* and prepare a clear development plan to reduce constraints to development control in Lagos. Address the current lack of transparency and the high fees in the mandatory approval of State Governor for any transfer of rights. Improve the current housing situation in Lagos by addressing the lack of security in land titling as well as financing issues.
- Prepare a coherent investment promotion strategy, with clear objectives and activities, targeting specific sectors and industries in line with the State development priorities (Lagos State Development Plan 2012-2025) and focus on promising areas of value-addition where Lagos holds competitive and comparative advantages. This strategy should be developed by the Ministry of Commerce and Industry (MoCI) in collaboration with the relevant sectoral ministries and parastatals.
- In collaboration with FMITI, clearly define the model of collaboration between federal and state governments to successfully carry out investment promotion in Lagos State. Also clearly delineate division of labour with efficient co-ordination mechanisms among implementing agencies. In particular, ensure an articulated collaboration model between the newly created Investment Promotion Unit (IPU), located within MoCI, and NIPC, so that their roles do not overlap but rather complement each other.
- Focus the IPU's attention on designing promotional material, including a brochure, as well as a clear, simple and eye-catching website. Perform investment generation in Lagos State by targeting a relatively small number of companies carefully identified in priority sectors. Focus facilitation services on responding to inquiries from interested investors and on providing the support that investors need to navigate the various regulatory and administrative obstacles once their investment decision has been taken. Perform well-focused aftercare activities, duly co-ordinate them with NIPC's national aftercare activities, and limit them to a restricted number of companies likely to reinvest and operating in priority sectors. Monitor

investors' requirements through surveys, interviews and roundtables in order to perform policy advocacy by focusing on certain key investors and industries.

- Enhance the role of the Corporate Assembly as a platform for public-private dialogue. In its consultation with the private sector, make sure to include business representatives from all sizes and all sectors of the economy.
- When designing fiscal incentives, follow the OECD Checklist for Foreign Direct Investment Incentive Policies and the OECD Principles to Enhance the Transparency and Governance of Tax Incentives for Investment in Developing Countries to promote the management and administration of tax incentives for investment in a transparent and consistent manner, limit discretion and increase accountability. Bear in mind that the provision of quality facilities in free trade zones, as well as site design and location, are far more productive means to attract foreign investors than fiscal incentives.
- Adopt a cluster-based approach in the State's zone development strategy, providing common infrastructure facilities for companies operating in specific sectors or facing similar challenges (such as SMEs). Encourage industrial clusters in free trade zones, especially Lekki Free Zone, with a view to support industrialisation and MNE-SME linkage creation. Align industrial and enterprise policies, and give emphasis to SME development. Concentrate cluster programmes on strategic sectors where the State holds a comparative advantage, foster industries in transition, support SMEs in overcoming technology absorption problems, and attract FDI and promote exports in these sectors.
- Maximise the impact of initiatives to support SMEs in Lagos by designing an SME/informal sector plan under the leadership of MoCI and in close co-ordination with the Federal Ministry of Industry, Trade and Investment and SMEDAN. Bear in mind that SME support programmes should complement, not substitute for, active efforts to establish a sound investment environment. For this to happen, continue collecting feedback from SMEs to better understand their challenges and regularly evaluate the efficiency of SME and informal sector development initiatives in place.
- Take a more proactive role – through MoCI – in linkage promotion by: i) organising match-making meetings or roundtables between foreign affiliates and domestic SMEs that could act as potential suppliers; ii) arranging specialised training for Lagos-based companies, according to foreign investors' requirements and benchmarks; and iii) developing an online database of existing domestic suppliers in Lagos. Sound co-ordination with NIPC on linkage creation programmes is key.
- Involve business representatives in human resource development by establishing local partnerships between education and training managers

and the private sector in order to quickly identify new needs and deliver new courses.

- With assistance from Lagos State Public Procurement Agency (PPA) and the Lagos Office of PPPs, build capacity and awareness within procurement entities regarding the recent updates of the public procurement regime. In particular, the improvements brought about by the PPA *Regulations* and procurement manual (both released in 2013) more comprehensively address risk-sharing and performance management in infrastructure contract design. The *Regulations* also clearly list available procedures and means for contract re-negotiation and possible dispute resolution. Sufficient awareness and dissemination of these *Regulations* across public and private parties would enhance greater sustainability of long-term infrastructure contracts.
- In addition to the procurement size thresholds newly clarified by the PPA *Regulations*, SME participation in procurement bids could be further facilitated by simplifying bidding requirements or disaggregating large-scale projects into several smaller contracts which would be more amenable to local bidders. This is an area in which State governments can bring particular value-added, given that small-scale infrastructure contracts are most often concluded at state or local government level.
- Through Lagos OPPP and Lagos State PPA, enhance awareness-raising and public consultation by LSG (both ex-ante and during the roll-out of infrastructure projects) so as to better reduce project risks and facilitate cost-recovery of infrastructure PPP projects. This is especially crucial in strategic sectors where infrastructure upgrading can enhance the comparative advantage of Lagos State production.
- Adopt more flexibility *vis-à-vis* the Federal level in terms of regulating the energy market, in order to increase the ability for LSG to encourage the development of renewable energy infrastructure. State Governments' effort to exercise further jurisdiction should be carefully considered and accommodated at Federal level. Any sector-specific regulators set up at State level should collaborate and frequently communicate with Federal regulatory agencies (notably NERC for the energy sector) so as to adjust electricity tariffs as well as power purchasing agreements to State-specific needs.

Notes

1. *IMF, World Economic Outlook Database* (April 2013), *www.imf.org/external/pubs/ft/weo/2014/02/weodata/index.aspx*.
2. *World Development Indicators Database* (2013), *http://data.worldbank.org/data-catalog/world-development-indicators*.

3. Central Bank of Nigeria statistics.
4. This group of countries includes Algeria, Angola, Botswana, Cameroon, Chad, Republic of the Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Libya, Namibia, Nigeria, Sao Tome and Principe, Sierra Leone, Sudan and Zambia.
5. See *www.mneguidelines.oecd.org* and *www.oecd.org/fr/daf/inv/mne/mining.htm*.
6. Central Bank of Nigeria trade statistics (2013).

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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.

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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*.
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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*.

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Chapter 3

Promoting and facilitating investment in Nigeria

Investment promotion and facilitation measures, including incentives, can be effective instruments to attract investment, provided they aim at correcting market failures and are developed in a way that can leverage the strong points of a country's investment environment. This chapter provides an analysis of the framework for investment promotion and facilitation in Nigeria. It examines existing strategies and institutions governing investment promotion and facilitation with a particular focus on the Nigerian Investment Promotion Commission. It highlights important measures that have been taken by the government to improve the business environment and attract foreign investment in various sectors of the economy. It also provides recommendations on the investment incentives regime as well as on actions to encourage business linkages and other policies to boost foreign investments' spillovers on domestic small and medium-sized enterprises.

Investment promotion and facilitation measures can be effective instruments to attract investment provided they aim to correct market failures and are developed in a way that can leverage the strong points of a country's investment environment. They can be particularly useful in country contexts, which are characterised by a recent history of macroeconomic and political instability. Effective investment promotion also serves to highlight profitable investment opportunities, by identifying local partners and by fostering a positive image of the country.

The objective of this chapter is to provide an analysis of the Nigerian framework for investment promotion and facilitation. After examining the government strategy for promoting and facilitating investment in Nigeria, the chapter analyses: the institutional framework governing investment, with a focus on the investment promotion agency; business facilitation measures, including aimed at streamlining administrative procedures; consultation mechanisms with the private sector; the investment incentives regime; and finally business linkages and other policies to boost foreign investments' spillovers on domestic small and medium-sized enterprises.

3.1. Investment promotion and facilitation strategy

Measures to promote and facilitate investment can be successful if they take place within the context of, and not substitute for, a broad range of policy actions that contribute to shaping the investment climate, including those covered in the OECD *Policy Framework for Investment*. Promotional efforts can be unproductive in the absence of a coherent, overarching strategy aiming to improve the business environment.

Since the return to civilian rule in 1999 and the beginning of subsequent economic reforms, the role of private investment, both foreign and domestic, has been increasingly recognised as central in Nigeria's development strategy. It is embedded in the third pillar of Vision 20:2020, which aims to "establish a competitive business environment characterised by sustained macroeconomic stability" (see Chapter 1). The Transformation Agenda 2011-15 recognises private sector development as the main engine of economic growth in Nigeria and the need for government policies and projects to support private investment.

The Federal Ministry of Commerce and Industry was renamed the Federal Ministry of Trade and Investment in 2011, in recognition of the importance of investment for improving the country's competitiveness and in view of enhancing

institutional co-ordination and policy coherence. It was mandated to diversify the resource base of the economy by promoting trade and investment in order to create wealth and jobs, and ultimately reduce poverty. In 2013, it incorporated an additional competence and became the Federal Ministry of Industry, Trade and Investment (FMITI). The Ministry is now in charge of designing all policies related to investment, industrialisation, exports and enterprise development. Having these three responsibilities within the same ministry is beneficial to ensure the cohesion of industry, trade and investment policies, particularly for the design and implementation of sector-specific promotion strategies and their related FDI attraction and retention components. FMITI has various implementing agencies under its auspices, such as the Bank of Industry (BOI), the Corporate Affairs Commission (CAC), the Industrial Training Fund (ITF), the Nigerian Investment Promotion Commission (NIPC), the Nigeria Export Processing Zones Authority (NEPZA) and the Small and Medium Enterprises Development Agency of Nigeria (SMEDAN), among others.

Improving the business environment and the country's competitiveness has become a top priority of the government. The National Council on Industry, Trade and Investment is an inter-Ministerial committee, which provides strategic guidance to government on investment-related issues as well as co-ordination between federal and state governments (see Chapter 2). No clear and coherent strategy, however, exists – or is made publicly available – for developing a sound, broad-based investment climate, although several initiatives illustrate the determination of the authorities to achieve this objective.

The National Technical Working Group on Business Environment and Competitiveness was created in the context of Vision 20:2020. The Working Group's report, released in 2009, notes that key priorities for improving Nigeria's business environment include: i) sustaining the on-going economic reforms; ii) simplifying the processes for obtaining approvals and certifications from state and federal agencies; iii) easing the process of obtaining visa and work permits for foreign investors; and iv) building capacity for development of key infrastructure for electricity, ICT, transportation, ports, education, among others (National Planning Commission, 2009).

With the assistance of Growth and Employment in States (GEMS 3) – a five-year programme (2010-15) supported by the UK Department For International Development (DFID), aiming to create an improved business environment – the federal government has set up an inter-Ministerial Doing Business and Competitiveness Committee. It is hosted by NIPC, the investment promotion agency, and is responsible for monitoring, reviewing and recommending improvements on existing policies and laws that govern business making in Nigeria. Improving Nigeria's position in the World Bank's *Doing Business* and in the World Economic Forum's *Global Competitiveness Index* rankings through

addressing specific policy and administrative bottlenecks is one of the key objectives of this Committee.

This initiative is laudable, as countries that have been successful in improving their position in the *Doing Business* ranking have followed similar strategies, as illustrated by Rwanda (Box 3.1). Nigeria's efforts will, however, have to be pursued, as the country is still relatively poorly ranked in these indicators. It ranked 170th out of 189 countries in the 2015 *Doing Business* and 127th out of 144 countries in the 2014-15 *Global Competitiveness Index*.

Box 3.1. **Rwanda's Doing Business reform framework**

In view of improving Rwanda's position in the World Bank's *Doing Business* ranking, a Doing Business Steering Committee gathering representatives from various ministries was created early 2009 to lead the reform efforts at cabinet level, with a task force made up of different working groups on six business related topics (business entry, licensing reform, legislative changes, taxes and trade logistics, construction permits and property registration). This structure was then reinforced with an operational team, the Doing Business Unit, located within the country's investment promotion agency (Rwanda Development Board). This unit is responsible for identifying the policy changes that are necessary to positively affect those indicators used in the *Doing Business* ranking. It is in charge of liaising with the working groups, ensuring co-ordination within the government and between the government and donors providing technical support, and monitoring progress through internal indicators. The Steering Committee then approves the unit's reform proposals and submits them to the cabinet.

As a result of this proactive attitude, Rwanda achieved moving from the 158th place in 2007 to the 45th place in 2012. Several conditions need to be met, including at institutional level, to make such reform processes happen. Strong political will and support is necessary for the proposed changes to be actually turned into concrete reforms. In addition to directly reporting to the Steering Committee, the Rwandan Doing Business Unit also reports to the Prime Minister and keeps the Office of the President regularly informed on progress. Moreover, involvement of various stakeholders is crucial. While private sector representatives are included in the Steering Committee's working groups, the Doing Business Unit systematically informs the private sector about ongoing reforms and has established links with the Parliament and the Judiciary. Civil society organisations and development partners have also been involved.

Source: World Bank (2013), *Doing Business 2013: Smarter Regulations for Small and Medium-Size Enterprises*, Washington, DC.

In the context of its economic diversification strategy, the federal government of Nigeria has identified in Vision 20:2020 a number of non-oil sectors on which it wants to put emphasis. They consist of: i) refining and petrochemicals; ii) chemicals and pharmaceuticals; iii) food, beverages and tobacco; iv) textiles, wearing apparel and leather; v) basic metal, iron and steel and fabricated metal; and vi) non-metal mineral products. However, there is currently no strategy aimed at promoting inward investment in these particular sectors (see Chapter 4, Table 4.1 on priority sectors). As analysed in the following section, NIPC continues to promote Nigeria as an investment destination with no particular sectoral approach. Although it intends to engage in targeted promotional activities in priority sectors, it has no solid capacity yet in investment generation to undertake sector-specific promotion activities. FMITI is presently developing the Nigerian Industrial Revolution Plan, which could also potentially provide strategic guidance as to investment promotion priorities with a view to integrating Nigeria's industrial, trade and investment strategies (see Section 3.6).

The federal government of Nigeria might thus wish to:

- harmonise efforts aiming at improving the business environment within an overarching strategy with clear goals and co-operation agreements within federal government and with State governments (see Chapter 6 on Lagos State). Developing a broad-based strategy for investment requires strong political support and leadership, from both the highest levels of government and from front-line agencies and ministries responsible for policy implementation; and
- prepare a coherent inward investment promotion strategy, with clear objectives and activities, targeting specific sectors and industries in line with national economic development priorities (such as those outlined in Vision 20:2020, Transformation Agenda, Nigerian Industrial Revolution Plan and National Trade Policy), and reflecting the Ministry's economic diversification agenda. This strategy should be developed by FMITI in collaboration with NIPC and NEPZA, and in partnership with the relevant sectoral ministries and agencies.

3.2. Investment promotion agency

Institutional framework and co-ordination

Nigeria started strengthening its institutional framework governing FDI during the 1990s, when the country engaged in economic reforms. While FMITI is in charge of investment policy design, at operational level, the Nigerian Investment Promotion Commission (NIPC) has the mandate to "encourage, promote and co-ordinate investment in the Nigerian economy". Its creation in 1995 by the *NIPC Act* was a recognition of the pivotal role of private investment, including FDI, in the country's economic development process.

NIPC's reporting line experienced, in the recent past, back and forth movements between the then Ministry of Commerce and Industry and the Office of the President (UNCTAD, 2009). A Ministry empowered with full competence in investment related issues – FMITI – was ultimately formed so as to ensure efficient co-ordination and stronger policy advocacy for investment. NIPC and other investment-related federal government agencies currently report to FMITI.

Co-ordination of investment promotion seems nevertheless to remain challenging in Nigeria. Although the *NIPC Act* stipulates that the agency is responsible for co-ordinating all investment promotion related activities, FDI attraction initiatives are spread among various government entities (see Chapter 2). Different entry points for investors exist at federal level. For example, in addition to NIPC, NEPZA is involved in inward investment promotion, with no clear co-operation agreement with NIPC. While these two agencies sometimes collaborate for FDI attraction, there also is a risk for potential harmful competition. Sector-specific investment promotion initiatives also exist, such as the establishment by the Ministry of Mines and Steel Development of a minerals and metals promotion centre to provide sector specific technical information and data to investors in the minerals and metals industry.

FMITI should make sure that there is a clear rationale behind the current labour division between the agencies in line with the Ministry's strategic priorities, so as to increase efficiency and avoid providing investors with incoherent messages.

Main functions of NIPC

Although large differences exist between investment promotion agencies (IPAs) across countries, they typically undertake five functions: i) *image building*, which consists of fostering the positive image of the country and marketing it as a profitable investment location; ii) *investment generation* through direct targeting of specific companies, particularly in the country's priority sectors; iii) *investment facilitation* to provide services to prospective investors during their establishment phase; iv) *aftercare*, aiming to retain companies and encourage reinvestments by proactively responding to investors' needs and challenges after their establishment; and v) *policy advocacy*, which includes identifying bottlenecks in the investment climate and providing recommendations to government in order to address them.

The Mandate of NIPC encompasses both promotional and regulatory/ administrative functions, and consists in encouraging, promoting, co-ordinating and facilitating investment in the Nigerian economy. Its main functions are listed in *NIPC Act* (Box 3.2). Its structure is made of seven departments: i) the One-Stop Investment Centre (OSIC); ii) the department of

Box 3.2. **NIPC's functions**

- be the agency of the Federal Government to co-ordinate and monitor all investment promotion activities to which the *NIPC Act* legislation applies;
- initiate and support measures which shall enhance the investment climate in Nigeria for both Nigerian and non-Nigerian investors;
- promote investments in and outside Nigeria through effective promotional means;
- collect, collate, analyse and disseminate information about investment opportunities and sources of investment capital and advise on request, the availability, chance or suitability of partners in joint-venture projects;
- register and keep records of all enterprises to which the *NIPC Act* legislation applies;
- identify specific projects and invite interested investors for participation in those projects;
- initiate, organise and participate in promotional activities such as exhibitions, conferences and seminars for the stimulation of investments;
- maintain liaison between investors and Ministries, government departments and agencies, institutional lenders and other authorities concerned with investments;
- provide and disseminate up-to-date information on incentives available to investors;
- assist incoming and existing investors by providing support services;
- evaluate the impact of the Commission on investment in Nigeria and recommend appropriate remedies and additional incentives;
- advise the Federal Government on policy matters, including fiscal measures designed to promote the industrialisation of Nigeria or the general development of the economy; and
- perform such other functions as are supplementary or incidental to the attainment of the objectives of *NIPC Act*.

Source: NIPC Act.

investment promotion, in charge of image building and investment generation; iii) the department of investor relations, responsible for investment facilitation and aftercare services; iv) the department of policy advocacy and external relations; v) the department of human resources development; vi) the department of finance and administration, and vii) the directorate of the office of the Executive Secretary made of different support units, including research and corporate development, legal, zonal co-ordination, Honorary International

Investors Council, data collection on trade policies, information technology, internal audit as well as press and protocol.

In theory, NIPC thus performs all the standard functions undertaken by IPAs. However, the agency does not put equal emphasis on all these tasks: it currently acts more as a regulatory/administrative agency engaged in facilitation and registration services than in actual promotion and marketing activities to promote Nigeria as an investment location. Investment facilitation measures (analysed in the following section) matter in view of offering a friendly investment climate to private investors, but it is increasingly recognised that IPAs should first and foremost focus on their core business, which is inward investment promotion. Worldwide experience shows that those IPAs which focus exclusively on investment promotion perform significantly higher results in attracting investors than those which carry out both regulatory/administrative and promotional activities (World Bank, 2011a).

As regards inward investment promotion, while NIPC is somehow active in image building, it does very little investment generation. Image building is a function that has been carried out by almost all IPAs worldwide since countries carry out active investment promotion. It aims to draw attention to profitable investment opportunities in the host economy and involves marketing the country as an investment location by creating a positive image of it while also overcoming potentially negative perceptions (OECD, 2006; 2011). Typical promotional activities include advertising, public relations campaigns, dissemination of brochures, participation in fairs and forums, and developing the IPA website.

Developing the website is of particular importance, as it often contributes to building the first impression of prospective investors about the host economy. It also constitutes an easy mean for the IPA to centralise all the information relevant to foreign investors at a reasonable cost. Currently, NIPC's website provides obsolete information (e.g. on the current President of the Federal Republic) and outdated publications (e.g. brochure, annual reports). It hence does not reflect the appropriate image of the country's determination to raise its profile as an investment location and does not contribute to building investors' confidence. Moreover, the website does not contain any statistics on FDI or sufficient factual and quantitative information on economic sectors to allow investors to make an informed decision about Nigeria as a potential investment location.

It is thus highly recommended to improve NIPC's website, in terms of its design, structure and substance, and most importantly update the content on a regular basis. The structure of the agency and the types of services investors can expect from it should also appear more clearly. It is important to bear in mind that multinational enterprises (MNEs) do not have perfect information

on all potential investment locations and are usually reluctant to consider new destinations, particularly if it involves a costly process (OECD, 2011). A helpful and updated website could contribute to placing Nigeria on the radar screens of new international investors. The World Bank noted that IPA websites from OECD countries remain the benchmark for other regions (Table 3.1).

Table 3.1. **Top 10 IPA websites as assessed by the World Bank**

1. ABA – Invest in Austria	*www.investinaustria.at*
2. CzechInvest (Czech Republic)	*www.czechinvest.org*
3. Austrade (Australia)	*www.austrade.gov.au*
4. Germany Trade and Invest	*www.gtai.de*
5. Invest in Denmark	*www.investindk.com*
6. Invest in Spain	*www.investinspain.org*
7. Investment Support and Promotion Agency of Turkey	*www.invest.gov.tr*
8. PRONicaragua (Nicaragua)	*www.pronicaragua.org*
9. Department of Investment Services (Chinese Taipei)	*http://investtaiwan.nat.gov.tw*
10. Hungarian Investment and Trade Development Agency	*www.hita.hu*

Source: World Bank (2012), *Global Investment Promotion Best Practices 2012 – Investment Climate*, Washington, DC.

NIPC should also seriously consider enhancing its investment generation activities, in line with a sound and well defined investment promotion strategy reflecting the country's broader economic objectives and diversification strategy, as recommended in the first section of this chapter. Investment generation should consist of, in a first phase, identifying those individual companies potentially interested in Nigeria and, in a second step, initiating constructive and proactive relationship building with them. This would involve sophisticated institutional capacities as, in addition to a thorough sector-specific knowledge, staff members must understand MNEs' internationalisation strategies (OECD, 2011). In other words, they have to be able to understand companies' investment location decision processes and identify their requirements long before their investment decision is taken, so as to effectively respond to their needs and enquiries during their investigation phase, and influence their decision making.

Most OECD countries have set particular targets for FDI promotion based on their national objectives and priority sectors (OECD, 2011). For example, *Invest in France* puts a special emphasis for its promotion policy on 15 activity niches with high growth potential. In addition, a global attractiveness policy has been set up, where attraction of talents, skills and expertise are a major priority. In Ireland, promotion policies are based on the concepts of "areas of convergence" and "platform technologies" rather than on traditional industry classification.

While NIPC participates in international investment forums, it does little effort to target MNEs in specific priority sectors or industries. Although investment generation is a more costly function than simple image building, it can yield significantly higher results in terms of realised FDI projects and hence respond to the country's development objectives.

In order to maximise resources, using embassies abroad is an efficient way to support inward investment attraction as diplomatic staff members are well positioned to perform targeted promotion and liaise with prospective investors. In this vein, regional investment and trade officers (RITOs) have been appointed in key Nigerian embassies. It is the government's objective to ensure that these officers act as the starting points for investment generation by working closely with NIPC. Another way to minimise costs is to narrow down the number of targeted countries for FDI attraction and concentrate efforts on those who are considered as most strategic. For example, Ethiopia's IPA decided a few years ago to focus its FDI attraction strategy on three main countries: China, India and Turkey. This strategy has yield to tangible results, as one of the world's major shoe producers from China has recently decided to invest in Ethiopia.

NIPC could also engage in a closer co-operation with the Nigerian Diaspora, notably through one of its largest membership organisation, the Nigerians In Diaspora Organisation (NIDO). Nigerians abroad are numerous (estimated at approximately 17 million) and based in key FDI source countries, such as the United States and the United Kingdom. In its investor targeting efforts, NIPC should aim to: i) attract entrepreneurial Nigerians living abroad and potentially interested to invest in Nigeria; and ii) use the Diaspora network to create connections between prospective investors, on the one hand, and Nigerian businesses and government counterparts, on the other hand.

NIPC has an aftercare unit, whose size is however limited compared to the potentially high impact of such an activity on retaining investors and encouraging reinvestments. It is also a more resource-efficient function than investment generation, as it is less costly to win reinvestments through aftercare than to generate investments from new firms (UNCTAD, 2007). Identifying redundant problems faced by investors through aftercare also contributes to feed into the IPA's policy advocacy role. When concerns are being raised to the attention of NIPC, the aftercare unit tries to guide the investors on overcoming these challenges. It does not perform, however, systematic consultations to identify and enquire on recurrent problems faced by investors.

An inter-Ministerial Aftercare Committee, hosted by NIPC, was set up recently in parallel to the Doing Business Steering Committee. The Aftercare Committee, which is meeting on a monthly basis, is responsible for considering

the complaints from investors on account of apparent irregularity and inconsistency in the implementation of government policies. Whereas this is a very valuable mechanism for consulting the private sector, NIPC's staff members in charge of aftercare should build on this opportunity to undertake systematic reviews of investors' concerns. In their activities, particular attention should be given to those investors interested in expanding their operations in Nigeria and those that have a high developmental impact.

Funding and performance

Experience suggests that a full commitment to IPAs by governments is necessary for them to succeed in attracting new investors. They need to be adequately funded in order to attract and retain qualified and motivated staff, ideally with private sector experience.

According to NIPC, indicators used for monitoring its performance are: i) the number of FDI projects attracted into the economy; ii) the number of jobs created by FDI; iii) the number of reforms carried out through advocacy; and iv) the frequency of public-private interface dialogues. There is little evidence, however, of clear targets against which NIPC's performance is measured. The absence of clearly defined key performance indicators and of recent publicly available annual reports renders the agency's performance even more difficult to assess.

NIPC considers that its budget allocation is inadequate and that lack of funding hinders its performance in attracting FDI. According to NIPC, other obstacles that prevent it from fulfilling its mandate include inconsistency in government policy, lack of co-ordination on investment promotion and insufficient autonomy from the federal government. In order to better perform its mandate and evaluate the impact of FDI, NIPC also emphasises the need to enhance the collection of sound FDI statistics. Making registration at NIPC mandatory in order to keep track of all FDI projects across the country might not be the wiser solution in this regard. This measure could indeed increase the burden on foreign investors and discourage them to invest. Alternative means of collecting statistics include a more efficient collaboration with CAC (the companies' registration agency) and the Central Bank of Nigeria as well as carrying out foreign investors' surveys. The collection, use and dissemination of recent and correct economic data are a broader problem in Nigeria, which needs to be addressed. It also raises methodological and capacity problems, which can be addressed with development partners (e.g. Paris 21).

With a view to improving its performance, NIPC could draw on the experience of Malaysia, whose IPA enjoys a positive reputation within the private sector and ranks amongst the best in Southeast Asia (Box 3.3). The Malaysian example shows that autonomy from and collaboration with the line

Box 3.3. **Funding and performance of Malaysia's federal IPA**

The Malaysian investment promotion agency (Malaysian Investment Development Authority – MIDA) is responsible for the promotion, co-ordination and facilitation of investments in the manufacturing and services sectors (except utilities and finance). It is also the lead agency in the co-ordination of the activities of the other investment promotion agencies at sub-national level.

MIDA is fully funded by the government as its key agency for promoting investment in the manufacturing and service sectors in Malaysia. It reports to the Ministry of International Trade and Industry, which is the designated line ministry for investment and industrial development. The performance of MIDA is reviewed based on global economic conditions and benchmarked against its key performance indicators, which are essentially the value of domestic and foreign annual investment in both key and non-key economic sectors.

The majority of MIDA's management staff has significant experience with the private sector and the agency has an internal review process to determine promotions and awards. The private sector's perceptions of MIDA are positive, and the agency has a good reputation for transparency and competence.

MIDA's organisational structure reflects a clear strategy of dividing the responsibilities of promotion and facilitation into dedicated units where resources and expertise differ. Promotion requires effective outreach and marketing while facilitation implies supporting companies in addressing difficulties in dealing with regulation. The agency also has sectoral expertise, divided into resource and non-resource industries.

Its structure and functions reflect global best practice, such as the establishment of a Client Charter. It is updated on a monthly basis and serves as an effective monitoring tool of the agency's responsiveness and professionalism in addressing investors' enquiries, information provision and project implementation assistance.

Source: OECD (2013), *OECD Investment Policy Reviews: Malaysia*, OECD, Paris.

ministry is not necessarily an issue affecting the IPA's performance Adequate budget provision is more critical if promotion is to yield results (Morisset, 2003), but has to be correlated with sound performance indicators, so as to maximise the effectiveness of public resource management.

International and regional investment promotion initiatives

Many international organisations work with IPAs, facilitating the exchange of good practices on investment promotion strategies and assisting in building policy capacity.

Nigeria participates in capacity building programmes organised by intergovernmental organisations such as the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), UNCTAD, the United Nations Industrial Development Organization (UNIDO) and the World Bank. Nigeria has benefited from the sharing of best practices through information exchange networks. For example, NIPC is a member of the World Association of Investment Promotion Agencies, which provides the opportunity for IPAs to network and exchange best practices on investment promotion. It is also a member of UNIDO's Africa Investment Promotion Agency Network (AfrIPANet). NIPC would nevertheless benefit from increased capacity building programmes from these various organisations.

At regional level, there is little initiative to jointly promote West Africa as an investment location. Regional promotion can nevertheless play an important complementary role to country-level promotion since many prospective investors think in regional terms (OECD, 2006). While neighbouring countries often see themselves as competitors for FDI, it is more likely that successful promotion in one country will enhance the prospects for investment in neighbouring countries, especially in those regions that are less known by investors. There is thus a case to engage in the promotion of FDI at West African level, at least at the image building stage. In the same vein, Chapter 4 details the collaboration with the Economic Community of West African States (ECOWAS) on trade integration.

3.3. Business facilitation measures

The federal government recognises the constant need to improve the business environment so that the private sector can effectively contribute to economic growth. Long delays and costly procedures to establish a new business entity are indeed key obstacles to new investment and entrepreneurial activity. The country's current performance in the World Bank's *Doing Business* report is relatively weak and has deteriorated since previous editions. It is ranked 170th out of 189 economies in 2015, a decrease of 62 places since 2008. The country ranked 129th for "starting a business". According to the report, it takes 8 procedures and 28 days to open a business in Nigeria, which is along the lines of the average for Sub-Saharan Africa but significantly worse than the OECD average (5 procedures and 9 days respectively). While this does not portray a comprehensive image of the business environment in Nigeria, it illustrates the necessity to address certain shortcomings to ease the establishment of new companies. In South Africa, for instance, it is two weeks faster and more than 100 times cheaper to register a company than in Nigeria.

The 1990 *Companies and Allied Matters Act* (CAMA) is the main body of law governing the establishment of companies in Nigeria. It is administered by the Corporate Affairs Commission (CAC), which performs the following functions:

- to administer the Act, including the regulation and supervision of the formation, incorporation, management and winding up of companies;
- to establish and maintain companies' registry and offices in all the states of the Federation suitably and adequately equipped to discharge its functions under the Act or any law in respect of which it is charged with responsibility;
- to arrange and conduct an investigation into the affairs of any company where the interests of the shareholders and the public so demand; and
- to undertake such other activities as are necessary or expedient for giving full effect to the provisions of the Act. CAC estimates that around 90 000 companies register with it every year.

CAMA was reviewed a first time in 2004 and complemented later by the 2012 *Companies Regulation*, which intention was to make business registration friendlier and less costly. The *Companies Regulation* lists all requirements that investors have to fulfil depending on the nature of their business, which is an important improvement as business people have regularly complained about the lack of available and accessible information (ENABLE, 2009). CAC has successfully computerised its registration system internally but has not yet fully upgraded it into an e-platform rendering on-line registration and payment accessible for investors. CAC is also working on a Customer Guide in order to better monitor its performance.

The federal government receives support from international development partners in its efforts to improve the business environment and facilitate investment in Nigeria. GEMS3 has worked to introduce business environment reforms to the federal tier of government and progressively to establish the institutional frameworks to sustain it. In addition to the establishment of the Doing Business and Competitiveness Committee (see above), GEMS3 has also supported the creation of the National Competitiveness Council of Nigeria (see below). Through the Doing Business and Competitiveness Committee, GEMS3 has proposed *Doing Business* reform action plans on "starting a business" and "trading across borders". For example, GEMS3 advised the government on the necessity to abolish the statutory requirement that lawyers must register new businesses. This measure represented a saving of approximately USD 310. GEMS3 is also collaborating with the World Bank on the 2014 sub-national *Doing Business* survey of all 36 states of Nigeria and the Federal Capital Territory.

In its continuous process of improving the legal framework in view of simplifying business registration, the government could draw on the experience of countries that have successfully simplified business registration requirements (Box 3.4).

Both CAC and NIPC act as entry points for company registration in Nigeria (see Chapter 2). Co-ordination mechanisms and efficient collaboration between

Box 3.4. **Case studies in easing business registration requirements**

Viet Nam: Before a new Enterprise Law was enacted in January 2000, business registration and licensing requirements were extremely burdensome in Viet Nam. Entrepreneurs were required to submit detailed business plans, curricula vitae, character references, medical certificates and other documents along with their applications for registration. On average, registering a business took about three months, and required visits to 10 different agencies and submissions of about 20 different documents with official seals. Additional licenses were often required before firms could start operating. Some of these licenses did not appear to serve vital public interests. It took 6 to 12 months for fulfilling the legal requirements to establish a business at a cost of USD 700 to USD 1 400. The new law reduced the costs of establishing a new business. The time to establish a new business came down to about two months – with business registration taking only 15 days – and total start-up costs were reduced to about USD 350. Vietnamese entrepreneurs responded positively to those improvements. Fewer than 6 000 new businesses had registered in 1999, but the number shot up to more than 14 000 in 2000 and to more than 21 000 in both 2001 and 2002.

Later on, under the Enterprise Law (2005) and Investment Law (2005), the former licensing system was replaced by a business registration certificate or an investment certificate. This helped abolish 150 types of licences and thousands of secondary permits issued at sub-national levels. Investment registration has become much simpler, although provincial investment promotion agencies have implemented the system with varying levels of success. The Enterprise Law and Investment Law task force has been continuously scrutinising secondary sub-licences and conditions established by line Ministries and provincial authorities.

Morocco: The National Committee for Investment Procedures (*Comité national de simplification des procédures relatives à l'investissement* – CNPI) was created in 2006 via a circular issued by the Prime Minister. It comprises representatives of the various government departments concerned, and has the role of identifying, simplifying and harmonising investment procedures. The CNPI has prepared an Investment Procedures Manual for projects undertaken by national and foreign operators alike. The manual is available online in Arabic, French and English (*www.manueldesprocedures.com*) and also through a voice server and by fax for investors in remote areas without Internet access. The manual explains the administrative formalities needed to carry out an investment project and provides access to the various forms that must be completed and submitted to different departments. This initiative has served to harmonise procedures affecting various sectors and used by various agencies and regions, thereby reducing processing times

Box 3.4. **Case studies in easing business registration requirements** *(cont.)*

considerably. It has brought a significant improvement to Morocco's results in this field. Between 2005 and 2012, the country had implemented 15 business regulatory reforms.

Source: OECD (2006), *Policy Framework for Investment: A Review of Good Practices*, OECD, Paris (based on World Bank, *World Development Report 2005*, p. 101, based upon Mallon, Raymond. 2004. "Managing Investment Climate Reforms: Viet Nam Case Study". Background paper for the WDR 2005); OECD (2009), *OECD Investment Policy Reviews: Viet Nam*, OECD, Paris; and OECD (2010), *OECD Investment Policy Reviews: Morocco*, OECD, Paris.

the two agencies seem to be lacking as there are overlaps of tasks and little sharing of information. Foreign investors need to obtain local incorporation of their Nigerian branch or subsidiary as a separate entity in Nigeria. Before forming a company, in addition to fulfilling the same requirements as domestic firms, foreign investors need a residence permit, which can be obtained from the Nigerian Immigration Service, as well as a business permit available at the Federal Ministry of Interior. Those intending to use the services of foreign workers need to obtain expatriate quota positions from NIPC. Companies operating in export processing zones only have to register with NEPZA.

In 2006, the One-Stop Investment Centre was established (OSIC) within NIPC (Box 3.5). OSIC is a one-stop shop bringing together 26 government agencies

Box 3.5. **OSIC's objectives and functions**

OSIC's mandate include:

- to provide speedy, efficient and transparent services to foreign and domestic investors;
- to shorten and simplify administrative procedures for the issuance of business approvals, permits and licenses including company incorporation;
- to serve as the bastion for triggering of reforms in the public sector by adoption of best practices;
- to remove bottlenecks faced by investors in establishing and running business by intervening, advocating and following up on behalf of investors: and
- to reduce the cost of doing business in Nigeria through transparent and corrupt-free dealings with investors.

OSIC's main services include:

- granting of business entry approvals, licenses and authorisations;

Box 3.5. **OSIC's objectives and functions** *(cont.)*

- provision of data and general information on the Nigerian economy, investment climate, legal and regulatory framework as well as sector and industry specific information to aid existing and prospective investors in making informed business decisions; and
- facilitation and follow up services on behalf of investors in all government Ministries and Agencies.

Source: NIPC.

under one roof in order to facilitate business entry in Nigeria. Investments have to meet the minimum threshold of 10 million Nigerian Naira (approximately USD 60 000) in order to benefit from OSIC's services. Agencies hosted at OSIC provide entry point services to investors. They include, among others: CAC, the Federal Inland Revenue Service (FIRS), the Federal Ministry of Interior, the Nigeria Immigration Service, the Nigeria Customs Service, the Federal Ministry of Finance, the Ministry of Foreign Affairs, the Standards Organisation of Nigeria and the Central Bank of Nigeria.

It is unclear whether foreign investors have the obligation to register with NIPC or if it is optional. While the *NIPC Act* states that foreign companies need to apply to NIPC for registration, interviews by the OECD highlight that it is not yet a mandatory requirement in practice. In this regard, best international practice suggests that registration of international investors with the IPA shall not be mandatory and that alternative routes to the one-stop shop should be available. It is the quality of OSIC's services that will determine the decision of foreign investors to interact with it or not. Making foreign investors' registration mandatory at NIPC (or OSIC) would only be more burdensome for investors willing to use other avenues of registration and will not encourage OSIC to propose a quality service to investors.

According to private sector representatives interviewed by the OECD, OSIC needs to be further improved in order to serve as a well-functioning one-stop shop. For the time being, investors still have to deal with different government agencies, which is a burdensome and time consuming process. In the future, CAC should accelerate ongoing steps towards establishing an electronic system for business creation. Such a system, which has been successfully implemented in many developing countries, would be a real time and resource saver to private investors. In addition, while the establishment of OSIC within NIPC and the improvement of business registration at CAC are valuable initiatives, they should not substitute for continuous regulatory reform to quicken and simplify the process of starting a new business.

3.4. Consultation mechanisms

In their continuous efforts to provide a friendlier investment climate, governments should maintain regular dialogue with the private sector throughout policy design and implementation, and systematically collect its feedback on recurrent issues affecting its operations. IPAs, for example, can play an important role to facilitate effective communication between investors and the government.

As mentioned above, NIPC performs some aftercare but not yet in a systematic way. According to private sector representatives, NIPC maintains dialogue with business representatives to collect their feedback on existing bottlenecks in the investment climate. This is, however, not done regularly and individual firms usually prefer to interact with representatives from the Organised Private Sector (Box 3.6).

Box 3.6. **The Organised Private Sector of Nigeria**

The Organised Private Sector (OPS) is a platform made up of five umbrella organisations representing the broader Nigerian private sector:

1. The Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture (NACCIMA), established in 1960, is the umbrella organisation for all the various affiliate member chambers within the country. NACCIMA's membership is voluntary and it encompasses City, State and Bilateral Chambers, Business/Professional Association and Corporate Bodies. It champions the course of business through its advocacy role and influences public policies that promote free enterprise.
2. The Nigeria Employers' Consultative Association (NECA) is the umbrella organisation of employers in the Organised Private Sector of Nigeria. It was formed in 1957 to provide the forum for the government to consult with private sector employers on socio-economic and labour policy issues. NECA provides a platform for private sector employers to interact with the government, labour, communities and other relevant institutions in and outside Nigeria for the purpose of promoting harmonious business environment that will engender productivity and prosperity for the benefit of all.
3. The Manufacturers Association of Nigeria (MAN) is a national industrial association serving and representing nearly 2000 in private and public companies in the manufacturing, construction and service sectors. Through its representative membership, MAN serves and acts as a central point of reference for government and others who seek the view and reactions of manufacturers on matters of socio-economic importance.

Box 3.6. **The Organised Private Sector of Nigeria** *(cont.)*

4. The Nigerian Association of Small Scale Industrialists (NASSI) was established in 1978 to champion the government's effort at boosting the real sector through the creation and revitalisation of small scale industries as the catalyst for growth and development.
5. The Nigerian Association of Small and Medium Enterprises (NASME) was established in 1996 to foster the promotion of micro-, small and medium-sized enterprises in Nigeria.

Source: OECD mission interviews and associations' websites.

The establishment of an Aftercare Committee hosted at NIPC constitutes an important step formalising a constructive dialogue between NIPC and investors. NIPC needs to ensure that the mechanism is fully opened and transparent, so as to serve as a major source of feedback to government policymakers on the concerns of the private sector. It will thus feed into its policy advocacy function and nurture discussions with public stakeholders on improving the business climate. Conversely, through its regular contact with government, NIPC can be an effective communication channel informing investors on government activities having an impact on their operations. Experience shows that those IPAs that spend more resources on policy advocacy are more successful in attracting FDI (Morriset, 2003).

In addition to NIPC's aftercare activities, there are other initiatives in Nigeria aiming at institutionalising dialogue between the government and the private sector. For example, the Nigerian Economic Summit Group (NESG) is a yearly gathering bringing together business leaders and senior public sector officials to discuss the future of the Nigerian economy and monitor the progress being made. Organised in collaboration with the National Planning Commission, it aims to help create an enabling environment conducive to good governance, responsible private sector investment and sustainable economic growth and development. Traditionally, the President of the Federal Republic of Nigeria, the Vice President, ministers and other high government officials participate in the NESG. The latest edition held in December 2012 on the topic of "Deregulation, cost of governance and Nigeria's economic prospects" covered issues such as financial inclusion and the Petroleum Industry Bill, highlighting the frustration of international oil companies with the current state of the sector.

Similarly, the National Competitiveness Council of Nigeria (NCCN) is a recent initiative led by FMITI, backed by the Tony Elumelu Foundation[1] and supported by GEMS3. The purpose of the NCCN is to improve Nigeria's competitiveness by using the World Economic Forum's *Global Competitiveness Index* as a benchmark. It is in charge of creating awareness on national

competitiveness, proposing relevant policy recommendations to address short and long term competitiveness issues, co-ordinating the efforts of both the public and private sectors as well as monitoring and evaluating the progress being made at national and sub-national levels.

Business' involvement in policy design and reform is however still unsystematic and irregular. Representatives of the OPS argue that the government tends to be selective on the businesses it consults and on the areas of the investment climate it intends to address. As such, they regret that, although NESG consists of a valid platform for institutionalising dialogue between the public and private sectors, it does not truly speak as a voice for the wider Nigerian private sector. Additionally, it barely represents the wider Nigerian private sector as it is mainly composed of large companies.

Although high level initiatives such as NESG and NCCN are valuable and should contribute to improving the Nigerian investment climate, the government should not be too selective in choosing its private sector interlocutors. Smaller businesses should not be left aside of high-level discussions. Setting up a consultation platform with the OPS would be a worthy initiative in view of broadening the scope of the dialogue, expanding the outreach of policy reform discussions and, as such, increasing opportunities to achieve poverty reduction through inclusive growth.

3.5. Investment incentives

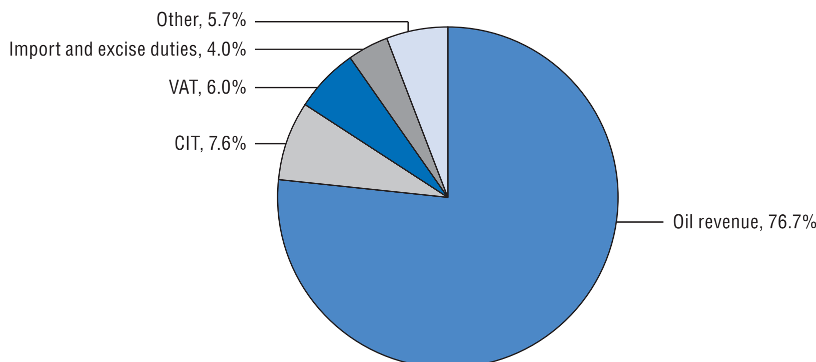
Background

A central issue frames the discussion on tax incentives in Nigeria: the country's wealth in natural resources. Nigeria raises the bulk of its revenues from oil. About half of the government revenue is derived from *non-tax* sources, primarily sales and royalties from oil and gas. In addition, a large part of *tax* revenue originates from oil – in the form of petroleum profit tax. In 2012, the latest year for which the actual revenue numbers are available (IMF, 2013), the oil revenue constituted 76.7% of the total consolidated government revenue in Nigeria (Figure 3.1). Such oil-dependency presents a significant downside risk not least in terms of financial management. To reduce the country's vulnerability to oil-price shocks, especially in view of medium- and longer-term moderation of international oil prices, a significant increase in non-oil revenues is critical. As most of the Nigeria states currently finance their budgets almost entirely by the shared oil revenue, the overall stability of the country is also at stake.[2] In fact, excessive reliance on oil revenues fuels conflicts and a struggle to control the oil and gas rents.

Investment tax incentives

Corporate tax revenue is the second largest non-oil source of revenue in Nigeria, at 7.6% of total consolidated revenue in 2012 (Figure 3.1). Thus, the

Figure 3.1. **2012 consolidated revenues (% of total)**



Source: IMF (2013), *Country Report* No. 13/116, May 2013, Washington, DC.

widespread use of tax incentives and exemptions, and the revenue loss associated with them, become of key importance in the efforts to mobilise the non-oil revenue. Considering the extent of the preferential tax arrangements in the oil sector, the shift of the attention focus on tax incentives and exemptions in Nigeria is even more understandable.

Tax base erosion through tax incentives

Unfortunately, tax incentives are all too often viewed as a relatively easy "fix" for promoting investment, especially foreign direct investment. According to the IMF (Keen and Mansour, 2009), Sub-Saharan Africa states provide tax incentives much more widely today than they were in the early 1980s with the number of countries offering tax holidays increasing from 8 in 1980s to 23 in 2005. As reflected in Table 3.2, Nigeria too has not shied away from offering generous incentive schemes. However, as ample evidence from around the world suggests, tax incentives have a limited effect on investment decisions. Factors such as stable economic and political conditions, a well-educated labour force, good infrastructure, dependable rule of law and effective investment promotion systems often matter more than generous tax breaks. In the context of Nigeria, considering also the prevalence of location-specific profit opportunities, a large number of tax incentives and exemptions simply erode the tax base and deprive the country of stable tax revenue. Unfortunately, no publicly-available information exists on the revenue forgone attributable to tax incentives. However, according to the Country Director of ActionAid Nigeria, Hussaini Abdu, "from 1999-2012, the government lost nearly N1 trillion (USD 6.3 billion) an average of N71 billion (USD 448 million) a year on import and export duty waivers".[3]

Table 3.2. **Overview of tax incentives system**

Types of incentives	Rates and provisions
Pioneer status	• 3-5 years tax holiday to eligible industries located anywhere in the Federation. 69 industries are currently approved for the pioneer status (the list is available at *www.nipc.gov.ng/guide.html*). • 7 years tax holiday for industries located in economically disadvantaged local government area of the Federation.
Research and Development (R&D)	• Up to 120% of R&D expenses on are tax deductible. • Up to 140% of R&D expenses on local raw materials. • Long-term research is regarded as a capital expenditure and will be written off against profit.
Capital allowances	• 15-25% for industrial and nonindustrial buildings. • 25-100% for companies engaged in mining, agriculture, and research. • Capital allowance is restricted to 75% of assessable profit for manufacturing, and 66% for others, except for agro-industry where 100% capital allowance is granted. • Additional 5% capital depreciation allowance over and above the initial allowances for economically disadvantages regions.
Loss carry forward	• For all companies except in agriculture – 10 years from the start of operations. • For companies in agriculture – no limit.
Infrastructure	• Investment tax relief is available for each year of expenditure, at the following rates, to companies who provide basic infrastructures: tarred roads (15%), water (30%), electricity (50%) and 100% for companies who provide all such basic facilities where they do not exist.
Exemptions from minimum tax	• Companies in agricultural business. • Companies with at least 25% imported equity or foreign participation.
Reinvestment allowances	• A generalised allowance of capital expenditure incurred by companies for: ❖ Expansion of production capacity ❖ Modernisation of production facilities ❖ Diversification into related products
Sectoral incentives	**Tax Holiday** as discussed below:

Sectors	< USD 5 million	> USD 5 m and < USD 15 m	> USD 15 m and < USD 25 m	> USD 25 m	> USD 5 billion
Agriculture, Food and related industries; Mining, Ceramics and base metals; Light industries; Metal products, Machinery and transport equipment; Electronic industry and electric appliances, Service and public utilities	2-5[1]	3-7[1]	4-9[1]	5-10[1]	10
Heavy industries	5	7	9	10	10
Petrochemicals/Chemicals, Paper and plastics	2-7[1]	3-8[1]	4-9[1]	5-10[1]	10

1. *Depending on the subsector.*

- Deductions up to 150% of the R&D investment by existing or new industries.
- Tax deduction to the extent of 35% of the cost of providing infrastructure facilities (capitalised during the tax holiday period), distributed over a five-year period.
- 20% tax deduction on the cost of local staff employed, whether directly or through contractors, subject to minimum employment of 100 people.
- Exemption of payment of custom duty on machineries imported solely for mineral development purposes.

Table 3.2. **Overview of tax incentives system** *(cont.)*

Types of incentives	Rates and provisions
Export incentives	*Companies engaged in export trade – With effect from 1 January 1996* ● Profits are tax exempted: ❖ for goods exported from Nigeria provided that the proceeds from such exports are repatriated to Nigeria and are used exclusively for the purchase of raw materials, plant and equipment and spare parts. ❖ If products are used exclusively as inputs for the manufacturing of products for exports is tax exempt. (For this purpose, the exporter must give a certificate of purchase of the input of exportable goods to the seller before the profit can be eligible for tax exemption.) *Tax relief of export-oriented enterprises* ● The profit or gains of 100% of export oriented undertakings, established outside an EPZ, shall be fully exempted from income tax for 3 consecutive years, provided that: ❖ The undertaking is 100% export oriented. ❖ The undertaking is not formed by splitting up or the reconstruction of a business already in existence. ❖ It manufactures, produces and exports during the relevant year, and the proceeds or goods exported during the year are not less than 75% of its turnover for the year. ❖ The undertaking is not formed by transfer of machinery or plant previously used for any purpose to the new undertaking or, where it does, the written down value does not exceed 25% of the total value of the plant and machinery. ❖ That the undertaking repatriates at least 75% of the export earnings to Nigeria and places this in the domiciliary account with a bank in Nigeria. *Export Expansion Grant Scheme – to encourage investment in non-oil sectors of economy* ● Method of assessment is company specific. The total incentive rate is determined yearly and is a sum of the following eligibility criteria 1) Local value added – 25%; 2) Local content – 20%; 3) Employment of Nigerians – 20%, 4) Priority Sector – 10%, 5) Export Growth – 20%, 6) Capital Investment – 5%. *Manufacture-In-Bond Scheme* ● The Scheme allows manufacturers to import raw material inputs and other intermediate products duty-free for the production of exportable goods, backed by a bond issued by any recognised financial institution. The bond is discharged after evidence of exportation and repatriation of foreign exchange is produced.
Free trade/export processing zones (EPZs)	● Free trade zones offer numerous incentives to businesses – Locating in any free trade zone in Nigeria automatically confers on the investor certain locational advantages, as well as, very generous incentives. ❖ Exemption from payment of all federal, state and local taxes, levies, rates, and customs duties; ❖ Repatriation of foreign capital investment in EPZs at any time with capital appreciation on the investment; ❖ Duty-free, tax-free import of raw materials ❖ Duty-free introduction of capital goods, consumer goods, machinery, furniture ❖ No import or export licence; ❖ Rent free land during the construction of factory; ❖ Unrestricted remittance of profits and dividend earned by investor in the zone; ❖ 100% foreign ownership of enterprises in the EPZ allowable; ❖ Sale of up to 25% of production permitted in the domestic market. ❖ As well as ❖ One-stop approvals for all permits, operating licenses and incorporation papers ❖ Services such as warehousing, standard pre-built factories, transportation, sanitation, canteen, etc., within the zones;

Table 3.2. **Overview of tax incentives system** *(cont.)*

Types of incentives	Rates and provisions
Employment tax relief	• Companies with minimum net employment of 10 employees, 60% being employees with no prior work experience within three years of graduating from school or any vocation are entitled to a relief of 5% of total assessable profits.
Work Experience Acquisition Programme Relief	• Companies with a minimum net employment of 5 new employees and retains these employees for a minimum of two years from the year of assessment in which they were first employed also enjoy a tax relief of five per cent of its assessable profits
Additional incomes exempted from Companies Income Tax (CIT)	• Short-term securities such as treasury bills and promissory notes; bonds; and interests earned by holders of the bonds and short-term securities.
Minimum Local Raw Materials Utilisation	• A tax credit of 20% is granted for 5 years to industries that attain the minimum level of local raw material sourcing and utilisation. The minimum levels of local raw materials sourcing and utilisation by sectors are: ❖ Agro-allied – 70% ❖ Engineering – 60% ❖ Chemicals – 60% ❖ Petrochemicals – 70%
SME Equity Investment Scheme	• This scheme requires all banks in Nigeria to set aside 10% of their profit after tax for equity investment and promotion of small and medium enterprises.

Source: Author's own compilation based on official documents.

Clearly, the tax system needs to be simplified and the tax base needs to be broadened to generate more revenues for development spending. Streamlining tax incentives for investment will be essential. It is, however, important to make a clear distinction between potentially beneficial and wasteful tax incentives. Nigerian policy-makers need to evaluate the effectiveness of individual tax provisions in order to decide on which incentives to keep and which to let go. The performance reviews should ask:

- Does the tax incentive meet its intended goals?
- Could other measures achieve the same goals more cost-efficiently?
- What alternative measures could address the country's most pressing priorities and what would their fiscal burden be?

A credible cost-benefit analysis of tax exemptions and special tax provisions should consists of:

- *Comprehensive tax expenditure analysis*. To inform the policy-making process, the revenue loss attributable to tax incentives as well as allocation of tax relief across different taxpayer groups needs to be estimated and reported by the Federal Ministry of Finance (FMF). Further, comprehensive and systematic evaluation of special tax provisions must be institutionalised to address the current lack of transparency around the revenue cost of investment incentives. This analysis will help policy makers decide whether to continue, abolish, or amend a given tax incentives programme.

- *Investment Impact Analysis*. To evaluate the impact of various tax incentives on investment trends in the country, policy analysts should develop a Marginal Effective Tax Rate model. This model would allow the authorities to assess the impact of various tax incentives on the rate of return for representative investment projects (at the margin). Marginal Effective Tax Rates can also be used to analyse investment's sensitivity (elasticity) to taxation and to evaluate the amount by which the level or rate of investment will be affected by tax provision changes.

Further analysis is necessary to re-design the tax incentive programme so that it maximises the impact on investment and growth while minimising the costs: in other words, encourages investment without foregoing significant tax revenues.

Legislative framework governing tax incentives

A complex legislative framework governs tax incentives in Nigeria. Tax Incentives can be introduced through laws, budget speeches, government notices/directives, and executed agreements.[4] The following legislative acts and provisions define the incentive system:

- The *Industrial Development (Income Tax Relief) Act* of 1971;
- The *Nigerian Liquefied Natural Gas (NLNG) Act*;
- *Companies Income Tax Act (CITA);*
- *Export (Incentives and Miscellaneous Taxation Provisions) Act;*
- *Petroleum Profits Tax Act (PPTA);*
- *Personal Income Tax Act*;
- *Capital Gains Tax Act*;
- *The Value Added Tax (VAT) Act* (exempts certain goods and services from payment of VAT);
- The *NIPC Act* allows the Commission to package incentives within the ambits of existing laws and policies;
- *Associated Gas Framework Agreement (AGFA)* of 1992;
- *Nigerian Export Processing Zones Act*;
- *Oil and Gas Export Free Zone Act* provides incentives which designate certain areas as export free zone to encourage businesses;
- *Finance (Miscellaneous Taxation Provisions) Act*;
- Section 3 of the *Deep-Offshore and Inland Basin Production Sharing Contracts Act* of 1999;
- Regulation 26-28 of the Petroleum (Drilling Production) Regulation under the *Petroleum Act*.

Tax incentives are also created through Memoranda of Understanding between the government and businesses, budget speeches, and government notices and directives. The end result is the complexity and opaqueness of the system with the true extent of tax incentives hidden from public scrutiny. It is advisable that Nigerian tax policy makers consolidate and publicise all tax incentives, along with their eligibility criteria, in the main body of tax law. Consolidating tax incentives into the main tax law will not only increase transparency of the system but also empower the Federal Inland Revenue Service (FIRS) in administrating the tax incentives regime.

According to NIPC, it is currently developing the Sector Specific Investment Incentives Policy that spells out the policies and incentives "for each sector of the economy". At the same time, the policy document aims at "creating a level playing ground […] for all investors". To ensure a level-playing field for all investors and reduce rent-seeking opportunities, Nigerian policy-makers are advised to treat all sectors and industries uniformly, subject to unvaryingly low tax rates.

Governance of tax incentives

In addition to streamlining tax incentives, improvements in governance and transparency of tax incentives would go a long way in improving both, the investment climate as well as the revenue mobilisation efforts. Currently, the investment incentives are managed by various MDAs.

- *Pioneer Status:* Firms apply to the NIPC for pioneer status qualification. The NIPC processes the applications and obtains approval from the Federal Ministry of Finance (FMF).[5]
- *All other forms of incentives:* For all forms of incentives except the Pioneer Status, firms apply for qualification to relevant MDAs, and MDAs obtain approval from the FMF.

As various MDAs are involved in the governance of tax incentives, the lack of co-ordination between incentive measures of individual MDAs (tax and non-tax) leads to overlap and inconsistency in incentive policies and seriously increases the risk of corruption and rent seeking. Consolidation of all tax incentives for investment under the authority of a single body will increase transparency and limit discretionary power.

When the FMF approves the application submitted by MDAs, a copy of the approval certification is submitted to the FIRS with a tax declaration. However, the revenue authority does not play any role in the approval, verification or valuation of the investment. Since MDAs are not responsible for the collection of taxes, the end-result is that too many incentives may be given away.[6] In addition, no inter-agency co-ordination or information exchange exists once the application has been approved. This absence of proper inter-agency

co-ordination provides fertile ground for tax avoidance and abuse, further undermining the revenue mobilisation efforts.

The best practice is to ensure that the granting/qualification for tax incentives is automatic, according to predetermined, uniform, and clearly declared criteria. Tax incentives should be claimed by a taxpayer by meeting the necessary conditions as prescribed, without negotiating with any granting authority. Absent such an automatic qualification that is consistently adhered to, there is little defence against rent-seeking and the pleading of the special interests that can always make plausible arguments as to why their case, and their tax preference, is meritorious.

Nigeria's fiscal federalism and its impact on investors

Another level of complexity for the investors is added by Nigeria's three-tiered tax system that levies tax at the federal, state, and local levels. The particularities of fiscal arrangements give rise to multiple-taxation and abuse, as reflected by a taxpayer in an interview with ActionAid: "We pay all sorts of taxes by different governments. Today it is one tax, tomorrow another and nobody explains to you when you ask about the reason for the multiplicity. To worsen the situation you don't even know who to complain to."[7] The Manufacturers Association of Nigeria (MAN) has frequently brought this concern to public attention, and most recently in October 2013 the Tax Payers' Association of Nigeria (TAPAN) called on the federal government to urgently harmonise taxes and levies across the country, and to facilitate tax payment procedures, so as to stimulate economic growth (Chima, 2013).

The federal Decree No. 21 of 1998 defines the taxing powers of the Nigerian states.[8] The Decree is not precise in its definition of different tax bases; this vagueness is exploited by the sub-national governments to "invent" and impose new taxes on businesses, resulting in multiple taxation of the same tax base. Based on the analysis conducted by the IFC in Nigeria, "the Lagos local government levies over 126 different fees and licenses, and the local government in Kaduna State has 147 different fees and licenses, including a burial fee levied on the number of corpses". This multiplicity of taxes and the lack of transparency affects the overall tax burden of the businesses, as well the overall costs of tax compliance. As a more indirect effect, multiple taxation can also hinder the effectiveness of infrastructure services as key enablers for doing business: the Nigerian Communications Commission (NCC) for instance attributes the poor quality of telecommunication services to multiple taxation and regulations by governments at all levels, which has restricted the spread of critical infrastructures (NAN, 2014). To address the opaqueness of the tax system, greater co-ordination of different levels of government is of critical importance. Collaboration will not only facilitate and reinforce actions to protect tax bases of the various levels of governments, but can also provide a

mechanism to address the issue of sub-national tax competition. As a starting point, a complete inventory of all taxes imposed on business and their legal jurisdictions will help to understand the overall tax burden on the businesses and facilitate the process of tax system simplification.[9]

Concluding remarks and recommendations

The Nigerian tax system needs to be simplified and the tax base needs to be broadened to generate more revenues for development spending. In this regard, streamlining tax incentives for investment is essential. Elimination of wasteful tax incentives should be conducted after a credible cost-benefit analysis of tax exemptions and special tax provisions. The technical assistance of multilateral organisations, such as the OECD, could be of use to analyse the effectiveness of tax incentives for investment and to understand whether the expected impact (if any) is achieved at a reasonable price. The authorities could benefit from the experience of the OECD *Tax and Development Programme* to improve investment incentives systems and to evaluate their effectiveness and cost efficiency. Further, a systematic, institutionalised tax expenditure analysis would help in identifying the revenue losses associated with tax incentives and, consequently, focus policy makers' attention on the fact that tax expenditures are quite similar to direct spending programmes and have to compete with other government spending priorities when the government makes its budget decisions.

It is advisable that all the tax incentives, along with their eligibility criteria, are consolidated in the main body of tax law to increase transparency of the system and empower the revenue authority in administrating the tax incentives regime. It would be equally advisable to ensure the granting/ qualification for tax incentives is automatic, according to predetermined, uniform, and clearly declared criteria.

A well-functioning mechanism of greater co-ordination between different levels of government would improve the transparency of the tax system. Reduced instances of multiple taxation and abuse would significantly reduce the overall tax burden on businesses, thereby improving the investment climate in the country.

3.6. Business linkages and SME development

Business linkages between MNEs and domestic companies constitute one of the major expected benefits of FDI by creating indirect jobs and boosting competitiveness notably through the transfer of knowledge and technology. These spillover effects are especially helpful to harness the potential of local small and medium-sized enterprises (SMEs) in host economies. Linkage creation opportunities mainly depend on the availability of adequate domestic

supply-side capacity. Nigeria is ranked respectively 46th out of 144 economies for the quantity of local suppliers and 99th for their quality on the World Economic Forum *Global Competitiveness Index* 2014-2015. While Nigeria shows a relatively good performance in terms of the quantity of local suppliers compared to several other countries in the emerging world, it is much weaker in terms of the quality of local suppliers (Table 3.3).

Table 3.3. **Ranking of local suppliers in Nigeria and comparator economies**

	Nigeria	South Africa	Kenya	Malaysia	Indonesia	Brazil	India	China
Quantity of local suppliers	**46**	47	19	6	38	21	72	24
Quality of local suppliers	**99**	38	47	24	75	54	78	63

Source: World Economic Forum (2014), *Global Competitiveness Report 2014-2015*, Geneva, *www.weforum.org/reports/global-competitiveness-report-2014-2015*.

In order to benefit from FDI spillovers through the creation of productive business linkages, the government should take steps to strengthen the network of potential domestic suppliers of MNEs through the development of the SME sub-sector, the creation of clusters, proactive linkage creation efforts and the reinforcement of human resources. These different points are analysed here below.

Promoting SME development and creation

The degree of linkage creation between domestic and foreign businesses primarily depends on the robustness of the host economy's SME sub-sector. Those that strive to become suppliers of world-class corporations frequently face challenges related to their size, their own organisational capacity (such as qualified human capital, quality control and international certifications), external conditions in the economy that are particularly constraining for small firms and the high cost of upgrading production processes to meet the needs of MNEs. The first way of encouraging productive business linkages is thus to increase efforts towards building absorptive capacities of domestic SMEs.

According to a government's survey of micro, small and medium enterprises undertaken in 2010, weak infrastructure, lack of access to finance and inconsistent government policies are the main challenges faced by SMEs in Nigeria (SMEDAN and NBS, 2010). The SME sub-sector is a vital player of the economy, as it contributes to 46% of the Nigerian GDP and employs more than 30 million individuals. According to the survey, only 36% of them have patent rights. The survey notes that, in 2010, most SMEs were evolving in manufacturing (29% of total), followed by wholesale and retail, repair of motor vehicle and household goods (17.6%), health and social work (11.6%), financial intermediation (10.1%), hotels and restaurants (9.6%) and education (7%).

The Small and Medium Enterprises Development Agency of Nigeria (SMEDAN) is the government agency, under FMITI, mandated to promote, monitor and co-ordinate the development of the SMEs sub-sector; instigate policy ideas for SME development; and facilitate development programmes and other services to support the modernisation of their operations. SMEDAN was established in 2003, which illustrates the fact that SME support is a relatively new priority for the federal government. In the post-colonial era, trade and financial policies were favouring the large scale industry. For example, the import substitution policy was focused on industries that could undertake mass production of consumer goods (SMEDAN and NBS, 2010). It is only in the 1980s, under the Structural Adjustment Programme, that the SME sub-sector started being a government focus of attention.

SMEDAN performs the following activities:

- information dissemination on markets, inputs and suppliers (there are currently 37 business information centres in 30 States of Nigeria);
- business development services to help SMEs build capacities to run their enterprise sustainably and profitably;
- promotion of clustering and providing access to common facilities for small businesses, such as layouts, incubators and industrial parks;
- SME policy design and advocacy (voicing the needs and challenges of SMEs to government); and
- facilitation of access to finance for SMEs.

SMEDAN developed in 2007, with the support of the United Nations Development Programme (UNDP), a national policy on micro, small and medium enterprises (SMEDAN, 2007). The policy outlines key objectives, strategies and programmes in view of addressing obstacles faced by SMEs in the areas of: i) institutional, legal and regulatory framework; ii) human resource development; iii) technology, research and development; iv) extension and support services (information resources and business development services); v) marketing; vi) infrastructure (particularly in designated industrial clusters and business districts); and vii) finance.

The policy is currently being revised, in collaboration with relevant stakeholders, in view of restructuring the institutional framework for SME support and readjusting the definition of SMEs by adding the criterion of number of employees. One of SMEDAN's major challenges will be to increase the outreach of its activities, notably by training and strengthening intermediary entities, as most SMEs spread around Nigeria are not aware of its existence and support services (SMEDAN and NBS, 2010). Another priority for SMEDAN is to work on the formalisation of micro-entrepreneurs, which will allow them to be better positioned to benefit from services offered by the State while also contributing to public revenues.

SMEDAN receives technical assistance from the United Nations Industrial Development Organization (UNIDO). Both organisations signed a Memorandum of Understanding in June 2013 on the implementation of the Learning Initiative for Entrepreneurs Programme, which seeks to support the development of SMEs in areas of capacity development, policy formulation and organisation of study tours. Two phases of the project complement each other: one focusing on the establishment of micro-enterprises and entrepreneurship capacity building, and the other on addressing skill gaps in sectors with high employment potentials. The World Bank has also been supporting the SME sub-sector in Nigeria, notably with a micro, small and medium enterprises pilot project (MSME Project) between 2006 and 2011, aiming to increase the performance and employment levels of SMEs in selected non-oil industries and in pilot areas of the country (Lagos, Abia and Kaduna). The project was implemented by NIPC in collaboration with SMEDAN.

The Enterprise Development Centre is also an active player in SME development and creation in Nigeria. The Centre is a department of the Pan-Atlantic University based in Lagos and was established in 2003 in order to professionalise and equip SMEs' managers with the skills needed to achieve and sustain success in their entrepreneurial endeavours. Its flag-ship programme is the Certificate programme in Entrepreneurial Management, through which it trains and supports over 150 new business owners every year. Among others, the Centre developed, in collaboration with the International Finance Corporation (IFC), the SME Toolkit Nigeria (*http://nigeria.smetoolkit.org*). This programme offers business management information and specialised training for SMEs.

Several programmes have also emerged to support entrepreneurship and enterprise creation in Nigeria. The Youth Enterprise with Innovation in Nigeria (YouWiN!) is an annual business plan competition supporting promising entrepreneurial young individuals to develop and execute business ideas that will lead to jobs creation. The programme, launched in 2011, is an initiative of the Ministry of Finance, the Ministry of Communication Technology, the Ministry of Youth Development, and the Ministry of Women Affairs and Social Development. SMEDAN is the monitoring agency of the programme. Similarly, the Grooming Enterprise Leaders programme aims to build the capacity of around 1 000 small businesses in the six geo-political regions of the country. Specifically, this includes access to capacity building, enterprise support and access to capital. The programme is also being used to build enterprise development infrastructure across Nigeria through a structured network of universities and non-for-profit organisations working as enterprise development institutions.

It is important that the federal government bear in mind that these SME support initiatives should complement, not substitute for, active efforts to

establish a sound SME investment environment. For this to happen, the government should continue collecting SME views to better understand the issues affecting them. It is also essential to regularly evaluate the various SME programmes in place in Nigeria. There currently is no sufficient information or key figures allowing assessing the impact and the results of SME support programmes. Because of their small size, SMEs can be particularly difficult to assist. It is important that surveys also seek to understand how SMEs experience government services and what dissuades them from using them.

Supporting cluster development

The government could also consider strengthening the development of industrial clusters as drivers of SME development and linkages. Cluster development can include the establishment of export processing zones and industrial parks, providing basic common infrastructure to investors, in view of enhancing economic development and encouraging backward linkages in strategic sectors of the economy. Many emerging economies, including Brazil, China, Costa Rica, Kenya, Malaysia, Mauritius and Viet Nam have followed this model, with some success, in order to develop certain industries. Most African countries have nowadays embarked upon a similar path, although benefits in terms of job creation and integration with the domestic economy remain limited (World Bank, 2011b).

In the same vein, Nigeria adopted a free zone scheme since 1992 with a view to diversify the economy, create jobs and encourage exports through local production. NEPZA is in charge of the licensing, monitoring and regulation of export processing zones, as promulgated by the 1992 *NEPZA Act*. The government started its strategy by focusing on the development of its flagship free zone in Calabar, with the purpose to attract FDI into manufacturing and diversify the economy. This objective has, however, not been achieved as the zone currently employs only approximately 1 000 workers, whereas another zone, developed later in Port Harcourt to support Nigeria's oil and gas sector, has attracted a higher number foreign investors and currently employs more than 20 000 workers (World Bank, 2011b). The creation of zones is thus barely supporting the government's objective of diversification. Furthermore, it generally rarely encourages the development of local SMEs. The government could envisage focusing on fostering productive linkages between domestic SMEs and the globally competitive MNEs anchored in free zones, which might be achieved through a cluster-based strategy. A deeper analysis of zone development can be found in Chapter 6 (Lagos State).

In OECD countries, industrial policies with a cluster focus tend to support those clusters that drive national growth, promote SMEs and create business linkages (OECD, 2007). The old approach of supporting national champions has given the way to a cluster development scheme, providing a less trade-distorting

framework for the support of strategic sectors. A stronger emphasis is given to SME development in an attempt to link industrial and enterprise policies. Cluster programmes tend to concentrate on strategic sectors for national growth, foster industries in transition, support SMEs overcome technology absorption, and create competitive advantages to attract FDI and promote exports (ibid.).

In Brazil, the Local Productive Arrangements Programme (*Programa de Arranjos Produtivos Locais*), which includes an export promotion dimension, is a cluster development programme targeting SMEs. While the government provides capacity building to SMEs, SEBRAE (*Serviço Brasileiro de Apoio às Micro e Pequenas Empresas*), SMEDAN's Brazilian equivalent, has been successful in promoting linkages between local SMEs and MNEs, notably those operating in the oil and gas industry (UNCTAD, 2010). The government has been providing capacity building to help SMEs meet global standards, upgrade their use of information technology and enhance their management expertise. As a result, SMEs, in their interactions with oil and gas companies such as Petrobras, have been able to build their capacities in maintenance, electronics, engineering, painting and assembly. This Brazilian case study is particularly interesting given the few existing – but high potential for – linkages between the oil and gas sector and other sectors of the economy in Nigeria (Ademola Oyejide and Adewuyi, 2011).

In the context of the emerging Nigerian Industrial Revolution Plan, the development of industry clusters could potentially benefit SMEs in Nigeria. The Nigerian Industrial Revolution Plan is a five year plan to accelerate the build-up and utilisation of industrial capacity within the country. It aims to increase manufacturing's contribution to GDP from 4% today, to 6% by 2015, and finally above 10% by 2017. It is based on the desire to drive a process of intense industrialisation, focusing on sectors where Nigeria already has comparative advantage, such as the agro allied sectors; metals and solid minerals related sectors; oil and gas related industries; as well as construction, light manufacturing and services.

Against this background, NEPZA is currently charged by FMITI to encourage industrial clusters, including but not exclusively in export processing zones, with a view to support industrialisation and SME linkage creation. SMEDAN is already running a Cluster Development Initiative, which objective is the co-location of different size of enterprises within a geographical location affording the enterprises the opportunity to pool resources in order to reap the benefit of economies of scale, gain knowledge spillovers, acquire specialised skills and achieve greater innovative capabilities. SMEDAN is also currently developing 27 Industrial Development Centres into SME clusters across the country, although not yet functional. FMITI should co-ordinate closely with NEPZA, NIPC, SMEDAN and the OPS in order to design a policy that would fruitfully combine industrial and SME development. Cluster development

could be based on factor endowment of regions since natural agglomeration of interlinked industrial activities are limited in Nigeria. As the Malaysian case illustrates, enhanced co-operation within government and between the government and the private sector is vital for the successful development of industry clusters (Box 3.7).

Box 3.7. **Industry clusters and SME development in Malaysia**

Industry clusters are an integral part of Malaysia's industrial policy. Dynamic clusters rely on the smooth interaction of a number of pillars, combining public policies and initiatives at the firm-level. In addition to being agglomerations of companies in a geographical area, clusters typically exhibit the following characteristics, critical for their generation of new technology, innovation and firm creation:

- Strong role of government (federal or state) in promoting stability and basic infrastructure.
- An institutional environment that stimulates technological acquisition and transfer, including through high intellectual property rights standards.
- Global connectivity of clusters through value chains and markets.
- Competent intermediary organisations in place to promote the horizontal connectivity and co-ordination of economic agents.

While Penang hosts Malaysia's most developed technology cluster, particularly in the manufacturing of semiconductor-based electronic components, other industry clusters have emerged in Klang Valley, in the ICT and machinery sectors, and in Johor, in the furniture and palm oil industries.

More recent effective public-private co-operation can be seen in the establishment of the Penang SME Centre and the Penang Science Council. The Centre, established in 2012 to act as an incubator for SMEs, is strongly supported by the Penang State Government, which provides rental subsidies to support SMEs to take advantage of the facility. It is the result of effective collaboration between the Penang Skills Development Corporation, investPenang and the Penang Science Council. Good systemic co-ordination resulted in close links and relationships between companies and institutions in Penang.

The geographical proximity of the companies, investPenang and other support agencies, has helped economic agents develop strong ties and networks. This has greatly facilitated the exchange of information and feedback circles, even informally. In Penang, public-private partnerships and other collaborative efforts have also led to a number of spin-offs and to the creation of new enterprises by former employees of MNEs.

Source: OECD (2013), *OECD Investment Policy Reviews: Malaysia 2013*, OECD Publishing, Paris, *http://dx.doi.org/10.1787/9789264194588-en*.

Encouraging backward linkages

Beside measures taken in favour of SMEs and cluster development, there are more direct ways of supporting linkage creation between MNEs and domestic companies. In the past, governments have tried to mandate linkages through local content, local equity or joint venture requirements and sometimes even direct technology transfer obligations. However, increasingly policy makers are seeking to promote more "natural" linkages as, for example, through electronic databases aimed at facilitating business partnerships.

There is no clear policy on business linkages in Nigeria and there are few and dispersed initiatives. Among them, SMEDAN is involved in forward and backward linkage facilitation through UNIDO's Subcontracting and Partnership Exchange (SPX) programme, which was established in 2011. It serves to provide a platform for the matchmaking of industrial subcontracting and partnerships between contractors, suppliers and subcontractors. The programme aims at linking the SME sub-sector in Nigeria to a global database of manufacturing operators that is benefitting both suppliers and buyers of goods. UNIDO is providing technical assistance while SMEDAN is offering office space, furniture and human resources. The Business Support Centre Matori, located in Lagos, is hosting the Nigerian SPX programme.

Another project is "Market Access Nigeria", an initiative by the Enterprise Development Centre, and Etisalat Nigeria (the Nigerian branch of a private company based in the United Arab Emirates active in telecommunications), in collaboration with FMITI and SMEDAN. It provides a platform that brings together SMEs and large companies to network, start relationships and create opportunities for commercial interactions. In more specific terms, the objectives of "Market Access Nigeria" are: i) to create market access for credible SMEs operating in Nigeria; ii) to bridge the gap between large companies and SMEs while fostering networking and partnership opportunities; iii) to enable local content development and participation in various sectors of the Nigerian economy; and iv) to create a platform for structured networking among SMEs. These events are taking place on a regular basis in Abuja, Calabar, Lagos and Port Harcourt.

NIPC, for its part, is not involved in linkage creation activities although it is its intention to do so. NIPC, by directly interacting with foreign investors on a regular basis, is however supposed to be positioned at the front stage to understand their supplying needs, standards and requirements. Integrating forward and backward linkage creation activities within its aftercare unit – where regular interactions with MNEs are maintained – would be the most suitable first step in this direction. Two particular measures could be envisaged by NIPC:

- *Information dissemination*: NIPC could compile a database of domestic suppliers, in co-ordination with relevant stakeholders such as SMEDAN and the OPS, and make it available online. This database should respond to MNEs' most

common requirements in terms of products and services, and be regularly updated. As a first step, NIPC could focus on potential suppliers in those priority sectors for FDI attraction.

- *Matchmaking*: NIPC could organise, in collaboration with private sector representatives such as the OPS, matchmaking meetings between foreign investors and SMEs that could act as suppliers or local partners. These meetings could take the form of large promotional events, in the same vein as "Market Access Nigeria", or of roundtables at a smaller scale. NIPC's role in these undertakings should be proactive, constructive and neutral, as linkage promotion programmes can only function in an environment of trust.

The government could also encourage foreign and large domestic companies to adopt a code of responsible business conduct such as the OECD *Guidelines for MNEs* (see Box 3.8). Under the *Guidelines,* companies are encouraged to:

- promote local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice;
- support human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees; and
- adopt, where practicable in the course of their business activities, practices that permit the transfer and rapid diffusion of technologies and know-how, with due regard to the protection of intellectual property rights.

Box 3.8. **OECD Guidelines on Multinational Enterprises and the 2011 update**

The OECD *Guidelines for Multinational Enterprises* are recommendations jointly addressed by governments to multinational enterprises. They aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises.

Following the update in May 2011, the *Guidelines* include new recommendations notably on human rights and a general principle on the need to exercise due diligence to avoid or mitigate negative impacts on third parties, notably with respect to the management of supply chains and other business relationships.

The recommendations of the *Guidelines* cover all major areas of corporate responsibility, namely:

- disclosure,

Box 3.8. **OECD Guidelines on Multinational Enterprises and the 2011 update** *(cont.)*

- human rights,
- employment and industrial relations,
- environment,
- combating bribery, bribe solicitation and extortion,
- consumer interests,
- science and technology,
- competition, and
- taxation.

The *Guidelines* comprise a distinctive implementation mechanism, the National Contact Points (NCP), which are government offices charged with advancing the *Guidelines* and handling enquiries in the national context and supporting mediation and conciliation procedures, called "specific instances". The 2011 update has clarified and reinforced these procedures to strengthen the role of the NCPs and foster functional equivalence.

Source: OECD, *http://mneguidelines.oecd.org.*

Addressing skills gaps

Policies that develop and maintain a skilled and adaptable workforce, and ensure the full and productive deployment of human resources, support a favourable investment environment. If a country is willing to use FDI as a catalyst for economic development through the creation of productive business linkages, a skilled labour force, tailored to private sector needs, is vital. Human resource development policies should be designed in light of the country's broader development objectives and investment policies.

Although the shortage of skilled workers is not yet perceived as a major impediment to investment by the private sector in Nigeria (World Bank, 2009), the risk of increased skills mismatch is emerging. Adequate capacities are necessary to further promote economic development through productive linkages between large investors and local SMEs. Strengthening the supply of qualified labour is also necessary to prevent a disproportionate increase in socio-economic disparities in the country. Although universal free primary education is compulsory in Nigeria since 1977, the adult literacy rate is nowadays just over 60%. The country was ranked 124th out of 144 for the quality of its primary education by the World Economic Forum in its 2014-15 edition.

The federal government has been implementing educational reforms in the past years and launched the *Roadmap for the Nigerian Education Sector* in 2009, which focuses on: i) access and equality; ii) standards and quality assurance; iii) technical and vocational education and training; and iv) funding, resource mobilisation and utilisation. The Roadmap concedes that the sector has suffered from years of neglect and has not been an efficient instrument for socio-economic development. According to stakeholders, universities are rarely sufficiently equipped to keep their academic curriculum up-to-date and in accordance with market needs and emerging industries. As a result, many large companies, especially in the banking sector, have their own training schools to build capacities in their required fields, as no such competences are being thought in the formal education system. Private schools and universities are increasing in number and tend to create more employable skills. However, these private institutions are relatively expensive, hence not well attended, and do not favour reduced inequalities.

Creating the environment for increasing the supply of qualified individuals not only requires educational reforms but also private sector involvement. While training existing and potential suppliers according to MNEs requirements and benchmarks can foster the creation of backward linkages, it is important that such training measures involve MNEs to ensure the relevance of training. The 2009 *Roadmap for the Nigerian Education Sector* recognises the necessity to involve the private sector in education policies, notably by strengthening synergies between tertiary institutions and business representatives for designing new curricula and tailoring academic research efforts to the needs of industry. In doing so, special emphasis also needs to be attached to the flexibility of the policy framework to respond to the new skill needs created by changing technologies and economic structures. Close co-operation between policymakers and the main stakeholders is also necessary for this to happen, such as between FMITI, ITF and NIPC on the one hand and the Federal Ministry of Education on the other hand.

While formal education equips individuals with the skills needed to learn, new recruits tend to lack the firm-specific knowledge that businesses require to unlock an employee's full productive potential. Transmitting these firm-specific skills is the domain of on-the-job training and specialised off-site training. However, market failures often lead to too little training by businesses and the limited training that is undertaken is often concentrated within a narrow group of individuals. The shortage of trained workers is thus an obstacle to expanding investment and makes it particularly hard to attract high-skill intensive industries. There is a role for government to support training programmes, which in tandem with formal education improves the business environment and attracts foreign investors in high-skill industries. Policy instruments to support training are many, including co-financing

arrangements where payroll levies are used to fund training grants to employers, or through levy exemptions for employers that spend a given proportion of their payroll on training, tax incentive schemes and subsidies.

In line with this, the Reimbursement Scheme of the Industrial Training Fund (ITF) was established in Nigeria since the 1970s in order to motivate and encourage employers to train and re-train their staff in accordance with the needs of their industries. The ITF, a parastatal of FMITI, is responsible for setting and regulating training standards and offering direct training intervention in industrial and commercial skills. ITF's Reimbursement Scheme provides that a maximum of 60% of levy be paid to up-to-date levy contributors who satisfy laid down conditions for claiming reimbursement. ITF's training curriculum is divided into seven main areas of courses: i) administrative and management; ii) banking and finance; iii) engineering and technical fields; iv) productivity and efficiency improvement; v) environment, health, safety and security; vi) human capital development; and vii) information and communication technology.

In addition, the NIRP also endeavours to better link technical and vocational education and training to industry needs. The government intends to conduct industry skills assessment (with the support of UNIDO), set up Skills Councils in each State to match major companies in those States with ITF and other government institutions, and put in place support mechanisms to reduce search costs for trainees and employers, and link training programmes to real jobs and internships.

Finally, with the view to bridging the skills gap that MNEs could potentially face, NIPC could develop closer linkages with the Nigerian Diaspora. Nigerians abroad are numerous (see above) and represent a pool of skilful individuals potentially interested in returning to Nigeria. NIPC could, in particular, play a key role by facilitating closer relationships between MNEs experiencing a shortage of skills in Nigeria or looking for specific expertise, one the one hand, and talented Nigerians from the Diaspora looking for attractive opportunities in their home country, on the other hand.

Notes

1. The Tony Elumelu Foundation was established in 2010 by Tony Elumelu, the Chairman of private company Heirs Holdings. The foundation's mission is to support Africa's economic development by enhancing the competitiveness of the African private sector. It is dedicated to the promotion and celebration of entrepreneurship and excellence in business leadership across the continent.
2. Nigeria is a federal state with three tiers of governments – federal, state and local. Fiscal relations are governed based on the principle of fiscal federalism; the oil and gas revenue sharing formula between levels of government and (a large number of) extra-budgetary funds is defined by the Constitution.

3. *http://allafrica.com/stories/201307051420.html. Country Loses N71 Billion Annually to Tax Waivers – Actionaid*, Olayemi R. Ibrahim, July 2013.
4. Francisca E. Nlerum, Reflection on the Attitude of the Courts to Tax Incentive Mechanism in Nigeria, NIALS Journal of Business Law (*www.nials-nigeria.org/journals/Dr.Francisca%20E.%20Nlerumbus.pdf*).
5. In light of the budgetary difficulties faced since mid-2014 due to the sharp decline in international oil prices, FGN "has commenced a review of the implementation of pioneer status exemptions to which is expected to unlock up to N 36 billion of additional tax revenues in 2015" (FRN, 2014).
6. The case of Mauritius is an illustrative example, as the Board of Investment – the country's investment promotion agency – is responsible for administering investment incentives but under the authority of the Ministry of Finance.
7. *www.actionaid.org/sites/files/actionaid/nds_report_-_final_version.pdf*.
8. Taxes and Levies (Approved list for collection) Decree No 21 of 1998; *www.nigeria-law.org/Taxes%20and%20Levies%20(Approved%20list%20for%20collection)%20Decree%20No%2021%20of%201998.htm*.
9. This paragraph draws on IFC's study of effective tax burdens in four Nigerian states conducted by the Foreign Investment Advisory Service (FIAS) in 2008.

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Chapter 4

Nigeria's trade policy

Export competitiveness is generally a challenge for Nigeria – in particular as concerns finding niches for exports in which the country can gain in value-added and diversify exports away from the current focus on raw materials. This chapter investigates to what extent Nigeria's policy and institutional framework for trade (including the draft National Trade Policy of 2013, still awaiting finalisation as of spring 2015) can help address these challenges. This indicates that due to the wide breadth of "targeted" sectors, it is difficult to dedicate sufficient resources and to address supply-side constraints specific to each sector. Moreover various policy questions relevant to trade are not under the ambit of the FMITI, but are rather dealt with by the agriculture or finance ministries, which complicates effective reform implementation. The chapter provides recommendations on how to improve the focus of the draft Policy, better address remaining non-tariff barriers to trade, and enhance institutional co-ordination among bodies responsible for trade and investment policy formulation.

A country's trade policy influences both domestic and foreign investment and is key for any growth and development strategy. The relationship between international trade, domestic investment and FDI is complex and multi-directional. For instance foreign firms investing in a host country can create new trade flows with their parent companies or foreign suppliers; and conversely, trade can draw attention to resources and markets that can highlight investment opportunities. Moreover trade policies determine the size of markets and output for firms and hence strongly influence both foreign and domestic investment. Indeed, export orientation attracts FDI and in return FDI contributes to export competitiveness.

In general greater trade therefore correlates with greater investment flows, especially as global FDI is becoming increasingly trade-intensive. In addition, just as foreign investment can generate "backward linkages" with domestic entrepreneurs (see Chapter 3), trade creates potential for additional technology linkage opportunities as well as for technology transfer to local suppliers. Over time, the influence of trade policies on the investment climate is in fact growing. Changes in technology, trade and investment liberalisation, and the globalisation of value chains have enhanced the role of trade policies as a crucial ingredient for encouraging both foreign and domestic investment and maximising their contribution to development.

4.1. Sectoral trade and investment opportunities in Nigeria

Export competitiveness is generally a challenge for Nigeria – in particular as concerns finding niches for exports in which the country can gain in value-added and diversify exports away from the current focus on raw materials (whether they be oil or a narrow range of agricultural and mineral products). Existing market access opportunities for Nigeria (both domestically and overseas, for instance under the ECOWAS Trade Liberalisation Scheme and the preference schemes of the *Africa Growth and Opportunity Act*) have so far been under-utilised. In 2013 Nigeria's Task Force on Trade Facilitation (see below) attributed this poor performance to the following domestic challenges, among others (DNTP, 2013):

- informal trade, notably smuggling of low-priced, low-quality goods into Nigeria at a detriment to the production of local manufacturing companies;
- cumbersome port (and more generally customs) administration, with inefficient, costly, non-transparent and time-consuming import, export and clearance procedures;

- multiple checkpoints and a lack of trade facilitation efforts at regional level;
- lack of adequate information and low quality of traded products (exacerbated by low effectiveness of standards-setting and certification activities);
- poor supply-side enablers for competitiveness, including human resource development (see Chapter 3) and quality of infrastructure networks (in particular deficiencies in Nigeria's power sector are estimated to increase the cost of goods and services in Nigeria by 40% due to the use of private generators – see Chapter 5);
- lack of effective trade facilitation measures and weak export promotion strategies, exacerbated by the absence of funding to monitor trade facilitation activities (as also addressed, from an investment promotion perspective, in Chapter 3);
- lack of systems for settlement of trade disputes;
- lack of a co-ordinating framework to streamline fiscal and trade measures among federal government, states, and local government councils;
- weak consultation with the private sector and traders concerning fiscal and tariff changes; and
- insufficient value-addition.

Insufficient value-addition is a particularly dominant challenge, which in part results from all of the others listed above. In fact while the international community has often pointed to the need for diversification outside of the oil sector as the central trade challenge for Nigeria, generating greater value-addition and moving up the product chain across all sectors of the economy is most likely the more critical issue. In the agriculture sector for instance, small farm-holders account for 95% of output and Nigeria's agricultural exports are dominated by raw materials. By contrast processed agricultural products dominate agricultural imports (over 95% of Nigeria's agricultural imports over 2006-09 was composed of food products). Similarly the volume of Nigeria's services imports is three times that of its services exports. Meanwhile the share of manufacturing in GDP averaged only 4% over 2005-09, with particularly low growth in building and construction. Even within the oil sector, very little refining is done domestically – thus forgoing the lucrative opportunity to supply both domestic and regional markets with refined oil.

Identifying sectors on which to focus export promotion efforts

Tackling the value-addition challenge within national trade and investment policies requires that strategic sectors of focus be identified for export-promotion and investment generation. Nigeria's draft National Trade Policy (August 2013 version, but which was still awaiting finalisation as of early 2015 – see below), identifies the following key sub-sectors for Nigeria's industrial

exports in addition to crude oil: mining and mineral products (liquefied natural gas, ores and aluminium, etc.); semi-manufactured products (processed skins, cocoa products, textile yarn, furniture/processed wood); and final manufactures (iron and steel, chemicals, light machinery and equipment, automotive products and textiles/clothing, footwear, rubber and plastics). Within industrial exports, the draft Policy sets out measures for developing the solid minerals and metal sector and the oil and gas sector in particular. As concerns the services sector, the draft NTP sees the most potential for trade in: tourism (to tap into Nigeria's cultural heritage and developed travel and hotel infrastructure), Business Process Outsourcing (BPO, for which there is relatively cheap unskilled and skilled labour); as well as in energy, transport, telecommunications and financial services. Finally for the agricultural sector the focus is placed on agro-allied products and food items so as to reduce food import dependency.

Table 4.1 below depicts the extent to which the draft NTP is aligned with other concurrent strategies identifying priority sectors of focus for channelling national trade and investment (although the NTP has undergone additional iterations since August 2013, these priority sectors are likely to remain unchanged). It is important to ensure a coherence and continuity among the sectors identified across different strategies, notably to increase the attractiveness of these sectors for investors and traders and also to ensure that government resources spent in supporting the targeted sectors are not too widely dispersed. In addition frequent review of these sectors to ensure that they are indeed competitive "niches" (and thus evaluating the rationale behind each sector's selection) is an important necessity. Table 6.1 suggests that the draft NTP's key sectors reflect almost exactly the sectors identified in the NIRP, which are themselves closely related to the Transformation Agenda (with the exception of the construction and water resources sectors).

However these categories are very broad – "agriculture" for instance encompasses all "processed foods and vegetables, beverages and food products" (DNTP, 2013: 13); and "light manufacturing" is extended to cover not only pharmaceuticals but also motor vehicles, rubber and plastic, and leather and textiles (as also reflected in NV 20:2020). Telecommunications is also encompassed in a broad manner, although more specific niche opportunities (such as, in the view of the Ministry of Communication and Technology, export of assembled ICT hardware – laptops, PCs, phones, etc. – into the West African sub-region) could usefully be detailed. As identified in Chapter 3, a similar challenge affects Nigeria's investment promotion efforts: these too become diluted due to the breadth of "targeted" sectors. For both investment promotion and trade generation, such a wide spectrum makes it difficult to dedicate the resources required by each sector so as to address specific supply-side constraints and to truly stimulate the sector in question. More in-depth

Table 4.1. **Sector focus of current economic development strategies in Nigeria**

Name of strategy	NV 20: 2020 (October 2009)	Transformation agenda 2011-15	Draft NIRP 2013	Draft National Trade Policy (August 2013 version)
Priority sectors	High priority (until 2015): • Chemicals and Pharmaceuticals sector • Non-metallic mineral products sector • Basic metal, iron and steel and fabricated metal sector • Food, beverages and tobacco sector • Textiles, wearing apparel, carpet, leather/ leather footwear	• agriculture • solid minerals • oil and gas • manufacturing • trade and commerce • culture and tourism • water resources	• agro-allied sectors • metals and solid minerals • oil and gas industries • light manufacturing • services • construction	• agro-allied sectors • metals and solid minerals • oil and gas industries • light manufacturing • services (esp. transport, telecom, financial services, tourism, energy, and entertainment industry) • construction
Basis for selection	The identified high priority sub-sectors represent sectors of the manufacturing industry which can be easily developed in the short to medium term, and within the context of Vision 20:2020. They are the sub-sectors which have the highest potential to provide raw materials for other key industries in the longer term.	Labour-intensive approach to create mass employment; cluster approach for regional comparative advantage. Sectors identified predominantly because they have faced productivity and competitiveness challenges in the past, as well as shortage of skilled manpower and R&D	Existing capacity and potential for value-addition (moving away from raw materials) as well as potential for employment creation and foreign exchange generation.	Value-chain analysis, linking investment and export strategies
Agencies in charge of M&E and implementation	Whole of government	National Planning Commission (NPC) to constitute Presidential Monitoring Teams to verify progress based on reports from MDAs. National reports to be submitted to National Assembly and Office of the President.	FMITI	FMITI as lead ministry, but with membership from all other ministries as well as organised private sector (MAN, NACCIMA, NASME, NANTS etc.)

Source: Federal Ministry of Industry, Trade and Investment (FMITI), August 2013.

evaluation of different (and narrower sectors) is necessary, in terms of their potential for investment attraction as well as competitiveness on domestic and foreign markets.

A similarly general approach is prevalent at the state level. For instance the Lagos State PATH strategy (which is reiterated in the Lagos State Development Plan 2012-2025) identifies as key economic drivers power, agriculture, transportation, and housing – but with little level of detail regarding which

"niche" sub-industries to target within these sectors. Thus although there is valuable coherence in terms of sectors targeted by government growth and development plans (at federal as well as Lagos State levels), the coverage is too broad: there is the need for more targeted investment promotion and trade federal and State policies, focused on strategic sub-sectors of the economy.

The identification of these sectors must be co-ordinated with an analysis of the destination markets. Of the key measures considered to implement the draft NTP, only two actually concern destination markets: the initiative to refocus export promotion policy on the ECOWAS region as a "catchment area", and the promotion of domestic trade, including inter- and intra-state trade. Greater catering to the Nigerian diaspora overseas (which counts about 3 million nationals in the United Kingdom alone) is also mentioned. However for the most part, the draft NTP is based on market expansion rather than market diversification – that is, gaining more reach or access within existing markets but without looking much further afield.

In a similar vein, the draft Policy (in its August 2013 form) does not tackle the supply-side enablers of competitiveness (including targeted development of human resources and infrastructure networks) in sufficient detail. The focus is rather placed on maximising benefits from preferential trade agreements, and on increased "patronage" of made-in-Nigeria products (see Chapter 5 as concerns Nigeria's public procurement regime). As detailed further below, this could however be an unsustainable approach: trade preferences, whether they serve to better position Nigerian production in domestic or external markets, do not address the structural components of competitiveness. Although this approach is in full compliance with WTO obligations, over-reliance on these preferences carries the risk of neglecting more pro-active structural measures, and cannot secure the long-term competitiveness of Nigerian enterprises.

Addressing sectoral weaknesses through production support schemes

The sectors of focus for investment and trade policy efforts are likely to necessitate targeted support schemes from government, especially in agriculture and manufacturing which are characterised by small-scale production. Access to market information and finance is one of the dominant constraints facing such entrepreneurs, as detailed in Chapter 3 and as addressed by various government agencies (including SMEDAN, where a Market Access Division was introduced in 2013). The impacts of poor quality infrastructure are also more severe for smaller enterprises – for instance in the agricultural sector, small-scale farmers suffer from difficult access to rural roads, and from very low levels of irrigation as only 1% of cultivated land in Nigeria is currently irrigated (FAO Aquastat, 2010). To overcome some of these challenges, large-scale agricultural investors and exporters based in Nigeria can play a role in

stimulating domestic production capacity, while reducing risks of creating adverse social impacts and enhancing the sustainability of their investments. For instance these firms could be encouraged to build partnerships with local communities – as has been successful in parts of Tanzania, where the out-grower partnership model has been successfully implemented in horticulture, sugar and tea projects. These are issues which Nigeria's trade parastatals (see Box 4.1) could attempt to actively explore and incorporate within their trade support activities in the agricultural sectors.

Box 4.1. **Incentives schemes for exporting firms: MIBS and EEG**

- **Manufacture in-bond scheme (MIBS):** This is available on application to the Ministry of Finance, and open to export manufacturers only. MIBS is designed to encourage manufacturers to import duty-free raw material inputs and other intermediate products (whether prohibited or not) for the production of goods for export. The Scheme backs raw material imports by a bond issued by any recognised Commercial Bank, Merchant Bank, Insurance Company or by the Nigerian Export-Import (NEXIM) Bank. This bond is discharged after evidence of exportation and repatriation of foreign proceeds has been produced. The Scheme is monitored by representatives of the Ministry of Finance, NCS, CBN, and two FMITI agencies: the Standards Organisation of Nigeria (SON) and NEPC.
- **Export Expansion Grant scheme (EEG):** This applies to non-oil export oriented activities. It is calculated on a company-specific basis and according to the following "Weighted Eligibility Criteria": local value added (25%); local content (20%); employment of Nigerians (20%); activity in a priority sector (10%); potential for export growth (20%); and potential for capital investment growth (5%). The EEG also has a scale for the type of product according to its level of value-addition (raw materials, intermediate, finished goods, etc.) Eligible exporters must manufacture the product in Nigeria, be registered with and submit an Audited Financial Statement to NEPC, and have a minimum annual export turnover of NGN 5 million (USD 31 000), with evidence of repatriation of export proceeds. EEG beneficiaries can access Negotiable Duty Credit Certificates (NDCC) for the payment of import duties. The EEG Scheme is domiciled in NEPC and administered in conjunction with an Implementation Committee (constituted of CBN, NEPC, the federal ministries of finance, trade and investment, and NCS).

It is to be noted that beneficiaries of EEG are prohibited from enjoying other industrial incentives (such as the Manufacturers Export In-Bond Scheme). As of 2013 the EEG is under review and its fiscal impact is being reassessed, with revisions expected in early 2015. According to FMITI, the direction is also to make the scheme more targeted so as to encourage exports of finished products,

Box 4.1. **Incentives schemes for exporting firms: MIBS and EEG** *(cont.)*

and not intermediate products and raw materials. Finally it is possible that the EEG scheme will be brought under the FMITI umbrella rather than remaining within the current oversight of the Ministry of Finance; this may enhance the scheme's effectiveness as an instrument for trade expansion (by contrast to its current status which rather puts the emphasis on its revenue generation potential).

Source: Federal Ministry of Industry, Trade and Investment, 2013.

Other support measures to address supply-side weaknesses across Nigeria's economic sectors can include export finance and import insurance, targeted vocational training, and facilitating access to market intelligence and to strategic international partnerships. For example, the Government of Nigeria proposes two tax incentives for exporting firms: the Manufacture in-bond scheme (MIBS) and the Export Expansion Grant (EEG) Scheme (see Box 4.1). The impact and possible benefits of such schemes deserves to be carefully evaluated, including in terms of the administrative and fiscal burdens that they place on public authorities. For instance while the MIBS scheme can provide helpful assistance to exporters at minimum co-ordination costs for the government (with most functions falling on commercial banks and on NEXIM), the same cannot be said for the EEG. Given the very detailed and complex eligibility criteria for the EEG (see below), it is likely that the latter applies to only a minority of exporters while imposing heavy calculation and administration costs on the EEG Implementation Committee. Chapter 3 above additionally details the risks that a multiplication of tax incentives for trade and investment can pose in terms of in terms of fiscal sustainability and of rent-seeking. In part for these reasons, the federal government has been reviewing the EEG since 2013 – especially in terms of reassessing its fiscal impact – and has announced its intention to modify the scheme in January 2015. Such assessment of the socio-economic, as well as administrative, impacts of these schemes is necessary not only during their roll-out but also before new export and investment incentives (as considered in the draft NTP) are put in place.

It is therefore important that these multiple measures be streamlined and cautiously implemented. If introduced in an ad-hoc and insufficiently co-ordinated manner, these sector-specific support schemes can otherwise become unpredictable or vulnerable to political fluctuations – thus forgoing the intended effects in terms of enhancing investor confidence and facilitating long-term entrepreneurship. Yet over the past three years the federal budget has placed emphasis on a range of diverse sectors (including construction and

housing, solid minerals, aviation, and creative industry) without clearly establishing the link with strategic trade, investment or even employment objectives. For instance while the 2013 budget announces that agriculture will be the primary sector of focus for job creation, the 2014 budget instead sought to leverage the manufacturing sector as a central job creator. The 2015 budget, in turn, emphasises job opportunities in the ICT and insurance sectors. Efforts should therefore be made to: firstly, narrow down the breadth of sectors covered by Nigeria's trade and investment strategies; and secondly, ensure that the individual, sector-specific support measures periodically announced by federal and state governments match these identified sectors.

This would enhance the predictability and longevity of these support measures – and thus their effectiveness. The draft NTP takes a good step in this direction: it aims to put in place several sector-specific measures that could be helpful for small-scale entrepreneurs, notably in the agricultural sector. It lays out the following measures to stimulate and raise the standards of domestic production, so as to reduce reliance on food imports: improving farmer access to low-interest financing, as well as to productivity-enhancing inputs (seeds, fertilisers, machinery, storage and warehousing facilities, etc.); encouraging importation of primary or partially processed agricultural produce that is not locally available and that is needed for further processing and export; and encouraging the domestic processing of locally produced agricultural products. Embedding such measures within a national strategy in this way, rather than only within periodic budget statements, is highly useful as it can make the support longer-lived and reassure investors and traders on the predictability and commitment of government backing. Nigeria's various other investment, trade, and industrial development strategies would benefit from a similar approach.

4.2. Customs procedures

In countries where customs procedures are protracted and involve multiple fees and technical regulations, the costs incurred to satisfy these procedures are sometimes higher than tariffs. Poor border procedures increase waiting times, can reduce the number and value of profitable projects dependent on international trade, and hinder FDI and investment in general. Even before considering the dynamic gains of inducing investment, the income gains from reducing border procedure-related trade transaction costs (TTCs) are substantial.

Nigeria Customs Service and the Nigeria Trade Hub

Customs procedures in Nigeria are overseen by the Nigerian Custom Service (NCS), which is headed by the Comptroller-General and assisted by five

Deputy Comptrollers-Generals in the following departments: Support Services; Tariff and Trade; Enforcement, Investigation, and Inspection; Strategic Research and Policy; and Human Resource Development. The operations of NCS are governed by the *Customs and Excise Management Act* (CEMA) of 1959, last amended in 2004. CEMA sets out conditions for importation, export and carriage of goods, and prescribes various excise duties, excise licenses, duties and drawbacks.

In its recent modernisation efforts, since 2013 NCS has developed a web-based portal (Nigeria Trade Hub, *www.nigeriatradehub.gov.ng*) to provide information and guidance for international trade business processors in the areas of import, export and transit trade (see Box 4.2). But beyond grouping all customs and trade licensing requirements within a single platform as is ongoing in Nigeria, transactions costs incurred in customs procedures can be further reduced by suppressing and streamlining unduly burdensome procedures, impartial and uniform administrative border requirements, and simplifying clearance systems (notably through electronic processing). Trade facilitation reforms should also include: measures doing away with unnecessary or outdated requirements, such as requesting information that has already been provided to other government agencies or is readily available elsewhere;

Box 4.2. **Services available on the Nigerian Customs Service Nigeria Trade Hub**

Launched in 2013, this portal provides an interactive platform for classifying goods, enabling trade processors to find exact Harmonized System Codes for their goods, together with the related tariffs, duties, and levies due for payment upon importation. The classification of goods can moreover be sorted according to the country from which the good is imported – thus taking into account any bilateral trading agreements in force.

In addition the portal groups all guidelines and procedures for obtaining the permits, licenses and certificates necessary for importing specific goods (see Section 4.5 below). By centralising customs-related information, this should help enhance voluntary compliance by traders.

Import and export prohibition lists are also provided – this is especially useful, given that these lists are amended from time to time in accordance to government policies. As detailed further below, the lack of predictability regarding such trade restrictions is a considerable hindrance for domestic and foreign traders, and an especially strong deterrent for export-oriented FDI. Export and import prohibition lists should at the very least be established for a long time-period and subjected to stringent and transparent revision criteria.

Source: Nigeria Trade Hub, *www.nigeriatradehub.gov.ng*.

updating domestic regulatory requirements through periodic audits or built-in sunset clauses so as to take account of changed contexts, technologies and markets; and ensuring that the regulatory compliance burden remains broadly proportional to the underlying policy objectives.

Box 4.3 lists common practices to simplify and accelerate customs clearance in developing and emerging countries (including various trade facilitation tools of the World Customs Organisation, WCO). The 2004 *CEMA Act* is outdated as it does not provide for these modern processing and clearing techniques (including the use of electronic signatures, documents and payments). The process of replacing CEMA with a new law has been under consideration since 2004; a revised version which allegedly covers these methodologies was before the National Assembly by mid-2013, but as of spring 2015 no new text has been enacted.

Box 4.3. **Common practices to simplify and accelerate customs clearance**

- Automation of customs procedures through an Electronic Data Interchange system for customs management.
- Online application and processing of import permits (generally centralised through the trade ministry).
- Paperless Customs – whereby only soft-copy (scans) of customs declaration and relevant commercial documents are to be submitted by importers and exporters, together with an electronic declaration. In addition to reducing transaction costs, paperless procedures can also reduce risks of corruption offences during customs clearance.
- Electronic application and processing of certificates of origin, managed by the customs authority; together with e-payment of any transaction at customs, ports as well as airports.
- Various channels for consignments (consignments are electronically selected for these channels so that the majority of customs declarations can be automatically cleared without requiring physical examination).
- Post Clearance Control, whereby customs audit is effected at importers' premises after clearance of goods so as to minimise dwell time of cargo under Customs control.
- Risk Management System, whereby a centralised section is established within the administration to ensure risk-based targeting for control by Customs: Customs attempt to identify and concentrate only on those vessels that represent highest risks to the country in terms of social and environmental protection, IPR, and revenue collection.

Box 4.3. **Common practices to simplify and accelerate customs clearance** *(cont.)*

- A system of online Reporting, Monitoring and Elimination of Non-Tariff Barriers (now for instance available at the level of several regional economic communities).
- Cargo Fast Track System, by which a group of certified traders with a satisfactory level of compliance at Customs benefit from more simplified procedures in the clearance of goods (based on a history of past compliance for eligibility).
- Single Window System, which provides an online facility to submit applications for import and export licences and permits, and to receive clearances from Government agencies. The System can enable traders to track the status of their applications in real time, facilitate data harmonisation and standardisation among Ministries and agencies, and increase trade efficiency through the reduction of processing time and related transaction costs.

Procedures for registering imports and exports

The 2004 *CEMA Act* governs imports into Nigeria, and does not require registration by importers; nor does the CEMA impose different import procedures for foreign and domestic traders. Nonetheless procedures for import declaration can be somewhat protracted and unnecessarily burdensome. Under the CEMA, an import declaration form must be submitted to an "authorised dealer bank", which then transfers it to NCS for scanning and risk management (these operations were temporarily outsourced to private operators but have returned to NCS as of 2012). NCS must then approve clearance of goods and also assesses duty based on their value (although a self-assessment scheme has been introduced since 2006). The goods are only released once the duties have been paid.

In addition to NCS, a range of sector- or commodity-specific regulators moreover have their own guidelines for import and export, with which traders of the relevant goods must comply in order to obtain the required licenses or certificates. The following agencies must thus grant their approval for trading of specific products:

- National Environmental Standards and Regulations Enforcement Agency (NESREA), which under the *Harmful Waste (Special Criminal Provisions, ETC) Act* 2004 regulates import of Used Electrical and Electronic Equipment (UEEE) into Nigeria; every UEEE importer is required to register with NESREA.
- Under the *Agriculture (Control of Importation) Act*, the Minister of Agriculture can regulate the importation of plants, seeds, oil, artificial fertilizers, and

other similar agricultural goods; importation of these goods also requires clearance from the Nigeria Agricultural Quarantine Service (NAQS).

- Narcotics and Controlled Substances Directorate (NAFDAC), which under the *Food and Drugs Act* and the *Dangerous Drug Act* 2004 regulates the import of narcotics substances, psychotropic substances, precursor chemicals, controlled solvents and drugs; import of these substances requires an authorisation from NAFDAC. In addition no food, drugs, drug products, or packaged waters can be manufactured, imported, exported, advertised, sold or distributed in Nigeria, unless they have been registered with NAFDAC.
- Federal Inland Revenue Service (FIRS), from which a tax clearance certificate is required as part of the application for any import or export license (under Part XIV of the Companies Income Tax Act, CITA 1990).

Institutional capacity and co-ordination among customs authorities

Harmonising administrative requirements in customs procedures, communicating on more transparent and predictable procedures, and regulatory co-operation and co-ordination in customs procedures, are also essential to accelerating customs processes and reducing transaction costs. In addition to the fast-tracking and process-based tools mentioned above, it is equally crucial to improve the institutional structure of the customs system. The multiplicity of regulators involved in approval of import and export procedures in Nigeria (including NESREA, NAFDAC and FIRS – as mentioned above) complicates procedures for traders in different sectors, and can generate avenues for rent-seeking at borders. A positive step forward in this regard has recently been made in the telecommunications sector, by aligning regulations of NESREA with those of the Nigerian Communications Commission (NCC) – but many further efforts remain necessary across all sectors of the economy. Streamlining customs and import control agencies within a single venue (physically and institutionally, rather than merely virtually through the online Nigeria Trade Hub) could also help provide stakeholders with clearer guidance and information and gather stakeholder feedback on the effectiveness and major stumbling blocks of the customs system.

In addition to these regulators, the functioning of the Nigerian Ports Authority (NPA) also has important implications for customs administration and trade facilitation. NPA has recently renewed momentum towards greater efficiency at Nigeria's ports, so as to better position Nigeria as a hub in the sub-region. A trade facilitation strategy, first engaged by the Presidential Committee on Ports in 2011, was re-launched in early 2013 by the Ministry of Transport, with NPA as its implementing agency. The new policy comes under the Integrated Port Community Information System (IPCIS), which is to offer physical security and rapid clearance to traders through risk analysis,

automated notice of arrival of ships, data information and tracking of goods among others. Accordingly, Trade Facilitation Centres (TFCs) have been set up at Nigeria's sea-ports (TDL, 2013).

In addition the vast bureaucratic overlap in Nigeria's ports has been reduced since 2011 following orders of the Ministry of Finance: the number of federal agencies exerting direct or indirect oversight of imports at points of entry was reduced from 15 to six official bodies. This is an important first step towards removing red tape and rationalising institutions as well as human resources; in moving ahead with this initiative it will be important to carefully co-ordinate with NCS in particular so as to ensure that its activities are consistent with the reforms pushed by NPA. This could be an important area for the revision of the *CEMA Act* to address.

These various efforts should help reduce container wait times in the Lagos Port Complex, which still averaged 25-30 days (from container arrival to clearance) in 2012 (OBG, 2012). This is considerably higher than total container wait times from other ports in Sub-Saharan Africa – such as Durban (4 days), Mombasa (11 days), or even Doula (19 days as of 2013) (Raballand et al., 2012). The implications in terms of economic competitiveness are vast, as it is estimated that each day in transit costs between 0.6 and 2% of the value of traded goods (Hummels and Schaur, 2012). In fact wait times are fuelling competition between the ports of Nigeria and Benin in particular, as Nigerian importers faced with high charges or bureaucratic bottlenecks have long tended to see Cotonou seaports as an alternative. Nigeria and Benin are in particular competing on positioning themselves as the regional "load centre", or transhipment base, in West Africa. Although Nigeria enjoys the market advantage of its large population, the current development of a deep seaport in Cotonou has raised policymakers' attention to this issue and has increased momentum for the development of the Lekki deep seaport in Lagos (Ugwoke, 2013). The headway made by Cotonou port in establishing an electronic "Port Single Window" data platform (which has purportedly reduced average container wait time from 39 to 6 days over 2012-2013) could hold useful lessons learned for Lagos port as well (Sawaya, 2013).

Beyond these trade facilitation and co-ordination efforts, a key priority for government should remain addressing the considerable capacity shortfalls of NCS – in particular as concerns human resources. Indeed delays at customs have been attributed not only to the excessive number of procedures required, but also to low efficiency among customs staff. Perhaps as a consequence, most customs reforms have had little impact so far. The 2011 WTO Trade Policy Review (TPR) of Nigeria points out that Nigeria has for instance faced difficulties in implementing the WTO Customs Valuation Agreement, due to poor understanding by Customs officers of valuation control techniques (such as post-import audit and risk management) (WTO, 2011). Moreover under-invoicing

is frequent and there remains excessive discretion for customs officers in setting cargo processing and licensing fees; thus forwarding costs from the port of Lagos and other border posts can vary by 100% for the same product depending on relationships between the operator and customs officials, forwarding agents, and security (USAID, 2010).

Customs authorities also need the statistical resources to regularly track the impact that such trade facilitation tools, once put in place, actually have on the dwell-time of cargo and on the cost of trade transactions. This involves Government efforts to assess actual performance of the customs administration, including by benchmarking against international best practice and identifying priority areas for building capacity. Conducting Time Release Studies (TRS) with the WCO can help prioritise these reforms and identify major bottlenecks in the clearance of goods. The potential revision of the *CEMA Act* and the establishment of a work programme within the Ministry of Justice to compile all trade-related laws within a common list, could hopefully address some of these constraints.

The challenge of informal trade

Few of the trade facilitation measures outlined in Box 4.3 have been effectively implemented in Nigeria so far, and an update of the CEMA Act is still pending. Instead the high levels of customs tariffs and duties, together with the complexity and duration of licensing procedures and porous border controls, create incentives for circumventing the formal customs administration. As a result informal trade remains a considerable challenge for Nigeria. In 2010 Nigeria's annual informal exports to other West African countries was estimated at USD 1.5-1.9 billion. And beyond cross-border informal trade, informal trade also prevails at the domestic level (in shops, markets, etc.). Informal domestic trade for instance accounts for 64% of total sales volumes in the wholesale and retail trade sector. These unregulated activities lead to a reduction in collected tariff revenues, permit an influx of products that do not meet Nigerian product standards, and prevent the collection of adequate statistics on imports and exports. The Trade Department of FMITI attributes the persistence of informal trade to, among others: high costs of business accommodation; poor exposure of businesses to current technologies; location of markets administration under local government authority, which exert excessive discretion; traffic congestion; cartels and monopoly structures in informal trading; and bribery and delays at border stations.

The National Association of Nigerian Traders (NANTS) relates part of the delay in Nigeria's compliance with the ECOWAS Trade Liberalization Scheme (ETLS, see below) to the volume of this trade. Indeed ineffective attempts to stem this informal trade (for instance through a multiplicity of checkpoints

along the border corridors) have only served to render cross-border trade more burdensome and protracted, while exacerbating time and resource constraints for customs officials. Yet efforts to reduce the number of border posts, which considerably hinder not only informal but also formal trade, have had a poor track record in Nigeria. A telling example is the Seme border (between Lagos and Benin), which was temporarily closed in 2003 to stem smuggling inflows from Benin and where efforts to establish a joint border post in partnership with the European Commission have seen minimal progress or political momentum to date.

The forthcoming National Trade Strategy (analysed in its draft form of August 2013 in this *Review*, but which is still pending) outlines measures to tackle both cross-border and domestic informal trade in Nigeria. These include, among others: eliminating high import tariffs, as well as export bans and prohibitions; simplifying customs clearance procedures for small quantities of imported goods; eliminating multiple taxation and similar charges levied on the movement of goods across local and state government boundaries; enforcing relevant health and safety standards and product quality assurance; enhancing access to relevant market information; and building stronger linkages, through supply chain management, between informal small-scale enterprises and larger enterprises in the formal wholesale and retail trade sector (FMITI, 2013). Moreover in six geopolitical zones of Nigeria (at strategic borders with its West African neighbours), the draft NTP aims to establish Trans-national Border Markets and Border Free Zones with a view to mainstreaming informal trade into the formal sector, and to facilitating the collection of more complete national trade statistics.

If well implemented, such measures would indeed likely mitigate the scale of informal trade in Nigeria, and could moreover tap into the formidable energy and diversity of the informal sector by aligning it with investment and business linkage opportunities in the formal sector. Implementation will however require heightened political commitment towards eliminating tariffs, NTBs, licensing and other fees – an area on which the government stance and level of determination has seemed ambiguous to date (as discussed below).

4.3. Enhancing predictability and consistency among long-term trade and investment objectives

Governments can take useful steps toward reducing trade policy uncertainty and to increasing trade policy predictability for investors. In order to tap into the complementary nature of trade and investment, they have a role to play in aligning national trade and investment strategies. For instance some countries have policies to target export-oriented FDI in sectors with potentially high productivity gains and trade potential, as well as significant

backward and forward linkages with domestic firms. Nevertheless the use of trade policy as an instrument to target investors must be carefully monitored, since exporters and investors do not always face the same needs, and trade measures can also induce costly distortions if restrictive policies are implemented. Multiple heterogeneous support regimes are also difficult to administer, particularly when priority sectors of the economy have been loosely defined (as noted earlier). Therefore investors and other interested parties should be regularly consulted on planned changes to trade policy. In this light the institutional and consultation structures encompassing trade and investment policy formulation need deliberate co-ordination, as highlighted below.

National trade policy: Ten-year review

Nigeria's first trade policy was produced in 1991 and was revised in 2002 in order to reflect Nigeria's obligations under the WTO trading system, as well as the findings of the 1998 WTO Trade Policy Review (TPR). The policy benefited from inputs across all State Governments as well as Organised Private Sector, under the leadership of the then Federal Ministry of Commerce. The policy identified 18 priority areas of export promotion, set out a series of export incentives, outlined objectives for the most notable of these sectors (particularly agriculture), and set out an institutional framework for implementation.

In August 2011 the Federal Minister for Industry, Trade and Investment ordered a review of this trade policy for the first time in ten years, in order to further the goals of NV 20:2020 – including as concerns the Agricultural Transformation Agenda (which aims for agro-industrial exports to derive over 50% of Nigeria's foreign exchange earnings by 2020). The new draft trade policy seeks to provide a more integrated approach for trade, industrial development and investment. In this view it will have strong links with the forthcoming National Industrial Revolution Transformation Plan (NIRP), also being elaborated by the same Ministry over 2013. For instance the draft NTP's import policy recommends that optimum tariffs be calculated and set in consonance with the NIRP and with Nigeria's Backward Integration Programme.

The draft National Trade Policy (as it stood in August 2013, and which has undergone further iterations over the course of 2014) aims to broaden the national product base, notably via encouraging non-oil exports. Related objectives include setting and enforcing environmental and product standards, and using various types of fiscal restrictions more appropriately. Yet the draft NTP also sets the goals of: promoting increased "local patronage" of made-in-Nigeria products (the 2014 *Local Industry Patronage Bill* is discussed in Chapter 5); and more effectively using trade defence mechanisms and measures of international trade governance where appropriate (such as

customs tariffs and measures to counteract dumped or subsidised imports). In this view the draft NTP notably proposes to establish a Board of Trade Defence Mechanisms, which would invoke all necessary provisions of WTO agreements on anti-dumping and countervailing measures, as well as subsidies and safeguards.

The above suggests that there is some incoherence in the rationale of the August 2013 version of the draft NTP – which will hopefully be rectified in the finalised version. Nigeria faces many structural impediments to competitiveness, not only in terms of its exports but also when catering to its large domestic market; yet within the draft Policy, restrictive market access conditions in industrialised countries is viewed one of the more central causes of Nigeria's poor export performance. Accordingly Nigeria still operates a wide range of tariffs, NTBs, and export and import duties (see Section 4.5 below), and while some sections of the document sets out commitments to abolishing these restrictions, it also considers new measures (including import duties, preferential procurement policies, and a variety of trade defence mechanisms as mentioned above) which could introduce additional trade distortions if they are not carefully structured.

In fact as highlighted in the NTP's export policy, establishing a liberal import regime will only be pursued to the extent that this promotes the international competitiveness of domestic industries and the realisation of industrialisation and growth under the NIRP. That is, NTBs and tariffs will be reduced primarily with regard to the needs of the import-dependent industrial sector, which relies on imported capital goods and raw materials. In parallel and for other economic sectors, domestic regulations will be strengthened "in order to mitigate negative consequences which may flow from unregulated imports". Chapter 4 of the draft NTP commits to substantial tariff liberalisation within the ECOWAS ETLS framework, but notes that this liberalisation will be sequenced and will not cover "consumer goods related to: health, education and poverty alleviation; developmental support for infrastructure; and other industrial development strategies designed to relieve supply capacity constraints". This definition leaves the sectors subject to liberalisation largely open to interpretation – at the risk of deterring potential investors or traders in those sectors.

Fiscal implications also raise questions regarding Nigeria's stated commitment to trade liberalisation. Customs is indeed a main revenue earner in Nigeria, as in many developing countries: customs revenues increased significantly (by 20%, to reach USD 21.25 billion) between the first half of 2011 and the first half of 2012, as a result of the multiple fees and levies imposed on imports and exports (OBG, 2012). This reduces policy incentives to eliminate such fees – and indeed, the draft NTP's provisions regarding customs duties could be made clearer. Chapter 4 of the draft NTP notes that customs duty

exemptions will be geared especially in view of "protecting carefully targeted categories of domestic production" (FMITI, 2013). Although the document makes clear that the introduction of new duties, tariffs and NTBs will remain in strict compliance with international trade obligations, the policy is thus frequently rather inward-looking. This may be untimely, coming when Nigeria is finally reaping the benefits of its past structural adjustment and liberalisation efforts. Changing the country's posture now may jeopardise the ground gained so far, and would be disconcerting for foreign investors.

Alongside, the impact and effectiveness of the draft NTP as a new strategy for the next ten years may suffer from the very wide scope of the document – not only in terms of sector, as mentioned earlier, but also in terms of policy area. The document attempts to tackle multiple cross-sectoral issues in detail, including competition policy, privatisation efforts, and investment policy. While these issues (and especially the latter) are certainly worth considering when elaborating a trade strategy, the draft NTP covers them in a largely descriptive manner and with little explicit investigation of their most important links and complementarities with investment policy. The new iteration of the draft NTP may provide a useful opportunity to re-focus the document in order to avoid diluting its objectives, and to propose more concrete measures for tackling the most relevant bottlenecks within these cross-cutting areas.

Institutional framework for trade policy formulation at federal level

In Nigeria the Federal Ministry of Industry, Trade and Investment (FMITI) is the primary government body charged with formulating and implementing trade policy. As concerns reform implementation, FMITI hosts an inter-ministerial Task Force on Trade Facilitation, which brings together 23 ministries, departments and agencies involved in export and import procedures to investigate how their activities (both within and outside Nigeria) can best be streamlined. The Taskforce has overseen the reduction in the number of agencies covering port operations and cargo from 16 to seven currently. Work is also undergoing to reduce the number of checkpoints on inter-state roads, which cause significant delays in the movement of people and of goods (especially costly when these are perishable). Since its establishment the Taskforce has thus identified and tackled several barriers to trade facilitation, including relative to trade between Nigeria's States. To simplify export procedures in particular, the draft NTP additionally aims to revive the Nigerian Committee on Trade Procedures.

As concerns policy formulation, relevant bodies within FMITI's Trade Directorate include the Enlarged National Focal Point (ENFP) on Trade Matters, a standing inter-ministerial committee first created in the mid-1990s and subsequently strengthened in 2001 (see Box 4.4). As of 2013 the ENFP has been

Box 4.4. **Enlarged National Focal Point (ENFP) on Trade Matters**

As of 2012 the Enlarged National Focal Point (ENFP) on Trade Matters is tasked with reviewing Nigeria's Trade Policy, for the first time in a decade. The ENFP is expected to serve as a consultative forum for discussing major concerns bearing on trade and commercial policy, to provide policy advice relating to trade negotiations. It is chaired by the Federal Ministry of Trade and Investment and composed of the following groups:

- The Federal Ministries of: health; finance; labour and productivity; education; all infrastructure sectors; agriculture; women affairs; environment; works, housing and urban development; mines and steel development; science and technology; youth development; foreign affairs; and tourism.
- All chambers of commerce and private sector groupings
- Export-promotion agencies, including NEPZA, NEXIM ad NEPC
- SON and NAFDAC
- Nigerian National Petroleum Corporation
- Nigerian Police Force and Nigeria Bar Association.

The ENFP is constituted of three sector-specific sub-committees (on Agriculture, chaired by the Federal Ministry of Agriculture; on Non-agriculture market access, chaired by FMITI and focused on manufactures, fuels and mining products, fish and forestry products; and Services, chaired by CBN). Each of these sector-specific groups is tasked with: reviewing the size and structure of exports and imports in that sector; reviewing and assessing external market access conditions facing exporters in that sector; reviewing Nigeria's import regime for that sector; and reviewing bilateral, regional and multilateral trade agreements relating to trade in that sector.

In addition the following five sub-committees also form part of the ENFP on Trade Matters:

- Trade Related Intellectual Property Rights (chaired by the Nigeria Copyright Commission and tasked with reviewing various provisions of the TRIPS agreement, their impact and implementation in Nigeria)
- Trade Rules (chaired by the Consumer Protection Council, and tasked with the review and domestication of relevant trade rules and their associated institutional arrangements; as well as the evaluation of bilateral, regional and multilateral trade rules for enhancing external market access).
- Trade Facilitation and Capacity (chaired by the Nigerian Customs Service, tasked with reviewing facilitation support measures in places for bilateral, regional and multilateral trade agreements; and reviewing and assessing capacity building needs for trade facilitation).

Box 4.4. **Enlarged National Focal Point (ENFP) on Trade Matters** *(cont.)*

- Trade and Development (chaired by the National Planning Commission and tasked with: reviewing and assessing linkages between trade and investment as well as the environment in bilateral, regional and multilateral trade agreements in terms of their implications for Nigeria; and examining trade policy review reports to gauge compliance with WTO obligations).
- Preferential, bilateral and regional trade agreements/arrangements.

Source: Federal Ministry of Industry, Trade and Investment, 2013.

tasked with elaborating the draft NTP. However the over-sized structure of the ENFP may reduce the overall coherence of trade policy formulation: it brings together 54 agencies, grouped into eight sub-committees, at the risk of diluting the focus and pace of policy formulation. This sprawling structure may moreover hamper effective implementation once the policy is approved.

A more limited structure, focused on trade, investment and industrial development more exclusively, may be more desirable and effective. Several smaller groups have been created alongside the ENFP – including the Trade Negotiating Committee (which provides technical support and policy advocacy for international trade negotiations) and the Trade Policy Advisory Council (TPAC, first temporarily created in 2002 to ensure effective co-ordination of trade, industrial and investment promotion policies among relevant government bodies). These two more focused entities could play a stronger role in the implementation of the draft NTP once it is finalised, rather than leaving this task to a slower-moving structure such as the ENFP (which would likely be more difficult to mobilise on a regular basis). An added advantage of the TPAC is that it can straddle both trade and investment activities. This is crucial given the close links between investment and trade – for instance both foreign and domestic investment can be stimulated by the creation of investment opportunities within export-oriented industries. If the TPAC is empowered to effectively co-ordinate and cut across both policy fields, this would allow aligning trade and investment strategies in such a way as to tackle shared structural bottlenecks and to effectively diversify export sectors as well as customer markets.

Capacity and accountability challenges for trade reform

In addition to this institutional challenge, Nigeria also has to meet a capacity challenge for effective trade reform. In order to formulate effective and coherent trade policies, the agencies mentioned above need effective tools to assess the impact of trade policies and agreements on revenue, employment, environment and poverty alleviation. As pointed out by the

UNDP in a 2011 assessment of 14 lower and middle-income countries (including Nigeria), a main challenge in "mainstreaming trade" within broader policy frameworks is the limited capacity to conduct trade policy analysis in lead trade agencies and key stakeholder groups. Equally, implementation and enforcement of reform requires considerable capacity, including strong statistical structures and co-ordinated implementing agencies. In Nigeria the coherence of trade policymaking, the pace of implementation, and the quality of trade negotiations, have all suffered from shortfalls in capacity and interdepartmental co-ordination in the past (UNDP, 2011). The draft NTP aims to "strengthen" a wide range of task-forces and implanting agencies for trade policy implementation (customs and standards organisations, as well as NEXIM and NEPC, are all listed), but could benefit from identifying some concrete and specific measures in this respect.

A related challenge is that of ministerial lines of accountability: responsibilities for various policy questions closely related to trade are dispersed under the responsibility of several ministries. While FMITI retains responsibility over export permits, the Federal Ministry of Petroleum Resources formulates all policies concerning the marketing of petroleum. Meanwhile the Federal Ministry of Finance formulates and implements measures relating to the elimination or reduction of tariffs and non-tariff barriers, and also oversees the operations of NEXIM. The Minister of Finance moreover has discretion in removing or adding products to the import and export prohibition lists, while the Minister of Agriculture is empowered to regulate the import of seeds and artificial fertilisers, among other goods (see Section 4.5 below). Alongside, the board of NCS is chaired by the Minister of Finance but also hosts representatives from the federal ministries of industry, trade and investment, and transport. This dispersed allocation of responsibilities and oversight across different ministries somewhat interferes with the effectiveness of trade policy formulation and implementation in Nigeria, as cross-cutting reforms are more difficult to design and enact. In particular the oversight of NEXIM and of the Export Expansion Grant scheme (EEG, see below) is under scrutiny since 2013, with a view to bringing them under the FMITI umbrella.

In addition to opening up the policy making process and making it more transparent and accountable, as well as ensuring greater monitoring and evaluation of these policies, UNDP accordingly suggests that government priority should be placed on strengthening trade and development planning institutions, and on ensuring better co-ordination among these institutions so as to reach greater consistency in policies across different parts of government (UNDP, 2011). UNDP also stresses the need to strengthen FMITI as the prime institution for trade policy in Nigeria, so as to tackle the considerable gaps remaining among the various agencies and ministries involved with trade issues.

This appears to be the intent of the draft 2013 NTP, which explicitly nominates FMITI as the lead ministry for driving trade policy implementation. However the draft policy does not explicitly address the need for a greater authority of FMITI *vis-à-vis* other ministries with competing powers over trade-related issues. Beyond establishing FMITI's authority on paper, it will also be necessary to develop an effective in-house research capability within the Ministry in order to enhance its effectiveness and ability to influence the policy agenda. Similar challenges are present at the state level – for instance in Lagos State, where the ability of the Ministry of Commerce and Industry (MoCI) to champion the cause of business among other ministries has been hampered by its lack of power over other government bodies (OECD, 2013). Alongside, the draft NTP could be improved by providing more concrete solutions to the recurrent problems of administrative fragmentation, which makes inter-ministerial action and policy implementation difficult to organise. The creation of new committees and task-forces on trade matters risks exacerbating rather than resolving this challenge.

Consultation framework for trade policy changes

In a federal government structure such as Nigeria, trade policy changes must benefit from consultation not only between the public sector and civil society (including the business community), but also across different tiers of government which will be in charge of implementing the trade policy. On this front, the biannual meetings of the National Council on Industry, Trade and Investment provide a venue for all State Commissioners for Commerce Industry and Investment to voice their concerns and provide policy advice to FGN. Most policy implementation itself is enacted at State level, with FGN taking an enabling role.

Businesses are also regularly consulted on trade policy. In specific issues presenting new challenges to businesses, appropriate enterprise support schemes can be introduced to enable them to mitigate the uncertainty and confront the challenges. The following private sector bodies form the basis of Organised Private Sector (OPS) in Nigeria as relates to trade matters (and as detailed further in Chapter 3 above).

- Nigeria Association of Chambers of Commerce, Industry, Mines and Agriculture (NACCIMA), an umbrella body for all city, state and bilateral chambers of commerce in Nigeria;
- Manufacturers Association of Nigeria (MAN), representing close to 2 000 public and private enterprises;
- National Association of Small and Medium Scale Enterprises (NASME);
- Association of Nigerian Exporters (ANE), of which membership if mandatory for all exporters; and

- Other bodies organised on a voluntary basis, such as: the National Association of Nigerian Traders (NANTS, which plays an active advocacy role in addition to its consultative platform); and the Nigerian Association of Small-Scale Industrialists (NASSI).

All of the above organisations have all been consulted in the formulation of the forthcoming National Trade Policy, notably as part of validation workshops held by the ENFP (see below). However this consultative and institutional framework for trade policy formulation has demonstrated evident shortcomings in the past. For example the UNDP highlights that while the external sector is seen as central to Nigeria's growth dynamics, trade policy has not been at the heart of the public policy process in the country. The process of formulating the trade dimensions of NV 20:2020 has "mostly been reduced to consultation rather than genuine engagement that effects real change". Trade policy formulation in Nigeria would need to rely on more bottom-up needs assessments, and the lower levels of government – both central and provincial – should also have greater input into trade and development policies.

Moreover it would be important to avoid an over-proliferation of high-level committees to guide trade policy development (such as ENFP, the National Council on Trade and Investment, TPAC, the Trade Negotiating Committee, etc.) which may blur lines of accountability and dilute the effectiveness of these bodies as potential channels of communication with the business and trading community. Moreover the variety of bodies with similar mandates risks introducing duplication as well as contradictions in trade policy orientation. In this light the revival of past task-forces and committees (such as the Nigerian Committee on Trade Procedures or the Tariff Review Committee) and the creation of new ones should be limited, with more emphasis placed on reinforcing the capacity of existing bodies. A stronger focus should especially be placed on implementing bodies – including trade parastatals such as NEPC and NEXIM, see Box 4.5 – and their respective spheres of responsibility and activity, notably as concerns communication with the private sector.

Box 4.5. **Targeted Government support to export-oriented enterprises: NEPC and NEXIM**

The **Nigerian Export Promotion Council (NEPC)** was established under the Nigerian Export Promotion Decree of 1976 (amended in 1979, 1988 and 1992, and since complemented by the Export (Incentives and Miscellaneous Provisions) Decree of 1986). The 1992 amendment was intended to enhance the performance of the Council by minimising bureaucratic bottlenecks and increasing autonomy in dealing with members of Nigeria's Organised Private Sector. As such NEPC's board is drawn from both the public and the private

Box 4.5. **Targeted Government support to export-oriented enterprises: NEPC and NEXIM** *(cont.)*

sectors. NEPC's roles are to: promote the development and diversification of Nigerian's export trade, including by promoting the development of export-related industries; spearhead the creation of (and administer) appropriate export incentives (notably the EEG, see below); and articulate and promote the implementation of Government export policies and programmes. In addition to the provision of trade information and products and market development services, NEPC conducts human resources training and development on exports and is responsible for registration of Nigerian exporters.

Meanwhile the **Nigeria Export-Import Bank (NEXIM)** was established as an Export Credit Agency in 1991 with a share capital held equally by the Federal Ministry of Finance and the Central Bank of Nigeria. NEXIM provides short- and medium-term loans to Nigerian exporters. These loans can be provided in local currency (under the Local Input Facility) or in foreign currency (under the Foreign Input Facility, whereby NEXIM grants short, medium and long term fixed-rate loans to participating banks on behalf of their export clients for the importation of raw materials, packaging materials, capital equipment and spare parts needed for the production of goods for export). NEXIM also provides short-term guarantees for loans granted by Nigerian Banks to exporters as well as credit insurance against political and commercial risks in the event of non-payment by foreign buyers.

Most recently and in addition to these traditional export support facilities, in March 2013 NEXIM announced its intention to provide "buyer-credit" facilities to potential buyers of Nigerian non-oil products. This would involve extending loans directly to foreign buyers, or to banks in the importing country, to pay for Nigerian goods and services. This approach is envisaged as a possible means of boosting exports and deepening transactions with Nigeria's trading partners, particularly those in the West African region. Alongside this support, in the past NEXIM has also conducted some market research and exporter guidance, having notably published studies on: the export potential of cassava, sesame and rubber (together with CBN); a Strategic Planning Framework for the Nigerian export sector; and an Exporters Handbook However these publications do not come out on a regular basis (the Strategic Planning Framework was for instance released in 1993), and moreover are not freely available and must be purchased through NEXIM.

Source: Federal Ministry of Industry, Trade and Investment, 2013.

4.4. Expanding markets through regional and multilateral engagements

Trade engagements under the WTO

Governments have an active role to play in increasing investment opportunities through market-expanding international trade agreements, and through the implementation of WTO commitments. Nigeria ratified the WTO Agreement in December 1994, and has since taken part in several negotiating groups under the Doha Development Agenda. However Nigeria would need to further build the capacity of negotiators in such a way as to inform decision-making and engage more fully in the WTO negotiating process. The UNDP considers that Nigeria has not been well prepared for the various negotiations under the WTO in the past. The skills needed to handle the numerous areas covered by the WTO, ranging from trade in goods to trade-related aspects of intellectual property, were found to be lacking on a broad base.

Nigeria's stance in WTO trade negotiations has traditionally been (and continues to be) focused on: enhancing access by developing countries to developed country markets (notably pushing for reductions in domestic support and elimination of export subsidies in those markets); and maintaining special and differential treatment measures for developing country WTO members. This perspective is visible in the multiple trade restrictions that continue to apply to certain goods (including import bans, NTBs, trade defence mechanisms, etc. – see above), many of which the draft NTP may prolong. This contrasts with the stance increasingly adopted by other fast-growing middle-income countries, which rather call for placing priority on addressing the supply-side constraints of developing economies in order to improve competitiveness and upgrade their standards and technical regulations. Mauritius for example considers trade preferences as a temporary arrangement rather than as a priority, so as to be progressively be replaced by trade-related solutions. It is hoped that this rather more balanced approach will be better reflected in the next iteration of the draft NTP, underway as of October 2013.

Nigeria's tempered approach to WTO negotiations is reflected in its WTO commitments and the extent to which these are transposed in domestic legislation. Nigeria has not signed the Agreement on Government Procurement, nor the Agreement on Trade in Civil Aircraft (despite being an observer of the latter). Moreover under the Constitution, a treaty between Nigeria and another country or group of countries has the force of law only to the extent to which it has been enacted into law by the National Assembly. As the Marrakech Agreement Establishing the WTO has not yet been incorporated into Nigerian law, traders and investors are thus unable to invoke WTO provisions in domestic courts. This risks exposing Nigeria to costly settlement of trade disputes

in international courts instead; nonetheless as of 2012 Nigeria had not been involved in any dispute (as complainant, respondent or third party) in the WTO (WTO, 2011).

Engagements for bilateral trade

Nigeria has signed a long list of bilateral trade agreements (BTAs), as well as more general Memoranda of Understanding and Agreements on trade relations and economic co-operation. However the majority of these agreements have not yet been ratified, or need revision as they are not yet domesticated for the Nigerian context (see Table 4.2). Recently the Federal Ministry of Justice has therefore issued a letter to FMITI requesting action towards accelerated domestication of all BTAs entered into by Nigeria. A more structured and less protracted approach to ratifying BTAs would be worth considering for Nigeria, particularly as several new trade MOUs are currently under negotiation (for instance with India, Kuwait, Tanzania and the UAE, among others).

Table 4.2. **Nigeria's bilateral trade and other economic co-operation agreements**

As of end 2014

	Type of agreement	Date signed	Status
Benin	BTA	1990	Replaced by ECOWAS protocol
Chinese Taipei	Agreement on trade relations	1990	Need for review
Uganda	BTA	1998	Need for review
USA	TFA	2000	Need for review
Cuba	BTA	2000	Need for review
Vietnam	BTA	2001	Need for review
Canada	TICA	2001	Need for review
Tunisia	BTA	2001	Need for review
Iran	BTA	2001	Need for review
Algeria	BTA	2002	Need for review
Niger Republic	BTA	2002	Need for review
Indonesia	MOU	2002	Document withdrawn by Indonesia for review
Egypt	BTA	2003	Need for review
Ethiopia	BTA	2001	Need for review
China	BTA MOU (with Guangdong Xinguang) Strategic EPA	2006	Need for review
Spain	MOU	2006	Need for review
Greece	MOU	2008	Need for review
USA	ITC MOU CAC MOU	2010 2012	
Turkey	BTA and IPPA	1986 and 2011	Need for review
South Africa	MOU	2012	
Chad Republic	BTA	2012	
Kenya	MOUs on trade and agricultural co-operation	2014	

Table 4.2. **Nigeria's bilateral trade and other economic co-operation agreements** *(cont.)*

As of end 2014

	Type of agreement	Date signed	Status
United Arab Emirates	Agreement on trade and economic co-operation		Negotiations ongoing
Ukraine	Agreement on trade and economic co-operation		Proposal received from Ukraine
Czech Republic	MOU of economic co-operation between ministries of commerce		Stalled negotiation due to disagreement on article 6 (duration and termination)
India	BTA		Negotiations ongoing
Kuwait	BTA		Draft to be considered
Tanzania	BTA		Draft to be considered
Croatia	Agreement on economic co-operation		Draft to be considered
Trinidad and Tobago	BTA		Draft to be considered
Pakistan	BTA		Negotiations ongoing

Source: Federal Ministry of Industry, Trade and Investment (FMITI), 2014.

Alongside these BTAs, the draft NTP proposes to promote further bilateral trade relations by establishing Nigerian Trade and Investment Councils abroad, putting in place implementation frameworks to optimise benefits from BTAs, MOUs and Bilateral Investment Treaties (BITs, as explored in Chapter 2 above), and entering into BITs and BTAs that are product and sector-specific, with a view to maximising benefits to Nigerian producers and traders of goods and services.

In addition to the above reciprocal arrangements, a number of countries provide non-reciprocal preferential treatment for imports from Nigeria, including: Belarus, Canada, the EU, Japan, New Zealand, the Russian Federation, Switzerland, and Turkey. The United States also provides preferential access under the *African Growth and Opportunities Act* (AGOA) (WTO, 2011).

Regional engagements for free trade within Africa

WTO-consistent regional trade agreements (RTAs) can help smaller economies attract domestic and foreign investment by creating larger markets and enhancing dynamic gains from trade. Meanwhile for the larger countries with a more developed production base, RTAs can provide a platform for targeting groups of customers that may not exist domestically. Depending upon the industry, such larger markets combined with economies-of-scale can make foreign and domestic investment more profitable. Moreover beyond their market-enlarging effects (which are only of relative importance to Nigeria, given its considerable domestic market size), these agreements include provisions for co-operation on other issues, such as investment, services, intellectual property or competition policy, which also significantly impact investment and trade.

Although the Nigerian economy makes up 60% of the region's GDP (ECOWAS Vanguard, 2013), to date Nigeria's trade links with ECOWAS countries have been very limited. Most of Nigeria's exports to other African countries (which by 2011 represented only 7% of total exports by value) go to Algeria, Botswana, and South Africa rather than to other ECOWAS members (WTO, 2011). Only 2% of Nigerian firms were global exporters in 2009, and only 1.3% were ECOWAS exporters (World Bank, 2014). Of the exports that do reach ECOWAS, over 90% consist of mineral fuel and oils, while by 2010 manufacturing made up only 5.4% of Nigeria's total exports to the region (up from 1% in 2001). Nigeria's agricultural exports to ECOWAS have dropped from 3% of the total to 1% over the past decade. On the import front, by 2010 Nigeria sourced less than 0.5% of its total imports from ECOWAS countries (Chere, 2011). This weak exchange in the region can in part be attributed to a significant gap in cross-border and trade-facilitating infrastructure. A low degree of complementarity in production structures across the region's countries may also be an explanatory factor. However possibly the most dominant obstacle to inter-regional trade is the extremely high volume and range of NTBs that are still in force at country level – this in spite of the on-going ECOWAS Trade Liberalisation Scheme (ETLS), which has made slow progress since its launch in 1990.

Essential features of the ETLS are the free movement of transport, goods and persons within ECOWAS, including the removal of all tariff and non-tariff barriers to trade. Goods covered include unprocessed goods (livestock, fish, plants, mineral products and other raw materials), traditional handicraft products, and processed and semi-processed industrial products of ECOWAS origin. The expected benefits of ETLS for West Africa include greater economic growth, employment creation, and lower consumer prices. By 2015, ECOWAS envisions progressing from a free trade area to a full customs union and eventually a common market. As the dominant economy among ECOWAS member states, with its large oil sector as well as a high share of traditional agricultural and manufacturing production in the region, Nigeria stands to gain from the ETLS process. Nigeria has two over-riding priorities in the ETLS: securing greater regional market access, and promoting industrialisation through export-led growth. According to NANTS, ETLS can also provide opportunities for Nigeria to: diversify its exports away from the dominant petroleum sector; stimulate human and technical capacity building required to meet competition in the global market; and increase the productivity and earnings of Nigerian companies tapping into regional trade opportunities (ECOWAS Vanguard, 2013).

Yet these objectives currently remain distant. In part, the disparity in levels of industrialisation across ECOWAS (with Nigeria having the highest levels of industrialisation) is responsible for the slow progress; but limited commitment at national level has also played a part. While the ECOWAS Common External Tariff (CET) was to have been established by early 2004, Nigeria was unable to

adopt the four-band CET (with rates at 0%, 5%, 10% and 20%). Nigeria has only been able to comply once a fifth band (at 35%) was introduced – and even so only about 80% of the country's tariff lines are currently covered by this band (WTO, 2011). Nigeria intends to continue to exclude strategic industrial sectors from the common tariff regime in its first years, before transitioning them to the CET over a period of time. Among other stakeholders, the Federal Ministry of Communications and Technology (MoCT) points to the hindrance that such tariffs (especially on imported components) pose on burgeoning industries such as the Original Equipment Manufacturing (OEM) subsector of the ICT industry; MoCT argues that review of this and other tariff structures, which place manufacturers at a disadvantage over importers, is urgently needed.

An ETLS Gap Analysis undertaken by the West Africa Trade Hub of USAID in 2010 puts forward the following three obstacles to full operation of ETLS protocols in Nigeria (USAID, 2010):

- a gap between legislation and implementation, whereby many ETLS protocols are codified in legislation but are not consistently enforced at the borders;
- lack of awareness on ETLS protocols on behalf of private sector traders; and
- incentives for informal trade, due to complex and duplicative border procedures.

More specifically, the implementation gap on the ETLS protocols results from the following: persistence of de-facto restrictions on trade, as reported by private sector operators (indeed Nigerian customs officials make no distinction between ECOWAS and third-country originating products in the application of import bans, which is in contradiction with ETLS); non-tariff barriers including non-reciprocity for standards/certifications, road harassment, and unofficial fees and delays; duty charged on goods in transit (which are not supposed to be charged duty under ETLS protocols); and improper use of transit documents and procedures (notably vehicle inspections, customs bonds and permits). As noted by USAID, these gaps have a direct impact on all aspects of intra-regional trade, notably by increasing the costs, delays, and unpredictability of trade – and thereby discouraging business expansion and investments. In addition as reported by NANTS, ETLS registration is needed for every individual product a company intends to export under the scheme – making the process particularly burdensome. More simplified registration and customs clearance procedure could be considered for small quantities of imported goods, and ETLS registration could be generalised to groups of products rather than taking place on a product-specific level.

4.5. Harmonising trade distortions amongst industries and addressing market access restrictions

Restrictive trade policies can weaken the positive effects of investment on host countries. Barriers to imports, like other barriers to entry, can encourage

the exercise of market power by firms in the domestic market, which in turn is generally associated with lower efficiency, higher consumer prices and sometimes the use of "second-generation" (rather than the most recent) technology. Therefore the technological spillovers from FDI and the backward linkages generated with domestic firms and will be lower in the presence of restrictive trade policies. Barriers on imports of capital and intermediate goods can be particularly damaging for the export competitiveness of firms, and can make it more difficult for domestic firms to integrate global value chains. In the case of Nigeria, where competition on a large domestic market is just as important as export competitiveness, these barriers can also severely limit local producers catering to the domestic consumer base.

High barriers to imports can also induce "tariff-jumping" FDI – that is, FDI as an alternative to trade. There is indeed evidence that firms tend to substitute FDI sales for exports when tariffs and NTBs are high. Nigeria's draft National Trade Policy places strategic focus on attracting more "trade-generating" rather than "tariff-jumping" investments into the country. Reaching this objective will require firm steps towards reducing existing NTBs and other trade measures that favour investment in some industries and discourage it in others. These distortions should be reviewed with a view to reducing their costs, limiting their dampening effect on investment, and finding alternative means of accomplishing public policy objectives.

Restricted products

Despite adopting the ECOWAS CET and thereby committing to more liberalised intra-regional trade (see above), as mentioned previously NTBs and import bans still persist in Nigeria and considerably add to the cost of doing business. The Absolute Import Prohibition List lists goods banned on security, health and morality grounds (although these terms are loosely defined); and the Import Prohibition List (recently made available on the NCS website and Trade Hub portal) applies mostly to agricultural products and textiles in the aims of protecting domestic industry. Meanwhile goods prohibited for export include endangered species and artefacts, maize, rough or sawn timber, raw hides and skin, scrap metals, unprocessed rubber, and all goods imported.

The above trade barriers (especially on agricultural products, and as measured by USAID in 2010) are considerably more restrictive than in many of Nigeria's ECOWAS neighbours. Currently the main duties and taxes applying to imports include: a port development levy (7% of duties payable); an ECOWAS community levy (0.5%); a Comprehensive Import Supervision Scheme charge (1% of the value of imports); a National Automotive Council levy (20% on wheel rims); and various product-specific levies (notably on the importation of sugar and rice) which are frequently revisited.

These duties vary from one product to another and moreover demonstrate some inconsistencies. A few examples are as follows:

- Excise duty is applied to domestically produced goods but not to imported goods – thus potentially putting domestic producers at a competitive disadvantage relative to equivalent imported goods.
- There are contradictions between the goods on the import prohibition and export prohibition lists, sometimes as a means of meeting ECOWAS CET requirements while continuing to protect domestic industries: thus a low import duty is placed on rice and sugar so as to bring the tariff in line with the CET, but higher product-specific levies (as mentioned above) may be imposed on these imports in addition.
- Considerable discretion remains prevalent in the system, opening possible avenues for rent-seeking and for unequal treatment among traders. The inclusion and removal of items from the import and export prohibition lists are notified through government notices and decrees, at the discretion of the Minister of Finance and subject to recommendations from the Tariff Technical Committee and the Tariff Review Board. Meanwhile the Minister of Agriculture has similar discretionary powers with respect to the import of seeds, fertilizers and similar goods. Finally the President is the only authority which can grant waivers to import-prohibited goods.
- Importation of vehicles, drugs, and pharmaceutical raw materials, and all containerised goods, is prohibited through Nigeria's land borders – that is, by road. This adds to the congestion at Nigeria's sea ports (where in 2011 39 days were necessary to import a standard container).
- Nigeria suffers from considerable tariff dispersion: similar goods have in the past been taxed at significantly different rates. The WTO warns that, the greater the differentials in tariff rates (especially within groups of similar and substitutable products), the higher the chance that consumer and producer decisions are distorted by the tariff structure (as this creates an incentive for product substitution, misclassification and tax evasion). Such dispersal also increases the complexity of the tariff structure (WTO, 2011).

A 0.5% "pre-shipment levy" is applied to all exports of goods, regardless of whether or not these goods require pre-shipment inspection – as a result the levy, which is justified as a compensation to cover inspection costs, rather functions as an additional export tax.

Rationalising restrictions within the National Trade Policy

The revision of the Trade Policy for Nigeria (in its draft form as of August 2013) considers the following commitments in order to simplify and liberalise import regulation:

- continuing to review and reduce the number of items on the import prohibition lists (particularly if items are included solely for developmental or protectionist purposes);
- reviewing the need for special product-specific duties and levies (such as for the National Automotive Council, sugar, and rice), and rationalising or eliminating them where possible in accordance with international statutory commitments; and
- continuing to strengthen the ECOWAS Common External Tariff (CET, aimed at ensuring that similar goods are subject to duty at the same rate) and supporting reduced tariffs on a number of tariff lines.

Nevertheless and alongside these commitments, the August 2013 version of the document specifies that the ECOWAS tariff liberalisation will be spread over 25 years, and that Government will "draw up product exclusion lists in the ECOWAS/EU EPA and WTO negotiations" for the purpose of protecting sensitive industries. There is therefore, as previously noted, some inconsistency in these liberalisation commitments. In addition the draft NTP plans to "continue to allow for Customs duty exemptions and concessions in order to attract investment including inward investment, and to protect carefully targeted categories of domestic production". This contrasts with an earlier version of the draft NTP (of February 2012) where elimination of all customs duty exemptions (outside of EPZs) was considered. While allowing for continued exemptions may indeed facilitate foreign as well as domestic investment, conditions for exemption should be set out in a clear and transparent list so as to avoid excessive arbitrariness and decision-making power at the level of customs officials. However the draft NTP does not address the problematic level of ministerial discretion in waiving or enforcing import and export bans, although this provides clear avenues for rent-seeking and further reduces predictability for investors and traders. Moreover the impact of such customs duty exemptions should be subject to careful cost-benefit analysis together with all other tax incentives for investment provided by the government (as highlighted in Chapter 3 above).

Another discrepancy arises in the domain of agricultural trade. While elimination of import and export bans and prohibitions is proposed, as concerns agricultural trade the policy also plans to introduce commodity boards and to strengthen any existing Commodities Exchanges. On the one hand, this move can help facilitate market access and information for smallholder farmers as well as guarantee them a minimum level of price security; more broadly they can enable better co-ordination of agricultural sub-sectors, enforce quality standards, provide inputs and facilitate research and development funding. But on the other hand, if poorly managed such exchanges can become venues for anti-competitive price-setting to the

advantage of Board managers and of large-scale producers, and with few advantages for small-scale farmers. Moreover the regulatory restrictions to trade imposed by some boards, as well as the risk of regulatory capture and political pressure (since most boards are centrally funded) may increase the costs and the uncertainty for investors. Should the final NTP retain the proposition of Commodities Exchanges, safeguards must therefore be put in place to ensure that the poor track record of across most commodity boards in Africa is not repeated – and that instead these exchanges truly play a valuable role in convening stakeholders and monitoring quality.

The final NTP is still pending as of spring 2015; in its last iteration, it would be worth reviewing the contradictions in policy direction observed in the August 2013. The draft has already benefited from review by a wide number of international organisations, including the International Trade Centre. The next steps should be taken in close consultation with a wide range of civil society and private sector stakeholders. Otherwise rather than increasing predictability and clarity of the trade and investment regime, the NTP would risk introducing more uncertainty for potential investors and traders – both internationally and domestically – and jeopardising rather than enhancing the country's prospects for long-term competitiveness.

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Chapter 5

Other areas of Nigeria's policy framework for investment

This chapter addresses Nigeria's policy challenges as concerns the impact on foreign and domestic investment of: infrastructure investment; competition policy; corporate governance; and financial sector development. It investigates ongoing efforts to: increase private participation in infrastructure networks, notably energy; enact a competition law as well as a code of corporate governance for Nigeria; and address critical challenges of access to finance in the country, which poses a particular barrier to SMEs seeking to tap into investment linkage opportunities. The chapter makes recommendations regarding how to secure effective implementation of these reforms, and to level the playing field for private investment in various sectors of the economy. In infrastructure markets this will notably require greater institutional co-ordination among the various agencies charged with: price-setting for basic utilities; public procurement; monitoring the governance of state-owned enterprises; and ensuring competitiveness.

5.1. Policies for energy infrastructure investment

5.1.1. Strategic importance of energy infrastructure for investment and competitiveness in Nigeria

Sound infrastructure plays a crucial role in developing the competitiveness and export potential of domestic enterprises across all sectors of the economy, including SMEs. In Nigeria, poor networks of transport and energy pose particularly constraining obstacles to growth and entrepreneurship. The infrastructure challenge was clearly recognised under the previous administration, featuring as a pillar of the 2003-2007 National Economic Empowerment Development Strategy (NEEDS). Power and energy in particular headed the government's "Seven-Point Agenda" for economic growth. Likewise, under the current administration Nigeria's National Vision 20:2020 highlights "poor and decaying infrastructure" as one of the leading domestic constraints to growth and development. Central priority is placed on "enabling the power sector to deliver sustainable adequate, qualitative, reliable and affordable power in a deregulated market, while optimising the on- and off-grid energy mix" (NV, 2009). More recently, the 2015 Budget allocates the largest share of the overall capital budget (32.58%) to infrastructure (FRN, 2014).

Currently electricity generation in Nigeria ranges between 3 500 and 5 000 MW. While at end 2014, full generation capacity was estimated as high as 7 000 MW (about 6 000 of which is thermal), such a load would exceed the capacity of the current grid (FRN, 2014). This said, the NV20:2020 warns that Nigeria will need to generate over ten times more (about 40 000 MW by 2020) to meet domestic needs. The Vision stresses that growth of the electricity supply industry will need to be private-sector led, with government providing an appropriate legal and regulatory environment for private capital investment. This section accordingly addresses in detail the policy framework for public procurement and private participation in infrastructure in Nigeria, with particular focus on the energy sector. Meanwhile Section 6.9 of Chapter 6 below investigates the corresponding legal and institutional arrangements at State level, in particular for Lagos State which is a front-runner in infrastructure development in the country.

Within the energy sector, attention will also be placed on the enabling environment for investment in clean energy – drawing on OECD policy tools such as the 2014 Policy Guidance for Investment in Clean Energy Infrastructure (see Box 5.1). Indeed when deciding to expand energy networks, the choice

Box 5.1. **OECD Policy guidance for investment in clean energy infrastructure**

Several obstacles, resulting from market and government failures – including fossil-fuel subsidies, the lack of supportive policies as well as outstanding barriers to international trade and investment – still hamper investment in renewable energy. A key challenge for host-governments to catalyse investment flows in clean energy is to design and implement clear and predictable domestic policy frameworks. The OECD has developed the Policy Guidance for Investment in Clean Energy Infrastructure, a non-prescriptive tool to help host governments – particularly in developing countries and emerging economies – identify ways to mobilise private investment in clean energy infrastructure. Key areas for policymakers to consider include:

1. Investment policy: Transparency, property protection and non-discrimination are investment policy principles that underpin efforts to create a sound investment environment for all;
2. Investment promotion and facilitation measures can be effective instruments to attract investment provided they aim to correct for market failures and are developed in a way that can leverage the strong points of a country's investment environment. They include: phasing-out of fossil-fuel subsidies; long-term policy goals (e.g. renewable energy targets); policy incentives for investment (e.g. predictable feed-in tariffs); licensing; and policy coherence and co-ordination within and across levels of government;
3. Competition policy: Levelling the playing field for IPPs and SOEs through sound competition policy (e.g. electricity market structure, non-discrimination in access to finance, and the competition authority) can support innovation, contribute to conditions conducive to new investment in clean energy, and help to transmit the wider investment benefits to society;
4. Financial market policy: Strengthening domestic financial markets and facilitating access to long-term finance can help enhance investment opportunities for both domestic and foreign investors in renewable energy infrastructure.
5. Public governance: improving governance in areas particularly relevant for promoting investment in clean energy infrastructure, such as the governance of electricity markets.
6. Cross-cutting issues include: regional co-operation (e.g. regional integration of national electricity markets); national treatment and trade-related concerns; and SOE governance (e.g. type of provision of clean energy infrastructure between public, private or PPP provision).

between clean energy and conventional energy is crucial and requires strategic thinking by policymakers. The very lengthy operational lifetimes of energy infrastructure and the long time-lags between planning and implementation for infrastructure investment make investment in a given form of energy infrastructure hard to reverse, with highly significant long-term implications for energy management and future resilience to climate change. Since 2003 Nigeria has elaborated several strategies aimed at making more space for renewable energy sources within the national energy mix (as outlined in Box 5.3 below). Meanwhile the 2011-15 Transformation Agenda highlights that investments in the power sector over 2011-15 (which should reach NGN 2.55 trillion, or USD 15 billion, if the country's power sector targets are to be met) will need to cover power generation, transmission, and distribution, but also alternative energy investments (MRTA, 2013).

5.1.2. Spectrum of public and private provision of energy infrastructure in Nigeria

There is a full spectrum of options available to governments wishing to develop infrastructure projects, with different levels of involvement by the private sector: from full SOE provision, through traditional procurement (where the government acquires infrastructure assets which are constructed by private companies, to whom the construction is awarded through tender and where the asset is operated by the government once the construction is finished), through public-private partnerships (PPPs) (where both the construction and the operation of the asset are transferred to the private actor, with different levels of risk-sharing between public and private parties), and finally to full divestiture and privatization of SOEs. Private sector participation in infrastructure thus takes various forms, including public procurement, which itself encompasses PPPs (see Figure 5.1).

Figure 5.1. **Spectrum of private participation in infrastructure provision**

Low →	Extent of private sector participation			→ High
	→ *Increasing share of risk shouldered by private partner* →			
Work and service contract	Management and maintenance contracts	Operation and maintenance concessions	Build operate transfer concessions	Full privatisation
Traditional public procurement and SOE provision	*Public Private partnerships*			Open competition by private operators across infrastructure market

Source: Author, adapted from: Straub, S. (2009), "Governance in Water Supply", *Thematic Paper for the Global Development Network Project.*

As these various options and risk-sharing arrangements all have their own costs and benefits, it is crucial to ensure that the choice among them will arrive at the most cost-effective option of infrastructure provision that provides the most value-for-money for end-users. This choice on the extent of private participation in infrastructure can be facilitated by transparent public procurement and PPP frameworks (see Section 5.1.4), and should be based on assessing the comparative advantage of each potential actor in providing the service. In countries such as Nigeria where state-owned enterprises dominate infrastructure markets, this notably requires a careful evaluation of the effectiveness and efficiency of state-owned enterprises. This in turn necessitates: measures to create a competitive environment in infrastructure markets (including dismantling barriers to entry and subjecting all activities to appropriate commercial pressure – see Section 5.2 on competition); and mechanisms for enforcing sound standards of corporate governance and financial reporting within state-owned companies (see Section 5.3 on corporate governance).

Momentum towards privatisation in Nigeria's energy sector

While the existence of "natural monopolies" in itself is not necessarily problematic or unusual in infrastructure sub-sectors (as the extremely high fixed costs for operation and maintenance of infrastructure networks are difficult to shoulder for all but large enterprises), these monopolistic state-owned firms frequently pose risks of inefficient management and under-investment. Moreover government intervention through discretionary pricing policies can distort competition on utility markets, creating an uneven playing field for private companies wishing to enter the market and compete on an equal basis with public enterprises.

The 1970s in Nigeria introduced an era of extensive government participation in the ownership and management of enterprises, as heralded by the *1972 Nigerian Enterprises Promotion Decree* and its 1976 amendment. Only in the 1980s did the government embark on more market-oriented reforms. The Bureau of Public Enterprises (BPE) played an important role in privatisation of many State owned assets after 1999, frequently using concessions as a means of commercialising existing SOEs. The BPE is the Secretariat of the National Council on Privatisation (NCP), which was set up in 1999 under the *Public Enterprise (Privatisation and Commercialisation) Act* with the task of monitoring privatisation and commercialisation policies, determining the timing and pricing for privatisation of particular enterprises, and ensuring that commercialised enterprises are soundly managed. However given the multiplicity of other actors currently engaged in public procurement and concessions, the BPE's role within the NCP is today less active than it has been in the past (see next section).

In recent years emphasis has especially been placed on introducing more private participation within the energy sector. FGN released the National

Electric Power Policy in 2001, which set the following critical objectives: ensuring foreign and domestic private investment in the sector; developing a transparent and effective regulatory framework; enhancing the capacity of domestic enterprises in electric power sector technology; divestiture of State-owned entities; promoting competition and liberalisation of the electricity market; and reviewing and updating electricity laws accordingly. These principles were captured in the *2005 Electric Power Sector Reform (EPSR) Act* which was intended to end Federal Government monopoly in the power sector, and to facilitate the unbundling of generation and distribution functions within the electricity industry. Meanwhile the government intends to retain control of transmission and has obtained several loans from foreign partners to help improve transmission nationwide.

The Roadmap to Power Sector Reform was launched in 2010 to accelerate implementation of the EPSR Act, as several of the major reforms for unbundling the sector had run into delays. Most recently a milestone was reached on 30 September 2013, when the share certificates of 15 state-run electricity distribution and generation companies were handed over to consortiums of domestic and foreign investors (see Box 5.2). However several concerns have

Box 5.2. **Chronology of power sector reform in Nigeria post-2005**

With a view to attracting foreign and domestic investment into the power sector and ensuring more reliable and cost-effective electricity, the 2005 *Electric Power Sector Reform Act* (EPSRA) created the Power Holding Company of Nigeria (PHCN) to assume the assets, liabilities and employees of the National Electric Power Authority (NEPA). PHCN was itself broken up into 18 different companies: six generation firms (corresponding to NEPA's major power plants), 11 distribution firms (one per region) and one transmission firm (the Transmission Company of Nigeria, TCN).

Although the corporatisation of the state-owned PHCN into these 18 companies was seen as a prelude to privatisation, these plans ran in to delays and all 18 firms remained in PHCN hands after 2005. In August 2010 the **Roadmap to Power Sector Reform** was therefore launched with the aim of fast-tracking the implementation of the *EPSR Act* and making more space for independent power producers (IPPs). The Roadmap was accompanied by creation of the Presidential Action Committee on Power (PACP, chaired by the President), of which the executive arm is the Presidential Task Force on Power (PTFP). The latter was established in June 2010 to drive reform implementation and to monitor the planning and execution of various short-term projects in generation, transmission, distribution and fuel-to-power. In December 2012, the following installed and licensed capacity (both off- and on-grid) were as follows:

Box 5.2. **Chronology of power sector reform in Nigeria post-2005** *(cont.)*

- 32 Licensed On -Grid IPPs with a total installed capacity of 1 899 MW (as of May 2012) and total licensed capacity of 12 324 MW
- 20 Licensed Off-Grid IPPs with licensed capacity of 274.5 MW
- 3 Embedded Generation Licenses with a capacity of 374 MW (but non-operational to date):
- 10 NIPP Projects with a total installed capacity of 750 MW (as of May 2012) and with a total licensed capacity of 4 180 MW
- 10 FGN Hydro and Thermal Stations with a total installed capacity of 6 504 MW (as of May 2012) and total licensed capacity of 6 948 MW.

As part of this roadmap, in 2013 NCP/BPE invited prospective investors, through open international bidding, to participate as core investors in thermal power stations and as concessionaires for hydro-power stations (BPE, 2010). The objective was for experienced private companies to take up at least 51% of shares in PHCN's six generation and 11 distribution successor companies. This renewed momentum was off to a successful start, with the handover of 15 distribution and generation companies to consortiums of domestic and foreign investors by September 2013. However as of early 2015, the lack of financial capacity on the part of the new investors, together with poor management of some of the new contracts and inadequate transmission and distribution capacity, have prevented Nigeria from reaping the expected dividends of this reform.

Source: Bureau of Public Enterprises; *Presidential Task Force on Power and Nigeria Power Guide*, Volume 1, 2012; Alike, 2015.

emerged in the course of this exercise. First, the 3.9 billion Naira contract which was awarded to a Canadian transmission company (Manitoba Hydro International) to manage the monopoly transmission firm TCN has run into controversy; the contract was put under review in October 2014 (Okafor, 2014). Many new investors have also had insufficient financial capacity to effectively take over generation companies; and as a result, distribution companies have also suffered financially. Moreover some of the new power plants (especially in the South West) do not have gas supply infrastructure, and even if most new plants were to operate at full capacity, the existing transmission lines would not suffice to service the system. Indeed transmission remained the weakest link in Nigeria's power sector in 2014, with frequent system collapses when loads of 3 000-3 500 megawatts were exceeded (Alike, 2015). Therefore although a variety of options for independent power provision as well as distribution exist in Nigeria today (including on- and off-grid IPPs as well as captive generation, see Table 5.1) the financial and technical realities of the power

Table 5.1. **Available independent power generation options in Nigeria**

Option	NERC requirement	Features
Captive Generation	Permit	• Generation of electricity exceeding 1 MW • Consumed by the generator and not sold to a third party • Off-grid i.e. power is not evacuated on the national grid • No Power Purchase Agreement "PPA" required • No distribution infrastructure required • Least hurdles in terms of financing and regulatory risks
IPP On-Grid	Generation Licence	• Generation of electricity exceeding 1 MW • Privately funded • On-grid i.e. power is evacuated on the national grid • Requires an off-taker which could be the transitional Bulk Trader (Nigeria Bulk Electricity Trading Company), an eligible customer declared as such by the Minister of Power, or an industrial customer • Suitable for large-scale power projects
IPP Off-Grid	Generation Licence	• Same as above, but power is provided off-grid; requires an • off-taker which typically is an industrial consumer – and thus provides a reliable way of meeting electricity needs of industrial consumers • However raises additional costs as the IPP would need to invest in distribution infrastructure
Embedded Generation	Embedded Generation Licence	• Generation of electricity exceeding 1 MW • Off grid • Power generated is evacuated through the distribution system of a distribution company • Distribution company off-takes the power • Power can also be sold directly to eligible users declared by the Minister of Power

Source: Nigeria Power Guide, Volume 1, 2012.

sector reform programme still remain to be fully taken on board by the authorities. The NV20:2020 objective (of reaching 40 000 MW in generation capacity) remains distant in light of these challenges.

Alongside these efforts to unbundle to power sector, increasing emphasis has also been placed on facilitating and attracting more investment into renewable energy sources (see next Section). The EPSRA itself highlights the role of renewable electricity in the overall energy mix, especially for expanding access to rural and remote areas. It stipulates that targets on access to electricity should be met through grid-based extension, independent mini grids and stand-alone renewable electricity systems for remote areas with scattered small loads. Indeed the growing momentum towards unbundling the energy sector can trigger more investment into clean energy in particular, as it opens opportunities for a wider range of energy sources to "plug in" to the national grid. Section 5.2.5 of this chapter outlines what benefits such structural separation efforts may additionally hold in terms of consumer choice, investment attraction and lower prices, based on the experiences of other countries over the past decade (OECD, 2011).

In this extent Nigeria is somewhat of a front-runner as compared to many other African countries, where the "single-buyer" model tends to predominate in electricity markets. Under this model, only the power generation segment of the market is opened to IPPs, while power transmission and distribution functions remain under the monopoly of the state-owned entity which purchases the power from the IPPs (see Box 5.3). Yet in the absence of competition in the transmission and distribution stages, there is a risk that the monopoly distributor might excessively influence the supply price and thus the risk-return profile of energy infrastructure investment, or otherwise pass an excessive fraction of the energy purchase costs through to its customers. Thus the ongoing efforts to increase private participation in power distribution (and not only generation) in Nigeria deserve to be further enhanced and structured within a co-ordinated and well-regulated framework.

Box 5.3. **Defining "Unbundling" and the "Single-buyer model" in electricity markets**

The **"Single-buyer model"** consists in the legal separation of power or water generation from transmission and distribution functions (a first step towards "unbundling" these sectors – see below).

- The single-buyer model first appeared in developing countries' power sectors in the 1990s, to relieve capacity shortages. Private investors are authorised to construct power plants – independent power producers, or IPPs – to generate electricity which they sell to the national power company (the state-owned "single-buyer" which retains monopoly over transmission and distribution functions).
- The single-buyer model preserves a key role for the sector ministry in decisions on investments in generation capacity; it also helps to maintain a unified wholesale electricity price, simplifying price regulation.
- However there are several downsides which include (among others): a lack of competition in transmission and distribution; contingent liabilities which are placed on governments engaged in power purchase agreements with IPPs; and possible mismatch between electricity prices and demand.

Unbundling/structural separation: Structural separation in infrastructure industries divides a formerly integrated company into competitive and non-competitive parts. Although most regulated industries (such as water, telecommunications or energy) include at least one segment that cannot sustain competition, this does not imply that every related sector in the same industry cannot sustain competition. "Unbundling" therefore refers to separating the different functions or segments of a network or distribution chain from its other parts (for instance generation, transmission/trading, and distribution/retail), thus making more space for private participation in one or more segment.

This experience could moreover hold lessons for introducing more private participation in other infrastructure markets. Whereas energy has so far been the focus of government efforts on this front, the rail sector is also rising on the government agenda – notably through the re-vitalisation by the Ministry of Transport and by the BPE of the 25-Year Strategic Rail Vision in 2011. As part of this Vision, the 1955 *Railway Act* is to be amended (and has been put before the National Assembly since 2012) in view of ending monopoly of the state-owned National Railway Corporation (NRC) over train operations and providing for concessions to private firms. In moving ahead on this front, managing the structural separation of the infrastructure markets will require that sector regulators and competition authorities play an important regulatory role and carefully co-ordinate their activities and responsibilities, at both federal and state levels (see Sections 5.1.4-5.1.6 and 5.2 below, as well as Chapter 6 on Lagos State).

5.1.3. Regulatory framework for renewable energy investment

Government commitments regarding renewable energy development

Although Nigeria has a vast potential for renewable energy and will also likely be vulnerable to the effects of climate change (see Box 5.4), the Federal Government of Nigeria has not yet developed a specific approach to promoting green investment. The development and promotion of renewable energy has been unsteady and slow: investments in this area are essentially government-funded and private initiatives remain very limited. The current regulatory framework lacks a comprehensive renewable energy support policy and while several options for off-grid and on-grid energy generation exist within the national energy framework (see Table 5.1), there is no national policy specifically dedicated to applications of renewable energy to rural areas. However recent studies (notably by the OECD and the International Energy Agency) suggest that beyond their recognised environmental benefits, investments in renewable energy hold considerable potential in terms of job-creation, value-addition, and international technology and trade transfers.

Nevertheless a series of initiatives and some economic incentives such as feed-in tariffs (FiTs) have been put in place to develop the sector, as there is a growing recognition that an appropriate legal framework is a prerequisite for maximising investment opportunities. The finalisation and implementation of a legislative framework for the energy sector, with consideration for the use of renewable energy technologies and their dissemination, is needed to further enable the development of Nigeria's renewable energy resources. This should take care to address the possible risks of FiTs and their applicability to Nigeria – so as to avoid the mixed experiences of several African countries having adopted such tariffs in recent years. Making careful use of Nigeria's

Box 5.4. **Environmental and renewable energy profile of Nigeria**

On the one hand, Nigeria is strongly exposed to severe negative impacts of climate change due to its fragile economy, weak resilience and low adaptive capacity. Much of the economy relies on climate-dependent resources. The agriculture, forestry and fishing sectors employ about 70% of the workforce, and the fossil-fuel sector is likewise particularly vulnerable to climate change-induced events, such as floods and droughts. Significant impact is also anticipated in the frequency of natural disasters.

On the other hand, Nigeria is an energy resource rich country, endowed with abundance of renewable energy (RE) resources, which provides the country with great capacity to develop an effective national energy plan. Nigeria's renewable energy resource endowment includes: large hydropower potential (~ 10 000 MW); small hydropower potential (provisionally estimated at ~ 734 MW); Animal Waste (~ 61 million tonnes per year); crop residue (~ 8.3 million tonnes per year); solar radiation (~ 3.5-7.0 KWh/m2-day); and wind (~ 2-4 m/s per year).

National targets set for renewable energy development are as follows:

- 18% of electricity from renewables by 2025;
- 20% of electricity from renewables by 2030;
- 100 MW of small hydro capacity by 2015 and 760 MW by 2025;
- 300 MW of solar photovoltaic capacity by 2015 and 4 000 MW in 2025;
- 40 MW of wind capacity by 2025; and
- 5 MW of biomass-fired capacity by 2015 and 30 MW by 2025.

Source: International Institute for Sustainable Development (IISD), African Development Bank (AfDB), International Renewable Energy Agency (IRENA).

renewable energy potential will not only mitigate environmental and climatic impacts, but can also create new avenues for economic development.

As concerns international commitments to tackling climate change, Nigeria submitted its First National Communication under the United Nations Framework Convention on Climate Change (UNFCCC) in November 2003, setting out Nigeria's needs and aspirations to reduce emissions via the following options: efficiency improvement options in the residential, industrial and commercial sectors; increased use of renewable energy resources, by introducing small-scale hydropower plants and solar-electric options; supply-side options, especially rehabilitation of some existing oil refineries and power plants, and the introduction of newer combined-cycle technologies and cogeneration at industrial facilities; and increased use of associated gas to reduce gas flaring.

A Special Climate Change Unit has been created under the Federal Ministry of Environment to implement the UNFCCC and the Kyoto Protocol. Nigeria has also established a Presidential Implementation Committee for Clean Development Mechanism (PICCDM) for Clean Development Mechanism (CDM) activities in Nigeria. By 2012 there were already six CDM projects registered in Nigeria in the gas flaring, efficient stoves, and municipal solid waste sectors. Other related Multilateral Environment Agreements (MEAs) to which Nigeria is a party are listed in Box 5.5.

Box 5.5. **Multilateral Environment Agreements (MEAs) to which Nigeria is a party**

Multilateral Environment Agreements (MEAs) to which Nigeria is a party include (among others):

- The United Nations Framework Convention on Climate Change (UNFCCC);
- The Kyoto Protocol;
- The United Nations Convention to Combat Desertification (UNCCD);
- The Convention on Biological Diversity (CBD);
- The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITIES);
- The Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat;
- The Stockholm Convention on Persistent Organic Pollutants (POPs);
- The Vienna Convention for the Protection of the Ozone Layer;
- The Montreal Protocol on Substances that Deplete the Ozone Layer; and
- The Basel Convention on Control of Trans-boundary Movements of Hazardous Wastes and their Disposal.

Alongside these international commitments, at the national level several policies have been elaborated to promote renewable energy investment. NV 20:2020 puts forward several objectives for promoting renewable energy and conservation of the environment, and includes commitments to: prevent further loss of bio-diversity, restore already degraded areas and protect ecologically sensitive sites; reduce the impact of climate change on socio-economic development (notably by reducing the occurrence and impact of environmental hazards and disasters); halt land degradation, combat desertification and mitigate impacts of droughts; enhance waste management; raise the level of awareness on the state of the Nigerian environment; and improve the overall governance of the country's environment (NV, 2009). The Vision places particular

emphasis on improving electricity generation in rural areas through an off-grid renewable energy system: it aims to boost private capital in the construction of mini-power stations in rural communities using locally appropriate technologies (including mini-hydro, wind, biomass, and solar); and emphasises the exploitation of wind energy for rural water supply in addition to electricity generation.

To follow through on these commitments, NV 20:2020 accordingly identifies several strategic priorities for the Nigerian energy sector: providing necessary commercial and market incentives in order to attract the private investments (both domestic and foreign) required to facilitate the energy capacity expansions; consolidating on-going structural and economic reforms targeted at establishing effective institutional and regulatory frameworks in the energy sector; achieving energy supply security by diversifying the energy mix; and developing efficient and sustainable energy generation and consumption patterns. More recently, nuclear power is also being considered as a possible alternative to coal and gas powered generation: in 2014 the *National Atomic Energy Act* of 1976 was under review and the National Atomic Energy Commission was mandated to act as the focal point for all activities related to nuclear power in Nigeria. This Commission has recently elaborated a strategic plan and a technical framework for the implementation of a nuclear power programme for Nigeria, and in this context it is expected to engage in official collaboration with nuclear research establishments worldwide.

Other policies more specific to the renewable energy sector, which carry forward these NV 20:2020 objectives, include the 2003 National Energy Policy and the 2006 Renewable Energy Master Plan:

- The National Energy Policy was established in view of achieving national energy security via energy delivery system based on an optimal energy resource mix. The policy states that dependence on oil can be reduced through: diversification of the nation's energy resources (in particular by using alternatives to fuel wood); aggressive research, development and demonstration (RD&D); and human resources development. Plans with regard to renewable resources include: fully harnessing the nation's large-and small-hydro potential; enhancing solar energy integration within the national energy mix; promoting efficient biomass conversion technologies; and commercialising wind resources.
- The Renewable Energy Master Plan (REMP) was formulated in 2006 with an understanding that achieving sustainable development would require a gradual move away from a fossil-fuel driven economy. The REMP stresses the need for exploiting renewable energy in quantities and at prices that will promote the achievement of equitable and sustainable growth. It institutes a number of fiscal and market incentives for the increased use of

renewable energy technologies. In the short term, the REMP places a moratorium on import duties for renewable energy technologies, and in the long term, it advises the design of further tax credits, capital incentives and preferential loan opportunities for renewable energy projects.

The REMP is a strong statement that provides government intentions as far as the development of renewable energy in Nigeria is concerned. It provides a clear pathway for clean energy development in Nigeria in coming years. Since its elaboration in 2006, concrete policy reform has been slow however – particularly regarding enabling climate change legislation. For example, most renewable energy resources that could, in principle, meet almost all of Nigeria's energy needs (such as solar power, wind power, geothermal energy and wave power) are not given any specific regulatory prominence nor legal frameworks which could facilitate their expansion; only hydroelectric power is governed by the *Water Resources Act* and placed under the responsibility of the Ministry of Water Resources and Rural Development. In addition over 2006-11 Nigeria took few steps towards elaborating a National Climate Change Policy to present current and future efforts to address climate change vulnerability and adaptation. Instead it has relied on environment related policies and action plans to implement climate change initiatives.

More recently however, momentum is increasing on this front. Aware of the country's high vulnerability to climate change, the Federal Government is in the process of finalising a National Climate Change Policy and Response Strategy (which was approved by the Federal Executive Council in September 2012). Alongside, the National Adaptation Strategy and Plan of Action for Climate Change in Nigeria (NASPA-CNN) was also being finalised in mid-2014. At State level, some strategies are also being put into place – for instance with the Lagos State Climate Change Policy 2012-14 (see Chapter 6). Additionally, Nigeria is a pilot country of the Clean Technology Fund (see Box 5.6) and has

Box 5.6. **The Clean Technology Fund in Nigeria**

The Clean Technology Fund (CTF) is one of the two multi-donor Trust Funds within the Climate Investment Funds (CIFs). The CIFs have been designed to support low-carbon and climate-resilient development through scaled-up financing channelled through Multilateral Development Banks (MDBs). The CTF aims to support the rapid deployment of low-carbon technologies on a significant scale, with the objective of cost-effective reductions in the growth of greenhouse gas emissions. Nigeria is one of the 12 countries of which programmes are financed by the CTF. Nigeria's CTF Investment Plan is a broad "business plan" by the Federal Government for the International Bank for Reconstruction and Development (IBRD), the African

Box 5.6. **The Clean Technology Fund in Nigeria** *(cont.)*

Development Bank (AfDB), and the International Finance Corporation (IFC). It supports the low-carbon growth objectives and priorities outlined in Nigeria's First National Communication to the UNFCCC as well as National Vision 20:2020.

As calculated in 2013, Nigeria is expected to tap USD 250 million in CTF financing for projects that are to transform the energy and transport landscapes of Nigeria's three largest cities. Total CTF financing is expected to leverage an additional USD 1 billion in public and private support for projects outlined in the country's 2010 CTF Investment Plan. The priorities of this Plan are the following :

- Transport and industries. These were selected as the key sectors as they are both end users of energy and are central to the Nigeria's economy, its development and its environment
- Expanding transportation choices in Nigeria's growing cities. This will help to bend Nigeria's emissions trajectory significantly in this sector, while contributing to a better quality of life in the short-to-medium term
- Catalysing markets for energy efficiency. This creates an opportunity for increased competitiveness for Nigeria's industry, with the opportunity to leverage private sector capital to scale-up these low-carbon investments in a reasonable timeframe.

In renewable energy, CTF financing is expected to help to fill financing gaps that may result from lack of familiarity and support for such projects from financial institutions. It would also provide concessionary terms that overcome the additional cost barriers of employing, for example, energy efficient boilers for agriculture and food processing companies. CTF resources could also be used to provide appropriate incentives for qualified waste-to-energy developers and local financial intermediaries to ensure timely and sustainable delivery of such projects.

Source: Climate Investment Funds (2010 and 2013), CTF Investment Plan for Nigeria, available at *www.climateinvestmentfunds.org.*

accordingly prepared an investment plan to transition towards a low-carbon development pathway. These will provide a guide for transition to greener growth and for the integration of climate change adaptation goals into government policies, strategies and programmes. But in spite of these efforts and as addressed below, Nigeria will still need support in developing a coherent and strategic approach to addressing the challenge of climate change (ADBG, 2013).

Key challenges to green investment in Nigeria

Achieving adequate energy supply where renewables can take part requires the creation of appropriate policy framework of legal, fiscal and regulatory instruments that would attract domestic and international investments. Clear rules, legislation, and responsibilities of various stakeholders along every stage of the energy flow from supply to end-use are crucial for the overall policy framework needed to promote renewable energy. Yet such policy, legal and institutional frameworks are only at the infancy stage in Nigeria (Efurimbe, 2011). Renewable energy development has been unsteady in the absence of a comprehensive framework to plan, co-ordinate and implement a national policy and strategy. Moreover, there have been no clear and consistent institutional champions to address barriers and create expanded opportunities for renewables.

Nigeria's major challenges to promoting renewable energy include: the absence of an efficient institutional framework that ensures linkages between the renewable energy sector and other major economic sectors; an unbalanced playing field between conventional energy and renewable energy; lack of portfolio standards for renewable energy; and insufficient use of fiscal and market incentives in order to overcome the high up-front capital cost of renewable energy materials. These bottlenecks are addressed in turn below:

- Co-ordination between government ministries and agencies responsible for rural development and renewable energy complex in Nigeria. Unlike for the oil and gas sectors, no agency has a clear mandate to oversee promotion of renewable energy. The lack of a clear agency results in the absence of a driving force for the sector's growth and development.
- It is important to create a level playing field in the energy market in order to make it an effective one that accommodates various sources of energy. This involves the removal of hidden fossil-fuel subsidies in the energy sector, as well as reflecting external environmental costs within the price of different energy sources. In addition, Power Purchasing Agreements (PPAs) between independent power producers (IPPs) and electricity distribution firms can be designed so as to favour a greater share of renewables (rather than being set primarily according to least-cost criteria, as is often the case). Without addressing these concerns, renewable energy technologies cannot compete with the already established alternatives. In Nigeria, as in many developed and developing countries, the price of conventional energy (especially petroleum products and electricity) is subsidised (see Section 5.1.6 on pricing). This creates barriers for renewable energies which cannot achieve a minimum level of market share.
- Clear portfolio standards for clean energies could help enhance the expansion of renewable energy. These standards can set minimum targets of clean

energy content within the overall energy supply. Renewable energy has high initial costs and Nigeria lacks manufacturing capacity for components of renewable energy; therefore policymakers should consider creating incentives for entrepreneurs to make money in the sector. Innovative fiscal and market incentives should be in place to encourage clean energy technology supply companies at the initial stages of introduction. Various fiscal incentives (such as tax credits, tax exemptions, tax reductions, or accelerated depreciation can be put in place to decrease the investment costs of renewables and attract investors). Direct investment grants can also be useful when the relevant technology is still far from competitive, since other forms of financial assistance (such as loans and tax breaks) may not suffice to guarantee economical operation. It is however more difficult to make these grants conditional on performance or on the extent to which the renewable energy installation operates. As for all investment incentives, it is imperative to accompany such incentive schemes and grants with a mechanism for regularly evaluating their costs and benefits (see Chapter 3). Likewise a careful assessment of the effectiveness of FiTs in the Nigerian context would be highly necessary before moving ahead in FiT adoption.

Tackling these constraints, and especially enhancing the institutional framework, can not only facilitate the expansion of renewable energy but can also facilitate the development of cross-sectoral linkages. Currently, renewable energy is inadequately linked to key drivers of the national economy – such as SME growth, rising demand for water supply, rapid developments in the telecommunication industry (which contributed about 8.7% of GDP in 2014), and the drive towards integrated rural development. Building on these cross-sectoral interfaces, thanks to an effective institutional framework, will be important to identifying and creating investment opportunities in renewable energy.

5.1.4. Legal and institutional framework for structuring private participation in infrastructure

Across all infrastructure markets (whether it be renewable or conventional energy, or indeed even water, transport or ICT), a sound legal and institutional framework is essential in order to manage the risks incurred in the transition from public to private and hybrid forms of infrastructure provision. A first step towards establishing a credible policy commitment between government and investors is to set up clear and encompassing long-term infrastructure and development plans which firmly emphasise the need for and role of competitive private sector participation. It is important to mainstream infrastructure objectives within national development strategies, and to account for these objectives within annual budget and procurement cycles. In Nigeria the National Integrated Infrastructure Master Plan (NIIMP) serves this purpose, as detailed in Box 5.7 below. Crucially, this political commitment must then be

Box 5.7. **Nigeria National Integrated Infrastructure Master Plan (NIIMP)**

An estimated sum of USD 2.9 trillion is required as investment cost for implementing Nigeria's National Integrated Infrastructure Master Plan over the next 30 years. The Plan focuses on core infrastructure, including energy (power and oil and gas), transport (roads, rail, ports and airports), housing, water and ICT. It contains a financing plan and sector and regional strategies, as well as a priority projects portfolio. The NIIMP aims to raise Nigeria's stock of infrastructure from the current 35-40% of GDP to 70% by 2043. This will be co-ordinated by the National Planning Commission (NPC) and follows on validation workshops that were organised by the ministry in the six geo-political zones to consider the NIIMP's draft. The document places strong emphasis on private investment in infrastructure, and assumes that 48% of the required funding is going to come from the private sector.

The NPC expects that successful delivery of the NIIMP will engender the following benefits:

- co-ordinated approach to infrastructure development;
- strengthened linkages between infrastructure sectors and the national economy;
- harmonisation and integration of various infrastructure plans;
- poverty reduction and wealth creation;
- achievement of economic growth via increased competitiveness of Nigerian products in regional and continental markets;
- address challenges of security, urbanization, poverty, housing, health care and education;
- increased foreign direct and local investment in transportation, power, telecommunications and water;
- significantly reduce the costs of doing business; and
- strengthen policy, legal, regulatory and institutional frameworks.

Source: National Planning Commission.

backed by an effective regime that can guide the shift towards greater private investment across all infrastructure markets. With the above energy backdrop in mind, this section accordingly discusses Nigeria's public procurement legislation and institutional structure at federal level, as well as its current federal PPP Policy and implementing bodies. This should be considered in parallel with the legal and institutional structure existing at State level – particularly in Lagos State where experiences and government capacity related to private participation in infrastructure provision are most advanced (see Chapter 6).

Federal legislation for public procurement, including PPPs

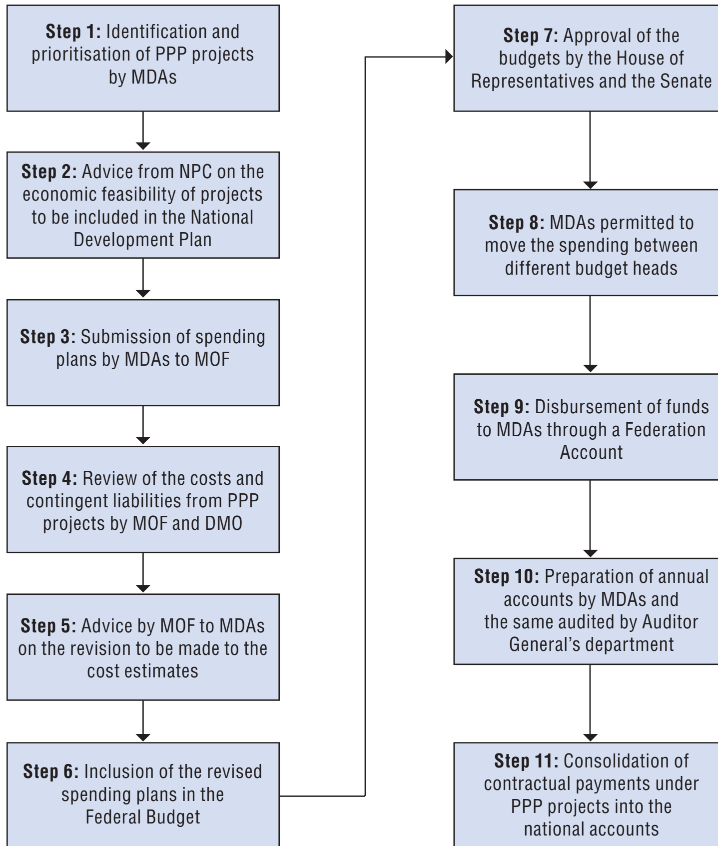
Procurement procedures for infrastructure projects are set out in legislation at both federal and State levels. At federal level, the *Infrastructure Concession Regulatory Commission Act* 2005 (ICRC Act) provided a launch-pad for private sector participation in the development financing, construction, operation and maintenance of federal infrastructure and development projects. It created a legal basis for PPP deals and established the Infrastructure Concession Regulatory Commission (ICRC, tasked with developing the guidelines, policies, and procurement processes for PPP projects in Nigeria) as well as the ICRC Board. The ICRC takes custody of every concession agreement made under the *ICRC Act* and monitors compliance with the terms and conditions of these agreements. The *ICRC Act* thus governs the participation of the private sector in financing the construction, development, operation, or maintenance of infrastructure or development projects of the Federal Government through concession or contractual arrangements. As an interface with the private sector and a national centre of expertise in PPPs, the ICRC hosts both a Contract Monitoring Unit and a PPP Resource Centre.

In 2007 the ICRC was complemented by the federal *Public Procurement Act* 2007. This establishes the National Council on Public Procurement (NCPP) and the Bureau of Public Procurement (BPP) as regulatory authorities discharging important responsibilities at various stages of PPP and broader procurement processes. The *Public Procurement Act* also harmonised existing government policies and practices by regulating, setting standards and developing the legal framework for public procurement in Nigeria. The provisions of the Act are applicable to all procurement by FGN and its procurement entities at federal level, as well as to other entities (including at State level) which derive at least 35% of their funds from the Federation share of the Consolidated Revenue Fund. Meanwhile public procurement laws also exist at state level (see Chapter 6 below for the case of Lagos State).

More specifically to PPPs, the National PPP Policy (N4P) was passed in 2009, notably establishing a PPP Resource Centre and a Compliance Committee for advising and monitoring the set-up of PPPs. The planning and budgeting cycle for PPP projects under the *ICRC Act* is outlined in Figure 5.2, and Figure 5.3 outlines the procurement and approval processes for individual projects at the federal level. Approval processes in the States are similar, with the Office of PPP carrying out the role of the ICRC and the State Executive Council being the ultimate approving body (see Chapter 6).

Also within procurement and PPP legislation, beyond planning and budgeting it is important to have adequate provisions to guide contract design (notably well-structured contracts that explicitly detail the allocation of risks and the quality of service required). Article 34 of the 2007 *Public Procurement Act*

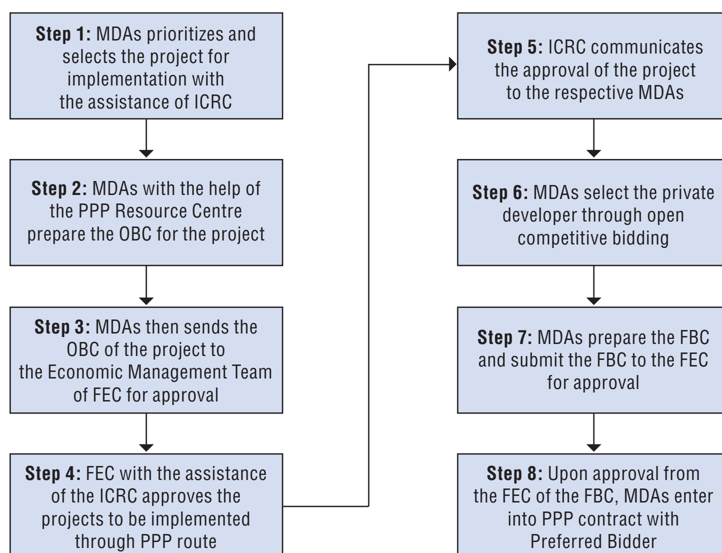
Figure 5.2. **ICRC planning and budgeting cycle for PPP projects**



Note: MDAs refers to Ministries, Departments and Agencies; MOF refers to Ministry of Finance; DMO refers to Debt Management Office.
Source: Infrastructure Concession Regulatory Commission, PPP Toolkit, available at *http://ppptoolkit.icrc.gov.ng/*.

allows for an advance payment or "mobilisation fee" by FGN on public contracts (15% of project value for domestic contractors and 10% for foreign contractors). This can allow to better spread and share risks over project lifetimes and to give contractors more "breathing space" in the first stages of a project. Article 37 of the Act also contains a reimbursement clause for payment of interest by the procuring entity when payment to the contractor is delayed by more than 60 days; however in practice contractors have had difficulty obtaining these interest reimbursements. In return for these guarantees, article 36 of the Act states that provision of a performance guarantee (of at least 10% of the contract value) by the contractor shall be a pre-condition to the award of any contract involving a mobilisation fee. Once the mobilisation fee has been paid

Figure 5.3. **Procurement and approval processes for individual projects at Federal level**



Note: OBC refers to Outline Business Case for each project; FBC refers to Final Business Case; FEC refers to Federal Executive Council.
Source: Infrastructure Concession Regulatory Commission, PPP Toolkit, available at *http://ppptoolkit.icrc.gov.ng/*.

to the contractor or supplier, no further payment can be made without issuance of an interim performance certificate.

This reciprocal arrangement covers some start-up risks of the private partner, while holding the latter to performance standards. It is a particularly interesting and necessary feature of the federal *Public Procurement Act*, given that no other sections of the procurement legislation at federal level address the specificities of risk-sharing and performance management in contract design. While both of these elements are also only very lightly touched upon in the 2011 Lagos State *PPP Law*, they have since been comprehensively addressed by regulations detailing the operations of the Lagos State Public Procurement Agency (including as regards PPPs). As further detailed in Chapter 6 below, the corresponding framework at federal level could benefit from the detailed and balanced approach of this new raft of regulations (in particular the *Procurement Regulations for Public Procurement Office* in Lagos State, released in April 2013; and the Lagos State Public Procurement Agency's Procurement Procedures Manual, of May 2013). Meanwhile although the extensive PPP Toolkit available online on the ICRC website provides some guidance for risk sharing, dispute resolution and contract design, the *ICRC Act* itself makes no explicit reference to these considerations.

The federal regimes for PPPs and public procurement could also benefit from more specific reference to procedures for communication and dispute resolution between public and private parties. Rather it focuses largely on the organisation of the procurement and tendering process and the different methods of procurement. More attention and guidance concerning actual contract negotiation (including potential re-negotiation as well as performance monitoring once the preferred bidder has been selected) would considerably strengthen this framework. Once again the 2013 Regulations and Procurement Procedures Manual released at Lagos State level could provide useful guidance in this respect (see Section 6.9 below).

Institutional structure for implementation and oversight of public procurement and PPP projects

The shift towards private sector participation in infrastructure places new demands on government agencies and involves the responsibilities of a multiplicity of bodies, from the Ministry of Finance (which should play a key role as a gatekeeper, ensuring that private procurement projects such as PPPs are affordable and that the overall investment envelope is sustainable), through central procurement and privatisation authorities, to procurement entities and dedicated PPP Units.

While procurement entities retain overall responsibility for identifying, developing, implementing and monitoring procurement projects, public procurement acts frequently establish several types of oversight and management authorities for these projects. Together with Ministries of Finance, these bodies are responsible for securing an efficient use of public funds, and ensuring that public procurement is carried out in a fair and transparent manner:

- **Central procurement authorities,** which approve the award of contracts by procurement entities, and channel and re-direct all tendering and bidding from line ministries and local government. In Nigeria there is no single central procurement authority. Rather, the Bureau of Public Procurement (BPP) is tasked with ensuring that the prices paid by the Government of Nigeria for goods and services are fair and reasonable; alongside, a Procurement Department has been set up in each MDA. Meanwhile the ICRC plays a monitoring and regulatory role, and also works with individual MDAs to identify potential PPP projects.
- **Procurement appeal authorities** with complaint and dispute resolution functions – although no dedicated entity appears to take this role in Nigeria, in Lagos State the Public Procurement Agency details a chain of authorities (from the Accounting Officer within the procuring entity, to the Agency itself, then through the Public Procurement Board and finally to the high federal court level) for dealing with procurement complaints.

- **Privatisation authorities,** to oversee procurement that takes the form of outright or partial divestiture, and to monitor the performance of public entities once they have been privatised. In Nigeria the Bureau of Public Enterprises (BPE) is endowed with this role.
- **PPP Units,** which provide all relevant actors (and especially procurement entities) with technical advice and assistance in order to support the PPP process and ensure the quality and consistency of projects with PPP policies. Alongside procurement entities, PPP Units are thus involved from the outset of project preparation (developing the project plan and timetable, carrying out feasibility studies, preparing design of responsibilities, risk allocation, and payment mechanisms within the PPP contract, defining bid evaluation criteria, and selecting the procurement method). In Nigeria, in addition to the PPP Resource Centre set up within ICRC at federal level, PPP Units are being set up at State level (with the Lagos OPPP providing a leading example, as detailed in Chapter 6 below).

This institutional structure for procurement and PPPs, as provided for by the *ICRC Act* and the federal *Public Procurement Act* 2007 (see above), is outlined in Figure 5.4. In addition to the above entities, in Nigeria projects must transit through the Debt Management Office for an assessment of their affordability and of the contingent liability that they are likely to place on government.

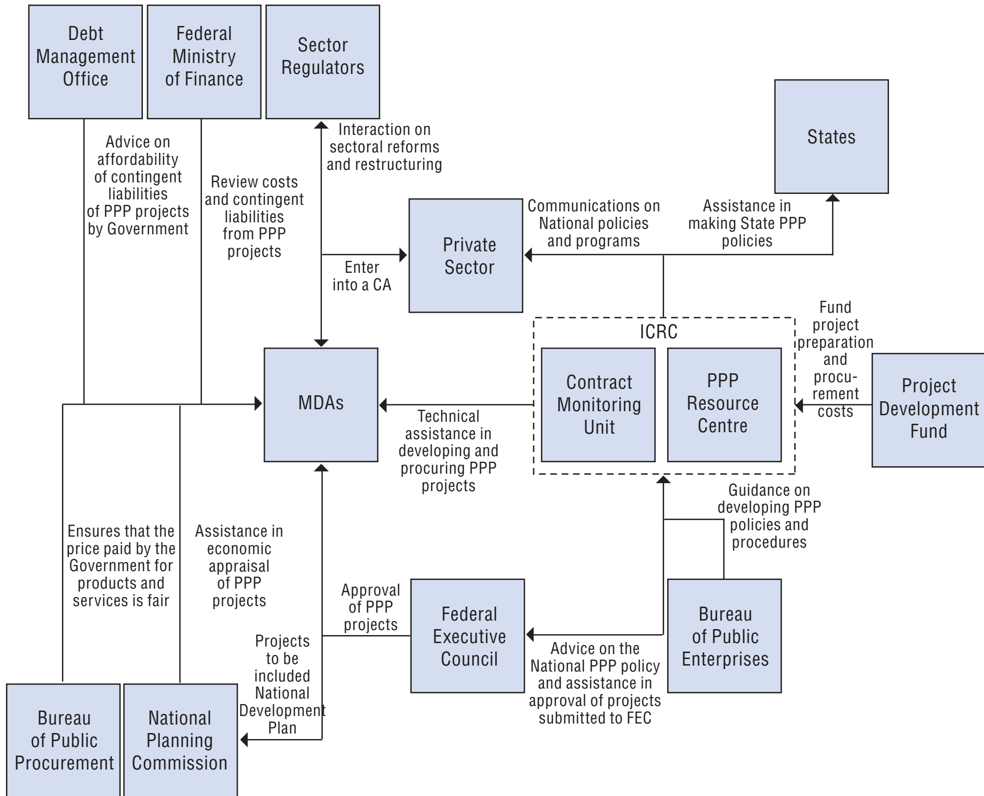
5.1.5. *Transparency and procedural fairness in the infrastructure procurement framework*

Emphasis on transparency in the 2007 Federal Public Procurement Act

The provisions of the 2007 *Federal Public Procurement Act*, to a greater extent than most equivalent acts in other countries, put a particular emphasis on transparency and tackling of corruption throughout the procurement process – especially by attempting to limit potential for conflict of interest during tendering. Part IV of the Act details "fundamental principles for procurement", including that every bid be accompanied by an affidavit "disclosing whether or not any officer of the relevant committees of the procurement entity or BPE is a former or present director, shareholder or has any pecuniary interest in the bidder" (Section 6.f.). Under Section 7(a), bidders can be excluded from the process if there is evidence that any supplier or contractor has promised any gift, employment, or other benefit to a current or former entity of the procurement entity or BPE.

Additionally Part XI of the Act provides for a Code of Conduct to be stipulated by the BPP, for use by all public officers, suppliers, contractors and service providers involved in public procurement. It is also specified that every public officer involved in public procurement must refrain from participating in any commercial transaction involving government bodies where his public

Figure 5.4. **Institutional framework for PPP development at federal level**



Source: Infrastructure Concession Regulatory Commission, PPP Toolkit, available at *http://ppptoolkit.icrc.gov.ng/*.

capacity is likely to confer him or his relations any unfair advantage. Finally Part IX of the *Public Procurement Act* (on disposal of public assets) details that any actual or potential conflict of interest must be declared to the authorities, and defines what constitutes conflict of interest in detail.

Perhaps most importantly, the *Public Procurement Act* dedicates Part XII to punishment of offences – not only those committed by contractors (who are liable to imprisonment of 5-10 years, as tried by the Federal High Court; and who can be debarred from future public procurements in addition to a fine equivalent to 25% of the procurement value), but punishes persons carrying out their duties as officers of the BPP or any procuring entity. The penalties for bid rigging and other malpractice include imprisonment of five years without any option of a fine, as well as summary dismissal from government services. The various offences (collusion and bid-rigging) are also defined within this Part of the Act. Similar provisions are also detailed at state level, for instance in the Regulations to the Lagos State *Public Procurement Law 2011* (as released in April 2013).

Domestic preferences and restrictions in public procurement

Part IX of the 2007 *Public Procurement Act* (on disposal of public assets) identifies open competitive bidding as the primary form of public procurement. Nonetheless the following measures exist in Nigeria to advantage domestic enterprises competing for public procurement contracts:

- Part V (Section 34) states that a procuring entity may grant a margin of preference in the evaluation of tenders under international competitive bidding, for domestic bidders *vis-à-vis* foreign bidders or when comparing tenders from domestic suppliers offering goods manufactured locally with those offering goods manufactured abroad. If such a margin is allowed, the bidding documents must clearly indicate what preference is to be granted and the conditions for eligibility to such preference.
- The Bureau of Public Procurement is tasked with periodically issuing regulations setting limits and formulae for the computation of these margins of preference and for determining the local content of manufactured goods. Section 49 of the Act lists the criteria to be used by procurement entities to evaluate proposals, and mentions the extent of participation by local personnel.
  - ❖ Similarly at state level, Section 6(1) of the *Lagos State Public Procurement Law* 2011 (see Chapter 6) provides for the grant of a margin of preference for domestic bidders as compared to foreign bidders in the evaluation of tenders. Schedule 2 of the *Lagos State PPA Regulations 2011* (operational as of 2013) clearly details the size and calculation of these margins, as well as the eligibility criteria (see Box 6.10 in Chapter 6). This is an important improvement to the state-level procurement regime, as it avoids leaving open avenues for the unjustified and arbitrary use of preference margins. Standard bidding documents applicable to these thresholds (using the different bidding methods) are now available on the PPA website, which was officially activated in July 2013.
- Most recently a *Local Industry Patronage Bill* is under elaboration since 2012, and submitted for consideration by Senate on several occasions (last in October 2014). If enacted, this would make it mandatory for Government Ministries, Departments and Agencies to give priority to local manufacturers and "indigenous companies" in the procurement of goods, works and services. It would also prohibit the exclusion of locally produced goods in the procurement process. As of spring 2015 the status of this bill however remains uncertain.

In addition the 2007 *Public Procurement Act* sets up a National Council on Public Procurement, which has power of approval over any procurement policies, can oversee the accounts of the BPP, and can consider and amend monetary and "prior review" thresholds for the application of the Act. These

thresholds apply in specific economic sectors, as detailed in Part VII of the act ("Special and Restricted Methods of Procurement"); among other areas, they cover goods that are subject to rapid technological advances, or where the procurement relates to a question of national security. For relevant projects that fall above the set thresholds, procurement is conducted through "two-stage tendering" and requires a certificate of "no objection" from the BPP. However the definition of national security and technological advances are subject to some interpretation, and these two stages risk introducing delays into the procurement process. In order to provide more predictability to potential investors considering participation in such "special" procurement projects, it may therefore be worthwhile to provide more quantifiable criteria for restricted procurement, and to specify timelines for the two-stage approval process.

While it is entirely legitimate for governments to provide such preferences for domestic participation in public procurement contracts, it is important to ensure that this does not come at the cost of project quality or value-for-money. In this interest, certain countries calibrate the level of preference margins in public procurement according to the project volume and risks involved. For instance in Botswana, all procurement-related documents maintain a clear emphasis on the quality of procured goods and services; this is essential in order to safeguard the prudent use of fiscal resources. Moreover the procurement policy is careful to avoid barring foreign contractors from large-scale and technologically complex contracts where their added expertise may be of particular value: no reservation or preference is permitted in open international bidding where contracts exceed USD 6.2 million, and in ICT sector a maximum preference of USD 12 540 is allowed for any contract size. Moreover several of these margins are to be of a short-term nature so as to boost competitiveness rather than generate dependency on the preferences in question.

This is a useful way of balancing value-for-money with citizen empowerment considerations in public procurement, while making space especially for SMEs to participate in low-risk, small-scale contracts. Procurement margins vary according to the size of the firm in Botswana, with the highest margins granted to smallest firms. This contrasts with the Nigerian case at federal level, where the federal *Public Procurement Act* 2007 makes no specific provisions for participation of SMEs in procurement (such as any preference margins, a minimum number of SMEs to be included in bidder short-lists, or simplification of bidding procedures for SMEs and smaller-size contracts). On the contrary, Part V of the Act recommends that procurement entities plan procurement not only by analysing in detail the associated costs and conducting the necessary market surveys, but also by "aggregating requirements wherever possible, both within the procurement entity and between procuring entities, to obtain economy of scale and reduce procurement cost". While this is a rational

objective, aggregating procurement creates a bias towards large-scale projects alone; whereas in several countries projects are instead unbundled into smaller components prior to tendering in order to facilitate SME participation in procurement.

Such considerations can be especially relevant where State-level procurement projects are concerned (see Chapter 6). Although neither the 2011 Lagos State *Public Procurement Law*, nor the Lagos State *PPP Law*, made particular reference to project size or to encouraging SME bidding, the 2011 *Public Procurement Regulations for Goods, Works and Non-Consulting Services* attempts to fill this gap. Under a specified size threshold, projects are subject to National Competitive Bidding rather than International Competitive Bidding; and small-scale projects are encouraged, although the *Regulations* do task the Lagos Public Procurement Agency with ensuring that "no contract splitting is carried out" merely in the interest of raising the number of eligible bidders.

Finally in order for domestic enterprises to truly latch onto these procurement possibilities, they require sufficient capacity and ability to provide procuring entities with quality goods. This entails targeted efforts by government and relevant implementing agencies (such as SMEDAN) to address binding supply-side constraints faced by domestic firms and especially SMEs. Chapter 3 investigates in more detail efforts underway in Nigeria to promote long-term capacity development for SMEs so as to render them more competitive (independently of financial support from Government) in public procurement tenders. All of the above capacity and quality concerns, together with regular impact evaluation prior and following the introduction of any new preference measures for public procurement, would be worth considering prior to the passage of the *Local Industry Patronage Bill*.

5.1.6. Regulation and pricing of the energy market to meet end-user needs

Especially in a context where government seeks to introduce more private participation into infrastructure markets, the pricing of infrastructure services becomes a key point of concern. Pricing can usefully be entrusted to specialised public authorities or regulatory agencies that oversee infrastructure investment and the operations of relevant enterprises. Given the frequently contentious and highly politicised nature of tariff-setting where basic infrastructure utilities and concerned, this requires that such agencies be competent, well-resourced and shielded from undue influence by the parties to infrastructure contracts.

In the Nigerian power sector, the main regulator (established by the EPSR Act) is the Nigerian Electricity Regulatory Commission (NERC). It carries out the following functions: promoting competition and private sector participation

in the sector; establishing operating codes and safety and quality standards; establish consumer rights and obligations with respect to the provision and use of electricity services; and licensing and regulating those involved in the generation, transmission, system operation, distribution and trading of electricity. Since 2007 NERC has developed a wide range of regulations pertaining to these functions, to cover licensing, billing, consumer complaints, embedded generation and energy procurement, and a grid code as well as a distribution code among others. In addition the Rural Electrification Authority (REA) has been established under Section 88 of the EPSR Act to implement the Rural Electrification Strategy and Plan, under the supervision of the Minister of Power (NPG, 2012).

Where pricing is concerned in particular, a central challenge is to balance the affordability of services to end-users with possibilities of cost-recovery for the private infrastructure operators. The Lekki Toll Road project in Lagos State (see Chapter 6) has for instance run into several complications over road tolling (an importance source of revenue recuperation by the private concessionaire). Road tolls were opposed with widespread public contestation when the expressway first opened, and most recently the state government has had to buy the concession rights back in order to avoid further tariff increases. Meanwhile in the energy sector, Nigeria has for many years had one of the lowest retail tariffs in the world, including in Africa. According to the Presidential Taskforce on Power, this government policy to subsidise retail or customer tariffs has hindered the growth of the sector. In addition to preventing cost-recovery by electricity providers, these low tariffs have deterred potential private investors, and have deprived the power sector of funds required to maintain and expand capacity.

Partially as a result, this pricing policy has been accompanied by extremely unreliable electricity supply; therefore the seemingly low average tariff in 2012, of N8.5/kWh (52 US Cents per kilowatt/hour), masked a real cost estimated to be ten times greater (over N80/kWh) for the poorest Nigerians (who resort to kerosene and firewood), N45-60/kWh for manufacturers (which use diesel or LPFO generation in larger generators), and N50-N70/kWh for the majority of Nigerians (who rely on self-generation). According to the Central Bank of Nigeria, Nigerians cumulatively spend USD 13 billion a year on generators, diesel and petroleum to provide electricity in homes and industries. It is estimated that private generators add about 40% to the cost of goods and services in Nigeria, and that annual GDP growth could be boosted from the current 7-8% to 10-11% if adequate power supplies were available (OBG, 2012).

While broadening the access of poorer citizens to electricity and water is a crucial objective to uphold, artificially low tariffs accompanied by production subsidies for state-owned enterprises indeed appear not to be the most efficient way to address the power and water access gaps. Production

subsidies do not automatically generate the expected socially desirable effects; where electricity and water access remain geographically constrained to areas inhabited by richer segments of the population, low tariffs, backed with extensive public funding, can act as a regressive subsidy for the rich rather than facilitating access for the poor. When these production subsidies are replaced by consumption subsidies, meanwhile, these must be well-targeted towards poorest end-users; in Nigeria, subsidisation of every customer regardless of the ability to pay has long created additional drain on public finances.

It appears necessary for Nigeria to reconsider its electricity pricing policy, so that tariffs become more cost-reflective and so that the neediest users are better-targeted by consumer subsidies. An independent regulator for the sector could help calculate tariffs based on power production and distribution costs, rather than artificially lowered via production subsidies. As part of the Roadmap to Power Sector Reform launched in 2010, the NERC has commenced studies and consultations to review electricity tariffs. In particular the Multiple Year Tariff Order (MYTO) for electricity price-setting has been revised recently; under the second version (introduced in May 2012 and applicable for five years) electricity prices were significantly raised in June 2012 in the interest of more realistic cost-recovery. Going forward these rates are to be reviewed on a bi-annual basis so as to adjust for inflation and exchange rate changes, as well as for fluctuations in daily generation capacity and in the operation expenditures of generation companies. MYTO II also includes more flexibility in wholesale generation and takes into consideration other fuel sources, such as coal. In addition MYTO II creates new classes of consumers. These new factors are expected to enhance cost-recovery in the electricity sector and to attract a broader range of investors into on-grid as well as off-grid IPPs. Already tariff increases have been announced for certain consumer groups in May and December 2014.

Tariff-setting also has an important influence on the development of renewable energy within the national power mix. The Federal Government's overarching policy on all electricity derived from renewable energy sources is contained within the 2006 Policy Guidelines on Renewable Electricity. These Guidelines sets out FGN's vision, policies and objectives for promoting renewable energy in the power sector and are drawn primarily from the 2003 National Energy Policy, the 2001 National Electric Power Policy, the 2005 *Electric Power Sector Reform Act* and Renewable Energy Master Plan, and the NEEDS Strategy.

To ensure a stable pricing policy and expanding market for renewable electricity in Nigeria, these Policy Guidelines state that feed-in tariffs (FITs) will be introduced for: small hydro schemes not exceeding 30MW; all biomass cogeneration power plants; and solar and wind-based power plants, irrespective of their sizes. In accordance with the Guidelines, FITs for solar

energy, wind power and small-hydro power have been developed by the Renewable Energy Research and Development (RRD) division of NERC. Consultations with shareholders on major reviews to the tariff methodology, including the institution of the FIT, took place in March 2011, and the reviewed tariff methodology came into effect in July the same year. As for the FITs on offer, wind projects in Nigeria appear to benefit from better rates than elsewhere: at USD 0.167 in Nigeria, for example, versus USD 0.088 in Germany and USD 0.09 in Vietnam. Similarly, solar rates tend to be higher, such as Nigeria (USD 0.461) compared with Germany (up to USD 0.1563) and even Japan, which has a famously generous feed-in tariff (USD 0.36-0.38) (BNEF, 2013).

According to the 2006 Policy Guidelines, specific tariff regimes formulated by NERC shall be long term, should guarantee buyers under standard contracts, and should provide reasonable rate of return. Beyond FITs, the 2006 Policy Guidelines additionally encourage FGN to continuously improve the climate for enhanced funding of renewable electricity through various financial support mechanisms (REPG, 2006):

- Equity Investments: FGN is to continuously review the conditions for effective private sector participation in renewable electricity investments with a view to improving the attractiveness of the sub-sector.
- Debt Financing: A key component of FGN policy is the improvement of the overall macro-economic and financial framework that ensures the availability and affordability of long-term funding for investors in renewable electricity.
- Grants: FGN is committed to mobilizing resources through international co-operation towards the development of renewable electricity for sustainable development in Nigeria. Grant financing from agencies of government and independent foundations is also to be promoted.
- Micro credit for Renewable Electricity Systems: As a result of the high upfront cost of renewable electricity systems, FGN commits to providing resources through funding for micro credit to buyers of standalone systems, especially in rural areas.

The Guidelines also state that NERC is to develop Standard Power Purchasing Agreements (PPAs) so as to transparently and predictably set the terms by which power is marketed and exchanged. This is an important step to implement going forward, as standard PPAs reassure prospective investors by determining the delivery location, power characteristics, price, quality, schedule, and terms of agreement and penalties for breach of contract. As noted in the Guidelines, PPAs should also: ensure that prices provide an adequate return on investments in renewable electricity; standardise and simplify contractual relationships; and protect investors, utilities and consumers. Indeed it is particularly important to ensure that PPAs are not determined only on a least-cost basis (as is the case for many countries) but

that they also take into account the non-cost related advantages of renewable energy; otherwise conventional energy generation, being cheaper, is likely to win all bids for independent power provision under the PPAs.

In addition to these responsibilities for tariff-setting, regulators in infrastructure markets such as NERC have a role to play in ensuring competition in the market – be it through behavioural measures (such as enforcing competitive behaviour, often in co-operation with Competition Authorities) or through more structural measures (such as "unbundling" of infrastructure markets – see Box 5.2 above). The topic of structural separation of energy utilities is addressed in Section 5.2.5 below.

5.2. Competition policy

5.2.1. Application and transparency of competition laws

Competition policy favours innovation and contributes to conditions conducive to new investment. Sound competition policy also helps to transmit the wider benefits of investment to society. No dedicated competition law currently exists in Nigeria, despite the recent elaboration of a competition policy. Existing relevant federal laws in this respect include: the *Competition and Practices Regulations* 2007 (made pursuant to the *Nigerian Communications Act* 2003); the *Investments and Securities Act* 2007; the *Public Enterprises (Privatisation and Commercialisation) Act* 1999; and the *NIPC Act* 1995. In addition tendering systems for government and public companies were introduced to enhance competition in public procurement as of 2004-06, under the *Public Procurement Act*. On the institutional and enforcement front, the lack of a dedicated competition law entails that bodies such as the Consumer Empowerment Organisation of Nigeria (CEON), the Manufacturers Association of Nigeria (MAN) and the Consumer Protection Council (CPC) are merely regulatory agencies which can only act *ex-ante* to safeguard competitive market conditions; aside from sector-specific regulators, no authority has power to apply remedies to competition violations *ex-post* (Ani, 2011).

In order to provide a more focused framework for addressing anti-competitive practices in the country, several draft competition bills have nevertheless been prepared over the past two decades – but never enacted, partly because two parallel legislative drafting processes have been underway (one initiated by the former FMITI, the federal Ministry of Commerce and Industry; and the other by the Bureau of Public Enterprises). The past attempted bills have included: the *2002 Federal Competition* bill, which aimed to set up a Federal Competition Commission and prohibit restrictive contracts and anti-competitive business practices; a 2008 bill for an Act to establish the Nigerian Trade and Competition Commission; and a *Federal Competition and Consumer Protection* bill, which aims to establish a Federal Competition and

Consumer Protection Commission and help enforce competitive practices as well as protect consumers' rights. This latest bill has run into similar delays as its predecessors – it was originally presented before the President in 2009, revised in 2011 by the National Council on Privatisation (NCP), and has since been oscillating between the House and the judiciary. As of early 2015 it has gone back to the House.

Nigeria stands out among its regional neighbours for this track record of repeatedly unsuccessful and stalled competition bills. According to a 2010 assessment of competition regimes across Western African countries, in Nigeria the process appears to be hampered by several political economy issues – including un-co-ordinated and parallel processes resulting in different bills being prepared by different bodies; as well as no consensus as to the line Ministry under which the proposed competition authority should be (CUTS, 2010).

This confusion and lack of co-ordination in the legal formulation and drafting process is not exclusive to the competition domain, but has in fact been noted across multiple policy areas (for instance on the possible update of the *NIPC Act* or the creation of a bankruptcy law, see Chapter 2). In principle all proposed bills emanating from MDAs must proceed via the Federal Ministry of Justice for consideration and perfection, prior to their transmission to the National Assembly. Issues of overlapping interest and inherent contradictions are usually resolved during this step and the proposed bills are considered as executive bills by the end of this process. However in practice literally any government agency (regardless of the authority and responsibilities vested in it) can formulate a draft bill for consideration by its ministry and subsequently by FEC, often without a sufficiently wide-ranging consultative process. This creates a multiplicity of bills that often overlap or generate turf disputes among various MDAs. Moreover this approach to legal formulation weighs down the work of the FEC and Ministry of Justice, and heightens the likelihood of delays and obstructions at the National Assembly to the passage of each bill. As recognised by the Federal Ministry of Justice, there thus remains a strong need for expediency and harmonisation of this process in practice.

Nevertheless, to date the 2011 draft *Federal Competition and Consumer Protection Commission bill* (hereafter FCCP Bill, initiated by FMITI) is still on the table, and its provisions were also referenced in the draft National Trade Policy in its version of August 2013 – an encouraging sign that enactment may be forthcoming. Moreover Nigeria has also released a Competition Policy in 2013. Overall the draft FCCP Bill (in its draft version of July 2013) is sound: it covers the essential points in respect of cartels, dominance and mergers in a standard way. It also defines a clear process, which means in principle that the law would be transparent. With a few modifications to the current draft, enactment of the law could fill a wide regulatory gap and bring important benefits to Nigeria. This would of course need to be accompanied by a strong

push on the implementation and institutional fronts; for instance the Trade Department of FMITI suggests that Nigeria's competition framework could in future be supported by a Trade Defence mechanism institution in order to be able to address unfair trade practices. Momentum on passing this law should be actively renewed, so as to avoid the still-born fate of the bill's predecessors. In this context, the current chapter draws on international best-practices in order to inform competition policy formulation in Nigeria. Specific comments and guidance are also provided based on the draft FCCP bill.

Regional co-operation on competition policy

The 1975 Economic Community of West African States (ECOWAS) Treaty, as revised in July 1993, aims at creating a Common Market among West African countries. It is in this context that adopting common competition rules has been envisaged. ECOWAS has its own competition regulations, adopted in 2008: the *Supplementary Act A/SA.1/06/08* adopting community competition rules and the modalities of their application within ECOWAS; and the *Supplementary Act A/SA.2/06/08* on the establishment of a regional competition authority for ECOWAS, which is to collaborate with national authorities as well as other regional competition authorities, notably for the West African Economic and Monetary Union (WAEMU). It is expected that risks of conflicts of interest and contradictions between the competition provisions of WAEMU and ECOWAS will progressively be eliminated as they are put into practice.

The first of these Acts covers agreements, practices, mergers and distortions caused by Member States which are likely to have an effect on trade within ECOWAS. This notably covers behaviour which directly affects regional trade and investment flows, as well as anti-competitive conduct that is impossible to eliminate other than within the framework of regional co-operation. A variety of exemptions are provided for, including on labour-related issues, agreements and trade practices approved by a regional competition organ of ECOWAS; and activities of professional associations designed to develop professional standards. Article 4(3) of the *Supplementary Act* specifies that the ECOWAS rules on competition also apply to State-Owned Enterprises (SOEs).

Given the predominance of Nigeria as the largest economy in ECOWAS, and arguably as the main agenda-setter for the region, this progress towards regional co-operation on competition policy should exert some positive "peer pressure" on Nigeria to move forward on domestic enactment of a competition law and establishment of the necessary institutional framework. However certain elements of the ECOWAS push on competition pose as many risks as opportunities. For instance, the Regional Competition Authority of ECOWAS may weigh on the already weak capacity and staffing of national competition authorities, by hiring some of their staff or increasing their workload (the

Supplementary Act A/SA.2/06/08 indeed provides that in case of need the national authorities may be invited to collaborate in enquiries and references). In addition the distribution of responsibilities between the regional authority and national ones will need to be better-balanced, as currently it would appear that under ECOWAS rules national competition authorities would no longer have the powers of deciding on anti-competitive practices (such as cartels and abuses of dominance).

As put by the CUTS Centre for Competition, Investment and Economic Regulation, in its 2010 assessment of competition regimes in selected ECOWAS countries, the ECOWAS regulations should clearly avoid conflicts of jurisdiction and accord more responsibilities to the national authorities in their task of sanctioning anticompetitive practices (CUTS, 2010). Otherwise, not only are existing national authorities left with very limited and unclearly defined competencies, but there is also no incentive for countries which have not yet established their own competition authority (such as Nigeria) to accelerate steps in this direction.

Transparency and communication on application of competition law

Transparency in competition policy reduces firms' costs of compliance and promotes confidence by reassuring investors that they are being treated fairly and that government is exercising its powers responsibly. For example foreign businesses wishing to invest in a country through mergers and acquisitions need to be able easily to obtain information on the process for obtaining merger approval of the local competition authority. Competition laws and their application must therefore be clear, transparent, and non-discriminatory. Public appeals (for both changes in implementing regulations and administrative decisions) moreover help avoid regulations that impose undue burdens and limit the discretionary power of officials. Nigeria's draft FCCP Bill provides for public hearings of the FCCP Commission under Part 11 (Section 13).

Competition authorities can also use a variety of measures to help investors understand and comply with competition laws, and to communicate changes in the laws and regulations. Competition laws can notably be accompanied by detailed Guidelines which clarify: market definition and calculation of market shares; collusive agreements; monopoly situations and non-collusive agreements; mergers; and remedies and penalties. Such Guidelines can simplify the tasks required of the nascent competition authority – in Mauritius for instance, the online Guidelines for the Competition Commission of Mauritius (CCM) provide concrete, country-specific examples of each anti-competitive behaviour. Moreover the Guidelines cover not only the application of competition law in theory, but CCM's approach in practice (for instance the guidance for market identification and definition recognises

that examining past patterns of substitution in response to past changes in price is rarely feasible, and suggests more practical alternatives) (CCM, 2009).

In addition Rules of Procedure can be drawn up, providing an administrative timetable and outline the major stages of competition investigations and competition rulings. Procedural Rules also enable an enterprise to take remedial action at any time before the start of, or during, an investigation: via an undertaking, the company can generally propose measures to address concerns that may have arisen or are likely to arise during the investigation. This provision can allow to tackle competition concerns without having to resort to hearings, thus reducing the risk of case backlogs, sparing time and resources, and encouraging more constructive co-operation and open information-sharing among business and the competition authority. Should Nigeria successfully move ahead in enacting the draft FCCP Bill, it would be necessary to consider the concurrent elaboration of such Guidelines and Rules of Procedure – in order to make the *FCCP Act* more "implementation-ready".

In the interest of greater clarity concerning the institutional setup for the enforcement of competition legislation, it would also be important for the forthcoming National Trade Policy (NTP, in its draft form as of August 2013) to be carefully aligned with the provisions of the FCCP Bill. Indeed the draft NTP makes extensive reference to the establishment of a Federal Competition and Consumer Protection Commission, and grants this body an important role in implementing the NTP once it has been enacted. However, currently the draft NTP refers to a variety of agencies that are not mentioned in the draft FCCP Bill (including a Regulatory Authority on Competition; as well as an Anti-Trust Competition Authority and a Consumer Protection Council which are to make up two branches of the FCCP Commission). Eliminating such inconsistencies would be necessary in order to avoid confusion among these different policy instruments.

5.2.2. Independence and capacity of competition authorities

Resources and independence of the competition authority to implement competition laws

Simply adopting laws and policies on competition will contribute little to an attractive investment environment without effective implementation. Competition authorities must have the resources and independence to adequately carry out their responsibilities. Furthermore, a strong commitment to policy implementation and oversight at the political level can help to protect competition authorities from regulatory capture.

Political support to the competition authority should extend to supplying sufficient resources for effective enforcement, including adequate lawyers, economists and support staff. Mergers, monopolies, and cartels that are

challenged by the competition authority often require a significant effort in gathering data, information about the markets under consideration, sophisticated econometric analysis, as well as the hiring of legal and economic experts. A central challenge for most Western African economies having already adopted competition laws has indeed been establishing the competition authority created by the law. These authorities, even when established, suffer from serious budget constraints and have difficulties in obtaining the necessary human and financial resources. Members of the competition commission often are employed only part-time alongside their duties in their home Ministry. In West Africa progress on enforcing competition law has therefore been extremely slow compared to that in Eastern and Southern African countries, as per analysis conducted at regional level in 2010 (CUTS, 2010).

Ideally, the competition authority should report to, and receive feedback on its activities, from independent oversight committees. Evidence of political intervention in competition cases is likely to fundamentally erode the authority and confidence of the competition authority. The competition authority should have autonomous status within the government structure, and enforcement decision-makers should be well insulated from political direction or influence. If the authority is relegated to a minor role in a ministry, then the effectiveness and decision-making capabilities could be weak. On the other hand the mandate and ability to engage in a wide range of investigations and prosecutions – where needed – would be key signals of political support.

These elements are only briefly addressed in Nigeria's draft FCCP Bill however: in the version of July 2013 only Section 88 protects the Commission and its members from civil and criminal proceedings as a result of any of their operations, unless it is shown that these actions were taken in bad faith. No specific provisions are made to guarantee independence in particular – such as establishing bi-partisan oversight committees to evaluate the work of the competition authority on a regular basis. Instead, Commission members would be appointed by the President and the Commission would be required to submit annual reports to the Federal Minister of Trade and Investment.

The question of budget and resources is also intimately tied to the independence of competition authorities. Indeed the possibility for staff to combine their functions at the authority with work in government ministries may jeopardise the independent functioning of the authority. The source of the competition authority's budget can also pose independence risks. Part V of the draft FCCP Bill contains financial provisions for the forthcoming CCP Commission, including annual budgetary subvention from FGN. In addition the Commission has the possibility of raising fees not only from levies and licensing and merger approval charges, but also from all fines and penalties payable to the Competition Tribunal for cartels and abuse of dominance

(Section 26 [2] [d] of the July 2013 version). While a few competition agencies do work on this basis, whereby paid fines form part of the agency's budget, international best-practice suggests avoiding this as it may create an incentive for over-enforcement in the agency.

Under Part V the FCCP can also accept a variety of in-kind transfers (such as gifts of land, money or other property, as per Article 28[1]). This is a particularly risky point to enshrine in law and on which to permit substantial discretion; although article 28(2), which notes that the gifts should not be accepted "if the conditions attached by the person or organisation making the gift are inconsistent with the functions of the Commission", this is an insufficiently strong safeguard against risks of rent-seeking and corruption. These clauses may need to be substantially re-considered in the interest of independence and probity within the agency.

Enforcement and appeal

Part III, Section 14 of the draft FCCP bill lists the enforcement powers of the Commission. However enforcement is in the majority of cases limited to a "cease and desist" injunction, whereby fines are only exacted if the company is found guilty of continuing the anti-competitive practice once it has already been "caught" by the Commission (i.e. on a second occasion). Upon second detection of anti-competitive behaviour – that is, failure to cease and desist – the Council is to ensure that the faulty company provides speedy redress to consumers' complaints through negotiation, mediation and conciliation. Especially in a country as large as Nigeria, where the capacity of the competition agency will likely be very stretched and where the weakness of existing corporate governance standards to date have made investigations and data gathering particularly difficult, this form of two-stage enforcement may be somewhat ineffective. Indeed it is likely that malpractice will occur on a regular basis, while firms take the gamble that their behaviour will not be detected by the CCP Council – as fines cannot be imposed upon first detection.

Enforcement of the draft FCCP Bill is expected to apply to conduct entered into before it comes into effect, although businesses will be granted 18 months from the date of enactment to bring their businesses activities in line with the law. So as to avoid large resistances from corporate lobbies to the passage of this aspect of the law, it would be wise for Nigeria to consider raising awareness on these provisions and launching compliance programmes *ex ante*, so that companies can comply on a voluntary basis rather than facing additional penalties once the Bill comes into effect (Ani, 2011).

Meanwhile companies can be entitled to special authorisations and clearances if their activities are deemed to cater "Public benefits" (Part XVI, Article 102.2 [a]). Likewise under Part XIV (Article 79.4), the competition authority

can approve a merger if it is justified on public interest grounds. Both of these provisions are rather vague and do not clearly define what constitutes public interest. A more careful – and perhaps restrictive – wording would be necessary in order to avoid avenues for excessive discretion and possible rent-seeking in the award of special authorisations for exemption from the competition law.

As concerns appeal of competition rulings, the draft bill sets up a tribunal under Part XIX. The tribunal can hear appeals from all aggrieved parties, including from sector regulatory authorities which may disagree with the judgement of the competition authority in a sector under their oversight. In the interest of clarity, it could be considered to mention the tribunal's functions and establishment directly after provisions relating to the competition authority.

Policy advocacy

Beyond enforcement, competition authorities also have a role to play in policy advocacy and transparency. A better appreciation of competition policy perspectives can indeed be valuable when laws and regulations are being developed in order to highlight possible trade-offs between competition and other policy objectives. In this way, the competition authority can play a similar role within the administration to what the Investment Promotion Agency plays on investment issues (see Chapter 3), by advocating policies with the smallest adverse impact on competition in the market. This requires that the competition authority have the capacity and channels of communication with government necessary to fulfilling this advocacy function. Intra-governmental communication and co-operation frequently involves ministries, the cabinet, and sectoral regulators (such as electricity, banking, telecommunications, natural gas, and financial markets – addressed in further below).

Part II, Section 11 of the draft FCCP Bill outlines the general functions of the CCP Commission. Functions most related to policy advocacy (among the 38 functions listed) include the following:

- formulating measures to increase market transparency (including weight and measures administration, as the FCCP Bill covers consumer protection and not only competition matters);
- periodically initiating policy and reviewing commercial activities to identify anti-competitive and restrictive practices;
- advising the Federal Government generally on national policies and matters relating to competition and consumer protection;
- reporting annually on market practices and the implications for consumer choice and competition in the consumer market; and
- reviewing legislations and regulations and reporting to the Federal Government concerning any provisions which permit uncompetitive behaviour.

Under Part XIII of the draft Bill, the Commission is also granted a role in price regulation. However in this regard the Commission is only invited to give its view on the need to amend, renew or revoke price regulation measures at the President's request. This reduces the transparency of the law – in the interest of greater independence in policy advocacy, it would be preferable if the Commission was independently able to issue an opinion, to which the government was required to respond. Moreover in general, international best practice would suggest that embedding price regulation into competition law should be avoided (see next section).

5.2.3. Coverage of anti-competitive practices

Restrictive trade practices and abuse of dominant position

Part IX of the draft FCCP Bill contains provisions regulating or prohibiting restrictive practices that substantially lessen competition. Criteria for restrictive practices are clearly listed, together with the associated offenses and penalties. Such restrictive practices, under article 54(2), include among others: fixing purchase or selling prices; dividing markets; collusive tendering; limiting or controlling production; applying dissimilar conditions to equivalent transactions with other trading parties so as to put them at a competitive disadvantage; and conditional conclusions of contracts. Part X notes that certain agreements are exempted from coverage in the bill, including "any act done to give effect to any intellectual property right", as conferred under the *Federal Copy Right Act*, the *Federal Patent and Designs Act*; and the *Federal Trade Marks Act* (all of 2004 – see Chapter 2).

Meanwhile Part XI of the bill defines a "dominant position" and lists both the criteria reflecting abuse of a dominant position, and conditions whereby the dominance is not considered to be abusive and should be tolerated. Under Part XI (article 61), the Commission is given some flexibility in defining the share of the market which constitutes a dominant position – updates in this regard may be specified in regulations issued from time to time by the Commission. This type of clause can help ensure that the Competition Law remains relevant to changing market circumstances (due to market size, technology, available substitutes, etc.), as the possibility of ensuing these updates through Regulations rather than legislative amendment makes the process less cumbersome and subject to delay.

Price regulation

Beyond anti-competitive practices, the draft FCCP bill also contains a section on price regulation. As noted above this is generally to be avoided in competition legislation – unless in exceptional circumstances such as market failure or natural monopoly, where regulation of the sector is needed and

prices set. In such cases the conditions for imposition of price controls should be very specifically stated. As it stands, Part XIII, Section 73 of the Bill notes that prices should only be regulated by presidential order if: the goods or services will be acquired in a market in which competition is in any case limited; price control is necessary in the interest of users or suppliers; and the price regulation itself if narrowly designed in terms of duration and of the goods and services affected. These three conditions however leave quite large margins for arbitrary or unjustified imposition of price controls; the circumstances for this (and especially the criteria for meeting the interest of users or suppliers) would deserve to be more clearly specified.

Tackling anti-competitive practices and bid-rigging in public procurement

Alongside anti-competitive practices, competition legislation also frequently contains some provisions related to public procurement. For example Section 53 of the Mauritius *Competition Act* provides for suspension and debarment of bidders and suppliers who are involved in collusion between bidders in public procurement. The draft FCCP Bill does mention bid rigging (under Part XVIII, Section 112), but makes no explicit reference to the federal Public Procurement Act. In fact bid rigging is only mentioned in cases where it takes place as an offence against Commission (i.e. where the Commission is itself the procuring entity). Yet it is important to ensure that there are no contradictions between the competition and the public procurement legislations.

Indeed certain rules that govern procurement, including the way in which a tender is carried out and the design of the tender itself, can hinder competition and promote collusion arrangements or bid-rigging conspiracies between competitors. Bidding participation requirements should rather be transparent, non-discriminatory, and should not unreasonably limit competition; the tender process should for instance be designed so as to reduce the opportunities for communication among bidders. In order to ensure more coherence with Nigeria's public procurement legislation and to better tackle bid rigging in procurement processes, the competition bill could therefore benefit from clearly referring to anti-competitive behaviour in public procurement.

In addition provisions for institutionalised collaboration between the CCP Commission and federal as well as state-level procurement authorities should be made. In this regard, the 2012 OECD *Recommendation of the Council on Fighting Bid Rigging in Public Procurement* recommends for competition authorities to: partner with procurement agencies to produce materials on fraud and collusion and to raise awareness within public agencies; offer support to procurement agencies to set up training for procurement officials, auditors, and investigators on identifying behaviour and bidding patterns which may indicate collusion; and establish a continuing relationship with procurement

agencies such that, should preventive mechanisms fail to protect public funds from third-party collusion, those agencies will report the suspected collusion to competition authorities so as to receive help in investigating and prosecuting any potential anti-competitive conduct. For instance in Mauritius Memoranda of Understanding have been established between the CCM and the Public Procurement Office.

Beyond public procurement alone, competition legislation can also address the responsibilities of competition authorities in the case of privatisations. In such areas, which are not directly associated with competition law, competition authorities may find themselves at the margins of policy formulation. One of the key concerns of privatisation endeavours has been the risk of replacing public monopolies with private ones, rather than increasing competition. Critical issues include potential exceptions and exclusions granted to the new (private) firm, such as exclusivity contracts, as well as monitoring the behaviour of formerly state-owned firms, which may still exert considerable market influence. Dominant incumbents have for instance complicated market access for new entrants in industries such as electricity, railroads, communications, banking and insurance in several countries.

Competition authorities should therefore play an active role during privatisation, including in the upstream and preparation phases – in Nigeria this could for instance require formalising co-operation with the BPE. This would help balance the need to create a more efficient and competitive industry with possible political pressures to sell state-owned assets at the highest possible price (for which exclusivity and other such clauses may come in). Of course post-divestiture monitoring by the Competition authority and sectoral regulators are also necessary to ensure that anticompetitive practices do not arise *ex post*.

5.2.4. Co-ordination with other regulatory authorities

Competition authorities require adequate political support and independence to exercise effectively, in particular when they must challenge vested interests – such as monopolistic private firms, or state-owned firms that fall under the regulatory authority of other parts of government. The respective powers and status of regulators and competition authorities are set out in a variety of manners across different countries. Most often these are entirely separate entities, as provided for in Nigeria. However, other options also exist, which can help better structure the co-operation and communication between the different regulators. In certain countries sector regulators are thus branches of the national competition authority – thus in the Netherlands the electricity regulator (the Office of Energy Regulation, *Energiekamer*) operates as a chamber of the Dutch competition authority (the NMa). Likewise the Australian Energy Regulator (AER), while established as an independent

legal entity, is administratively part of the Australian Competition and Consumer Commission (ACCC) (OECD, 2011).

For co-operation between competition authorities and sector regulators to be effective, their respective responsibilities must be clearly outlined in order to minimise contradictions and pre-empt areas of overlap or conflict. Part XVIII of the draft FCCP Bill is entirely dedicated to "provisions related to regulated industries". This requires government agencies or regulatory authorities having jurisdiction in respect of an industry or sector to negotiate agreements with the Commission. Whenever a provision of the competition legislation has been contravened by an entity operating within a regulated industry, exemption is only possible if the entity can demonstrate that the conducts in question were ordered or required by a regulatory agency possessing jurisdiction over that industry. Meanwhile under Part II, Section 11(m) of the Bill, one of the functions of the Commission is to give and receive advice from other regulatory authorities or agencies within the relevant industry or sector on consumer protection and competition matters.

The Commission is also empowered to declare, by ruling that certain industries are to be "regulated industries" in order to avoid conflicts with the functions of other governmental agencies which may interfere with the operations of those industries. Any industries affected by price regulations (see above) are for instance part of this group. However this is somewhat of an arbitrary and perhaps unnecessary provision, as no clear list of "regulated industries" is established, and enabling the Commission to declare specific industries as "regulated" may on certain occasions increase the risk of administrative and judicial "turf wars" rather than minimising confusion over the powers of the Commission *vis-à-vis* those of other regulatory authorities.

For such reasons it is generally necessary for the competition commission to sit relatively high within the hierarchy of governmental units – thus enabling it to take precedence, where necessary, over the decisions of sector regulators. However the draft FCCP Bill on the contrary places the competition authority in a largely subordinate position *vis-à-vis* sector regulators. Part I (article 2.2) states that the bill "applies to public utilities provided that the Commission shall before it exercises any function in relation to such utilities, consult with the body responsible for the regulation of the utility concerned". Likewise under Part VIII, which concerns enforcement of consumers' rights, any consumer disputes with suppliers must be referred to the relevant industry sector regulator (if one exists); only if the sector regulator concludes that the dispute cannot be resolved through resort to the relevant industry code, can the matter then be filed as a complaint with the Commission (Section 47[2]). This implies that that prior approval from sectoral regulators is necessary both before the Commission can use its powers towards public utilities, and before consumer disputes can reach the Commission. Moreover

under Section 49, the Commission can only issue a compliance notice to the supplier following consultation with the industry sector regulator that issued the license to the supplier.

The above aspects risk severely limiting the scope of action of the Commission, especially as it is not mentioned in which cases decisions by the Commission or the sector regulator take precedence. Clearer or less restrictive wording on the form of collaboration with sectoral regulators may be desirable. In the Republic of Korea for instance, the sectoral regulator for telecommunications (the KCC) has primary jurisdiction over regulatory matters, but the national competition authority (KFTC) retains residual jurisdiction over competition matters in the sector. There are also provisions in place in the relevant regulations to ensure that undertakings are not fined twice under both sets of legislation for the same conduct (OECD, 2011).

5.2.5. Managing the structural separation of infrastructure utilities

As highlighted in Section 5.1 above, Nigeria is one of the few countries in Africa to be engaging rather extensively in structural separation of its energy market – that is, moving beyond the "single-buyer" model of electricity provision and considering to what extent electricity transmission and distribution functions could be "unbundled" as well (see Box 5.2 above for definitions of these concepts). Structural separation often aims to enhance the level of efficiency and competition in infrastructure markets. As emphasised by the *OECD Recommendations Concerning Structural Separation in Regulated Industries* (2001), structural solutions to competition can be more effective than behavioural remedies, as the former modify the incentives of firms in the market – whereas behavioural measures, such as mandatory access requirements, merely attempt to redress non-competitive conduct in an unchanged market setting. Structural separation can thus play a pivotal role in ensuring that a formal right of access is effective in practice.

Yet the OECD Recommendations also highlight that structural separation is not a "quick fix" to the challenges of SOE market dominance and inefficiency. Rather, the choice of this approach must be carefully weighed according to the context and characteristics of the market. Thus, as an example, EU Member States are required to implement either ownership or functional separation in the electricity and gas sectors, whereas functional separation in telecommunications markets remains an exceptional measure for implementation only in cases of persistent market failure (OECD, 2011). Based on the experiences of structural separation in four regulated industries (gas, electricity, telecommunications and rail) across 34 OECD member countries, the OECD Competition Committee warns that "forcing" competition via structural separation can have significant costs (both financial and efficiency-based). It is important to

determine whether increased competition in the market concerned actually brings with it increased benefits for consumers.

The Recommendations therefore argue that any policy-driven vertical separation needs to be justified through a thorough cost-benefit analysis. Determining whether and what form of separation is appropriate in a particular sector must take into account several factors (considered here in the Nigerian context):

- The presence of economies of scale and scope. Sufficient market size to justify the co-existence of multiple providers and distributors of the infrastructure service is also necessary – a condition which Nigeria, with the largest population in Africa, undeniably meets.
- The rate of technological innovation in the sector; this criteria will become particularly relevant as Nigeria moves toward a greater share of renewable energy within the national energy mix (see earlier in this chapter). On the one hand, as emphasised by the *OECD Policy Guidance for Investment in Clean Energy Infrastructure* (2014), unbundling power provision and making more space for independent power producers (IPPs) clearly opens more opportunities for small-scale renewable energy generators to plug into the national grid; but on the other hand these generators may face specific size and technology challenges that prevent them from being structurally separated themselves. In response to this apparent paradox, New Zealand has for instance amended its 1998 *Electricity Industry Reform Act* – which requires full ownership separation between electricity lines, and generation and retailing – so as to exempt renewable energy and small-scale generation capacity (OECD, 2011).
- The effectiveness of other forms of regulatory intervention. Structural separation is particularly useful in circumstances where the alternative behavioural regulation would be difficult to design, follow and enforce.
- The possible trade-off between competition and efficiency (related to vertically integrated firms' ability to better maximise profits along the production chain). This trade-off becomes far less relevant in cases where the vertically-integrated SOEs in the market concerned have a poor track-record in terms of efficiency themselves. In Nigeria for instance, the extremely sub-standard performance of NEPA prior to the first reforms in the electricity sector suggest that unbundling the company would come at very few efficiency costs.
- The likely impact on levels of investment. Indeed the OECD Recommendations argue that, in the case of infrastructure sectors which are currently in a developmental phase and where the cost of capital is of paramount importance (as in most of Nigeria's infrastructure markets), the "cost of capital effect" (that is, the likely effect of unbundling on corporate incentives

to invest) should be the primary focus of the cost-benefit analysis. Although implementation of structural separation can result in increased investment by new entrants into the competitive portions of the sector, there is in particular a risk that these large-scale market reforms generate additional uncertainty regarding network ownership, thus deterring otherwise desirable investment in the market. In Nigeria, it is likely that the first of these contending factors would prevail. Indeed, as in most other African countries Nigeria has to date attracted little foreign investment in the electricity sector, and it is likely that the ongoing momentum for structural separation will reduce rather than exacerbate uncertainty for investors. The risk of policy reversal on the structural separation of the market is mitigated through reiterated government commitments to unbundling the market – expressed not only in Vision 20:2020 but also in more recent documents at federal as well as State levels (such as the draft 2012-25 Lagos State Development Plan which aims to ensure constant and adequate power supply through IPPs and to urge improvement in Federal power supplies). In this context, structural separation can simplify the regulatory regime and bring more legal certainty.

Once the choice of structural separation has been taken, the management and implementation of this process will require close monitoring as well as some degree of flexibility and market-specific adjustments. Indeed the OECD Competition Committee warns that competitive markets do not always follow or flourish even after the implementation of structural separation: where other barriers to entry remain, de facto monopolies can persist. New Zealand has for example recently had to revise its laws on structural separation in the electricity sector to allow a degree of re-integration between distribution and retailing – this aimed to better challenge the continued market power of combined generator-retailers which had remained in operation even after the implementation of structural separation.

It must also be determined whether structural separation is to be imposed merely to enhance the existing market structure (without necessarily finding an infringement of competition law), or whether it can be imposed by the Competition Authority as a remedy for competition violations. In the latter case, structural separation would have to be enshrined within the Competition Law itself. Countries have different approaches to this question. While divestiture, which would include structural separation, is not available as a remedy under the "abuse of dominance provisions" in Australian law, in Chile the Antitrust Commission can impose structural separation as a remedy if it finds a violation of competition rules. By contrast although Estonia's competition authority can issue mandatory and prohibitory injunctions as well as "cease and desist" orders and fines, any measures that can be taken to improve competition in the market can only be put forward as non-binding

recommendations to government or business. Czech competition law has an even more restricted scope, whereby the only penalties available are fines and criminal sanctions for hard core cartels (OECD, 2011). In all of these cases and as addressed earlier, formalised co-operation between sector regulators – such as the NERC in Nigeria – and competition authorities is essential.

5.3. Corporate governance

Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders; good corporate governance should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and its shareholders and should facilitate effective monitoring. The degree to which corporations observe basic principles of sound corporate governance is a determinant of investment decisions, influencing the confidence of investors, the cost of capital, the overall functioning of financial markets and ultimately the development of more sustainable sources of financing. Of particular relevance is the relation between corporate governance practices and the increasingly international character of investment: international flows of capital enable companies to access financing from a much larger pool of investors. Corporate governance arrangements must therefore be fully disclosed and credible, well understood across borders and must adhere to internationally accepted principles if countries are to reap the full benefits of the global capital market, and attract long-term "patient" capital. Corporate governance is therefore one of the key elements in improving economic efficiency and growth, as well as enhancing investor confidence.

5.3.1. National corporate governance framework

According to the *OECD Principles of Corporate Governance*, national corporate governance frameworks should be developed with a view to their impact on overall economic performance, market integrity and the incentives created for market participants. Moreover the legal and regulatory requirements that affect corporate governance practices in a jurisdiction should be consistent with the rule of law, transparent and enforceable. The division of responsibilities among different authorities in a jurisdiction should be clearly articulated so as to ensure that the public interest is served. Finally, supervisory, regulatory and enforcement agencies should have the authority, integrity and resources to fulfil their duties in a professional and objective manner, and their rulings should be timely, transparent and fully explained. Box 8.2 below provides further details on some best-practices for national corporate governance standards.

Regulatory framework pre-2011: CAM Act and industry-specific codes

Prior to 1990, corporate governance in Nigeria was broadly informed by general company law (the *Companies Act* 1968, which was modelled on United Kingdom legislation); this was then repealed and replaced by the *Companies and Allied Matters Act* (CAMA) 1990. The latter required that all financial statements issued in Nigeria comply with accounting standards laid down in the Statements of Accounting Standards issued periodically by the Nigerian Accounting Standards Board (NASB). The CAMA was amended with the guidance of the Nigerian Law Reform Commission in 2004 and complemented by the 2012 *Companies Regulation* (see Chapter 3). CAMA contains provisions for greater accountability by directors, prescribes some formats and contents of company financial statements, and sets disclosure and auditing requirements. However it is recognised as increasingly outdated and inadequate to cover all technicalities of corporate governance.

In 2003 with the passage of the Nigerian Accounting Standards Board (NASB) Act, the NASB Inspectorate Unit was established to strengthen compliance with accounting standards and enhance reliance. The same year, the Nigeria Securities and Exchange Commission (SEC) released its Code of Best Practices on Corporate Governance in Nigeria (2003 SEC Code), the outcome of joint committee work with the Corporate Affairs Commission (CAC). The SEC Code significantly modified the corporate governance landscape in Nigeria, as the first corporate governance code to be issued by any regulator and applicable to all public companies registered in the country (Ofo, 2013).

However the SEC Code was not updated for several years following its release, and numerous gaps have been exposed – including, among others, no provisions concerning: independence of directors; critical board committees; appointment, remuneration and evaluation of directors; independence of external auditors; whistle-blowing procedures; sustainability issues; and general disclosure and transparency issues. To address some of these gaps, a revised SEC Code was released in April 2011.

Over this interval (2003-11), the CAMA and SEC Code had meanwhile been supplemented by three more industry-specific codes of corporate governance, originating mostly from the regulatory framework in place in the financial sector (see Box 5.8). The codes released by the different regulators within the financial sector sought to address new market realities that had emerged since 2003 and that had exposed gaps in the SEC Code. These codes arose in the context of a severe banking crisis in Nigeria, as detailed in Section 5.4 (on financial market development). The crisis resulted from multiple banks exploiting loopholes in domestic accounting and auditing standards, weak capacity and enforcement by regulatory bodies, and widespread creative accounting to boost bank balance sheets. By 2008 more than 70% of stock

Box 5.8. **Regulatory framework for the financial sector – a backdrop to corporate governance reforms in Nigeria**

Each segment of Nigeria's financial sector is regulated by a dedicated agency: among others, banks are regulated by the CBN under the BOFIA Banks and Other Financial Institutions Act; securities markets are regulated by the Securities and Exchange Commission (SEC) under the *Investment and Securities Act* of 2007 (which made SEC the only regulator of the securities market); the National Insurance Commission (NAICOM) is in charge of regulating the insurance sector; and the National Pension Commission (PENCOM) regulates the pensions sector.

CBN's prerogatives in terms of regulation and supervision were considerably reinforced by the *CBN Act* of 2007. It reasserted the independence of the Central Bank (thus setting its objectives in terms of price and output stability rather than government deficit financing). The *CBN Act* also extended CBN's mandate to include the regulation and supervision of the financial system as a whole, while increasing its regulatory prerogatives to include corporate governance issues and internal controls and reforms. In particular, the supervision of the financial sector has been reinforced and placed under the responsibility of the Financial Services Regulation Coordinating Committee, which brings together the CBN, the NIDC, the SEC and NAICOM among others.

As part of this mandate, CBN has issued a number of compulsory prudential guidelines to promote the stability and soundness of the financial sector and ensure public confidence in the system. Among these developments are: the adoption of risk-based supervision, compulsory reporting to the CBN to ensure proper prudential regulation (under the CBN Code 2009 – see below), and the adoption of International Financial Reporting Standards (IFRS). The Bank's supervisory mission is carried out in collaboration with Nigeria Deposit Insurance Corporation (NDIC).

Source: Central Bank of Nigeria.

market capitalisation was thus accounted for by banks that had used margin loans to artificially inflate their share prices, and 2009 CBN inspections revealed that bank non-performing loans amounted not to 5% (as reported in 2008) but in fact to almost 60% (World Bank, 2011).

The three industry-specific codes are as follows:

- The Code of Corporate Governance for Banks in Nigeria Post-Consolidation (2006 CBN Code), issued by the Central Bank of Nigeria in 2006. This was a key element of the widespread banking sector reform (see Section 5.4). Compliance with the provisions of this Code is mandatory for all banks operating Nigeria; however much like the SEC Code, the CBN Code today

remains somewhat outdated with respect to the challenges of the current global economic context in which Nigeria's banks operate.

- The Code of Corporate Governance for Licensed Pension Operators (2008 PENCOM Code) issued by the National Pension Commission (PENCOM) in 2008. This outlines minimum corporate governance requirements for pension fund administrators and custodians, with a view to fostering greater stakeholder confidence; however it does not comprehensively address all features of sound corporate governance.
- The Code of Good Corporate Governance for the Insurance Industry in Nigeria (2009 NAICOM Code), issued by the National Insurance Commission (NAICOM) in 2009. The code is mandatory for all insurance and re-insurance companies under the regulatory supervision of the NAICOM, and emphasises the following principles (among others): proactive, responsible and accountable Board/Management; a management succession plan; compliance with rules and regulations; disclosure and transparency; and effective exercise of shareholders' rights.

Meanwhile neither of Nigeria's two stock exchanges (the Nigerian Stock Exchange and the Abuja Securities and Commodities Exchange) provides any corporate governance listing requirements for its companies; nonetheless NSE together with the Nigeria Institute of Directors has been developing a guide for listed companies since 2012 – which is expected to update these listing requirements.

2010 Roadmap for effective adoption of IFRS and 2010/11 ROSC Report

Given the increasing globalisation of capital markets and following adoption of International Financial Reporting Standards (IFRS) by the European Union, FGN began considering the possibility of listed Nigerian companies to adopt globally accepted, high-quality accounting standards by fully converging Nigerian national accounting standards with IFRS. Yet transitioning from national financial reporting standards to IFRS is not an automatic process – several risks are involved, often creating a need for clarification or interpretation of the provisions of certain IFRS in relation to certain country-specific circumstances. In order to accelerate the transition towards IFRS, an IFRS Roadmap Committee was set up to schedule a phased IFRS adoption. The Roadmap, released in 2010, outlined the following milestones:

- January 2012: adoption of IFRS for all listed public entities and Significant Public Interest Entities (with mandatory reporting for these entities, using IFRS-based financial statements, beginning in December 2012);
- January 2013: All other public interest entities are to mandatorily adopt IFRS; and

- January 2014: Small and Medium Enterprises (SMEs) to mandatorily adopt IFRS, and public entities to adopt International Public Sector Accounting Standards (IPSAS).

The Roadmap report also contained recommendations for the amendments of various laws and regulations containing provisions impacting on financial reporting (such as the CAMA, the Banks and *Other Financial Institutions Act* 1991, *Investments and Securities Act* 2007, etc.) to ensure uniformity and remove ambiguity. The report additionally recommended the rapid enactment of the *Financial Reporting Council (FRC) Bill* so as to bring all financial reporting regulations under one umbrella and ensure ease of compliance. As the next section details, the *FRC Act* was passed in 2011. In its 2010/11 Report on Observance of Standards and Codes (ROSC) for Nigeria, the World Bank commends the adoption of IFRS and the promulgation of the FRC Bill as the "most important areas for further progress" in corporate governance since the first ROSC assessment in Nigeria (2003/04). As of December 2013 the first two objectives of the above Roadmap have been reached, and as a result the IFRS Board officially classified Nigeria as an IFRS country in August 2014 (Chima, 2013). The third step (extension of IFRS to SMEs) has been re-scheduled to begin as of 31 December 2014. To help SMEs prepare for this step, and to facilitate the diffusion of IFRS standards in Nigeria more generally, an IFRS Academy is being set up by the FRC (Iyatse, 2013).

On the other hand the 2010/11 ROSC report found that limited improvements had been made overall. The Government had successfully implemented only 6 of the 14 action plans recommended by the 2003 report. In particular while the momentum on adopting IFRS and passing the FRC Bill demonstrated Government commitment to improving the quality of financial reporting, and while monitoring and enforcement mechanisms of accounting and auditing standards and codes had improved, efforts remained necessary to update the country's statutory framework reporting and strengthen the capacity of accounting and auditing regulatory bodies.

The 2010/11 ROSC also recommended amendment of the CAMA 2004, and better co-operation between the two professional accountancy bodies in Nigeria (the Institute of Chartered Accountants of Nigeria, ICAN; and the Association of National Accountants of Nigeria, ANAN) to serve both private and public sectors. As concerns the CAMA more specifically, the report suggested exempting small-size private companies from statutory audit requirements; this conflicts somewhat with the third step of the Roadmap above, which seeks to extend IFRS to SMEs and risks imposing an unnecessary burden on smaller companies. The ROSC also notes that the CAMA should include, within regulations or guidelines, penalties for noncompliance with applicable accounting standards. Compliance with basic reporting requirements must also be enhanced: although companies are required, as per the CAMA, to

file their records with the Registrar of Companies (within the CAC) annually, enforcement is weak, the penalties for non-compliance are an ineffective deterrent, and many companies do not comply with the deadlines.

Although CAMA has most recently been strengthened by the *Companies Regulations 2012*, which serve as a guide for investors seeking to register business in Nigeria (see Chapter 3), these provide no particular guidance or standards with respect to corporate governance. Rather the 2012 Regulations mainly outline the various registration steps before the CAC and FRC, and contain the relevant application forms for investors.

2011 FRC Act and ongoing creation of a National Code of Corporate Governance

One of the major challenges to the above corporate governance framework up until 2011 was that it remained largely unco-ordinated: the revised (2011) SEC Code, while it applies to all public companies registered in Nigeria irrespective of their sector of operation, does not clearly establish which code takes precedence when its provisions come into conflict with one of the three sector-specific codes (CBN, NAICOM, and PENCOM). The SEC Code simply states that in the case of conflict, the code with the strictest provisions prevail – a judgment which is somewhat arbitrary and open to interpretation. Moreover whereas the industry-specific codes make compliance mandatory, the SEC Code is more permissive.

Most recently and with a view to remedying this situation, the *Financial Reporting Council (FRC) Act* was released in 2011. This establishes the FRC, which replaces the Nigerian Accounting Standards Board (NASB). FRC is today the central authority in Nigeria tasked with (among others):

- developing accounting and financial reporting standards, and reviewing and enforcing compliance with these standards;
- receiving copies of annual reports and financial statements of public interest entities;
- advising the Federal Government on matters relating to accounting and financial reporting standards;
- promoting compliance with the adopted standards issued by the International Federation of Accountants and International Accounting Standards Board; and
- ensuring consistency between standards issued by FRC and the International Financial Reporting Standards (IFRS).

In addition FRC (under its Directorate of Corporate Governance, which is under establishment) is to guide the process of elaborating a national code of corporate governance (discussed below). The authorities intend to roll out this code by the first quarter of 2015 (Oji, 2014). FRC is also expected to harmonise

activities of relevant professional and regulatory bodies relating to Corporate Governance and Financial Reporting. Accordingly, the industry regulators above (SEC, NAICOM, CBN and PENCOM) all sit on the FRC Board, in addition to (among others) the CAC, federal Auditor General, Federal Inland Revenue Service (FIRS), Federal Ministry of Finance, and Nigerian Association of Chambers of Commerce, Industries, Mines and Agriculture (NACCIMA). 23 members from different government regulatory agencies thus sit on the FRC board and have been nominated to the FRC's committee on corporate governance, which is to roll out, monitor and enforce the code.

The forthcoming National Code of Corporate Governance would be enforced at both federal and State levels, with FRC as its custodian. Under the FRC Act, the FRC is indeed empowered to enforce compliance with financial reporting and accounting standards. Any public interest entity or professional accountant in disagreement with the decision of any of the FRC's seven directorates (set up under Part III of the FRC Act) is able to appeal to the FRC's Technical and Oversight Committee. However it is unclear whether FRC will have sufficient capacity to cover all investigation enforcement functions that this entails; members of the National Committee on Corporate Governance (which has been set up by the Federal Minister of Trade and Investment to elaborate the code, under FRC leadership) also note that establishing FRC authority over industry regulators such as CBN or NAICOM may also take time. As recommended by the 2010/11 ROSC report, it will be crucial for FRC to develop formal collaborative arrangements with each of the key financial sector regulators.

The *FRC Act* provides little information on the content of the National Code of Corporate Governance itself, for which a final draft was prepared for 31 December 2013, after which it was planned to be subjected to debate by stakeholders before being transmitted to the Federal Executive Council for endorsement (Iyatse, 2013). Work conducted to date by the National Committee on Corporate Governance suggests that the main items addressed will concern not only financial reporting but especially board activities, including: separation of CEO and chairmanship responsibilities and functions; ensuring the independence of directors; and protecting minority shareholders (especially because many boards of large Nigerian companies currently have boards that are heavily dominated by majority shareholders). It is expected that a code of ethics and labour relations will also be included. Altogether, the forthcoming code is hoped to provide a central template that will serve as the overarching code for all government-linked entities as well as private enterprises – rather than enshrining corporate governance principles only in the laws that created each entity.

The FRC has affirmed its commitment to cover both SOEs and the private sector within the forthcoming code, in two dedicated instruments. Indeed

sound and enforceable corporate governance standards for SOEs, alongside private firms, can help structure the ownership function of these enterprises so as to create a more level playing field and competitive market conditions *vis-à-vis* private investors. Processes must be put in place to reduce the level of state interference in day-to-day management of SOEs, and to ensure that board members effectively carry out their role of strategic oversight rather than to serving as a conduit for undue political pressure. More broadly, SOEs must be effectively held accountable to the government, the public, and to other shareholders. These considerations are addressed in more detail in Section 5.3.2.

Due to the greater ease of developing a code for the private sector, which is subject to fewer political considerations and rigidities, progress on the private sector code has been more rapid to date. Yet the government has stressed that considerations for SOE governance should not be relegated to the backseat, given the prominent competition and efficiency challenges posed by SOEs across most sectors of the economy. Therefore in order to avoid confusion and so as to maintain momentum on both fronts, rather than first releasing the private sector code both codes are to be enacted concomitantly.

The coverage of both SOEs and private corporations, and the creation of a Directorate of Corporate Governance within FRC, would thus be significant steps forward in the legal and institutional framework. The Directorate would be the first regulatory authority specifically mandated to enforce corporate governance in Nigeria. This would reduce the possible overlaps and blurring of responsibilities among the industry-specific regulators above. Under Part IV of the FRC Act, in addition to issuing a national code of corporate governance the Directorate of Corporate Governance is expected to assess the need for corporate governance in both public and private sectors, and to oversee a mechanism for their periodic revision. Given that both the SEC and CBN codes suffered in the past from their rigidity and could not keep up with rapid evolutions in international corporate governance standards, the provision for periodic revision of a code of corporate governance is particularly useful.

5.3.2. Corporate governance of state-owned enterprises

Distinct corporate governance challenges faced by SOEs: Accountability, finance and competitiveness

SOEs face distinct governance challenges from the private sector – which calls for the elaboration of codes of corporate governance (or chapters within these codes) that are tailored to the characteristics of SOEs in particular. SOEs may suffer just as much from undue hands-on and politically motivated ownership interference, as from totally passive or distant ownership by the state. There may also be a dilution of accountability, since SOEs are often

protected from two major pressures for sound management in private sector corporations: takeover and bankruptcy. In addition common performance challenges for SOEs include insufficient professionalization of boards, which may moreover need to be better shielded from the political apparatus; and the need to upgrade or downsize SOEs to render their functioning more efficient (Sultan Balbuena, 2014).

More fundamentally, corporate governance difficulties derive from the fact that the accountability for the performance of SOEs involves a complex chain of agents (management, board, ownership entities, ministries, the government), without clearly and easily identifiable principals. Thus Nigeria hosts several types of SOEs, from those which are incorporated according to ordinary company law (such as the Power Holding Company of Nigeria, PHCN; or the Nigerian National Petroleum Corporation, NNPC), to those which have been established according to special statutory laws (for instance the Nigeria Ports Authority, established under the 1999 NPA Act), and to others which are embedded in general government and in many cases perform non-commercial functions ("parastatals", such as the Bureau of Public Enterprises or the Nigerian Broadcasting Corporation). Moreover certain SOEs have regulatory functions in addition to ownership functions, which are not always clearly separated – for instance NNPC has been commercialised into 11 strategic business units, covering the entire spectrum of commercial oil industry operations, but regulates and supervises the oil industry on behalf of the Nigerian Government. This complicated landscape makes it necessary to harmonise the disparate legal and regulatory frameworks under which these diverse SOEs operate. This web of accountabilities must be clearly structured in order to ensure efficient decisions and good corporate governance (OECD, 2005).

On the financing side, complications also arise and make sound standards of financial reporting all the more important. SOEs can be fully subsidised entities carrying out social or public objectives, commercial entities with mainly commercial objectives, or semi-commercial or partially subsidised entities (as in many infrastructure markets). In the latter case, the SOEs often suffer from inadequate capitalisation, whereby the debt and finance on which they must rely to fund basic operations seldom suffices to fund infrastructure investment (especially rehabilitation and upgrading). In addition tariff structures are often set artificially low for reasons of social access and affordability, forcing the SOE to function below cost recovery and to rely on subsidies which place heavy liabilities on government (see Section 5.1.6 on pricing of infrastructure services). Further hampering their cost recovery prospects, many SOEs face revenue collection deficiencies. All of these funding challenges are compounded by the lack of adequate reporting systems and financial monitoring; this reduces the transparency and accountability surrounding SOE cost structure, and complicates exposure of where SOEs may be over or under-financed.

In addition to the accountability and financing considerations above, establishing a dedicated legal and regulatory framework for SOE governance should help work towards a more level-playing field in markets where state-owned and private sector companies compete in order to avoid market distortions. Therefore SOEs should not be exempt from the application of general laws and regulations, including high quality accounting and auditing standards. Sound financial reporting by SOEs can notably pave the way towards better informed decisions regarding private participation in infrastructure markets: structural separation or PPP projects in these markets should not be embarked upon without prior (and regular) assessment of the SOE's performance and comparative advantage for infrastructure deployment *vis-à-vis* the private sector. Reliable and regular financial disclosure can indeed help identify in which functions SOEs under-perform, and where private provision or public-private partnerships would be best-suited. SOEs themselves should moreover have flexibility in adjusting their capital structure, and should face competitive conditions regarding access to finance.

For SOEs operating in vertically integrated infrastructure markets, higher standards of corporate governance can also result from efforts towards greater "unbundling" of the markets (as discussed earlier in this chapter). If well implemented and subject to the appropriate cost-benefit analysis ex-ante, this can subject SOEs to more competitive pressure in some of its infrastructure delivery functions. Moreover even if the most extensive form of structural separation (ownership separation) is not undertaken, even the least intensive forms (such as accounting separation) can allow for a clearer attribution of costs and revenues – and thus enhance SOE efficiency and transparency.

State of play of SOE reform in Nigeria

In Nigeria as in many developing countries, efforts at SOE reform began by restructuring state-owned firms as part of broader structural reform policies. While for most sectors this "marketisation" was seen as an intermediary step towards privatisation (as was the case with the corporatisation of PHCN in the power sector over 2005-10), the second step and the actual introduction of private actors in infrastructure markets has been subject to delays or has stalled altogether. Although momentum towards outright privatisation has recently been renewed in the power sector and to some extent in the rail sector, in others (such as rail or airways) the focus of the process has changed from privatisation toward improving the efficiency of SOEs destined to continued government ownership.

At federal level, as of 2013 Nigeria counted 541 statutory, non-statutory federal commissions and agencies, which make the average cost of governance ranked among the highest in the world. With a view to reducing the financial burden of SOE on federal government and to enable government to function

more efficiently, a presidential Committee on Rationalisation of Federal Government Parastatals and Agencies (the "Oronsaye Committee") was set up in late 2011. The Committee reviewed the activities of the 541 federal parastatals, commissions and agencies, and submitted its report in April 2012. The Federal Executive Council undertook its review of the report, which recommends the reduction of federal statutory agencies from 263 to 161, in June 2013 (see Box 5.9). According to the 2015 Budget Speech, partial implementation of the government's "Whitepaper on the Rationalization of Agencies", based on the Oronsaye Report, has begun – resulting in savings of about 6.5 billion Naira in the 2015 Budget. The Budget Speech calls for greater efforts over the medium-term to cut the cost of governance across all tiers and branches of government, and recognises that this requires support from the legislature to amend the laws underpinning certain agencies. A list of such laws should be submitted to the National Assembly for consideration by the second quarter of 2015 (FRN, 2014).

Box 5.9. **Content of FEC discussions on the recommendations of the Committee on Rationalisation of Federal Government Parastatals and Agencies ("Oronsaye Committee")**

The Committee on Rationalisation of Federal Government Parastatals and Agencies, in its April 2012 report, recommended the abolition of 38 federal agencies, the merger of 52, and the reversion of 14 agencies to departments in the relevant ministries. The management audit of 89 agencies and the discontinuation of government funding of professional bodies and councils was also recommended. By early July 2013 the content of discussions by the FEC tended towards the following potential reforms:

- Dismantling of: the Bureau of Public Enterprises (BPE); Fiscal Responsibility Commission (FRC, distinct from the Financial Reporting Council); National Salaries, Incomes and Wages Commission (NSIWC); National Poverty Eradication programme (NAPEP); Utilities Charges Commission (UCC); the National Economic Intelligence Committee (NEIC) and the Public Complaints Commission (PCC).
- Merger of: the Nigeria Export Promotion Council (NEPC) and the Nigeria Investment Promotion Commission (NIPC); Public Complaints Commission (PCC), which is to be merged with Human Rights Commission; and the Economic and Financial Crimes Commission (EFCC) with the Independent Corrupt Practices and Other Related Offences Commission (ICPC).

Source: Premium Times Nigeria, "The Review Committee chaired by the President on draft white paper on the report of the Presidential Committee on the restructuring and rationalisation of federal government parastatals, commissions and agencies", 11 June 2013.

The drastic conclusions of the Oronsaye Report exemplify to what extent the evolutions from state ownership towards commercialisation and privatisation can be delicate and complex. These transitions raise concerns on the managerial and technical capabilities of SOEs, and can open avenues for irregular practices including conflicts of interest and outright corruption – as have been alleged on a large scale in Nigeria. Managing these transitions thus require that adequate attention be placed on rationalising state ownership and on establishing clear ownership policies that are supported by sound corporate governance principles and practices.

Clearly identifying the exercise of ownership rights within the state administration is an important step towards greater SOE accountability, and can be facilitated by setting up a co-ordinating or ownership entity, which should be held accountable to representative bodies such as the Parliament. In addition an ownership policy, specifying the purpose of state ownership over the long-run, is a prerequisite to providing individual SOEs with clear objectives (both commercial and non-commercial), and to ensuring that the government follows a consistent and coherent approach as the enterprise's owner. This can also create more predictability for private investors hoping to participate in possible divestiture of SOEs.

Benefits of a dedicated code of corporate governance for SOEs

High standards of transparency, disclosure and accountability are thus among the most important and challenging aspects of SOE governance. The basic challenge is to ensure that SOEs are fully accountable *vis-à-vis* national fiscal budget processes. This is especially of concern where SOEs are carrying out public service obligations and are either directly compensated by the State or enjoy a privileged position in the marketplace. The question of board independence is highly relevant in this regard, as boards can hold SOEs to specific performance and reporting objectives. In Nigeria as in most jurisdictions in Africa, civil servants (and sometime Ministers or other persons related to the executive powers) sit on boards. This raises clear independence concerns, especially as board appointment processes are frequently subject to significant political controls and are vulnerable to changes in government. An additional element necessary to safeguard corporate governance within SOEs is therefore the clear distinction between policymakers and SOE directors (particularly government nominees drawn from the private sector).

A national code of corporate governance targeted towards SOEs can provide guidance in establishing such a distinction and in identifying the roles that policymakers and directors can and should respectively play, as well as how they might better interact to face common challenges. In light of the above, establishing corporate governance guidelines for SOEs should also include a clear categorisation of their activities and of the separation between

their social/developmental and commercial activities. A clear ownership policy, together with strong financial reporting standards, can give policymakers a full picture of the state-owned sector, in order to guide decisions concerning in which sectors state ownership will be retained and which forms of state ownership are most suitable. Malawi, Mauritius, Zimbabwe and South Africa are among the African countries that have established ownership policies or governance codes applicable to SOEs in particular (Sultan Balbuena, 2014).

It is apparent that beyond the ad-hoc merger and dismantling measures suggested by the 2012 report of the Committee on Rationalisation of Federal Government Parastatals and Agencies, a far more structured and permanent approach to enhancing corporate governance standards for SOEs indeed remains necessary in Nigeria. Performance contracts can be a first step in this direction, as is the progress made in the transition towards International Financial Reporting Standards (IFRS). Yet performance contracts are only effective if the State clearly identifies its objectives and expectations for the company, and if the SOE is fully transparent about its cost structure. Thus proper financial reporting by SOEs, together with sufficient board independence, remain core pre-requisites for more extensive forms of appropriate corporate governance. In addition to incentives-based means of encouraging better corporate governance by SOEs, legal obligations – or at least clearly stipulated rules providing SOE-specific guidance – are thus essential.

The potential coverage of SOEs by the forthcoming code of corporate governance, as is being considered by FRC, would be a timely element to fill these gaps. Alongside, efforts will remain necessary not only within the FRC taskforce but also at higher political and corporate levels, in order to address sensitivities and bottlenecks that may otherwise impede effective implementation and enforcement of the Code once it has been enacted. A first step would involve raising awareness about the benefits of SOE coverage. In view of the on-going elaboration of this Code, Box 5.10 provides some best-practices and OECD standards for corporate governance (reviewed in 2014).

Box 5.10. **Best-practices and OECD standards for corporate governance**

The corporate governance framework should: ensure the equitable treatment of shareholders; put measures in place to monitor and prevent corporate insiders and controlling owners from extracting private benefits; ensure that companies meet the market demand for timely, reliable and relevant disclosure, including information about the company's ownership and control structure; and ensure that the board plays a central role in the strategic guidance of the company.

Box 5.10. **Best-practices and OECD standards for corporate governance** *(cont.)*

- **Equitable treatment of shareholders**

The *OECD Principles of Corporate Governance* stress that basic shareholder rights should include the right to: secure methods of ownership registration; convey or transfer shares; obtain relevant and material information on the corporation on a timely and regular basis; participate and vote in general shareholder meetings; elect and remove members of the board; and share in the profits of the corporation. Shareholders should also have the right to participate in, and to be sufficiently informed on, decisions concerning fundamental corporate changes. Likewise they should have the opportunity to participate effectively and vote in general shareholder meetings and should be informed of the rules, including voting procedures, that govern such meetings. In addition procedures and institutional structures should be put in place for legal redress in cases of violation of shareholder rights, and should function as a credible deterrent to such violations.

- **Disclosure of company information**

Disclosure requirements should apply not only to private companies but to public enterprises as well. Requirements should include, but not be limited to, material information on: the financial and operating results of the company; company objectives; major share ownership and voting rights; remuneration policy for members of the board and key executives, and information about board members, including their qualifications and the selection process; related party transactions; foreseeable risk factors; issues regarding employees and other stakeholders; and the content of any corporate governance code or policy and the process by which it is implemented. In addition annual audits should be conducted by independent, competent and qualified, auditors (OECD, 2004).

- **Strategic guidance of the board**

The board should play a central role in the strategic guidance of the company, the effective monitoring of management, and be accountable to the company and its shareholders. The corporate governance framework should notably recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs and the sustainability of financially sound enterprises (OECD, 2004).

- **Code of ethics and considerations for responsible business conduct**

Traditionally corporate governance issues have been viewed as almost exclusively limited to financial disclosure, board structure, and shareholder rights. However elements of responsible business conduct (RBC) are increasingly

Box 5.10. **Best-practices and OECD standards for corporate governance** *(cont.)*

coming to the fore, particularly in countries such as Nigeria where many large businesses have had a weak track record in terms of environmental governance and labour relations. The elaboration of a code of corporate governance could therefore stretch beyond the traditional focus (which is especially geared towards the financial sector), and incorporate a voluntary code of ethics for companies to follow. Indeed it is important for government to make clear for investors the distinction between its own role and responsibilities (e.g. effectively enforcing laws on respecting human rights, environmental protection, labour relations and financial accountability) and those ascribed to the business sector. Government can also support RBC initiatives through facilitation (setting overall policy frameworks), partnering with business (thus combining public and private resources and skills), and endorsing (showing political support for particular kinds of good RBC practice).

Source: OECD (1999), *OECD Principles of Corporate Governance*, OECD Publishing, Paris, *http://dx.doi.org/10.1787/9789264173705-en* (reviewed in 2014).

5.4. Financial sector development

Financial sector development has a strong potential to accelerate economic growth and improve social welfare. Efficient deposit collection, financial intermediation, and credit markets increase consumption and investment levels, while reducing reliance on potentially unstable and expensive foreign sources of funding. The financial sector can also improve corporate efficiency by imposing discipline on firms to perform and by providing risk mitigation mechanisms. Finally, well-functioning financial markets may improve the well-being of populations, by giving them access to cash management services, and by offering the possibility to insure against risks.

5.4.1. *Evolution in structure and regulation of Nigeria's financial sector*

Nigeria's financial sector is dominated by banking institutions, which represent 79% of total financial assets in the country, followed by insurance companies and pension funds (15% of total assets). Non-banking financial institutions stand at 7% of total assets. As of end 2011, the financial sector included 21 commercial banks, 876 microfinance banks (MFBs), five Development Finance Institutions, 61 insurance companies, two reinsurance companies, 21 pension funds and the Asset Management Company of Nigeria (AMCON) (IMF, 2013). Gross financial system assets represented 61% of GDP in 2011 (IMF, 2013).

Two rounds of financial sector reforms in the 2000s

Before 2004, the Nigerian financial sector was constrained by several factors. According to the government's Financial Sector Strategy 2020, these shortcomings included the low level of aggregate banking credit to the economy (less than 20% of GDP), the oligopolistic structure of banks (10 banks out of 89 accounted for over half of total banking assets, many banks being very small), poor corporate governance (including corruption and non-compliance with regulatory requirements), low banking access and shallow financial institutions in other sectors than banking (insurance, pension funds, stock market). In particular, such a situation resulted in high levels of inefficiency, high operating and intermediation costs and increased the risk of systemic crises (Cowry, 2009). A first round of reforms was undertaken in 2004 to address some of these issues, including:

- sector reforms: consolidation of banks (from 89 to 25 banks), revoking licenses for underperforming and mismanaged banks, withdrawing public sector funds, limiting government ownership to 10%; and
- prudential and supervisory reforms: adoption of a risk-based regulatory framework, and of distress resolution mechanisms.

These reforms did not, however, succeed in improving significantly the soundness of the financial sector. Although the reforms led to continued growth in bank assets – deposit money bank assets grew from 17% of GDP in 2005 to 44% in 2009 – and regional expansion of domestic banks, several governance deficiencies continued. Newly consolidated banks continued to demonstrate increased risk appetite to enhance shareholders' profit, as attested by increased speculation on the bond and equity market and bank diversification into other financial segments such as insurance, asset management and trading. Second, corporate governance and risk management were still weak, leading to higher levels of risky loans (due to poor due diligence on loans), non-compliance with prudential requirements and several cases of insiders' dealing. A financial asset bubble progressively took place, with bank stocks increasing by nine times during the period.

The combined effects of persistent domestic financial instability and the global financial crisis led to a severe banking crisis in 2009. The oil market and equity market drop stressed the credit portfolios of several banks, especially the ones with high exposure to oil and stock market activities. The global financial crisis also resulted in liquidity tightening for banks, already affected by capital outflows and lower oil earnings, and having to set higher loan loss provisions, which resulted in a severe domestic credit crunch. The crisis involved 40% of the banking sector in terms of assets: an IMF examination revealed that 10 banks were either insolvent or undercapitalised (IMF, 2013). In 2009, the government engaged in a second round of key structural reforms, led

by the Central Bank of Nigeria (CBN), to improve soundness of the financial sector (see Box 5.11 below, as well as section 5.3 above as concerns corporate governance and regulatory reforms).

Box 5.11. **Structural reforms of Nigeria's banking sector in 2009**

The reforms launched in 2009 by CBN to improve soundness of the financial sector fall under three axes. The reforms were instrumental in maintaining all banks afloat, and no bank bankruptcy occurred. Pursued up until 2011, these reforms have been largely effective in restoring the soundness and stability of the sector:

1. **Tightening of regulation and supervision:** i) enforcement of the CBN Code of Corporate Governance (see Section 5.3.1); ii) review of the contingency planning framework for distressed banks; iii) strengthening of institutional framework for macro prudential supervision and intervention (through the Financial Sector Regulatory Coordinating Committee) and capacity building (Supervisory Intervention Framework of 2011, training of supervisory staff, automation of reporting and processes); iv) implementation of a consolidated risk-based supervision framework and issuance of holistic guidelines covering all sub-segments of the financial sector.in addition the universal banking model, whereby banks could operate in several segments (e.g. deposit collection and share trading), was abolished and banking activities separated.
2. **Injection of liquidity into the banking system:** Although the state participation in banks was limited to 10% in 2005, the government assumed ownership of 3 distressed banks through the NIDC (Afribank, Bank PHB and Spring Bank) and injected USD 4.5 billion of liquidity into the banking sector, notably through AMCON which was established to address banks' balance sheet issues (by purchasing Non-Performing Loans and toxic assets and by recapitalising banks, in exchange for sovereign guaranteed bonds. The CBN publicly committed to covering depositors and foreign creditors against losses).
3. **Confidence building operations by CBN:** i) ensuring that it would not let any bank fail and reinforcing creditor/depositor protection mechanisms (guaranteed inter-bank deposits, introduced a guarantee on all deposits and foreign loans through the Nigeria Deposit Insurance Corporation); ii) guidance to banks for public disclosure of information – including via a series of regulatory and supervisory guidelines, such as the implementation of IFRS accounting in 2012, and the 2009 corporate governance code (see Section 5.3.1); iii) consumer protection ("Know Your Customer") guidelines; and iv) ownership takeover and management replacement in several banks.

Source: Central Bank of Nigeria.

Reforms were likewise undertaken to enhance the soundness of Nigeria's capital markets over this period, as the financial crisis and subsequent stock market crash shed light on several shortcomings in capital markets regulation. In particular, several cases of insider dealing, share price manipulation and non-compliance with disclosure requirements were brought up. Government reforms, notably a campaign against insider dealing, the enforcement of penalties to improve compliance, and the enhancement of market regulation and shareholder management, contributed to restoring relative confidence in the stock market.

Current state and structure of Nigeria's financial sector

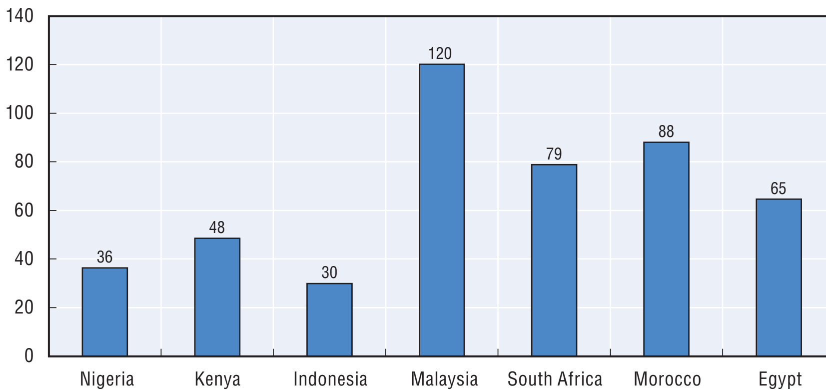
Banking sector and other financial institutions. As of 2011, the Nigerian banking sector was comprised of 21 banks, 13 of which were domestic private-owned banks and only three of which were state-owned (as part of CBN's financial reforms). In spite of the dominant position of domestic institutions, international linkages in the sector are increasing: the share of foreign banks in total financial assets has grown threefold between 2006 and 2011 and several domestic banks have a sufficient capacity to expand regionally. The sector is relatively concentrated, with six dominant banks (five domestic and one international) representing over 60% of banking assets. The largest bank accounts for over 25% of market capitalisation and the top five banks account for approximately 60%. The banking went through a movement of drastic consolidation, from 89 banks in 2005 to 21 banks in 2012.

The soundness and stability of the banking sector has been considerably enhanced as a result of the reforms outlined above. The capital adequacy ratio of the banking sector increased from 4% in 2010 to 18% in 2012, above the regulatory Basel III requirement of 10.5%; and the liquidity ratio reached 64% in 2012, up from 47% in 2010. The share of non-performing loans was divided by four between 2011 and 2012, from 9% to 3.5%, well below the acceptable CBN guideline of 5%, as AMCON was mandated to buy back low-quality loans (OECD, 2012). The Capital Adequacy ratio for the eight largest banks reached 21% in 2012, up from 17% in 2011, and above the 15% CBN regulatory threshold. Finally, the average Return on Equity (ROE) of the sector stands at 9% (IMF, 2013) and 7 Nigerian banks were projected to deliver on average 18-20% ROE for 2012 (OECD, 2013a). Overall, Nigeria's banks thus appear to be stable, well capitalised, liquid and profitable. According to the IMF's 2013 assessment, "stress tests suggest that most Nigerian banks could withstand extreme shocks" in the future.

However, the banking sector remains underdeveloped when benchmarked to comparable peers. As illustrated by Figure 5.5, bank assets to GDP stand at 36%, higher than Indonesia (30%) but much lower than South Africa (79%), Morocco (88%) or Malaysia (120%). The share of foreign investment is also

Figure 5.5. **Deposit money bank assets in Nigeria and comparator economies, 2011**

% of GDP



Source: World Bank Global Financial Development Database (2013a), *http://data.worldbank.org/data-catalog/global-financial-development.*

relatively low, and although FDI of USD 1 billion was recorded in the sector for 2007 alone, foreign bank assets represented only 3% of total bank assets in 2009.

Other financial institutions which have gained importance over the past few years include government-backed development finance institutions, which have specific sectoral mandates on agriculture, infrastructure, SME lending, housing and export-import, development finance schemes (see Table 5.3) and microfinance banks. In particular, microfinance has been recognised as a key activity in enhancing access to financial services for SMEs and low-income households (see Box 5.14).

Capital markets. As for capital markets, the Nigerian Stock Exchange (NSE) grew exponentially between 2006 and 2008, before dropping sharply during the global and domestic financial crisis and slowly recovering since then. Market capitalisation dropped from USD 80.6 billion (30% of GDP) in 2008 to USD 52 billion (12% of GDP) in 2009, and recovered to USD 52 billion (12% of GDP) in 2012 (IMF, 2013). While over 100 companies started listing in 2006-07, only six new companies have listed since 2009, bringing the total number of listed companies to 202. Collective investment schemes (bond funds, equity funds, etc.) remain marginal, 43 funds holding about USD 600 million of assets as of 2012.

By contrast to the banking sector, however, the IMF notes that the capital market remains "relatively small, with low investor confidence since the crisis, and large sectors of the economy underrepresented". The Nigerian capital markets stood at USD 74 billion in 2011 and represented 29.2% of GDP, well below such comparable peers as South Africa (60% of GDP), Kenya (56%)

and Malaysia (250%) (see Table 5.2). The equity market is dominated by a few companies, the top five companies accounting for about 60% of total market capitalisation, and the leading company for about 25%. Equity trading remains dominated by foreign investors (share trading represented 60% of total capital importation into the country, well ahead of FDI), which may pose serious threats to the stability of the stock market in terms of volatility of inflows, and highlights the necessity to tap into domestic resources for financial markets investments. Overall, the equity market is more developed than the bond market, the former accounting for 17% of GDP and the latter for 13%. Hence, there is a need to improve the long-term stable financing capacity of capital markets and reduce speculation.

Table 5.2. **Comparative size of capital markets**

% of GDP

	Nigeria	South Africa	Malaysia	Kenya
Government bonds	11.1	30.6	54.1	23.0
Non-government bonds	1.4	27.0	54.9	2.8
Equities	16.7	2.1	141.8	30.3

Source: IMF (2013).

Institutional investors. The non-bank financial sector likewise remains to be developed. Institutional investors, namely insurance and pension funds, held 15% of total financial assets as of 2011. Although this figure has increased almost fourfold since 2006, the share remains low compared to the 79% held by the banking sector. In the insurance sector, the total premium income represented 0.7% of GDP, about a tenth of the average OECD penetration rates (IMF, 2013). Growth prospects in the sector are important, as a result of the market growth potential as well as the various government's reforms and incentives: pension fund assets represent 7% of GDP (USD 15 billion) and are projected to grow to 20% of GDP (USD 100 billion) over the upcoming 10 years; the insurance industry size is expected to triple over the next years to reach 1% of GDP (OECD, 2013a).

Islamic finance. Islamic finance, also referred to as profit-loss sharing banking, has a non-negligible growth potential in the country. Two banks were licensed to conduct Sharia-compliant financial activities in 2012 (Jaiz Bank and Stanbic IBTC Bank), but the sector is still in need of a sound and consistent regulatory framework, one that would be in line with conventional banking regulation to avoid arbitrage opportunities and include risk-based supervision (IMF, 2013). The segment is currently regulated by the Framework for the Regulation and Supervision of Institutions Offering Non-interest Financial Services in Nigeria.

Government priorities for the financial sector and remaining challenges

Financial sector development has been highlighted as a key priority by the federal government of Nigeria (FGN), which has committed to ensuring both the stability and growth of the sector. The Transformation Agenda seeks to "ensur[e] access to long-term and stable access to finance". The Financial Sector Strategy 2020 sets three priorities for the upcoming decade:

- Strengthening the domestic financial market, by: developing internal capacity and product offerings; enhancing bank lending; improving access to finance; encouraging a savings culture; integrating the informal financial sector into the formal one; fostering cross-border investment and encouraging regional expansion of domestic banks.
- Establishing a sound and consistent framework for the development of the financial sector, through: supervisory and legal guidelines; enhancing infrastructure (including information technology, transportation, data); and developing human capital for the financial services industry.
- Developing into an international finance centre, by: allowing for full foreign ownership in the financial sector, setting up tax incentives, and ensuring currency convertibility and foreign exchange stability.

Several challenges need to be overcome to achieve the government's goals, improve the soundness of Nigeria's financial system and increase its contribution to the real economy. Although the World Bank's *Doing Business* rankings highlighted the country's progression in terms of getting credit (see Box 5.12 further below), access to financing remains highlighted as the main impediment to doing business in the country by the World Economic Forum's *Global Competitiveness Index* for 2014-15. The availability of financial services and access to loans pose particular problems, in addition to high costs of financial intermediation, and notably, high interest rates and high transaction costs, as

Table 5.3. ***Global Competitiveness Report* rankings 2014-15: Financial market development**

Nigeria and comparator economies, out of 148 economies

Section	Nigeria	Kenya	South Africa
Availability of financial services	87	56	6
Affordability of financial services	122	64	21
Financing through local equity market	46	30	3
Ease of access to loans	137	33	32
Venture capital availability	131	43	37
Soundness of banks	78	54	6
Regulation of securities exchanges	65	47	1
Legal rights index, 0-10 (best)	11	1	43

Source: World Economic Forum (2014), *Global Competitiveness Report 2014-2015*.

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Box 5.12. **Financial exclusion and the informal financial sector**

According to a survey by Enhancing Financial Inclusion and Access (EFinA), financial inclusion has been improving in Nigeria over the past 5 years. While 40% of Nigeria's population (amounting to 35 million people) was excluded from the financial system (whether formal or informal) as of 2012, this figure is up from 53% in 2008. The share of banked population has risen from 21% in 2008 to 33% in 2012, The government set a financial exclusion target of 20% of the population by 2020, The government's efforts will need to focus on two segments of the population to achieve this objective: the unemployed and those with an irregular income.

The size of the informal sector has also been decreasing, from 24% in 2008 to 17% in 2012. The informal sector is defined as all adults who do not have any banked or formal other products but have access to or use only informal services and products. This includes savings clubs/pools, moneylenders; as well as remittances. However, this figure is still high when compared to other countries: the informal financial sector in South Africa represents only 8% of the population. The population segments most concerned by the informal financial sector in 2012 were farmers (52%) and dependents (48%).

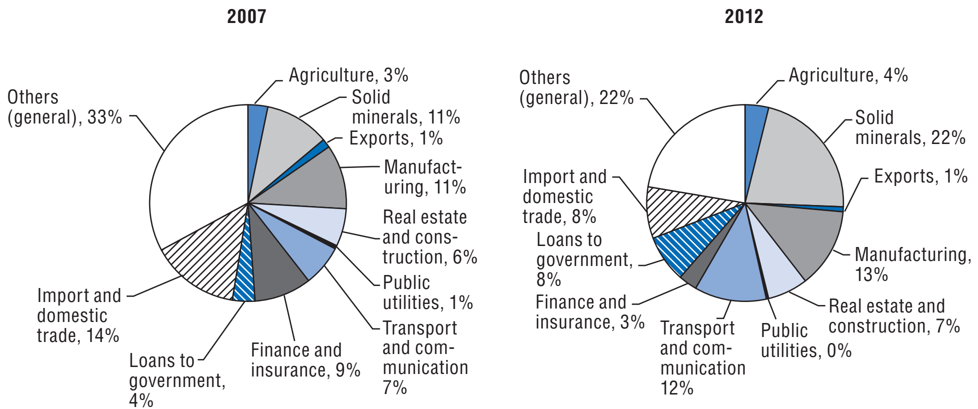
Source: Enhancing Financial Inclusion and Access (2012).

illustrated by Table 5.4. Although some progress has been made compared to 2012 in terms of availability of financial services and soundness of banks, Nigeria's position in all other categories of the survey has declined when compared to previous editions, and the country is outperformed by Kenya and South Africa in almost all categories. Low levels of financial inclusion and a high share of informal financial activities also constitute an important challenge (Box 5.12).

5.4.2. Financing the real economy: Access to finance and development finance

Although banking credit to the private sector is on the rise – from 33% of GDP in 2010 to 42% in 2012 – conventional bank lending has proven to be insufficient to achieve the government's development goals. Several strategic sectors represent only a marginal part of total lending, which still excludes a large part of the economy, notably SMEs. The sector split of bank credit, as illustrated on Figure 5.6, shows a clear preference of banks for lending to mineral extraction companies (22% of total bank credit in 2012, up from 11% in 2007) and manufacturing firms (13% in 2012), while lending to agriculture account only for 4% of total lending. Financial intermediation needs to be strengthened and broadened: 40% of total population was excluded from the financial system

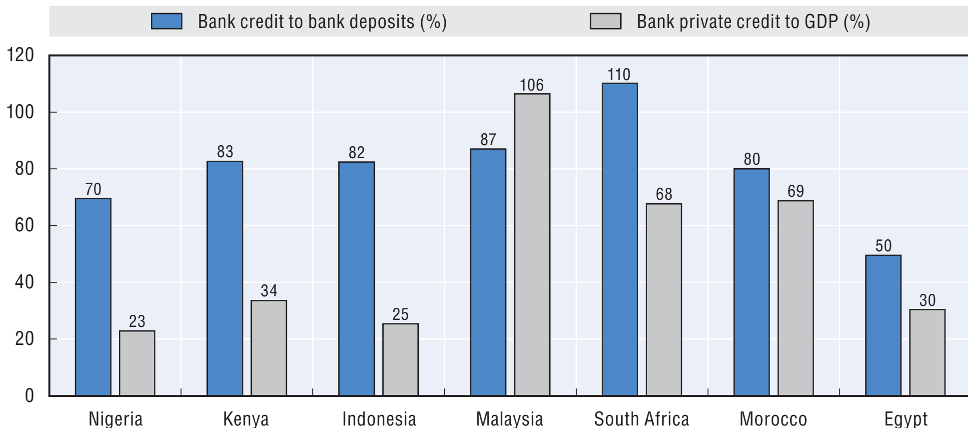
Figure 5.6. **Conventional bank credit breakdown in Nigeria**



Source: Central Bank of Nigeria.

as of 2012 and SMEs benefitted from only 5% of total bank lending in 2011 (OECD, 2013a). More generally, banks are reluctant to expand their lending portfolio and, as a consequence, the credit-to-deposit ratio stood at 70% in 2011, much lower than Kenya (83%) or South Africa (110%); and private credit amounted to 23% of GDP the same year (Figure 5.7).

Figure 5.7. **Selected banking sector ratios for Nigeria and comparator economies, 2011**



Source: *World Bank Global Financial Development Database* (2013a), *http://data.worldbank.org/data-catalog/global-financial-development.*

Access to finance remains constrained by several factors, including the high cost of borrowing (with an average interest rate of 30%), banks' reluctance to lend to SMEs and lack of long-term financing (OECD, 2013a). While such

situations are widespread across developing countries, some best-practices exist in this domain; for instance the South African legal rights framework for the financial sector includes provisions on collateral use and debtor/creditor protection, and a credit registry is made available to all lenders and borrowers (regardless of their size). As a result South Africa has been highlighted as the best-performing country in the world for getting access to credit by the World Bank's Doing Business rankings in 2012 and 2013 (Box 5.13).

Box 5.13. **An improved Doing Business ranking**

Nigeria has succeeded in improving its ranking for "getting credit" in the World Bank's Doing Business report, from 38th country in 2012 to 23rd country in 2013, out of 185. The country notably improved its score for depth of credit information (from 3 to 4 out of 6), and the Bank included for the first time in 2013 an indicator for private bureau coverage in its calculation of Nigeria's score. Although the rankings in terms of strength of legal rights (9/10, compared to 6/10 for Sub Saharan Africa and 7/10 for average OECD countries) and depth of credit information (4/5) are satisfactory, the country is still lacking proper credit information sharing, through a public credit registry or private credit bureau. The existing public credit registry covers 0.1% of adults only (as opposed to 7.7% in Sub-Saharan Africa on average and 31.5 in OECD countries), and private bureau coverage stands at 4.1% of adults only (25.6% for Sub-Saharan Africa and 74.6% for OECD countries). Other reforms that could be implemented to improve the ranking include:

- in the legal rights index: ensuring that secured creditors are paid first (i.e. before general tax claims and employee claims) when a business is liquidated; and
- in the depth of credit information index: ensuring the registry distributes credit information from retailers, trade creditors or utility companies as well as financial institutions; and guaranteeing by law that borrowers can inspect their data in the largest credit registry.

Doing Business rankings in terms of getting credit aim at assessing the sharing of credit information and the legal rights of borrowers and lenders. In the region, South Africa was ranked first for getting credit in 2013, followed by Kenya (12), Nigeria (23), Ghana (23) and Botswana (53). The regional average ranking for Sub-Saharan Africa was 109 for 2013.

Source: World Bank Doing Business (2013), *www.doingbusiness.org/data/exploreeconomies/nigeria*.

The Federal Government of Nigeria recognises that such best-practices exist, and has adopted a holistic strategy to improve access to finance across the economy. Relevant initiatives focus on rural financing and SME financing, and generally fall within the following areas of intervention:

- Direct financing and intermediation: through Development Finance Institutions, Development Finance schemes and other initiatives, the government provides long-term favourable funding to companies in priority sectors (including agriculture, manufacturing, and SMEs – Table 5.5 lists several such schemes). These funds are usually made available through banks (as Box 5.14 illustrates with the case of Nigeria's Bank of Industry).
- Financial facilitation: guarantee schemes are provided to improve bankability of projects and lending incentives to banks, including capped interest rates and reduced transaction/financing costs (these features are requirements for banks intending to lend to specific segments of the real economy).
- Technical advisory services and project consulting are offered so as to improve performance and lending eligibility of companies in some sectors.

Table 5.4. **Selected examples of FGN development finance initiatives**

Development finance schemes	Sector	Year
Agricultural Credit Guarantee Scheme Fund	Agriculture	1977
Agricultural Credit Support Scheme	Agriculture	2006
Commercial Agriculture Credit Scheme	Agriculture	2009
Nigeria Incentive-based Risk Sharing System for Agricultural Lending	Agriculture	2011
Small and Medium Enterprises Equity Investment Scheme	SME	2001
SME Restructuring and Refinancing Facility	SME	2010
Small and Medium Enterprises Credit Guarantee Scheme	SME	2010
Development finance institutions	**Sector**	**Year**
Bank of Agriculture	Agriculture	
Bank of Industry	Industry, SMEs	
Federal Mortgage Bank of Nigeria	Real Estate	
Nigeria Export-Import Bank	Trade	

Source: OECD, based on Central Bank of Nigeria.

Box 5.14. **Financing SMEs and the manufacturing sector: The Bank of Industry**

The Bank of Industry is a multi-stakeholder financial initiative aimed at serving the manufacturing sector development by providing long-term financing to companies operating in strategic segments. Shareholding includes the Central Bank, the Federal Ministry of Trade and Investment, State governments and SMEDAN. Projects are selected according to several factors, including industrial output potential, local sourcing of raw materials and inputs, potential comparative advantage of Nigeria in the selected industry, employment generation and poverty alleviation potential. Priority subsectors include agro-industries, textile, petrochemicals, minerals and information technology services. A large part of the funds is dedicated to SMEs.

Box 5.14. **Financing SMEs and the manufacturing sector: The Bank of Industry** *(cont.)*

The Bank aims at positioning itself as a central partner and facilitator for industrial/manufacturing finance: it has concluded partnerships with several commercial banks to enhance and orientate credit, and is well positioned to manage Official Development Assistance loans and grants. The Bank was recapitalised in 2013 (USD 5 billion) to enhance its developmental impact and attract private and multilateral funding.

Source: Bank of Industry; Central Bank of Nigeria.

In addition, FGN has implemented several financial schemes to improve rural access to finance in particular, in recognition of the crucial role played by the agricultural sector plays in the Nigerian economy. Agriculture constitutes about 1/3 of GDP and 60% of total employment, has and the potential of the sector in terms of employment generation, government revenue (lower import and wider tax base) and poverty alleviation, the government. Four Development Finance Schemes (DFS) out of nine target agriculture lending and address bottlenecks across the entire agriculture value chain (see Box 5.15).

Box 5.15. **Financing schemes for the agricultural sector**

Direct financing and intermediation (through Development Finance Schemes) in support of the agricultural sector include:

- The Agricultural Credit Guarantee Scheme Fund, established in 1977 in order to induce banks to channel credit to the agricultural sector of the economy;
- The Agricultural Credit Support Scheme set up 2006, aimed at providing credit to farmers at single-digit interest rates and at promoting large-scale commercial agriculture in Nigeria; and
- The Commercial Agriculture Credit Scheme of 2009, designed to promote commercial agriculture enterprises as part of the Federal Government of Nigeria Commercial Agriculture Development Programme. Funds raised through a bond issuance are made available to participating banks which in turn lend them to potential borrowers.

Financial facilitation schemes include:

- The Nigeria Incentive-based Risk Sharing System for Agricultural Lending Programme (2011). This is the latest government programme and is aimed at facilitating lending to agriculture, by de-risking and enhancing lending to agriculture. Priorities under this programme include mitigating the perceived high risks in the sector (through insurance and risk-sharing mechanisms),

Box 5.15. **Financing schemes for the agricultural sector** *(cont.)*

streamlining and provide guidance into the complex credit assessment processes, reducing the currently high transaction costs, and encouraging bank lending to agriculture (through a rating mechanism for banks, co-financing structure, pooled lending and several other incentives).

- The Interest Drawback Programme, introduced in 2003 to reduce the effective borrowing rate under the Agricultural Credit Guarantee Scheme, without the complication of introducing dual interest rates. The Programme is funded by the Federal Government and CBN.
- Several banks also received training on Agricultural Financing in 2005.

Technical advisory services include:

- A self-help Groups linkage programme introduced by CBN in 1991 to promote group synergy, cross guarantees, peer-group pressure and to allow loan applicants under the Agricultural Credit Guarantee Scheme to overcome the hurdle of the collateral often demanded by banks; and
- A Trust Fund Model, introduced in 2001 as a strategy for reducing the exposure of banks that granted uncollateralised agricultural loans to small-scale farmers, as well as for facilitating their access to credit.

Source: Bank of Industry; Central Bank of Nigeria.

Beyond the agricultural sector in particular, access to finance also remains a major constraint for SME development across all fields of Nigeria's economy. Only 5% of the total credit value in the economy has been dedicated to SMEs, the figure falling below 1% when only conventional bank lending is considered (CBN; OECD, 2013a). Yet FGN recognises SMEs as an effective vehicle for the promotion of accelerated industrial development, job creation, income generation and poverty reduction. They can make a significant contribution to output expansion, employment generation, local value added (via development of local technologies, promotion of local entrepreneurship, production of intermediate goods, mobilisation of domestic savings to a productive use) and fiscal revenue generation (notably through tax collection from formal SMEs). A well-performing SME sector can also contribute to reaching the objectives of achieving well-balanced social development by ensuring income redistribution and the even geographic localisation of industries across the country.

FGN has developed SME support schemes which acknowledge the critical interest of having a well-functioning SME sector, and which seek to address the lack of long-term financing. In addition to the agriculture-specific schemes highlighted in Box 5.14 above, these include an SME Equity Investment Scheme, established in 2001 under the supervision of the CBN, which requires that all

banks dedicate 10% of their profit before tax to debt (at single-digit capped interest rates) and equity investments in SMEs. The overarching objective is that of facilitating financing and technical advisory (management expertise, technical support, etc.) from banks to SMEs, with a focus on industrial SMEs and microfinance institutions. In addition, an SME Restructuring and Refinancing Facility has been launched in 2010 under management of the Bank of Industry, in order to refinance and restructure banks' loan portfolios to SMEs and the manufacturing sector. Alongside, the SME Credit Guarantee Scheme was also released in 2010 in view of providing credit guarantees to SMEs and manufacturers.

More broadly, since 2003, FGN – together with State governments – supports SMEs through the work of SMEDAN and its state offices. SMEDAN works as a dedicated one-stop shop agency for SME development in Nigeria, and notably runs Entrepreneurship Development Centres since 2008 (as Chapter 3 explores in more detail). As of 2013, the government has also unveiled plans to establish a Micro, Small and Medium Enterprises Development Fund, and CBN has been moving forward on enhancing the regulatory framework for microfinance in the country (Box 5.16). Alongside, FGN has announced its intention to launch in 2015 the Development Bank of Nigeria (DBN), a wholesale financial institution aimed at supporting the country's private sector and especially facilitating SMEs' access to more affordable financing with longer tenure. The existing Bank of Agriculture and Bank of Industry will be re-structured as specialised institutions to retail financing from this new wholesale entity (FRN, 2014).

Box 5.16. **Microfinance policy developments in Nigeria**

The Central Bank launched in 2005 the Microfinance Policy, Regulatory and Supervisory Framework for Nigeria, in view of making financial services accessible to a larger segment of the potentially productive population (including rural population and vulnerable groups) and main-streaming the informal sector into the national financial system. Under this scheme, CBN was given a pivotal role in the implementation of the microfinance policy and supervision of activities, and set up the National Microfinance Consultative Committee. To address some of the challenges faced by the sector, notably operational inefficiencies, insufficient capacity and deficient consumer protection, the CBN microfinance policy has been designed to follow two key axes:

- enhancing lending capacity and reducing the financial exclusion rate by: promoting linkages between conventional banks, development banks, specialised financial institutions and microfinance banks; and complementing and supporting the lending activities of MFBs (a Micro Credit Fund was established in 2008); and

Box 5.16. **Microfinance policy developments in Nigeria** *(cont.)*

- ensuring proper regulation and supervision by: revising microfinance guidelines issued in 2012 clarified the definition and scope of activities of MFBs, while setting up clear requirements in terms of licensing, board and management, financial statements disclosure, lending conditions (interest rates, lending limits and tenors) and prudential ratios (liquidity, capital adequacy, Central Bank reserves), in line with the risk-based prudential framework implemented in other financial segments.

Source: Central Bank of Nigeria website, IMF (2013), OECD (2013).

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Chapter 6

The policy framework for investment in Lagos State

This chapter examines the policy framework for investment in Lagos State. The chapter analyses its various facets in which Lagos State Government has the largest policy space in terms of encouraging investment at state level to support economic growth and sustainable development. These areas include: the resolution of business disputes, where Lagos has proved to be a forerunner in promoting innovative and alternative dispute resolution means; access to land for investors in Lagos State; the institutional framework governing investment promotion in Lagos State, with a particular focus on the newly created Investment Promotion Unit; measures to enhance the business environment, facilitate investment and improve consultations with the private sector; free trade zones development and investment incentives; business linkages and measures to support SMEs operating in Lagos State; and the policy framework for private sector participation in the development of state infrastructure with a focus on clean energy and public-private partnerships.

In federal states such as Nigeria, reform efforts to improve the investment climate require strong co-ordination between the Federal and State governments. This co-ordination must stretch across all areas of reform, from policy formulation to policy implementation and evaluation. On the one hand, State governments are to some extent bound to legislative, operational and other constraints set at the Federal level (see Box 6.1); on the other hand, the Federal backdrop in which States are embedded can present good opportunities for State-level progress and innovation, as well as constructive "peer-learning" across States. State governments must therefore seek to push reform and improvements in the state-level business climate to the greatest extent possible, while avoiding duplication of activities or contradictions in investment laws and policies *vis-à-vis* the federal government.

Box 6.1. **The legal framework for federalism in Nigeria**

The 1999 Constitution provides the legal framework for federalism in Nigeria. The country has a three-tier system of government, composed of the federal government and State and local governments. Each level of government has its own legislative body and the role of both the Federal government and State governments in the implementation of laws through regulatory powers which are clearly defined in the Constitution, in laws and regulations.

As both federal and state government have a legislative competence regarding investment related issues, particular attention should be given to ensuring that there is no duplication of legislative outputs on the same subject matters at different levels of government. The Constitution contains an Exclusive Legislative List of items that can only be legislated at Federal level, as well as a Concurrent Legislative List. State Assemblies are competent to make laws on any matter not included in the Exclusive List.

A well-informed State strategy for business climate improvement must target specific reform areas where the State government's policy space is greatest, and where gaps at federal level can most realistically be filled by State-level action. In addition, State-level investment promotion and facilitation efforts must be carried out with a strategic, long-term vision as concerns the key comparative advantages of the local economy. That is, gains

made on the grounds of investment attraction should feed into the broader growth and competitiveness of the State's niche industries. In Lagos State, this requires that the interventions in the policy fields mentioned below (from resolution of business disputes to free trade zones and to the policy framework for private sector participation in infrastructure markets) be planned for with the needs of particular economic sectors in mind. For example, the potential of Lagos State as a hub of industrial transformation *vis-à-vis* Nigeria's hinterland as well as neighbouring land-locked countries, and the latent growth prospects of agribusiness, among other sectors, both remain largely untapped due to specific business facilitation and infrastructure constraints. These would need to be comprehensively tackled through a deliberate and tailored approach to improving the State-level investment climate and its implementing structures.

Reform efforts to improve the investment climate in this way require a strong co-ordination between the federal government and State governments. Indeed, the allocation of legislative competences between federal and State legislative Houses is however not always clear (as illustrated by the debate recently raised over the competence of Lagos State to pass an Arbitration Act, as further detailed below). To prevent such conflicts of laws in investment policies, whose broad lines are designed at Federal level, platforms have been put in place to ensure that state governments are involved in the design of policies at the federal level. In particular, the National Council on Industry, Trade and Investment involves all relevant agencies at both levels of government to ensure that policies implemented at state level mirror and complement those defined at federal level.

Yet beyond such consultative structures, State governments and policymakers themselves have a critical role to play for promoting the interests of the local economy. They need to ensure that large and small businesses in the State take root within sectors where there is full potential to expand, create employment, add productive value and, as such, contribute to poverty reduction, gender equality and social inclusion.

Against this background, this chapter analyses various facets of the investment policy framework of Lagos State in which Lagos State Government (LSG) has the largest policy space (within the limits set by the federal system) in terms of encouraging investment at state level to support economic growth and sustainable development. These central areas of action are also of critical importance in view of creating the enabling conditions for growth and innovation within economic niches, in which Lagos State stands to reinforce its comparative advantage vis-à-vis neighbouring states and countries. These areas, on which LSG can make a true difference in terms of business climate improvement as well as competitiveness, include the following – which are each explored in turn below:

1. resolution of business disputes (where Lagos has proved to be a forerunner in promoting innovative and alternative dispute resolution means to overcome the shortcomings of the court system);
2. access to land for investors in Lagos State (given that land is administered at State level in Nigeria);
3. institutional framework governing investment promotion in Lagos, with a particular focus on the newly created Investment Promotion Unit;
4. measures to enhance the business environment, facilitate investment and improve consultations with the private sector;
5. free trade zones development and investment incentives;
6. business linkages and measures to support small and medium-sized enterprises (SMEs) operating in Lagos State; and
7. policy framework for private sector participation in the development of state infrastructure (with a focus on clean energy and on public-private partnerships, where Lagos State has developed far more specific experience and legislation than other states in Nigeria).

Appropriate mechanisms for co-ordination and communication have to be put in place for the design and implementation of policies across state and federal governments, and this element will be addressed in a cross-cutting manner within the above topics. Because the Federal and State policy competences are so closely intertwined, all the preceding chapters of this *Investment Policy Review* (in particular Chapters 2, 3 and 5) will also be of particular relevance to LSG.

6.1. Alternative dispute resolution

Lagos has envisioned itself as a pioneer in the promotion and use of alternative dispute resolution (ADR) means, not only in Nigeria but also across West Africa. Building on the strong national tradition of dispute adjudication through customary arbitration and acknowledging the need to reduce the backlog of cases before judicial courts, Lagos State has developed a policy of providing an enlargement of access to justice and its institutions through ADR. As further detailed in Chapter 2, Section 2.5, of this report, there is an increasing demand from the business community, for settling disputes out of courts, mainly to shorten the timeframe for solving disputes.

As a major business destination in the region, and aware of the growing popularity of arbitration for resolving commercial disputes, Lagos has grasped the opportunity to establish itself as an arbitration hub, starting with the enactment of the *Lagos State Arbitration Law* in 2009. The Law represents a strong improvement compared to the legal framework for arbitration applicable under the federal *Arbitration Act* 1988 (see Chapter 2, Section 2.5) and contains provisions

based on the 2006 amendments of the UNCITRAL model law on international commercial arbitration. Various improvements brought about by the Act have secured and made more efficient the use of arbitration in Nigeria. It is more supportive of arbitration in that it reduces the discretion given to court judges to stay proceedings pending reference to arbitration and provides for procedural rules that are in line with internationally recognised best practices. A key innovation of the *Lagos Arbitration Law* is that it provides that the Lagos Court of Arbitration shall be the default appointing authority where the parties, or the appointed arbitrators, fail to agree on an arbitrator.

There has been a controversy on whether such arbitration laws enacted at State level are valid under Nigerian law, based on the interpretation of what administrative authority as between the federal government and the state government has the power to legislate on arbitration matters (Azikiwe and Onyia, 2013). There seems to be now a consensus among the legal community that the State legislation applies to commercial arbitration, while the Federal *Arbitration and Conciliation Act* applies residually and covers non-commercial arbitration. It would however be valuable to clarify why both the Regional Centre and the Lagos Multi-Door Courthouse (LMDC) refer on their websites to the federal arbitration law only and make no mention of the Lagos *Arbitration Act* that is supposed to apply to the arbitration of domestic commercial disputes settled in Lagos. The implementation of the law has laid the foundations for reinforcing Lagos State's position as a major seat for international and domestic commercial arbitration.

The Regional Centre for International Commercial Arbitration was established in Lagos in 1989 under the auspices of the Asian African Legal Consultative Organisation, in a similar way as peer organisations such as the regional centres in Cairo and Kuala Lumpur. The *Regional Act* No. 39 of 1999 transposed into Lagos State's legislative framework the establishment agreement creating the Centre, thus formally enshrining its existence into the law. The Centre is a recognised independent arbitral institution that provides a neutral venue for the resolution of international commercial and investment disputes through arbitration, mediation or conciliation. The rules of arbitration applied by the Centre are mostly drawn upon the UNCITRAL Arbitration Rules of 1976. Under such rules, awards remain confidential, as it is commonly the case in commercial arbitration. Domestic arbitration may also be administered by the Centre, in which case the federal *Arbitration and Conciliation Act 2004* shall apply (RCICAL, 2004).

The government also recently facilitated the establishment of an additional private arbitration body that is expected to further establish the State as a regional place of commercial arbitration. The Lagos Court of Arbitration was founded by law in 2009 and effectively launched at the end of 2012. The *Lagos Court of Arbitration Law* 2009 (LCA) provides that the court of arbitration shall

be private sector driven, independent of regulation, direction or control by any branch of government. LCA provides arbitration and other ADR services for the resolution of international and domestic commercial disputes, in Nigeria and in the West African region. In line with the highest standards of international arbitration, the court provides a neutral seat and administers the process for the resolution of disputes by international arbitrators. LCA is also committed to be active in promoting awareness and engagement of arbitration and ADR through advocacy trainings.

Lagos government is ahead of the modernisation of adjudication means not only in that it has a modern and somehow unique arbitration framework in the region, but also in its efforts to promote other ADR means such as mediation. The Citizens Mediation Centre (CMC), established in 1999 within the Lagos State Ministry of Justice, is the first body in Nigeria to provide comprehensive legal assistance and mediation services for indigent people. The *Lagos State Citizens Mediation Law* 2007 institutionalised the operations of the centre, which provides mediation on disputes relating to landlords and tenants matters; labour, family, land property matters; as well as for commercial disputes and other civil related disputes. The centre provides a non-adversarial forum for the settlement of disputes between parties that voluntarily present themselves for mediation at the centre. It only deals with cases involving parties that are resident in Lagos State.

The most remarkable innovation in terms of ADR in Lagos remains the creation, in 2002, of the Lagos Multi-Door Courthouse (LMDC) under the form of a public-private partnership between the High Court of Justice, Lagos State and a non-profit private organisation named "Negotiation and Conflict Management Group". This ADR centre, whose establishment has been formalised by the 2007 *Lagos Multi-Door Courthouse Law*, has the particularity to be statutorily connected to the court system and to be mandated to facilitate dispute resolution within the justice system. It is the first ADR centre to be "court-connected" in Africa. The LMDC deals with a wide array of dispute matters from commercial, banking, intellectual property rights disputes to real property, securities, and civil rights issues, although it mainly focuses on the resolution of commercial disputes. It provides for alternative dispute settlement options through the Mediation Door, the Arbitration Door, the Early Neutral Evaluation Door and the Hybrid Door. The advantages of mediation before the LMDC is that the mediation agreement can, at the request of the parties, be endorsed by the ADR judge and thus become a consent judgement of the High Court of Lagos State and enforced as such. As for the Early Neutral Evaluation, it is an innovative process where a preliminary assessment of facts, evidence or legal merits is undertaken by a neutral experienced lawyer. The assessment has no binding value, but provides guidance as to the likely outcome if the case were to be brought before a court. Lastly, the Hybrid Door

is an original and creative mix of various ADR mechanisms in order to obtain settlements tailored to dispute cases' particularities. Over the past ten years, LMDC has successfully settled 780 cases out of 1 708 that were referred to it by the High Court (PT, 2013). This average record has been attributed to the reluctance of litigants and lawyers to use ADR means.

State government thus took a further step in its endeavour to use ADR as a mean to ensure speedier resolution of cases by introducing the compulsory use of ADR. The 2012 *High Court of Lagos State Civil Procedure Rules* provide that parties must first explore ADR means for the resolution of disputes to be brought before the courts. Provided that the dispute matter is suitable for ADR, the resolution of the case at the LMDC or any other ADR institution must be attempted. If the case is successfully achieved through ADR, it would then be enforced as a consent judgment of the High Court of State Lagos. If the parties fail to settle the dispute, the matter would enter into the traditional litigation track in courts. In order to ensure the efficient implementation of this innovative rule, the Lagos Court of Arbitration has provided extensive training and sensitisation course on the importance of commercial arbitration and mediation to the High Court judges.

It is a real strategic asset for Lagos State, as a major regional business hub, to have established itself as a pioneer in the development of commercial arbitration. The government should continue on this path, while bearing in mind that such alternative dispute resolution mechanisms are only a good complement of a sound, efficient judicial system, and must in no way be seen as a substitute of a well-functioning court system. Although arbitration friendly initiatives are encouraged, arbitration remains a very costly system and the priority must remain on enhancing the rule of law in administrative practices in order to ultimately improve investors' confidence in the judiciary.

6.2. Accessing land

The legislation governing land issues is the federal *Land Use Act*, which regulates access to land and land titling throughout the country. As described in Chapter 2, the federal legislation on land vests the power to administer, manage and control State land in the State Governor. The *Land Use Act* also establishes Land Use and Allocation Committees in each State to assist the Governor on land administration and management matters. The Lands Bureau, under the authority of the Governor, is responsible for registering land titles and recording them, administering land use and allocation, formulating and implementing land policies, and issuing and revoking certificates of occupancy. It is also mandated, among many assignments, to fund infrastructure projects for government schemes through the New Towns Development Authority, to acquire land for overriding public interests and give compensation

for acquired land. A computerised system for recording land titles, the Electronic Document Management Systems (EDMS), has been established by law.

The implementation of the land regime and the administration of land allocation and registration thus fall under State jurisdiction. Land rights are among the key issues identified by Lagos Government as contributing to attracting foreign direct investment and the government has made steady efforts to create an enabling environment through enactments of modern pieces of legislation. Lagos has the characteristic of being the country's smallest but also most populous State of Nigeria. It faces the overriding challenges of having both limited land resources and a very large and rapidly growing population.

Lagos is the fastest growing city in Africa and specific land issues are encountered in both rural and urban land areas, due to an increasing scarcity of available parcels of land. The State has a deficit of five-million housing units. Addressing this challenge of urban housing provision is one of the key aspects of the administration 10-Point Agenda and Lagos government has committed to further use the PPP model to facilitate private sector investment in this area. The State is well aware that in order to attract the amount of private investment needed to address the enormous housing shortage and to fill the infrastructure gap, it will have to reassure investors about the security of the legal framework for land titling. A number of factors have contributed to aggravating the housing issue in Lagos, among which the problem of land accessibility, and the inefficiency of the financial and mortgage systems.

Lagos State has acted as a forerunner in the land registry modernisation reform, which has been identified at a priority reform area at both State and federal level (see Chapter 2, Section 2.2). Lagos led the way with the introduction in 2006 of a computerised management system for land transfers and titles. Records of the Lagos land registry have started being computerised in collaboration with a private IT firm. The *Bill on Lands Electronic Document in Management System* has been enacted to ensure better management of land records and land use through improved technology. The computerisation aimed at streamlining the process for issuing certificates of occupancy, although a very small share of land parcels has been formally titled so far. Over the first year of implementation of the reform, more than 2.5 million deeds and agreements dating back as far as 1863 were stored in a database, the EDMS. This has not only fastened the issuance of titles, but has also further secured land documents and has proved to be efficient in the fight against fraudulent practices (DFID, Sparc, 2012).

The government has also expressed its willingness to move forward in further enhancing the safety of certificates of occupancy issued by the State Governor. An inter-ministerial committee set up by the governor and comprising

the Ministries of Justice, Housing and Finance, the New Town Development Authority and the Surveyor General's Office has been established to further facilitate investment in real estate properties in the State. Sound co-operation across responsible bodies is indeed key to achieve strong reform of the regime for accessing land. For example, while the Lands Bureau and the Office of the Surveyor General have clear mandates, they however are interdependent of each other's function, which sometimes hampers proper functioning of their activities. The Land Bureau claims that it issues certificates of occupancy in a period of one month, but often fails to do so because verifications required from the surveyors' office delay the process.

The government has also endeavoured to facilitate access to land for larger segments of the population. The Land Regularisation Programme introduced by Lagos State in 2006 was aimed at improving access to land for low income people. It had however mixed results as it takes more than 200 days at a still high cost to obtain land titles from the Regularisation Directorate. As a consequence to these bureaucratic bottlenecks and high costs associated with the application process, the regularisation programme fell short of expectations and an enormous number of building projects are developed without the necessary permissions, thus being classified as illegal by the authorities.

Another initiative for improving the housing issue in Lagos was the introduction, in 2007, of a mortgage scheme designed to facilitate access to land ownership for middle and low income earners. Although it was not an initiative of Lagos Government, the State gathered the majority of the Primary Mortgage Institutions set up in the country to implement the programme. Here again, the scheme showed mixed results since people working in the informal sector were denied access to the scheme due to the difficulties to track their income and to the absence of formal titles for their land properties.

In 2013, Lagos State introduced a new land policy to further fast track land administration. Lagos State Governor recently expressed his willingness to institutionalise technologies that would reduce bureaucratic bottlenecks in land administration and facilitate the acquisition of certificates of ownership. Officials have repeatedly called on a better implementation of building and land subdivisions regulations to control land use in the Lagos megalopolis (Lagos State Government, 2013). The lack of implementation of the *Lagos State Urban and Regional Land Planning Law*, as well as the absence of a clear development plan have been identified as other important constraints to development control in Lagos. Lagos government should also uphold efforts to further improve transparency and decrease fees in the mandatory approval of State Governor for any transfer of rights. Alongside with financing issues, the lack of security in land titling is the main impediment to a real improvement of the current housing situation in Lagos. The on-going computerisation reform is an encouraging step towards further and more secure land registration and faster

issuance of certificates of occupancy. Although the computerisation of registration process is likely to result in a reduction of registration costs he authorities should further endeavour to lower the costs, including the fees, associated with land registration. To bear full fruit, such necessary reform efforts will need to be well co-ordinated with actions taken at Federal government level, where the responsibility of ensuring quick enactment of the draft land bill lies. Land reform indeed requires a full set of measures at all levels of government, including strengthening the legal and institutional frameworks, improving the registration system, and a strong governmental commitment to project implementation.

6.3. Investment promotion

Inward investment promotion strategy

Investment promotion measures carried out at sub-national level can be effective instruments to increase both domestic and foreign investment and to enhance their contribution to local economic development. According to international investment experts (MCI and VCC, 2009, among others), there is a strong rationale for conducting investment promotion activities at a sub-national level (region, state, province or city) for four main reasons:

- *development objectives:* Sub-national governments and the central government may have different economic development objectives and competitive advantages;
- *knowledge of their location:* Sub-national governments have greater knowledge of their area's strengths and weaknesses, and are thus better able to market them by providing accurate information to investors;
- *facilitation on the ground:* As sub-national governments are closer to local decision-makers, they are better positioned to assist investors in their establishment and post-establishment phases; and
- *attracting domestic investment:* For many decentralised entities, attracting companies from the same country can be equally important than attracting foreign investors. Sub-national governments can apply the same principles and techniques as those used to promote FDI as well as more successfully link their operations to the local economy.

At federal level, both Vision 20:2020 and the Transformation Agenda recognise the central role of private investment, both foreign and domestic, in the economic development of Nigeria (see Chapter 1 and Chapter 3). At sub-national level, investment is equally central in the development strategy of Lagos State, as acknowledged in the Lagos State Development Plan 2012-2025. The first pillar of the draft plan on Economic Development provides a strategic orientation to "harnessing public and private investment to create a strong,

mixed economy that can provide jobs for all and create the base for expanding social services and environmental sustainability". The three other pillars – infrastructure development; social development and security; and sustainable environment – also entail a private sector dimension.

LSG is focusing on four main priority sectors for economic growth: power, agriculture, transport and housing, also called PATH. The Ministry of Commerce and Industry (MoCI) is the entity, within Lagos State government, in charge of investment and private sector development. Its mission is "to promote, facilitate and enhance a sustainable trade and economic development in the State, including provision of business support services through the use of a highly motivated, efficient and effective workforce".

In terms of investment promotion, efforts by LSG – mainly through MoCI – have essentially consisted in encouraging and hosting trade missions, facilitating the creation of local industries, providing investment incentives and supporting an enabling business environment. Promoting Lagos as an investment location now stands among the top economic priorities of the State, which is willing to take a more proactive approach, notably with the creation of an Investment Promotion Unit within MoCI (see below). In this context, in addition to the four above mentioned economic sectors (PATH) identified as key for FDI attraction, the Lagos State Development Plan also refers to manufacturing, construction, wholesale and retail, tourism, communications, and services. For the time being, the government puts particular emphasis on promoting specific projects and free trade zones more than Lagos as an investment destination. As such, it is prioritising the development of clusters by establishing special economic zones, in particular agro-industrial parks, enterprise zones and the Lekki Free Zone (see below).

More specific measures to attract inward investment into Lagos, particularly in targeted sectors, are, however, not yet fully articulated and specified although MoCI is currently developing a strategy to create an Investment Promotion Unit (see below). It would therefore be particularly relevant that the LSG prepare a coherent investment promotion strategy, with clear objectives and activities, targeting specific sectors and industries in line with the State development priorities (Lagos State Development Plan 2012-2025) and based on selectively-defined sectors where Lagos State can develop unique economic "niches". This strategy should be developed by MoCI in collaboration with the relevant sectoral ministries and parastatals. It is important to bear in mind, while designing this strategy, that promotion should not be seen as a substitute for more general policy reforms (at federal level in co-ordination with States) or try to conceal underlying weaknesses in the investment climate.

Institutional framework and co-ordination

The Nigerian Investment Promotion Commission (NIPC) is the federal IPA in charge of encouraging, promoting, co-ordinating and facilitating investment, both foreign and domestic, in the Nigerian economy. It is reporting to the Federal Ministry of Industry, Trade and Investment (FMITI), which is responsible for designing all policies related to investment, industrialisation, exports and enterprise development. The division of roles and tasks between federal and state entities (governments, ministries and agencies) responsible for investment promotion is not well articulated and implementation thus remains confusing and not optimal. For the time being, co-ordination mainly takes place through the meetings of the National Council on Industry, Trade and Investment. The latter is the federal inter-Ministerial and inter-States body in charge of defining investment related priorities as well as co-ordination between federal and state governments (see above). This type of co-ordination is, however, mainly targeted at sharing the same strategic vision and objectives more than allocating specific responsibilities to federal and state governments as well as their respective IPAs.

While almost all countries in the world have established a national investment promotion agency (IPA), an increasing proportion of IPAs worldwide have been set up at sub-national level. Many of them feature amongst the best performing and most client-oriented IPAs. Their mandates on investment promotion often allow them to become leading experts on their local economies and to provide accurate information about their area's strengths and benefits (World Bank, 2009).

While sub-national IPAs have mainly been created in countries that have decentralised forms of government, such as federal states, more centralised states are increasingly involving sub-national entities in the promotion of various geographical areas (UNCTAD, 2001). This is the case in most OECD countries, where sub-national IPAs are in charge of promoting their respective regions, states, provinces or cities as investment locations and of linking multinational enterprises (MNEs) more closely to the local economy. Large emerging economies such as Brazil, China, India, Indonesia, South Africa and Viet Nam have also developed wide networks of sub-national IPAs. In most cases, sub-national agencies are independent from national IPAs and/or their infra-national offices. The latter are usually mostly geared at acting to facilitate introductions to State level IPAs and at operating a policing role to avoid potentially harmful "race to the bottom" competition with incentives between decentralised entities.

Among decentralised states across the world, different roles are assigned to central and sub-national agencies for the purpose of attracting investment, including FDI. In those countries that are highly decentralised, such as

Belgium, Brazil, Canada and the United States, sub-national IPAs take a leading role in investment promotion while national IPAs have a less proactive role and mainly refer to their sub-national counterparts. In other countries, such as Germany, Malaysia and the United Kingdom, national IPAs continue to play a key role in investment promotion and have a strategic responsibility for co-ordination across sub-national initiatives (Box 6.2). Some countries choose to allocate FDI attraction to the national IPA and domestic investment promotion to sub-national agencies. In Indonesia, while the Indonesia Investment Co-ordinating Board – the national IPA – administers all foreign investment projects and those domestic investment projects with scope covering multiple provinces, provincial governments administer domestic investment projects with scope covering multiple districts/cities; and district/city governments manage projects with scope limited to one district/city (OECD, 2010).

Box 6.2. **Experience in decentralising investment promotion**

Brazil *(decentralised approach):* Institutions responsible for FDI promotion in Brazil are APEX (Trade and Investment Promotion Agency), an agency oriented mainly towards exports promotion, RENAI (National Network of Investment Information), which works as an information vehicle about investment opportunities in the country, and SIPRI (Investment and Technology Transfer Promotion System for Companies). The official Brazilian agency to promote investment was created in 2001 as *InvesteBrasil*. It was a public-private partnership maintained by the private sector (50%) and the government (50%), but it was closed down in 2004. Thus, today Brazil does not have a national IPA that articulates the entire mechanism of attracting investment and promotional efforts mainly emanate from states. Beside the national level, the network of investment promotion bodies in Brazil includes IPAs originating from state development banks (e.g. *Agência de Fomento de Goiás*; *Agência de Fomento do Rio Grande do Norte*), IPAs composed by government and private organisations (e.g. *Pernambuco Economic Development Agency – AD Diper*; *Minas Gerais Industrial Development Institute*), and private, non-profit organisations (e.g. *Development Agency of Rio Grande do Sul – Pólo-RS*). Some of the latter organisations are development institutions with investment promotion functions.

Malaysia *(co-ordinated approach):* The Malaysian investment promotion agency (*Malaysian Investment Development Authority* – MIDA) is responsible for the promotion, co-ordination and facilitation of investments in the manufacturing and services sectors (except utilities and finance). It grants all FDI agreements and manufacturing licences. MIDA is also the lead agency in the co-ordination of activities of other investment promotion agencies at

Box 6.2. **Experience in decentralising investment promotion** *(cont.)*

sub-national level. Part of Malaysia's investment promotion framework encompasses a number of agencies that undertake some sort of investment promotion, including state-level investment promotion agencies. The state of Penang for example has its own IPA, *investPenang*, which spun-off from the Penang Development Corporation's industrial office in 2004 to enhance investment promotion efforts at the state level. Its functions include enhancing Penang's business environment, administrating land for business purposes and supporting companies in their due diligence, as well as promoting SMEs in Penang where the agency promotes business linkages through match-making events and an elaborate database of suppliers for larger companies. The agency co-operates closely with MIDA as the federal IPA, particularly on incentives, which are under MIDA's sole responsibility. Examples of such co-operation include the attraction of big brand name electronics and medical device companies, which were able to benefit from Multimedia Super Corridor status for incentives. Investment promotion also occurs at the city level. Kuala Lumpur has its own IPA, *InvestKL*, mandated by the federal government to attract and service large MNEs in Greater Kuala Lumpur and Klang Valley.

Source: Giroud A. and D. Botelho (2008), "Policies Promoting MNEs Linkages in Host Economies: A Comparison between Brazil and Malaysia", *Paper presented at the OECD Global Forum on International Investment*, Paris; and OECD (2013b), OECD (2013b), *OECD Investment Policy Reviews: Malaysia 2013*, OECD Publishing, Paris, *http://dx.doi.org/10.1787/9789264194588-en*.

It will be important to clearly define the model of collaboration between federal and state governments, as well as the precise labour division on investment promotion efforts, to successfully carry out investment promotion in Lagos State. When it comes to implementing agencies, this model will need to entail a clearly delineated division of labour with efficient co-ordination mechanisms. In particular, once the Investment Promotion Unit (IPU), located within MoCI, will be fully operational, an articulated collaboration model with NIPC is essential so that their roles do not overlap but rather complement each other. As NIPC intends to establish a zonal office in Lagos, its role could mainly focus on co-ordination tasks between the IPU, on the one hand, and NIPC's headquarter and other zonal offices, on the other hand. NIPC needs to keep a national perspective for investment promotion with its zonal offices acting as focal points for effective co-ordination with States. Efficient collaboration at Lagos State level will not only support more professional and results-oriented investment promotion, but it will also avoid being counterproductive by providing investors with incoherent messages.

Co-ordination within LSG – and its numerous parastatals – is also of crucial importance for successful, co-ordinated investment promotion. A dedicated unit

(the IPU) to lead investment promotion and strategy can be valuable, but co-operation among the many ministries concerned with economic affairs and regulation must remain a priority. Different agencies have different points of view and responsibilities, and hence might not all see investment proposals in the same way. Lagos State's IPU should have a clear strategy for inter-governmental communication.

Main functions of the IPU

National IPAs usually perform five main functions: i) *image building*, consisting of disseminating the positive image of the country and marketing it as a profitable investment location; ii) *investment generation* through direct targeting of specific companies, particularly in the country's priority sectors; iii) *investment facilitation* to provide services to investors before and during their establishment phase; iv) *aftercare*, aiming to retaining companies and encouraging reinvestments by proactively responding to investors' needs and challenges after their establishment; and v) *policy advocacy*, which involves identifying bottlenecks in the investment climate and providing recommendations to government in order to address them (see Chapter 3, Section 3.2). IPAs at sub-national level should basically focus on the same five functions.

An Investment Promotion Unit (IPU) has been established under the Department of Commerce within MoCI, which mandate is to evaluate investment proposals, conduct investment analysis and facilitate linkage of prospective investors with relevant government entities. The proposed mandate for the IPU is "to be the lead agency for promoting Lagos State as an investment location (for both foreign and domestic investors)". Within this, the tentative objectives are:

1. promote and present Lagos State as a compelling (attractive and competitive) location for investment (and business activity);
2. advise and support investors through their location decision and investment project planning and implementation process; and
3. contribute to improvements in Lagos State as an attractive and competitive location for investment (and business activity).

The IPU should perform the five functions of an IPA, but with a focus on specific, focused activities, where the potential of results is the highest.

Image building

While this function is particularly important at national level, the IPU should do some branding of Lagos State as a profitable investment location. In doing so, it should market its comparative advantages and the sectors in which it intends to attract both foreign and domestic investment. Since engaging in a high level marketing campaign and the participation in

international investment fairs would be time and resource consuming, the IPU should rather focus on designing promotional material, including a brochure, as well as a clear, simple and eye-catching website. The latter is of particular importance, as it often contributes to building the first impression of prospective investors. It would also constitute an easy mean for the IPU to centralise all the information relevant to investors at a reasonable cost. It could take the form of a link "Invest in Lagos" on the State's official website (*www.lagosstate.gov.ng*). Information included on the website should be clear, informative and regularly updated (Box 6.3).

Box 6.3. **Inward Investment Website Basic Design Template**

- **About us** [information about the Lagos IPU]
- **Our services** [information on investment facilitation services]
- **Doing business in Lagos** [summary with below sub-navigation]
  - Lagos economy overview [summary of key aspects of Lagos and FDI in Lagos]
  - Nigeria economy overview [summary of key aspects of Nigeria and FDI in Nigeria]
- **Business opportunities in Lagos** [summary with below sub-navigation]
  - Sector A [summary of value proposition and key benefits of the sector with fact sheet]
  - Sector B [summary of value proposition and key benefits of the sector with fact sheet]
  - Sector C [summary of value proposition and key benefits of the sector with fact sheet]
- **Investor network** [information on the aftercare programme with contact points]
- **News and publications** [below sub-navigation]
  - News [what's new in Lagos]
  - Publications [links to relevant publications]
- **Inquiry form** [e-mail inquiry form and telephone contact points]

Source: Millennium Cities Initiative (MCI) and Vale Columbia Center (VCC) (2009), *Handbook for Promoting Foreign Direct Investment in Medium-Size, Low Budget Cities in Emerging Markets*, New York (based on Loco Software Ltd).

Investment generation

Investment generation – or targeting – is the most sophisticated and challenging function for sub-national IPAs while also the most important one,

as it can contribute to achieving the goals of the State's economic development strategy by encouraging the highest quality companies to invest in priority sectors (MCI and VCC, 2008). Investment generation consists in identifying those individual companies potentially interested in Lagos and in initiating proactive and sustained relationship building with these.

Staff members of the IPU would require solid capacities in investor targeting and lead generation techniques as well as a thorough sector-specific knowledge, particularly of Lagos State's priority sectors. While targeting potential investors, emphasis should be given to a relatively small number of companies carefully identified in priority sectors or industries. Experience suggests that those IPAs focusing on a limited number of sectors are yielding higher results than those with broader mandates. For example, the Costa Rican IPA (*Coalición Costarricense de Iniciativas de Desarrollo* – CINDE), a relatively small institution for a national IPA (35 employees), focuses its efforts, almost exclusively, on promoting foreign investment in three targeted sectors: advanced manufacturing, life sciences and certain services (OECD, 2013a). This strategy has proven itself successful, as it allowed CINDE to achieve attracting significant inflows of FDI in these priority sectors and to over-perform (against its own target) in terms of jobs created by FDI projects in the past two years. CINDE, the first IPA established in Latin America, is recognised as a very good performer within the global field of investment promotion and was recently ranked the 10th best IPA in the world by the World Bank (2009). Targeting a limited number of key sectors for FDI can thus allow an IPA to maximise its performance and competitiveness.

The IPU could also mobilise the Nigerian Diaspora, since Nigerians living abroad are numerous (estimated at approximately 17 million individuals, see Chapter 3) and are based in key source countries such as the United States and the United Kingdom. The IPU could aim to attract entrepreneurial Nigerians living abroad and potentially interested to invest in their country of origin by establishing a targeted Diaspora FDI strategy.

Investment facilitation

The IPU should focus its facilitation services on responding to inquiries from interested investors and on providing the support that investors need once their investment decision has been taken. Handling inquiries is particularly important, as investment generation activities will potentially yield results and create investment leads only if the IPU has the capacity to respond to inquiries adequately. After making sure the inquiry is correctly understood, the agency should provide an accurate, customised and informative response promptly. The IPU could draw on the example of *Invest in Bogota*, which has been ranked by the World Bank as the top sub-national IPA from a non-OECD country, particularly for inquiry handling (Box 6.4). In terms

Box 6.4. **Inquiry handling by Invest in Bogota (Colombia)**

Invest in Bogota is the IPA for Bogota, a public-private partnership between the Bogota Chamber of Commerce and the City Government. Its mission mainly consists in supporting investors that are exploring opportunities in Bogota. The agency has a multidisciplinary team with sector-specific knowledge, allowing it to provide potential investors with relevant information and advice.

Invest in Bogota was praised by the World Bank *Global Investment Promotion Benchmarking 2009*. It was ranked 16th out of 231 IPAs for its overall performance, the top ranking for an agency from a non-OECD country and the seventh sub-national IPA out of 32. *Invest in Bogota* was particularly high performing in inquiry handling, ranked 13th out 231, being again the top non-OECD agency and the fifth sub-national IPA. The indicators used by the World Bank to assess inquiry handling are divided into: availability, responsiveness, the response itself and customer care.

This good performance illustrates that a focused facilitation team can meet investors' needs and potentially influence the long-listing process even working in countries where information might not be so readily available. *Invest in Bogota* is a relatively young IPA operating in a country where there is a national IPA and a network of sub-national agencies. It outperformed its national and sub-national counterparts.

Source: World Bank (2009), *Global Investment Promotion Benchmarking 2009: Summary Report*, Washington; and Invest in Bogota's website.

of facilitation during the establishment phase, the IPU could also handhold investors while they navigate the various regulatory and administrative obstacles (MCI and VCC, 2008). Its role will be central to obtain the required permits and licences and establish relevant service providers at both the federal and state levels.

Aftercare

Aftercare consists of all the activities performed by an IPA that involve proactive monitoring of challenges faced by investors after their establishment as well as helping find solutions to respond to their specific needs. This function can potentially have a significant impact on retaining investors and encouraging them to reinvest. It is also more resource-efficient than investment generation, as it is less costly to win reinvestments through aftercare than to generate investments from new firms (UNCTAD, 2007). Aftercare should thus be a key function of the IPU, although well-focused and duly co-ordinated with NIPC's national aftercare activities. The IPU's aftercare work should thus be limited to a restricted number of companies, based on: i) their propensity to

reinvest in Lagos State; ii) the developmental impact of their investment (notably in terms of direct and indirect job creation); and iii) the sectors in which they operate – in line with results of CINDE and *Invest in Bogota* (focus could be given to priority target sectors).

While the Lagos Corporate Assembly, a public-private dialogue mechanism that has been put in place within MoCI (see below), is a valuable initiative, the IPU should also perform systematic and proactive consultations with selected investors to collect their feedback on a regular basis and assist them to address challenges they face.

Policy advocacy

While there is a natural tendency for an IPA to focus on promotion, where results are most tangible, the impact of advocacy should not be downplayed. Through its aftercare activities, Lagos State's IPU will be in the front-line for hearing about adverse perceptions or practical problems and will therefore be in a position to play a role as advocate for investors within government, whether by seeking approvals for permits or requesting fundamental changes to laws and regulations.

By following up on companies' pre- and post-establishment needs, the IPU should monitor their requirements through surveys, interviews and roundtables in order to perform policy advocacy. Similarly to its aftercare activities, the IPU should focus its advocacy role on certain key investors and industries. Policy recommendations should not only be channelled to LSG but also to NIPC.

Structure, funding and performance of the IPU

Experience suggests that a full commitment to IPAs by the government is necessary for them to succeed in attracting new investors. They need to be adequately funded in order to attract and retain qualified and motivated staff, ideally with private sector experience.

There are different options for the organisational structure of a sub-national IPA. Lagos State government has chosen to establish a specialised unit within the Department of Commerce of the ministry responsible for investment (MoCI). This is a reasonable decision, for a first phase, given the limited resources of the Ministry. Operating an effective IPA is rather expensive and in order to maximise the use of resources, the exact cost of the IPU's functioning should be carefully calculated. Staff members should be well-qualified, ideally with private sector experience.

Attracting inward investment will be the main priority of the IPU and it should be regularly monitored. There are three main inward investment performance targets generally used by sub-national IPAs: i) number of greenfield

FDI projects attracted; ii) number of direct jobs being created by these FDI projects; and iii) amount of capital investment these FDI projects are making (MCI and VCC, 2008). Beyond an overall assessment, each of the five functions of the IPU should be evaluated separately using one or several relevant indicators.

The IPU could potentially seek the support of NIPC, as the latter benefits from ongoing international experience in investment promotion. NIPC has benefitted from capacity building and experience sharing programmes organised by inter-governmental organisations such as UNCTAD, UNIDO and the World Bank Group (see Chapter 3). NIPC is also a member of the World Association of Investment Promotion Agencies, which provides the opportunity for IPAs to network and exchange experience. Exchanges of best practices on investment promotion strategies between NIPC and the IPU should thus be encouraged to allow staff members of the newly created Lagos' IPU to build and strengthen their capacities.

6.4. Business facilitation

Strategy to enhance the business environment

Although the Lagos State government, similarly to the federal government, does not have yet a clear and defined strategy for developing a sound business environment at the state level, it is strongly committed to establishing an environment that is conducive to expanding industry and business and to promoting entrepreneurship. Policy objectives of the Lagos State Development Plan include:

- a sound regulatory framework;
- a simple and fair tax regime;
- a good State information system for existing and potential businesses;
- fiscal incentives to promote investment;
- the creation of Special Enterprise zones and Free Trade Zones with additional tax breaks and regulatory arrangements; and
- improving the ease of setting up a new business in Lagos.

These objectives constitute a valuable first step in the direction of improving the business environment of Lagos State. The government would, however, benefit from a separate policy document gathering and detailing all intended and existing efforts and initiatives in this direction. In addition, this document could help lay out the links between particular interventions in the fields of investment policy, promotion and facilitation, and infrastructure investment, and their expected gains for specific economic sectors. Developing such a strategy for enhancing the investment climate requires strong political support and leadership, both from the highest levels of government as well as from front-line agencies and ministries responsible for implementing policy.

Moreover, careful and regular monitoring of the investment climate is also necessary. A sound, broad-based business environment is a process as much as an outcome. Countries or states that have sound investment climates maintain them through formalised processes to evaluate business conditions and adapt continuously to competition and to changing economic conditions. Such evaluation processes require institutions for setting and monitoring a business environment strategy.

Business facilitation measures

The Lagos State government recognises the constant need to improve the business environment in order for the private sector to effectively contribute to economic development, as stated in the Lagos State Development Plan 2012-25. Long delays and costly procedures to establish a new business entity are indeed one of the obstacles to new investment and entrepreneurial activity. At federal level, the 1990 *Companies and Allied Matters Act* is the main body of law governing the establishment of companies in Nigeria. It is administered by the Corporate Affairs Commission (CAC). The Act was amended in 2004 and complemented later by the 2012 *Companies Regulation*, which intended to make business registration friendlier and less costly (see Chapter 3, Section 3.3).

In 2010, the World Bank produced a sub-national *Doing Business* report for Nigeria. Lagos' overall performance was rather weak, ranked 25th out of the 36 States and Abuja, whereas it was significantly better for "starting a business", figuring at the 8th position. For the same sub-category, Lagos was better ranked than all other States hosting major business cities, such as Kaduna (14th), Ibadan (24th), Kano (26th) and Port Harcourt (29th), except Abuja (1st). The report notes that there are significant differences across Nigeria in the time, cost and number of procedures necessary to start a business. These variations arise from different performance levels of state offices of national agencies, such as CAC, and in state departmental taxes and local licensing fees for business premises in each State. According to the report, it takes 8 procedures and 31 days to open a business in Lagos for a total cost of 77% of income per capita. These figures compare fairly well with other States, which on average require 9 procedures, 36 days and cost the same. Lagos figures are very similar to Sub-Saharan averages but significantly higher than those of OECD countries (respectively 5 procedures, 12 days and 4.5% of income per capita).

According to Lagos authorities, the actions of LSG in streamlining administrative procedures to quicken and to reduce the cost of establishing a new business have been focusing on: i) the completion of various reviews on land, tax and judicial administrations in the State; ii) the facilitation of connections with relevant federal agencies, including CAC; iii) the review and

consolidation of rates chargeable by relevant state agencies and local governments in the State; and iv) improvement of transport and communication facilities to reduce turnaround time.

A One-Stop Investment Centre was established in Abuja in 2006 (see Chapter 3, Section 3.3). It brings together 26 government agencies under one roof in order to facilitate business entry in Nigeria. There is no such one-stop shop in Lagos. Nevertheless, almost all federal agencies involved in setting-up a business have operating offices in Lagos State. An investor is supposed to be able to start and finish all administrative procedures in Lagos. LSG reports that it collaborates with the federal government on issues affecting the investment climate through consultations and collaborative actions.

In its continuous process of improving the legal framework in view of simplifying business registration, both the federal and LSG could draw on the experience of other federal countries that have successfully simplified business registration requirements. The case of Mexico illustrates how the impulse of states has served regulatory reform at federal level (Box 6.5).

Box 6.5. **Unleashing regulatory reform at the state level**

The regulatory reform initiative in Mexico was not a one-time initiative, but instead an effort that has strengthened with continued benchmarking in all 31 States and Mexico City to stimulate change and to support co-ordination with and within federal, state and municipal governments. Regulatory reform efforts started as early as the 1980s but it is only in 2000 that the Federal Commission for Regulatory Improvement was established. While this agency became the main driver of change, political obstacles limited its effectiveness and reforms failed to pass. However, thanks to Mexico's federal structure, the states could start reform efforts immediately.

While states were benefitting from peer-learning and experience sharing during the entire reform process, competition between states was the biggest catalyst for reform. Faced by almost identical federal regulations, governors had difficulty explaining why it took longer or cost more to start a business in their state and were inspired by the reform efforts of other states. Consequently, Mexican states were improving their regulatory environments and the impulse for reform persisted even through changes in government. The pace of reform was maintained thanks in part to the regulatory reform units that had been created by states and that were receiving technical assistance from the federal government.

Delegating the reform agenda proved to be an essential part of the national reform effort. It fostered commitment, a sense of collaboration and better communication among federal, state and municipal authorities. Early on in

Box 6.5. **Unleashing regulatory reform at the state level** *(cont.)*

the reform process, the federal government collaborated with the states to improve business registration through the creation of one-stop shops. After a few years of steady improvement at the state and municipal levels, the federal government saw a need for broad regulatory reforms at the federal level, which process started in 2009.

Source: World Bank (2012), *Doing Business 2012: Doing Business in a More Transparent World*, Washington, DC.

Consultation mechanisms

In their continuous efforts to provide a friendlier investment climate, governments should maintain regular dialogue with the private sector in order to involve them in policy design and to collect their feedback on recurrent issues affecting their operations.

MoCI recently established the Lagos Corporate Assembly, a public-private dialogue platform held biannually. The Lagos Corporate Assembly serves as a channel for voicing private sector needs and challenges to policymakers with a view to improving the business environment and making it friendlier for both domestic and foreign investors. It was set up with the support of the Growth and Employment in States programme (GEMS 3), a five-year programme (2010-2015) funded by the UK Department For International Development (DFID) aiming to support an improved business environment in Nigerian States.

The first meeting of the Lagos Corporate Assembly took place at the beginning of 2012. The Assembly covered topics as diverse as: the necessity to enhance government support for SMEs; difficulty to access credit by SMEs; wharf landing fees; relocation of farmers affected by the development of the airport project; multiplicity of government agencies visiting companies; multiplicity of state and local government levies; number of effective taxes; duplication of rates and levies across States of the Federation; high cost of the Lagos State Signage and Advertisement Company; disparity in the rates of stamp duty between Lagos State and federal governments; and state of roads and drainage within industrial estates.

At a subsequent session of the Corporate Assembly, LSG presented to the private sector its actions to tackle these issues. It is indeed thoughtful to also use the Lagos Corporate Assembly to inform business representatives about government plans and of progress achieved in diverse areas of interest. The Lagos Corporate Assembly is perceived by the private sector as a useful mechanism to foster dialogue and policy reforms. The State has shown particular determination in following-up on investors' concerns. A challenge lies in the fact that, although MoCI should be the major player driving business

climate reforms in Lagos, it has limited power to influence other State ministries or the federal government.

Similar initiatives exist at the federal level, such as the Nigerian Economic Summit Group, the National Competitiveness Council of Nigeria and the Aftercare Committee hosted at NIPC (see Chapter 3). Bridges between the Lagos Corporate Assembly and these federal platforms should be built, so as to maximise co-ordination between federal and state policy reforms according to relevant responsibilities.

In its consultation with the private sector, the Lagos State government should make sure to include business representatives from all sizes and all sectors of the economy. In this regard, the Organised Private Sector consists of a valid platform to interact with. It is made up of five umbrella organisations representing the broader Nigerian private sector: the Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture (NACCIMA); the Nigeria Employers' Consultative Association (NECA); the Manufacturers Association of Nigeria (MAN); the Nigerian Association of Small Scale Industrialists (NASSI); and the Nigerian Association of Small and Medium Enterprises (NASME) (see Chapter 3, Box 3.6).

6.5. Free Trade Zones and investment incentives

To date, Lagos State puts strong emphasis on the development of Free Trade Zones (FTZs) in its efforts to attract investment. FTZs in Lagos are administered by the Nigeria Export Processing Zones Authority (NEPZA), a federal agency under the Federal Ministry of Industry, Trade and Investment. Companies wishing to operate in FTZs have to submit their application and register with NEPZA. There are currently five FTZs in Lagos that are operational and three awaiting approval (Table 6.1). The Lekki Free Zone is the flagship project of state authorities to boost domestic and international investment and generate employment (Box 6.6).

While the development of Lekki Free Zone is an ambitious initiative with the potential to generate high levels of employment, it is important to bear in mind that its development should not be a substitute for the State's larger trade and investment reform efforts. To the contrary, international experience suggests that the positive impacts of free trade zones depend on the degree to which they are integrated with their host economies and the overall investment climate reform agenda. Against this background, FIAS has developed a set of good principles to guide policymakers to underpin their zone development efforts (Box 6.7).

FTZs in Nigeria are often accompanied by investment incentives, including fiscal incentives. Specific incentives exist in Lagos State and they are co-ordinated with national regulations by focusing on areas where the State

Table 6.1. **Free trade zones in Lagos State**

Name	Ownership	Date of designation	Status	Specialty
Lagos Free Trade Zone	Private	2002	Operational	Manufacturing Oil and Gas, Petrochemical
Airline Services Export Processing Zone	Private	2003	Operational	Food Processing and Packaging
Snake Island Integrated Free Zone	Private	2005	Operational	Steel Fabrication, Oil and Gas, Sea Port
Ladol Logistics Free Zone	Private	2006	Operational	Oil and Gas, Fabrication, Oil and Gas Vessels, Logistics
Lekki Free Zone	State Government/ Private	2008	Operational/ Under construction	Manufacturing, Logistics
Nigeria Aviation Handling Company	Private	-	Awaiting Approval	Cargo Hub, Trans- shipment and Warehousing
Eko Atlantic City Free Zone	Private	-	Awaiting Approval	Finance, leisure, real estate, shopping malls, corporate business, commerce
Airport Free Zone	NEPZA/ Federal Ministry of Aviation	-	Awaiting Approval	Warehouses, processing of manufactured goods, tourism, light industries

Source: NEPZA.

Box 6.6. **Lekki Free Zone**

The Lekki Free Zone consists of a 16 500-hectare zone located on the Lekki Peninsula adjacent to the Atlantic Ocean to the southeast of the city of Lagos. It was launched in 2004 as a vehicle to fully utilise the investment potential of Lagos and with the objective to create at least two million jobs. The zone is designed to be a multi-purpose facility suitable for a variety of activities including: oil and gas; petrochemicals; electronics; mechanical (light and heavy equipment, machinery and automobiles); pharmaceuticals; textiles; shopping, warehousing and transportation; and banking and financial services. The Lekki Free Zone initiative is part of a wider plan to develop the Lekki sub-region into a self-sustained model city. As such, the project will also include tourism, leisure and residential development opportunities.

Lekki Free Zone is conceptualised, licensed and co-ordinated by LSG and anchored on a private capital investment strategy. A tripartite agreement was signed between LSG, Lekki Worldwide Investments Limited (a private company of Lagos State government) and a Chinese Consortium to develop the first phase. The latter covers an area of 3 000 hectares. While the Lagos State Government is providing the land, the Chinese consortium is investing in basic infrastructure, including power, water, sewage and roads. Land is then being leased to prospective investors and proceeds from the land are used for

Box 6.6. **Lekki Free Zone** *(cont.)*

further development of the zone. In addition, there is an agreement with the Chinese consortium to include into the project an element of skills transfer to Nigerian workers.

Source: Lagos State government (2008), *TradeInvest Lagos: A Guide to Business and Investment in Lagos State*, Lagos; and Lagos State Government (2012b), *Lagos State Investor Handbook*, Lagos.

Box 6.7. **Special Economic Zone basic policy framework**

	International Standard
Concept of Extra-territoriality	Outside domestic customs territory Eligible for national certificates of origin Eligible to participate in national trade agreements/arrangements
Eligibility for Benefits	No minimum export requirement Manufacturers and services Foreign and local firms Expansions of existing enterprises Private developers of zones
Foreign and local ownership	No limitations Equal treatment
Private Zone Development	Clearly defined in legislation; specific zone designation criteria Eligible for full benefits Competition from government-run zones on a level playing field
Sales to the Domestic Market	Liberalised Provided on a blanket basis rather than case by case Treated as import into domestic market, subject to payment of import duties and taxes
Purchases from Domestic Market	Treated as exports from domestic market; enterprises eligible for indirect exporter benefits Labour Policies Full consistency with ILO labour standards Specialised dispute settlement mechanism

Source: FIAS (2008), *Special Economic Zones: Performance, Lessons Learned, and Implications for Zone Development*, Washington, DC.

has legislative powers. The institutions in charge of administering incentives in Lagos State are MoCI and the Lagos State Inland Revenue Service. It is, however, important to bear in mind that the provision of quality infrastructure facilities in FTZs, as well as site design and location, are far more productive means to attract foreign investors than fiscal incentives provided (FIAS, 2008; OECD, 2013c). Tax incentives are rarely a top motivation factor for investment decisions, especially in Sub-Saharan Africa but are too often viewed as a relatively easy “fix” for promoting investment, especially FDI.

A thorough analysis of tax incentives in Nigeria is provided in Chapter 3 (Section 3.5) and could be useful for LSG. The OECD Policy Framework for Investment encourages states to evaluate the costs and benefits of incentives, in particular the use of tax incentives together with the level of tax burden they impose on businesses with a view of meeting its investment promotion objectives. The OECD Checklist for Foreign Direct Investment Incentive Policies also helps raise awareness of decision makers in assessing the usefulness and relevance of investment incentives (OECD, 2003). In addition, the OECD Tax and Development Programme developed the Principles to Enhance the Transparency and Governance of Tax Incentives for Investment in Developing Countries to promote the management and administration of tax incentives for investment in a transparent consistent manner, limit discretion and increase accountability (Box 6.8).

Box 6.8. **OECD principles to enhance the transparency and governance of tax incentives for investment in developing countries**

1. Make public a statement of all tax incentives for investment and their objectives within a governing framework.
2. Provide tax incentives for investment through tax laws only.
3. Consolidate all tax incentives for investment under the authority of one government body, where possible.
4. Ensure tax incentives for investment are ratified through the law making body or parliament.
5. Administer tax incentives for investment in a transparent manner.
6. Calculate the amount of revenue forgone attributable to tax incentives for investment and publicly release a statement of tax expenditures.
7. Carry out periodic review of the continuance of existing tax incentives by assessing the extent to which they meet the stated objectives.
8. Highlight the largest beneficiaries of tax incentives for investment by specific tax provision in a regular statement of tax expenditures, where possible.
9. Collect data systematically to underpin the statement of tax expenditures for investment and to monitor the overall effects and effectiveness of individual tax incentives.
10. Enhance regional co-operation to avoid harmful tax competition.

Source: www.oecd.org/ctp/tax-global/Transparency_and_Governance_principlesENG_June2013.pdf.

The focus of zone development should be on the development of a cluster-based strategy, providing common infrastructure facilities for companies operating in specific sectors or facing similar challenges (such as SMEs). In this

regard, beside FTZs, LSG is currently developing two agro-industrial parks, of respectively 22 and 100 hectares, and three enterprise zones. The most advanced enterprise zone is the Gberigbe Enterprise Zone, which is currently being provided with infrastructure, including road network, drainages, kerbs and street lighting. It is designed to accommodate metal and aluminium, fabricators, block moulders, and furniture makers. Enterprise zones are understood by the Lagos authorities as the smallest units of the cluster concept meant to create communities of complementary businesses situated in the same location – although in practice they tend to gather similar business rather than complementary ones. These zones are designed to provide an enhanced work environment, improve social and economic support structures and encourage standards and competitiveness. Attention should be given to the affordability of spaces for SMEs.

In the same vein, the Lagos State government could encourage industrial clusters in free trade zones, especially Lekki Free Zone, with a view to support industrialisation and linkage creation. Emphasis could be given to SME development in an attempt to link industrial and enterprise policies. Cluster programmes should concentrate on strategic sectors for national growth, foster industries in transition, support SMEs overcome technology absorption, and create competitive advantages to attract FDI and promote exports (see Chapter 3 section 3.6 for a more extensive review of cluster development).

6.6. Business linkages and SME development

Foreign direct investment is often welcomed not just for its contribution to overall levels of investment and employment but also because it can bring additional benefits to local citizens through the diffusion of new technologies as well as human resource and management expertise. These spillovers take place largely through linkages between foreign investors and local firms, whether as suppliers, customers, partners or competitors. Governments often adopt proactive policies to foster greater linkages, particularly by assisting local firms wishing to supply foreign investors. These policies are especially helpful to harness the potential of SMEs in host economies.

In order to benefit from FDI spillovers through the creation of productive business linkages, the government should take steps to strengthen the network of potential domestic suppliers of MNEs through the development of the SME sector, proactive linkage creation efforts and the reinforcement of human talents.

Promoting SME development

The degree of linkage creation between domestic and foreign companies primarily depends on the quality of the host economy's SME sub-sector (see

Chapter 3). The first approach to encourage productive business linkages is thus to increase efforts towards building absorptive capacities of domestic SMEs. According to a federal survey of Nigerian micro, small and medium enterprises undertaken in 2010, weak infrastructure, lack of access to finance and inconsistent government policies are the main challenges faced by SMEs in Nigeria (SMEDAN and NBS, 2010). Lagos State has the highest number of SMEs in Nigeria, with over 50% of them (Lagos State government, 2012a).

According to the Lagos State Development Plan 2012-25, the State is currently supporting SMEs in several ways, including through the provision of technology and business incubation centres and operation of 22 industrial estates. The government points out that this assistance is insufficient, as only a small fraction of manufacturers in the State are accommodated on the industrial estates, with the result that many businesses still operate from residential accommodations. LSG also supports small businesses' associations such as the Nigerian Association of Small Scale Industrialists (NASSI) and the Nigerian Association of Small and Medium Scale Enterprises (NASME). The government, through MoCI, is also involved in the promotion of domestic and international trade fairs to showcase the products of SMEs and in the organisation of seminars on non-oil facilitation for SMEs. Finally, the State has established a micro-credit scheme to assist SMEs in accessing soft loans.

LSG is willing to put stronger emphasis on the development of the SME and informal sector, which are addressed jointly by the authorities. In doing so, it intends to find ways to accommodate the informal sector so that it continues to contribute to the economic life of the State. The government has identified the following priority actions:

- developing an SME/informal sector plan;
- including gender issues in SME/informal sector development with programmes targeted at women entrepreneurs;
- establishing business incubator centres (e-centres and physical centres) and earmarking land with sites and services for SMEs;
- assisting enterprises with access to new markets through procurement processes;
- promoting business linkages between the informal and formal sectors;
- promoting health and environmental health education among informal economic enterprises;
- strengthening micro-credit institutions that service the SME/informal sector;
- holding regular consultations with SMEs to understand their needs and determine ways of meeting those needs;

- streamlining existing regulations on small businesses to facilitate business creation, survival of new and existing enterprises and increased development of entrepreneurs;
- assisting informal businesses to become formal SMEs;
- encouraging co-operatives; and
- establishing information and monitoring systems to keep track of the sector's evolution.

At federal level, the Small and Medium Enterprises Development Agency of Nigeria (SMEDAN) is the government agency, under the Federal Ministry of Industry, Trade and Investment, mandated to promote, monitor and co-ordinate the development of the SMEs sector. It was established in 2003 and disposes of a zonal office in Lagos. SMEDAN performs activities that include market information dissemination; business development capacity building; promotion of clustering and access to common facilities; policy design and advocacy; and facilitation of access to finance (see Chapter 3).

Federal and State programmes co-exist but do not seem to be articulated in a co-ordinated approach and strategy. In order to maximise the impact of initiatives to support SMEs in Lagos, the SME/informal sector plan that will be developed in the near future should be designed by MoCI in co-ordination with the Federal Ministry of Industry, Trade and Investment and SMEDAN. It is also important to bear in mind that SME support programmes should complement, not substitute for, active efforts to establish a sound investment environment. For this to happen, the government should continue collecting feedback from SMEs to better understand their challenges as well as regularly evaluate the efficiency of the various SME and informal sector development initiatives in place in Lagos.

Encouraging backward linkages

There are other, more direct ways of supporting linkage creation between foreign investors and domestic SMEs. In the past, governments have tried to mandate linkages through local content, local equity or joint venture requirements and sometimes even direct technology transfer obligations. However, increasingly policy makers are seeking to promote more "natural" linkages as, for example, through electronic databases aimed at facilitating business partnerships.

There is no clear policy on business linkages in Nigeria and there are few and disperse such initiatives across the federation, including in Lagos State. In the latter, SMEDAN is involved in forward and backward linkage facilitation through the assistance of the United Nations Industrial Development Organization (UNIDO) and its Subcontracting and Partnership Exchange (SPX) programme that was launched in 2011 (see Chapter 3). The SPX network acts as technical

information, promotion and matchmaking centres for industrial subcontracting. It aims at linking the SME sector to a global database of manufacturing operators. UNIDO is providing technical assistance while the Lagos office of SMEDAN is offering work space, furniture and human resources. According to the authorities, the Lagos State government is also involved in promoting business linkages between investors and local SMEs through the organisation of meetings with trade missions. Moreover, the Lagos Chamber of Commerce and Industry, among its various activities, organises matchmaking meetings and arranges business contacts between foreign investors and its members.

The government, through MoCI, should take a more proactive role in the promotion of linkage creation policies – especially in sectors where State-specific comparative advantages have yet to be effectively tapped into. In particular, it could start by:

- organising match-making meetings or roundtables between foreign affiliates and domestic SMEs that could act as potential suppliers;
- arranging specialised training for Lagos-based companies, according to foreign investors' requirements and benchmarks to better act as their suppliers (see following sub-section); and
- developing an online database of existing domestic suppliers in Lagos (for example based on the existing yellow pages that MoCI produces).

These activities should be operated in collaboration with relevant federal stakeholders such as NIPC and SMEDAN as well as small business associations (such as NASSI and NASME) and other private sector representatives. Training measures, in particular, should involve the business sector. Because linkages programmes must be shaped to the specific investor and SME needs, a one-size-fits-all approach will not work. Programmes should be carefully designed with input from both investors and SMEs and should be built around regular dialogue to ensure that problems are identified and quickly corrected. Starting small and working within priority sectors or those sectors with high potential for employment creation or technology transfer can be advantageous.

Finally, although it should not take too much of its scarce resources, the IPU could also be involved in business linkage creation. By directly interacting with foreign investors in its aftercare activities, the IPU will be very well positioned to understand their supplying needs and standards. The information gathered could be of valuable interest to better tailor the State's efforts to foster productive business linkages.

Addressing skills gaps

Close linkages can also be promoted through wider government efforts to develop human resources, through investments in education and training, which can improve the capacity of a country to absorb foreign technology.

Education policy in Lagos State is led by the Ministry of Education and is perceived as a tool to develop and provide human capital for the State, aimed at supporting macro-economic development. The State government recognises that human resource development is central to support economic growth by avoiding skills deficit in priority and booming sectors. The government has, however, not yet established a coherent and comprehensive human resource development policy framework, consistent with its broader development and investment strategy. Education programmes and vocational trainings are not systematically linked and adapted to private sector needs. Strategic actions included in the Lagos State Development Plan 2012-25 in this regard include measures aiming at increasing access to education for everyone; enhancing the quality and relevance of education at all levels, including vocational and career-specific training; better regulating and managing education institutions; and maximising the use of resources.

Domestic capacity building should constitute a major element of all linkage programmes. In many cases, SMEs may be unfamiliar with the quality, technical or sanitary standards required by foreign firms and thus have difficulty entering supply chain agreements with them. Training can be a valuable way to encourage linkages. Encouraging larger companies to share their material and service-sector purchasing requirements with smaller local firms can also help. In some cases, local suppliers may be individually too small to provide the needed volumes on a regular, secure basis, but efforts to create production co-operatives can assist SMEs in fulfilling the needs of larger firms. Especially in service industries, training and facilitation can assist larger companies in sourcing supplies and labour from local communities, which can also assist in preventing labour or community disputes.

Involvement of business representatives in human resource development is key. Education and training managers should establish local partnerships with the private sector so as to quickly identify new needs and deliver new courses. Internships in businesses as well as career education in schools could also be encouraged to support the development of adequate skills. Malaysia has scored some impressive advances in this regard, such as through the Penang Skills Development Centre (PSDC) led by the State of Penang (Box 6.9).

Box 6.9. **The Penang Skills Development Centre in Malaysia**

The Penang Skills Development Centre (PSDC) was established in May 1989 as a not-for-profit training and development centre. At initial start-up, the PSDC received support from the Penang State government in the form of subsidised rental of premises and an annual training grant for the centre. As it grew in relevance it attracted the attention of the federal government. Starting

Box 6.9. **The Penang Skills Development Centre in Malaysia** *(cont.)*

from 1993, the PSDC received capital grants to assist with its capacity building expenditure such as equipment and machinery. The PSDC invites membership from the manufacturing and related industries and to-date has a member base of 130 companies. With strong support from the government and industry, the PSDC undertook the facilitation of effective resource utilisation amongst the manufacturing and service industries.

The PSDC does not target any specific group and is accessible to all who wish to pursue lifelong learning. Its staple programmes such as those conducted on behalf of the government and the degree and diploma programmes offered under continuous education tend to attract: i) secondary school (high school) leavers; ii) unemployed graduates; and iii) the existing workforce which requires re-skilling and skills upgrading. The success of the PSDC is also attributable to its tripartite business model, which draws on the involvement of its three key stakeholders: industry, academia and government. The PSDC is managed and led by the industry and is supported by national academic bodies and the government.

Six government agencies were involved in launching the PSDC: i) the Ministry of Entrepreneur and Co-operative Development (has since then been dissolved); ii) SME Corp (the federal focal agency for information and advisory services for SMEs); iii) the Standard and Industrial Research Institute of Malaysia; iv) the Penang Regional Development Authority; v) the Penang Development Corporation; and vi) the Penang State Secretariat. These agencies represent the various interests of the government such as local enterprise development, research and development and both state and national level development initiatives. More importantly, their involvement in the PSDC council enables the PSDC to understand the policy directions of the government and therefore, to implement and introduce new human resource development initiatives which complement national policies.

Source: OECD (2013b), *OECD Investment Policy Reviews: Malaysia 2013*, OECD Publishing, Paris, *http://dx.doi.org/10.1787/9789264194588-en*, (based on OECD, LEED Programme).

The PSDC business model can be applicable to developing countries facing rapid industrialisation and a workforce which is under-equipped to support the changing industrial needs. The underlying success factors are an industry-driven approach and government commitment (OECD, 2013b).

6.7. Policy framework for infrastructure investment

Lagos State, as emphasised earlier, has strong potential to position itself as a hub of industrial transformation *vis-à-vis* Nigeria's hinterland as well as neighbouring land-locked countries. Moreover there are several sectors in

which Lagos could build considerable comparative advantage – both in terms of trade with external markets, and in terms of investment attraction and catering to the evolving needs of the large domestic market. The growth prospects of these sectors (such as agribusiness and business process outsourcing) remain mostly untapped at present – not only because of insufficiently targeted investment promotion and facilitation efforts (as highlighted earlier in this chapter), but also because infrastructure networks need to be further developed in order to support the expansion and cost-effectiveness of these industries.

In particular, positioning Lagos as a platform for industrial transformation will require not only highly efficient port infrastructure (container clearance times at Lagos Port remain markedly high as compared to other major African ports), but also reliable road and rail connections between the Lagos and Nigeria's hinterland. Transport connections to neighbouring landlocked countries will also need to be improved, and road congestion within Lagos city itself remains a considerable deterrent for investors seeking to establish themselves in the State. Additionally on the energy front, energy intensity in Lagos State is among the highest in Nigeria. Insufficient generation capacity, combined with inefficient and poorly maintained power networks, result in frequent power outages and cause the majority of businesses to rely on generators for the majority of their operations. This of course considerably raises production costs and further hampers the potential for developing comparative advantages in any niche sectors of the economy – with a particularly damaging effect on the growth of SMEs.

In this light, the section that follows investigates several facets of infrastructure investment policy in Lagos State: first, the State-level legal and institutional framework for private sector participation in the development of infrastructure (on which LSG is a front-runner in Nigeria); second, the co-ordination of infrastructure procurement and PPPs between Federal and State governments; and third, given Lagos State's pressing energy constraints, the prospects and challenges for encouraging renewable energy investment in the State. Throughout, infrastructure investment policy in Lagos State should be considered within the broader context of Federal-level legal and institutional frameworks (which can generate both constraints and opportunities at State-level). Therefore the analysis that follows builds largely on Chapter 5 above, which can be read in a complementary manner. In particular Section 5.1 present insights on the federal framework for public procurement and PPPs, and Sections 5.2.4-5.2.5 address competition concerns related to the structural separation of infrastructure utilities – both with important implications for Lagos State.

Legal and institutional framework for private sector participation in the development of infrastructure in Lagos State

Over the past decade LSG has developed a variety of laws designed to facilitate private participation in different infrastructure sub-sectors. These

laws also frequently set up regulatory authorities tasked with the management of these sub-sectors, including as concerns tariff-setting and regulation of corporate governance as well as competition behaviour by operators. Relevant laws include (among others): for water transportation services, the 2004 *Lagos State Water Sector Law* and the 2008 *Lagos State Waterways Authority Law*; and for the roads sector, the 2004 *Lagos State Roads, Private Sector Participation (PSP) Board Law* 2004 (or "Roads Law", since improved by the Lagos State Roads Authority Law of 2007). The 2004 *Roads Law* in particular broke new ground by establishing the enabling framework for PPP infrastructure projects in Lagos State. It notably formalised the role of the "State Roads, Bridges and Highway Infrastructure PSP Development Board" as a regulatory authority to oversee concessions and other PPP infrastructure projects in the State's roads sector, and provided a model for future legislation and regulation across the State's other state infrastructure markets.

More recently, these diverse laws have been supplemented by the *Lagos State Public Procurement Law* 2011, which seeks to "domesticate" the equivalent federal law (see Chapter 5 above) and which establishes the Lagos State Public Procurement Agency to regulate procurement by LSG Ministries, Departments and Agencies. In addition the 2011 *Lagos State Public Private Partnership Law* (LSPPP) applies to all infrastructure sectors and seeks to enshrine into a single document a governing framework for PPPs in across the economy of Lagos State. The law makes provisions for different concession agreements, and establishes the Office of Public Private Partnership (OPPP) and its governing Board.

The Lagos OPPP is tasked with overseeing the performance of concession agreements and other PPP models and has powers to designate service charges or user fees for public infrastructure assets, and to prescribe guidelines for use of such asset that are consistent with the public interest. The Office had been in existence for some two years prior to enacting the *LSPPP Law*. As the first office of its kind in Nigeria, its facilities and guidance are currently available to all State governments and not only to LSG – thus supporting the activities of the ICRC's PPP Resource Centre at federal level (see Chapter 5 above). Moreover the capacity of the OPPP has been a point of priority in order to secure the successful preparation and roll-out of projects. This stands in contrast to PPP Units in the majority of Sub-Saharan African countries, which (when they exist) are often constituted of part-time staff with very limited private sector experience, who must often combine their roles as PPP officers with responsibilities in various ministries and agencies. The fact that the majority of OPPP staff comes from the private sector has brought crucial project finance, negotiation and management experience to the Office, and has assuredly been an important element to the Office's successful track record so far.

Overall the procurement and PPP legislation of Lagos State is very well-developed, and serves as a useful complement to existing legislation at the

federal level. Some gaps remaining in the federal framework, and which were likewise only very lightly touched upon in the 2011 *Lagos State PPP* and *Public Procurement* Laws, have more recently been filled by a comprehensive set of regulations and guidelines released in 2013. In particular this includes the *Public Procurement Regulations for Goods, Works and Non-Consulting Services* (or "PPA Regulations") enacted for the Lagos State Public Procurement Agency (PPA) in 2011 and operational since April 2013; and the *Procurement Procedures Manual* (released in May 2013). The following shortcomings of the pre-existing federal and state-level regimes have thus been addressed:

- The federal procurement legislation does not specifically address elements of risk-sharing and performance management in contract design; and while the Lagos OPPP has significant expertise in these considerations, little guidance in this regard is provided in the *Lagos State PPP Law* or the *Public Procurement Law* either. This gap is addressed by the *PPA Regulations*, which provide for interim performance reports to be provided by private partners in infrastructure contracts; in addition Section 63 of the Regulations specifies that, "bid documents for goods and works shall require a performance security in the form of a guarantee from a bank or a performance bond from an insurance company … in an amount sufficient to protect the Procuring Entity against unsatisfactory quality of the goods, non-performance… or non-completion" by the private partner. This rebalances risks of non-performance and ensures that competitive pressures are placed on the winning bidders of infrastructure procurement contracts. Meanwhile and in order to protect the interests of bidders in equal measure, the Regulations set a ceiling on the volume of the performance guarantee: the total amount of both performance security and retention fee (should the procurement entity request one) should not exceed 15% of the contract sum. Also in the interest of private contractors, the procurement entity is to pay interest on any contract payments delayed by more than 60 days.
- There is almost no reference, neither within the federal nor the state-level legal regime for PPPs and public procurement, to procedures for communication and dispute resolution between public and private parties; nor many provisions for appeal of procurement decisions. By contrast, Section 67 of the 2013 *Procurement Regulations* sets out the means through which dissatisfied bidders can seek administrative review, first through the Accounting Officer of the procurement entity and subsequently through increasingly high levels of authority (through to the PPA, the Lagos State Public Procurement Board, and finally the high courts). As concerns contract re-negotiation, the Regulations also acknowledge that, "during the execution of a contract, changes may occur in the quantity of work done requiring amendments to the contract agreement between the Procuring Entity and the contractor"; provisions for contract adjustment are made accordingly, increasing the

flexibility of the system for both public and private parties involved. Finally the Regulations usefully specify that, "the conditions of contract shall contain provisions dealing with the applicable law and the forum for the settlement of disputes; and for National Competitive Bidding, the national law of Nigeria shall prevail".

- Another prior shortcoming, as highlighted in Chapter 5 above, is that the *Lagos State Public Procurement Law* 2011 (Section 6.1) makes no provisions to facilitate SME participation in procurement bids. By contrast Schedule 1 of the PPA Regulations, as available from April 2013, sets out the various project size thresholds below which National Competitive Bidding (NCB) is the preferred procurement method, and above which the default is International Competitive Bidding instead. Beside this threshold approach, SME participation could be further encouraged by simplifying bidding requirements or disaggregating large-scale projects into several smaller contracts which would be more amenable to local bidders. This is an area in which State governments can bring particular value-added, given that small-scale infrastructure contracts are most often concluded at state or local government level.
- While the *Lagos State Public Procurement Law* 2011 provides for a margin of preference for domestic bidders as compared to foreign bidders in the evaluation of tenders, there is no clear indication in the text itself on the size of these margins, nor on the eligibility criteria. More restrictive wording in this regard can help guard against the unjustified and arbitrary use of preference margins, which may otherwise limit the efficiency gains of public procurement contracting. Schedule 2 of the PPA Regulations now clearly identifies the size and criteria for the preference margins used in international competitive bidding (ICB), as well as the criteria for using National Competitive Bidding (NCB) as the preferred procurement method instead (see Box 6.10 below).

Box 6.10. **Bidding procedures, timelines and evaluation criteria for public procurement in Lagos State**

Part IV of the *Lagos State Public Procurement Regulations* (as of April 2013) details the following procurement methods:

a) **National Competitive Bidding** (NCB) for contracts above One Hundred Million, and below a certain monetary threshold as set from time to time by the Public Procurement Board.

b) **International Competitive Bidding** (ICB) for contracts above the monetary threshold for NCB and for which there is responsive inadequate number of qualified and bidders within the Country a certain monetary threshold as set from time to time by the Board.

Box 6.10. **Bidding procedures, timelines and evaluation criteria for public procurement in Lagos State** *(cont.)*

c) **Two-Stage Bidding** for large and complex contracts where it is necessary to obtain first greater clarity in technical specifications and possible alternative technical approaches.

d) **Restricted Tendering** (RT) for contracts for which only a limited number of qualified suppliers or contractors exist.

e) **Selective Bidding** (or "Request for Quotations") for small contracts, where it is sufficient to obtain written quotations from at least 3 reputable suppliers or contractors.

f) **Single Source Procurement** (or Direct Contracting) applied only in exceptional circumstances and always subject to the provision of the Public Procurement Law.

g) **Framework contracting** (where applicable, as a schedule of rates or indefinite delivery contract)

Schedule 2 of the Regulations provides further details on the criteria and conditions under which a Procuring Entity may grant domestic bidders a margin of preference in the evaluation of bids launched under International Competitive Bidding. Such preferences can be up to 15% for bids from domestic suppliers for goods domestically produced; and up to 7.5% for bids for works by domestic contractors.

Finally Schedule 7 of the Regulations sets out the timeframe for the various procurement methods, as follows:

Serial Number	Method of procurement	Period (calendar days)
	PREQUALIFICATION STAGE	
1	International competitive bidding	30
2	National competitive bidding	21
	TENDERING STAGE	
3	National competitive bidding	30
4	International competitive bidding	45
5	Restricted national competitive bidding	21
6	Restricted international competitive bidding	30
7	National shopping	7
8	International shopping	14
9	Where large works are involved	90

Box 6.10. **Bidding procedures, timelines and evaluation criteria for public procurement in Lagos State** *(cont.)*

Alongside, the Procurement Procedures Manual of May 2013 gives precise clarifications concerning every step of the contract preparation and bidding process. These are very successful steps forward which could provide useful guidance for other states, as well as for future updates of the federal public procurement and PPP regimes.

Source: Lagos State Public Procurement Agency, *Public Procurement Regulations for Goods, Works and Non-Consulting Services 2011* (April 2013).

The above are a few legislative shortfalls at federal level, and also within the pre-2013 state-level procurement regime, which have recently been effectively filled by complementary regulations. Additional improvements secured by the Lagos State PPA Regulations also include a prescribed timetable for the duration of the procurement process (in Schedule 7, and differentiated according to national bidding, international bidding, and restricted bidding); as well as for procurement appeal procedures. Schedule 3 of the Regulations also specifies the information which must be provided to all bidders, in the interest of maximum transparency – including with the broader Nigerian public. Likewise in view of greater transparency, the Procurement Procedures Manual of May 2013 gives precise clarifications concerning every step of the contract preparation and bidding process; and the PPA, now fully operational since its board was inaugurated in March 2014, is preparing Standard Bidding Documents to further streamline the procurement process. In March 2014, the Audit Service Commission was also inaugurated, as a partner institution to create a more institutionalised approach to open, transparent and accountable governance. LSG has thus successfully begun using its room for manoeuvre *vis-à-vis* the federal framework in this domain.

Co-ordination of infrastructure procurement and PPPs between Federal and State governments

PPPs in Nigeria can be initiated and managed at either the federal level or the state level. The ICRC (see Chapter 5 above) is notably tasked with co-ordinating the PPP policies and programmes of the State and Federal Governments to ensure consistency among them. Such co-ordination – not only as concerns implementing and regulatory agencies, but also aligning legislative frameworks as well as project financing structures – is crucial to the success of procurement and PPP infrastructure projects. On the one hand and as the shortcomings mentioned above suggest, at State level, an additional layer of legislation can be vital to the success of certain PPP projects. On the other hand, the federal super-structure can facilitate project implementation

even when State structures are well-developed (as is the case in Lagos State): some State projects require some form of Federal Government guarantee in order to attract international finance, and must therefore comply with the process for Federal projects since securing the guarantees requires the approval of the Federal Executive Council (ICRC, 2012).

This inter-dependence and complementarity among State and Federal levels is exemplified in the case of the Lekki Toll Road Concession project:

- This project was the trigger for the modernisation of several facets of LSG PPP and procurement legislation. Specifically, the *Lagos State Roads Law* (mentioned above) was designed with the Lekki project in mind.
- Meanwhile the project finance for the Lekki toll road project was guaranteed not only by LSG (through a guarantee issued by a commercial bank in favour of the Lekki Concession Company, LCC), but also through a Federal Support Agreement (FSA). This provided a sovereign guarantee in case of project termination (see Box 6.11). In addition the Federal level played a role in granting possible investment incentives: LCC applied for various waiver consents from FGN, including certain tax exemptions granted by awarding the LCC a Certificate of Pioneer Status.
- Yet beyond this form of financial support, clear communication with the wider society and end-users on the expected costs and benefits of infrastructure PPP contracts is equally vital in the interest of sustainable long-term contracts. This is exemplified by the latest development in the Lekki toll-road concession, as detailed in Box 6.11 below.

Box 6.11. **Lekki Toll Road Project – insights into PPP project financing, risk management, and cost-recovery**

The Lekki toll road project, one of the first PPPs in Nigeria, would probably not have taken off had it not been for strong Government support and commitment (demonstrated by the guarantees and loans provided by the Lagos State Government), and from enabling legislation (2004 *Lagos State Roads Law*) and good risk mitigation efforts. It also had a robust financial model with innovative parallel financing arrangements, committed sponsors, and an experienced concession and project manager. More recently the project has provided an example of flexible and effective re-negotiation in view of balancing cost-recovery with the affordability needs of end-users. The following elements can give useful insights and lessons for future PPPs in Nigeria:

- The project was financially supported at federal level through the Federal Support Agreement (FSA). This was issued as an Irrevocable Standing Payment Order (ISPO), which under the Concession Agreement committed FGN, in the event that the Lekki Concession Company (LCC) and the lenders

Box 6.11. **Lekki Toll Road Project – insights into PPP project financing, risk management, and cost-recovery** *(cont.)*

had any claim against Lagos State and that the latter did not meet its obligation, to make deductions from the federal statutory allocations to LSG and to instead pay over these sums to LCC and/or to the Lenders.

- The project also benefited from adequate risk-sharing in the project preparation phase. Under the terms of the concession agreement between the LCC and Lagos State Government, traffic management responsibility rests primarily with Lagos State Traffic Management Authority (LASTMA). *LASTMA Law* (No.9) of 2004 confirms LASTMA's responsibility for regulating, controlling, and managing road traffic in Lagos State, and for enforcing road traffic laws as well as prosecuting road traffic offenders.
- The project also provides some important lessons in terms of cost-recovery. Indeed user fees (in the form of a road toll) were intended to provide a key source of project revenues for the private partner, but this approach has run into difficulties – entailing re-negotiation and considerable flexibility on behalf of both public and private parties:
  - Tolling was first suspended shortly after its first introduction in 2010. This suspension responded to widespread contestation over the tolling, reflecting public misunderstanding as to the toll's purpose and the rationale of the PPP project itself. Suspension was justified by Lagos State Government in order to allow more time to provide alternative routes to enable road users to bypass the toll plazas if they preferred to do so, and also to allow more of the road works to be completed. However this entailed payment of NGN 4 billion (USD 24 million) to LCC by way of compensation. While tolling was re-introduced in December 2011, this remained a controversial topic.
  - In August 2013 LCC notified Government that, given the rapid rise in interest rates on local loans and other cost parameters, it would be compelled to raise tolls currently being charged by 20% in order to maintain cost recovery. In response Lagos State Government bought back the rights of LCC and announced that it would solely fund the completion of the project, while maintaining LCC's involvement in management of the road. Therefore the take-over by Government, which amounts to an anticipated transfer of the concession back to the public party and which grants the latter total control of the toll rates being charged, aims to safeguard end-user affordability by adjusting the terms and level of risk-sharing of the public-private partnership.

The 2013 developments in the Lekki concession provide a positive model of flexibility in contract re-negotiation, whereby the private partner remains engaged and costly dispute resolution or outright contract termination is avoided.

Box 6.11. **Lekki Toll Road Project – insights into PPP project financing, risk management, and cost-recovery** *(cont.)*

It also illustrates the importance of carefully anticipating key risks ex-ante (such as interest rate and demand risks), and wherever possible allocating those risks to the partner best able to control them (in this case this perhaps should have been the public party rather than the concession company). Finally it highlights the necessity of raising more public awareness on the rationale of the PPP model and what it entails, especially in terms of pricing – so as to anticipate possible backlash against user fees. Such awareness-raising is one of the key tasks faced by the Lagos Office of PPPs, and also features high on the agenda of the newly operational Lagos Public Procurement Agency (PPA). The website launched by the PPA in July 2013, together with regular issues of the PPA *Procurement Journal*, are important steps accomplished in this direction.

Source: NEPAD-OECD Africa Investment Initiative, March 2012 and Bisiriyu, Rasheed, Popoola, Nike and Adesomoju, Ade. "Why we intervened in Lekki-Epe Expressway management – LASG". The Punch Nigeria, 29 August 2013.

Successful infrastructure procurement and PPP implementation thus requires close interaction between federal and State governments to optimise the available laws and agencies, and to adapt the investment framework to state specificities. Figure 5.2 in Chapter 5 above details the institutional structure for PPP development at national level, and notably illustrates where State governments fit in within this process.

Encouraging renewable energy investment in Lagos State

Of all of Nigeria's states, Lagos is the smallest in landmass but the most populous (hosting 18 million people). 60% of industrial activities in Nigeria take place in Lagos State, which is exposed to significant negative climate change impacts. The risks are particularly high because of Lagos' long coastline, flat topography, high water table and growing population and a heavy concentration of industry and infrastructure near the coast. Nevertheless the State has vast potential in renewable energy sources such as solar, wind, tidal and biomass energy, which it can exploit to power its economy. For example Lagos State can cost-effectively access natural gas, which is abundant in Nigeria, and much of which is currently flared.

LSG recognises the importance of developing renewable energy. A number of renewable energy programmes and projects are or have already been implemented in Lagos State, which can provide a learning base for future similar projects. These include the on-going consideration of bio-fuels for incorporation into the BRT system; the Eco-Atlantic City, which will derive its energy exclusively from renewable sources including tidal wave; the on-going retrofitting of

street lights with solar and wind power sources; piloting of waste gas recovery for electricity generation from the Olusosun landfill site; and biogas from agricultural wastes. Lagos is also the only State in Nigeria to have established an office of "Transformation" (within the State Governor's office) tasked with greening reforms and overseeing green growth across the State.

More broadly, LSG has addressed the need for renewable energy development in the Lagos State Climate Change Policy 2012-14, which aims to tackle climate change while putting Lagos State on the path to greater economic competitiveness (see Box 6.12). The Policy states that the State has to set goals and targets for shifting to alternative and renewable energy sources as well as investing heavily in renewable energies to achieve these goals and targets if it is to remain competitive and develop into a modern industrialised state capable of attracting eco-friendly commerce and investment. This Climate Change Policy is reinforced by the fact that the power sector features prominently on the State's political agenda for economic transformation – the "PATH" or Power-Agriculture-Transport-Housing programme.

Box 6.12. **Lagos State Climate Change Policy 2012-14**

The Lagos State Climate Change Policy states that in order to enhance the State's energy security and economic, social and environmental sustainability, diversification of energy sources so as to make renewable energy the main source of energy for Lagos State is crucial. According to the Policy, this can be achieved through increasingly investing in alternative energy R&D, technology development, acquisition, transfer and adoption. The Policy also urges development of the capacities of real estate firms and financiers to incorporate climate smart and resilient designs into buildings (i.e. incorporation of solar water heating and direct solar lighting and heating as means of reducing a building's energy consumption).

The implementation of the Policy will be the responsibility of the Ministry of Environment of the Lagos State Government, working in close collaboration with other key line ministries. The policy recommends that various implementation instruments be developed for its operationalization, including an elaborate State Climate Change Strategy and Action Plan. In addition, the policy recommends that Lagos State develop sector specific strategies and plans of action to address climate change.

In August 2013, the State Ministry of Environment in collaboration with the United Nations Development Programme (UNDP) validated the draft of the State Climate Change Policy and Action Plan. According to LSG, the draft emphasises the importance of forming a strong partnership between the public

Box 6.12. **Lagos State Climate Change Policy 2012-14** *(cont.)*

and private sectors. LSG is also expected to continue its commitment towards formulating a policy framework necessary for mitigating and adapting the society to the impact of climate change.

Source: Lagos State Climate Change Policy 2012-14.

However, the development of the renewable energy sector in Lagos State is characterised by several challenges. These are for the most part related to constraints at the federal level, and include: a minimal electricity transmission and distribution network across the entire country; an undeveloped domestic market for low-carbon energy options; and an un-conducive legal and regulatory framework for investment in the grid power system at the State level (that is, under the Constitution power distribution is comprised within the 'Exclusive List' of sectors reserved for control by the Federal Government). A broader range of federal-level obstacles to the development of renewable energy generation is detailed in Chapter 5 above.

Nonetheless there may be some scope for increasing the agency of LSG where pricing and stimulating renewable (as well as traditional) energy generation is concerned. As noted by the Lagos State Ministry of Commerce, State Governments are now trying to move power to the Constitution's 'non-exclusive list'. Currently some flexibility already exists, as States can take the initiative without referring to FGN for any power projects below 12 MW. Also while Multi-Year Tariff Order (MYTO II, which sets electricity tariffs) is elaborated at federal level, there also is some flexibility in adjusting these tariffs at State level (see Chapter 5 on pricing of the energy market).

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