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PRIVATIZATION AND FOREIGN INVESTMENTS IN NIGERIA

Lawrence Azubuiké†

I. INTRODUCTION

Following the seemingly successful outcome of the British experience in privatizing otherwise state-owned enterprises (SOE)¹ in the 1980s,² and

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1. State-owned enterprises means business enterprises owned by government. See Richard J. Zeckhauser & Murray Horn, *The Control of State-Owned Enterprises*, in PAUL W. MACAVOY ET AL., *PRIVATIZATION AND STATE OWNED ENTERPRISE: LESSONS FROM THE UNITED STATES, GREAT BRITAIN, AND CANADA* 7, 10 (Kluwer Academic Publishers 1989) (quoting Aharoni (1986 p.6) to the effect that SOEs have three distinguishing characteristics: "First . . . they must be owned by the government. Second, . . . [they] must be engaged in the production of goods and services for sale . . . Third, sales revenues of SOEs should bear some relationship to cost."). Although this is not a definition of art, it does underline the requirement that an SOE must belong to the public, and must be, at the bare minimum, aim to do business even if profit making is not the sole objective. The Nigerian Bureau of Public Enterprises defines a "[SOE] as government-owned or government controlled economic entities that generate the bulk of their revenues from selling goods or services. It may also include enterprises established to provide commercial activities in which government controls management by virtue of its ownership stake. It encompasses enterprises . . . directly or indirectly through other federal and state government entities." Bureau of Public Enterprises Frequently Asked Questions, <http://www.bpeng.org/10/0317731656532b.asp?DocID=93&MenuID=34> (last visited Dec. 9, 2005).

2. See Ingo Vogelsang, *Micro-Economic Changes from Government Owned and Managed Enterprises to Private Sector Enterprises: Micro-Economic Effects of Privatizing Telecommunications Enterprises*, 13 B.U. INT'L L.J. 313; see also Yair Aharoni, *The United Kingdom: Transforming Attitudes*, in *THE PROMISE OF PRIVATIZATION: A CHALLENGE FOR U.S. POLICY* 23-56, (Raymond Vernon & Council on Foreign Relations eds., 1988); JOHN VICKERS & GEORGE YARROW, *PRIVATIZATION: AN ECONOMIC ANALYSIS* 428-429 (MIT Press 1988) (giving a favorable review of the British program but expressing reservation about the privatization of monopolies); John Vickers & George Yarrow, *Privatization in Britain*, in PAUL W. MACAVOY ET AL., *PRIVATIZATION AND STATE-OWNED ENTERPRISE: LESSONS FROM THE UNITED STATES, GREAT BRITAIN, AND CANADA* 209, 209-245 (Kluwer

the collapse of communism, the world witnessed a reduction in direct state involvement in economies.³ There is now a de-emphasis on direct government participation in enterprises. What were once state-owned companies are being transferred to private hands.⁴ In another sense, privatization is part of the overall restructuring of the political and economic lives of many nations; from communism to market economies, from dictatorship to democracy, and, in the case of developing countries, from neo-colonialism to an attempt at true independence.⁵

Nigeria is the most populous country in Africa. It has had its own share of the oscillation between robust state participation in the economy and capitalism. Its history is marked by political instability, as evidenced by its attempts at civilian administration frequently interrupted by military interventions. Consequently, Nigeria has witnessed the dilemma of the tension between free enterprise and the nationalism notionally ensured by a state-run economy. Nigeria desires foreign capital in the form of foreign investments for its economy. This article analyzes Nigeria's effort to resolve this dilemma by privatizing SOEs. It attempts an assessment of the exercise, which in one sense is more than a decade old, and in another sense is five years old. In particular, it examines the extent to which the exercise has promoted, or is capable of promoting foreign investment. Part II gives a brief background of Nigeria. Part III examines the meaning

Academic Publishers 1989); Gladstone Hutchinson, *Efficiency Gains through Privatization of U.K. Industries*, in *PRIVATIZATION AND ECONOMIC EFFICIENCY: A COMPARATIVE ANALYSIS OF DEVELOPED AND DEVELOPING COUNTRIES* 87-107, (Attiat F. Ott & Keith Hartley eds., 1991) (concluding from a study that public ownership in the U.K. led to growth in labor productivity, while private ownership led to growth in profits); Ronald D. Utt, *Privatization in the United States*, in *PRIVATIZATION AND ECONOMIC EFFICIENCY: A COMPARATIVE ANALYSIS OF DEVELOPED AND DEVELOPING COUNTRIES* 73 (Attiat F. Ott & Keith Hartley eds., 1991) (asserting that the British experience is perhaps the best known and most successful program of privatization where major divestitures occurred over an extended period).

3. See Otiye Igbuzor, Presentation of Paper Entitled "Privatization in Nigeria: Critical Issues of Concern to Civil Society" at a Power Mapping Roundtable Discussion on the Privatization Programme in Nigeria Organised by Socio-Economic Rights Initiative (SERI) 2 (Sept. 3, 2003), available at http://www.cdd.org.uk/pdf/nigeria_privatisation.pdf (asserting that "[t]oday, the received wisdom is that the state should recede . . . and that private ownership of the means of production is the only viable approach to the efficient production of goods and services, as well as economic growth and development. Consequently, there is a move all over the world to privatize erstwhile public enterprises.").

4. See Keith Hartley and David Parker, *Privatization: A Conceptual Framework*, in *PRIVATIZATION AND ECONOMIC EFFICIENCY: A COMPARATIVE ANALYSIS OF DEVELOPED AND DEVELOPING COUNTRIES* 11 (Attiat F. Ott & Keith Hartley eds., 1991) (stating that privatization has become a feature of many economies).

5. *Id.*

of privatization and the arguments usually proffered in favor of and against privatization. Part IV discusses the legal and institutional frameworks under which privatization is carried out in Nigeria and the incentives, which, together with the privatization exercise, are expected to attract foreign investment, while Part V examines what impact the privatization exercise has had or is capable of having on foreign investments in Nigeria.

II. BRIEF HISTORY OF NIGERIA

Nigeria is made up of several tribes.⁶ It is comprised of more than two hundred and fifty ethnic groups, although three of them are more predominant.⁷ Geographically, it is situated in the western part of sub-Saharan Africa, and has a total land area of 923,768 square kilometers.⁸ With an estimated population of about 130 million,⁹ Nigeria is the most black populated country in the world. It is endowed with enormous natural resources, of which oil accounts for ninety-five percent of the country's foreign exchange. The agricultural sector was vibrant before oil was discovered in the early 1970s.¹⁰ Politically, Nigeria was a colony of Great Britain until it obtained independence in 1960.¹¹ Since attaining autonomy, it has not had a durable democratic government. Of the forty-five years Nigeria has been independent, the military has tightly held the reins of governance, having been in power for twenty-nine of those years. Civilian officials have maintained control for only sixteen years, and are currently in control. There appears to be a resolve to ensure that the military never returns to control the government of Nigeria.¹²

6. Central Intelligence Agency World Fact Book, <http://www.cia.gov/cia/publications/factbook/geos/ni.html> (last updated Dec. 9, 2005).

7. *Id.*

8. *Id.*

9. *Id.*; see also Energy Information Administration Country Analysis Briefs, <http://www.eia.doe.gov/emeu/cabs/nigeria.html> (last updated Dec. 9, 2005).

10. E. Wayne Nafziger, *The Economy, in NIGERIA: A COUNTRY STUDY* 155, 163 (Helen Chapin Metz ed., U.S. Gov't Printing Office 5th ed. 1992). "The United Nations (UN) Center for Development Planning, Projections, and Policies observed that Nigeria's real growth in GDP between 1970 and 1974 was 12.3 percent per year. The annual target had been only 6.2 percent. Nigerian growth could be explained by factors largely outside the planners' purview—rapid oil industry growth and sharply increasing oil prices." *Id.*

11. *Id.* at 160.

12. The country recently concluded an election in 2003 in which the incumbent civilian president, Olusegun Obasanjo, was re-elected for a second term. It is worthy of noting that Mr. Obasanjo had first ruled the nation as a military head of state. He later won election as a civilian in 1999.

Classical economics recognizes three dominant models: capitalism, socialism, and communism. For the most part, Nigeria has operated a system that cannot be pigeonholed into any of these models. It is said to have a mixed economy.¹³ Individual ownership and participation in the economy have been on the rise. Most strategic sectors were initially run and continue to be run by the government.¹⁴ A few private enterprises were foreign-owned. This was, of course, a consequence of the colonial experience. It has been asserted that during the 1960s and 1970s, SOEs became the rule rather than the exception in sub-Saharan Africa.¹⁵ This would appear to be a direct consequence of the nationalistic and independent fervors that were prevalent in that part of the world at the time.¹⁶ Indeed, Nigeria's Second National Development Plan for 1970-1975 called for the state to assume the "commanding heights" of the economy.¹⁷ This plan was followed in 1972 by the government's implementation of a nationalization program under which some foreign-owned companies were indigenized.¹⁸ Although the shares in the nationalized enterprises were available to and acquired by the private sector, the result of the exercise was the co-existence of state and private

13. Osaheni Victor Iyayi, *Foreign Investors' Perceptions of Nigerian Public Policy on Foreign Investment* (1988) (unpublished Ph.D. dissertation, Golden Gate University) (on file with Golden Gate University Library).

14. Government owned entities once exclusively operated the financial, manufacturing, and communications sectors. *See also* GARY MOSER ET AL., *NIGERIA: EXPERIENCE WITH STRUCTURAL ADJUSTMENT* 25 (International Monetary Fund 1997) ("State intervention in major sectors of the economy spread throughout the 1970s and early 1980s. Virtually all the country's largest enterprises were wholly government owned... [and] [p]ublic enterprises posed a significant burden on the Federal Government's budget...").

15. ERNST & YOUNG, LLP, *PRIVATIZATION: INVESTING IN STATE-OWNED ENTERPRISES AROUND THE WORLD* 35 (John Wiley & Sons, Inc. 1994); *see also* Peter M. Lewis, *State, Economy, and Privatization in Nigeria*, in *THE POLITICAL ECONOMY OF PUBLIC SECTOR REFORM AND PRIVATIZATION* 211 (Ezra N. Suleiman & John Waterbury eds., Westview Press 1990) [hereinafter *Privatization in Nigeria*] (noting that throughout the 1950s and 1960s, the Nigerian Government's economic role was interventionist and tutelary, but limited to the state acting as a "catalyst" for private sector development by creating the physical, institutional, and financial environment for economic progress. This all changed with the military intervention in 1966, and as a result the 1970s witnessed a strategy of de facto state capitalism).

16. ERNST & YOUNG, *supra* note 15 at 34; *see also* Thomas M Callaghy & Ernest James Wilson III, *Africa: Policy, Reality, or Ritual?*, in *THE PROMISE OF PRIVATIZATION: A CHALLENGE FOR U.S. POLICY* 183 (Raymond Vernon ed., Council on Foreign Relations 1988) (attributing the pronounced state involvement in enterprises to a fall out of the anti-colonialist efforts which were in essence anti-capitalist and pro-socialist).

17. *Privatization in Nigeria*, *supra* note 15, at 213.

18. *See* Nigerian Indigenization Decree 1972.

enterprises in the economy. If sub-Saharan African states embraced direct state interference and participation in the economy, the embrace appeared warmest in Nigeria. It is claimed that by 1990, the country possessed the largest and one of the most troubled public enterprise sectors in sub-Saharan Africa.¹⁹

The boom of the 1970s, occasioned by the discovery of oil and the resultant increase in the country's earnings, gave way to serious economic problems and a decline in the overall economy starting in the early 1980s. That decline has continued. In response, several administrations, both civilian and military, have struggled with policies that would arrest the decline, if not totally turn the economy around. The problems are exacerbated, and some would say actually caused, by the unfortunate malaise of corruption.²⁰ One of the measures that has been introduced is the privatization exercise that theorizes the sale of government enterprises, which have become drain pipes of the economy instead of boosting government reserves, would spur the overall economy and in particular promote foreign-investment.²¹ Yet, it remains an open question whether the government embarked on the privatization program after a careful and constructive analysis of the country's economic situation. It might have just been a knee-jerk reaction to what is undoubtedly a poor economic outlook. Besides following the British experiment, privatization gained worldwide attention, and countries facing harsh economic conditions have joined the bandwagon.

III. PRIVATIZATION – MEANING AND JUSTIFICATIONS

A. *Meaning*

Privatization is essentially the withdrawal of the government from active and direct participation in the affairs of an enterprise, which it hitherto owned.²² Privatization is at once an old and a new concept. On

19. *Privatization in Nigeria*, *supra* note 15, at 210-233; Callaghy & Wilson, *supra* note 16, at 184.

20. Niyi Alabi, *West Africa*, in GLOBAL CORRUPTION REPORT 215, 220 (Transparency International 2003).

21. See MOSER ET AL., *supra* note 14, at 25 (“In 1986, 33 percent of the Federal Government’s domestically financed capital budget was allocated to investment in public enterprises, and they absorbed an estimated 40 percent of the Federal Government’s nonsalary recurrent expenditure in the form of subsidies.”).

22. See L. GRAY COWAN, *PRIVATIZATION IN THE DEVELOPING WORLD* 6 (Greenwood Press 1990) (defining privatization as the transfer of a function, activity, or organization from the public to the private sector); ERNST & YOUNG, *supra* note 15, at 4 (also defining privatization broadly “as the transfer or sale of any asset, organization, function, or activity

one hand, the notion that business efficiency is best attained in private hands has been around from time immemorial, and could be found in the writings of Adam Smith as early as 1762.²³ On the other hand, the conscious adoption of privatization as part of state economic policy is recent. It has been noted that the term first appeared in a dictionary only in 1983.²⁴ Privatization is usually done in an effort to affect the economy in a positive manner by removing structural obstacles inherent in the ambiguous (if not self-contradictory) roles of the government in seeking to provide services at the cheapest terms to the citizenry, while at the same time hoping that an enterprise remains a going concern. Scholars identify two aspects of the meaning of privatization. In one sense, it is said to be "an array of actions designed to broaden the scope of private sector activity, or the assimilation by the public sector of efficiency enhancing techniques generally employed by the private sector."²⁵ This definition is broad enough to include not only the government's divestment of its interest in any or all enterprises, but also every conscious effort undertaken by the government to reform its public sector and make it more efficient.²⁶ In this way, privatization should be a constant in the

from the public to the private sector."); PAUL COOK & COLIN KIRKPATRICK, *PRIVATISATION IN LESS DEVELOPED COUNTRIES* 3-4 (St. Martin's Press 1988).

23. "In every great monarchy in Europe the sale of the crown lands would produce a very large sum of money, which, if applied to the payment of the public debts, would deliver from mortgage a much greater revenue than any which those lands have ever afforded to the crown When the crown lands had become private property, they would, in the course of a few years, become well improved and well cultivated." VICKERS & YARROW, *supra* note 2, at 1 (quoting ADAM SMITH, *WEALTH OF NATIONS* (1776)); *see also* COWAN, *supra* note 22 at 6; *see also* ERNST & YOUNG, *supra* note 15, at 4; *see also* Academy of Political Science, *Prospects for Privatization*, 36 *PROCEEDINGS OF THE ACAD. OF POLITICAL SCI.* No. 3 at 2 (Steve H. Hanke, ed., 1987) [hereinafter *Academy of Political Science*] (asserting that Adam Smith tilled the ground for privatization).

24. COWAN, *supra* note 22, at 6; *see also* ERNST & YOUNG, *supra* note 15, at 4 (noting that although privatization is old, it came to worldwide attention with the British experiment in the 1980s); *see also* Academy of Political Science, *supra* note 23, at 2 (noting that although the word, privatization, was not in the dictionary before 1983, its counterpoint, nationalization, was already in the dictionary by then).

25. Mark Baker, *Privatization in the Developing World: Panacea for the Economic Ills of the Third World or Prescription Overused?*, 18 *N.Y.L. SCH. J. INT'L & COMP. L.* 233, 237 (1999) (quoting CHRISTOPHER ADAM ET AL., *ADJUSTING PRIVATIZATION: CASE STUDIES FROM DEVELOPING COUNTRIES* 6 (James Currey 1992)). Ernst & Young see privatization as a process and not an event, and note that it applies to all kinds of joint public-private ventures. *See* ERNST & YOUNG, *supra* note 15, at 4.

26. *See also* ERNST & YOUNG, *supra* note 15 (asserting that privatization is a process not an event); Callaghy & Wilson, *supra* note 16, at 180 (asserting that "[i]n its broader sense,

political economy of every state. This is because no state would admit that it is not taking measures to make its public sector as efficient as possible. The dispute has never been on the need for optimization of public enterprises. Rather, it has always been on the best way to achieve that result. The other sense in which privatization is understood is narrower. In this context, it is viewed as the transfer from the public to the private sector of ownership or control of productive assets or both.²⁷ It would seem that the narrower definition is more legal, while the broader definition is more economic. Thus, the former focuses on the legal consequence of privatization, whereas the latter captures its social and economic benefits.

Privatization may also be done gradually or with a “big bang.”²⁸ While a gradualist or intermediate approach to privatization effects a phased divestment of the government’s interest in enterprises, a “big bang” or immediate privatization exercise seeks to transfer the government’s interest in an enterprise to the private sector as quickly as possible.²⁹ It is argued that a gradualist approach spreads the time within which the pains of the exercise may be felt, and thereby reduces its impact.³⁰ On the other hand, proponents of immediate privatization posit that the inherent disruption in services is felt once and for all.³¹ Even if its severity is pronounced, the populace would take solace in the fact that it is for a short while. The line between the so-called “big bang” and intermediate approaches may not be so sharp. It is inconceivable that a government may wake up one morning and simply divest its holdings in

privatization is the introduction of greater market rationality or competitiveness into an arena of economic activity.”).

27. Callaghy & Wilson, *supra* note 16, at 180; *see also* Stephanie R. Nicolas, *Privatizing South Africa’s Industries The law and Economics of a New Socialist Utopia*, 30 LAW & POL’Y INT’L BUS. 721, 721 (1999) (defining privatization “as the sale of a state-owned business to entities other than the state.”); Yuliya Mitrofanskaya, *Privatization as an International Phenomenon: Kazakhstan*, 14 AM. U. INT’L L. REV. 1399, 1404 (1999) (quoting Andrei A. Baev, *Civil Law and the Transformation of State Property in Post-Soviet Economies: Alternatives to Privatization*, 12 UCLA PAC. BASIN L.J. 131, 150 (1993) to the effect that privatization is “the single act of transferring (by the means of buying and selling) the legal title of State property, which was in the possession of State enterprises for restricted purposes of producing certain goods under owner-State control, to individual or associated owners.”); Callaghy & Wilson, *supra* note 16, at 180 (stating that “[n]arrowly defined, privatization is any action that serves to dilute or eliminate government equity ownership or managerial control of an enterprise.”).

28. Nicolas, *supra* note 27, at 721-22; Mitrofanskaya, *supra* note 27, at 1404.

29. Nicolas, *supra* note 27, at 721.

30. *Id.*

31. *Id.* at 338.

public enterprises. Usually, preparatory work is done. Moreover, because of the vagaries and uncertainties associated with the exercise, most states start out gradually on the privatization course.

B. Rationale

The privatization of SOEs is not usually an easy task. It is susceptible to controversy. In many states, public enterprises are synonymous with the government and oftentimes are avenues to reward political or other patronage. Thus, a state intent on transferring ownership to the private sector, has to contend with so many factors not least of which may be the antagonism of the employees of the firms to be privatized.³² Yet, many view privatization as a talisman for economic recovery.³³ The western and industrialized countries tout the benefits of a free market economy and of privatization. To them, free market is to the economy what democracy is to the polity.

First, and most importantly, it is argued that privatization leads to efficiency,³⁴ in the erstwhile SOEs. The notion here is that the performance of most SOEs is not measured on the basis of their profitability.³⁵ Nor are the managers and other staff of the companies necessarily answerable for losses sustained by such entities. Instead, the continuity of their employment may be dependent on other factors, such as party affiliation. Nigerian Supreme Court jurisprudence holds that the staff of government owned enterprises cannot be terminated at will. They can only lose their jobs for misconduct, and this can only be determined

32. *See id.* at 733-36.

33. *Id.* at 712.

34. Mary M. Shirley, *The What, Why, and How of Privatization: A World Bank Perspective*, 60 *FORDHAM L. REV.* 23, 25-28 (1992) (asserting that privatization improves the use of public resources and also improves operating and dynamic efficiencies); *see also* Peter Rutland, *Privatization in East Europe: Another Case of Words That Succeed and Policies that Fail?*, 5 *TRANSNAT'L L. & CONTEMP. PROBS.* 1, 5 (1995); John R. Dempsey, *Thailand's Privatization of State Owned Enterprises During the Economic Downturn*, 31 *LAW & POL'Y INT'L BUS.* 373, 374 (2000) (asserting "that privatization is the best route to the development of competitive industries, the deepening of domestic and international capital supplies, and to continued economic growth in a world fixated on reducing commercial barriers and promoting a free market."); Roger Barrett James, *Information - The Key to Fair Privatization: British Successes and Russian Pitfalls*, 20 *LOY. L.A. INT'L COMP. L.J.* 837, 839-40 (1998) (stating that "[a]mong the most widely espoused reasons are to create an enterprise culture, increase competition, reduce government involvement in industry decision-making, eliminate waste, minimize state dependency, and increase and improve the quality of goods and services.").

35. Nicolas, *supra* note 27, at 724.

after a rigorous procedure.³⁶ Such employees are said to enjoy a status with statutory flavor.³⁷ On the other hand, the private sector is profit-driven. Performance is based on output and profit. Directors constantly are aware of the bottom line and of the need to achieve results. In consequence, it is thought that when the ownership of a SOE is transferred to the private sector, it will be infused with the efficiency that is believed to be standard in the private sector.³⁸

One of the consequences of privatization is usually the removal of government subsidies.³⁹ Such subsidies take different shapes. They may be in the nature of guaranteed patronage by individuals or other persons over whom the government may have leverage. Such persons, in a sense, are forced to patronize the SOEs notwithstanding the standard of their goods or services. The subsidies may also be in the form of grants and subventions.⁴⁰ With privatization, the SOEs will have to compete with other firms and entities in the economy, without any subsidies from the government.

Secondly, privatization is said to free the government to do what it is best suited, which are regulation and the provision of security and other fundamental services encapsulated in its police powers.⁴¹ Perhaps, this rationale can best be understood on two levels. Since government is inherently not best suited to run profitable businesses, its direct involvement distracts attention from its other functions. By pulling out of direct involvement in the running of corporations, it can concentrate on its core functions. An analogy to the basic economic concept of specialization is apposite. Privatization results in the government deploying all its resources to the fundamentals of running the country, and this will lead to optimum performance in that area, while the private sector engages in

36. *E.g.*, Fed. Civil Serv. Comm'n v. Laoye, [1989] 202 N.S.C.C. 87 (Nigeria); Garba v. Univ. of Maiduguri [1986] 1 N.W.L.R. 550 (Nigeria); Olaniyan v. Univ. of Lagos, [1985] 2 N.W.L.R. 599 (Nigeria).

37. *Id.*

38. Nicolas, *supra* note 27, at 724.

39. *See* Dempsey, *supra* note 34, at 379.

40. In Nigeria for instance SOEs sometimes receive subvention from the government to pay staff salaries and to meet other recurrent expenses. *See* Edward Bewayo, Presentation of Paper Entitled "Will Entrepreneurship Lead to National Development in Africa?" to the 1999 Small Business Institute Director's Association (Feb. 1999), available at <http://www.sbaer.uca.edu/research/sbida/1999/31.pdf>.

41. This is one of the reasons which the Nigerian government gave for embarking on the privatization exercise. Olusegun Obasanijo, President of Nigeria, Inauguration of the National Council on Privatization (July 29, 1999), available at http://www.nopa.net/Useful_Information/Presidential_Speeches/29july99.html [hereinafter Presidential Statement].

directly providing goods and services. This may be a variation on the theme of efficiency. On another level, the government is the regulator of the economy. In performing its refereeing role, the government is supposed to be impartial and fair. If at the same time it is regulating the conduct of market players, the government is also a market participant, there is an inherent conflict of interest.⁴² This may lead to distortions in the economy and again militate against efficiency. Privatization removes this structural imbalance in the economy.

In the era of globalization, privatization is also seen as being beneficial to a state's economy because it attracts foreign capital in terms of foreign investment. Practically, since the SOEs are for sale, they constitute another avenue for foreign investment. This is mostly the case in developing countries where the enterprises may be gigantic and the purchase price may not be readily available locally. However, while privatization may make SOEs available to foreign investors and therefore increase the avenues for capital inflow into the country, privatization alone may not promote foreign investment.⁴³ Outside investors are usually aware of the political, social, and other dimensions of these enterprises. Such circumstances may make foreign investors wary of committing their resources to these ventures. Sometimes, in order to do so, they would seek many assurances and other guarantees from the government. The extent to which this rationale is carried out by the Nigerian exercise will constitute a substantial theme of Part V of this article. Furthermore, privatization may be embarked upon in order to raise funds for other important social services. The logic is that since the enterprises are not performing, the government may sell them off and apply the proceeds to other pressing public needs. There are other reasons for which a state may choose to privatize its public enterprises.⁴⁴ These may vary with the

42. This is not just a theoretical possibility. There are claims that some SOEs may violate regulations and go free. See Shirley, *supra* note 34, at 26 (giving the example of one African country in which the SOEs were several years behind in paying their taxes and their utility bills but were not sanctioned).

43. This is one of the stated objectives of the Nigerian exercise. See NATIONAL COUNCIL ON PRIVATISATION (NIGERA), PRIVATISATION HANDBOOK art. 1(2) (Bureau of Public Enterprises, 3rd ed. 2000) (stating that the government intends to use the privatization program to reintegrate Nigeria into the global economy, as a platform to attract foreign direct investment in an open, fair and transparent manner.).

44. For instance, some cynics believe that in some cases a state may privatize its state ownership of commercial enterprises just because the level of failure on the part of the enterprises is such that they imperil the position of the state officials. See Mitrofsanskaya, *supra* note 27, at 1403. In that sense the privatization is prompted by the self-interest of such officials. See also Callaghy & Wilson, *supra* note 16, at 183 (attributing the momentum

particular state, but the overarching consideration is usually the attempt to attain economic efficiency.⁴⁵

The concept of privatization is not a wholly-sweet pill to swallow. It has its critics, who charge that privatization results in the increase in prices and hurts the common man. This is the direct antithesis of the advantage of efficiency and market forces. Since the SOEs are not profit driven, they may charge significantly lower prices for their goods or services. Indeed, the subsidies from the government are indirectly passed to the citizens, in the nature of low prices. With privatization, and the need to compete on equal terms with other participants in the market, the enterprises tend to increase prices. However, proponents of privatization would counter that while the cost of the products may increase, there is a corresponding increase in the quality and standard of services obtained.

Closely related to this are the redundancies and loss of jobs that seem to follow privatization. In a bid to achieve efficiency, the privatized enterprises may want to streamline operations. This results in the loss of jobs. The projected positive impact on the overall economy is not immediate, and such aspiration may not seem a sufficient counterpoint to the devastating effect the loss of jobs may have on individuals. No wonder that in most developing economies, the stiffest resistance to privatization comes from the labor unions and other workers' groups.⁴⁶ In some cases,

of the privatization exercise in Africa partly to the fact that African governments ran out of cash).

45. But sometimes the touted objectives may conflict. And scholars may disagree on the hierarchy of these rationales. Compare VICKERS & YARROW, *supra* note 2, at 425 (arguing that the primary criterion for judging privatization is the improvement of industrial efficiency and that other goals such as "extending share ownership, raising revenue, and so on" are secondary; they assert that the latter goals can be achieved by other means), with Leroy P. Jones et al., *Net Benefits from Privatization of Public Enterprises*, in PRIVATIZATION AND ECONOMIC EFFICIENCY: A COMPARATIVE ANALYSIS OF DEVELOPED AND DEVELOPING COUNTRIES 53-70 (Attiat F. Ott & Keith Hartley eds., 1991) (alluding to "the most standard measure of performance" of privatization, as being social welfare; they assume that governments privatize in order to maximize social welfare, and that to assess the success of privatization is to examine the effect of the divestiture on social welfare); of course the dichotomy between the two reasons is not that sharp. The one inevitably leads to the other. Economic efficiency invariably results in the greatest benefit to the greatest number of individuals, that optimal and utopian state which is not antithetic of social welfare. However, as with every controversial subject, perceptions may differ. The rationales may also vary depending on the stakeholder concerned. This may range from national and local governments, managers of the SOE to employees. See ERNST & YOUNG, *supra* note 15, at 13-14.

46. For example, the Privatization agency in Nigeria has been having a running battle with the workers of the state owned electricity enterprise, National Electric Power Authority (NEPA). The workers strongly oppose privatization of NEPA.

the government has to take this factor into account, and may obtain a guarantee from the prospective transferees of its interest that there would not be a lay off of workers.

Similarly, it is contended that privatization exposes the economy to dominance by a few. Only a few rich are in a position to acquire the SOEs. This problem is compounded by the fact that in most developing countries SOEs are monopolies. While the government owned them, political pressures generally would insulate the consumers from the predatory tendencies of the monopolies. But when they are transferred into the private hands of a few rich folks who can afford them, they would exploit and indeed abuse their market dominance.⁴⁷ This will undercut the social and macroeconomic objectives for privatization, because "privately efficient profit seeking can no longer be expected to lead to socially efficient results."⁴⁸ In a region, such as Africa, reeling from the effects of colonialism, this concern is elevated and may be at the heart of opposition to privatization. Some might see the clamor for liberalization as another mechanism to re-colonize the region of Africa using privatization as the Trojan horse.⁴⁹ The panaceas for this shortcoming are few. First, states may take measures to reduce the market power of the privatized enterprise by expanding the scope of competition. This may be achieved by eliminating any barriers to entry into the relevant market so as to increase the scope of actual or potential competition.⁵⁰ Secondly, the enterprise may be restructured so as to eliminate or reduce its market dominance.⁵¹ Where monopoly power remains as of necessity, the state has to enact effective competition laws and other regulations.⁵² One caveat is that a cautious balance must be maintained between appropriate regulation and over regulation since the latter may defeat the purpose for the privatization.⁵³ Ideally, both reduction of market power and regulation

47. Thus Vickers and Yarrow argue that "[t]heoretical analysis and empirical evidence support the view that private ownership is most efficient—and hence privatization is most suitable – in markets where effective (actual or potential) competition prevails." See VICKERS & YARROW, *supra* note 2, at 426.

48. *Id.*

49. Callaghy & Wilson, *supra* note 16, at 183.

50. *Id.* at 427.

51. *Id.*

52. *Id.*

53. Leroy P. Jones et al., *Net Benefits from Privatization of Public Enterprises*, in *PRIVATIZATION AND ECONOMIC EFFICIENCY: A COMPARATIVE ANALYSIS OF DEVELOPED AND DEVELOPING COUNTRIES*, *supra* note 2, at 45 (noting that government should safeguard against price increase by regulating the enterprise after the privatization, but that such regulation should be done carefully in order to maintain a balance between the need

should precede the privatization. However, experience shows that most developing states at best enact regulatory laws, if they do so at all, only as part of the privatization exercise. Parts IV and V will emphasize that this is one of the pitfalls of the privatization program in Nigeria.

This imbalance is more pronounced in developing states, and Amy Chua, a scholar,⁵⁴ has argued that writers on the subject tend to ignore this tension. Simply put, privatization and “marketization” of the economy would benefit the economically dominant few. It would further entrench their dominance and cause a tension between democracy, as represented by the majority, and market, which is dominated by the rich minority. Chua asserts:

In developing countries with a market-dominant minority, markets and democracy will tend to favor different ethnic groups. Markets will (by definition) benefit the market-dominant minority, while democracy will increase the power of the relatively impoverished majority. In these circumstances, markets and democracy will not be mutually reinforcing. Rather, the combined pursuit of markets and democracy will produce a very charged and unstable situation.⁵⁵

Chua’s thesis assumes a powerful ethnic minority, but the thrust of the proposition is equally true even where the minority is not a recognized ethnic group. As long as the economic power resides in the hands of a few,

to protect against price increase and the need for the enterprise to achieve the objective for its privatization in terms of cost constraint and productivity improvements).

54. “Most developing countries have one or more ethnic minorities who, for widely varying reasons, have economically dominated the “indigenous” majorities around them. Under certain conditions, the presence of an economically dominant minority will introduce a fundamental tension between markets and democracy. This will be the case whenever the economically dominant minority is also *market-dominant*, meaning that it tends to be economically dominant under market conditions.” Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 *YALE L.J.* 1, 7 (1998). Of course it is arguable whether such tension is wholly undesirable. To the extent that the market dominant group is in the political minority, that scenario will offer an inherent protection to the consumers, which will invariably be in the political majority. Furthermore, in the peculiar context of developing or undeveloped democracies, the dilemma may be theoretical because political power may tend to track economic power. In other words, those who control economic power, even if they are in the minority, still possess political power. Although this is antithetic of democracy, developing countries especially in Africa have not witnessed true democracy.

55. *Id.*

they will tend to coalesce into an association that may be likened to an ethnic group. This triggers a tension where they are in a position to virtually buy all SOEs. Part IV will show that this concern is not lost on the architects of the privatization exercise in Nigeria.

Privatization also results in the loss of a sense of symbolic ownership of the SOEs. Notionally, since the enterprises are owned by the state, they belong to everyone. They are the common heritage of the entire citizenry. Therefore, upon sale, it is not only the government that is divested, but also the common man. And critics may not be persuaded by the fact that the sale of the enterprises will be for valuable consideration, which will go to the common purse. They see the physical structure of the SOE as a sign of their common ownership. The money realized from the sale may not be so visible to them, and indeed, it may be doubtful if it would be applied for their common good. Besides, in a system that is not particularly transparent, the valuation and pricing of the enterprises may be tainted or, indeed, dubious.

IV. PRIVATIZATION OF STATE INTERESTS IN ENTERPRISES IN NIGERIA

The objectives of the Nigerian government in undertaking the privatization of its SOEs are not different from the overall rationale, which inform the process in most places.⁵⁶ According to the government,

[i]t is estimated that successive Nigerian Governments have invested up to 800 billion naira in public-owned enterprises. Annual returns on this huge investment have been well below 10 per cent. These inefficiencies and, in many cases huge losses, are charged against the public treasury.⁵⁷

In the same vein, the government claims that millions of dollars are lost due to inefficiencies in the generation and distribution of power and fuel,

56. See Presidential Statement, *supra* note 41.

57. *Id.* A similar sentiment informed the first privatization program in 1986. See M. T. OKORODUDU-FUBARA, A LEGAL APPRAISAL OF THE PRIVATISATION OF PUBLIC ENTERPRISES 13 (Adepegba Printing Press 1988) (referring to a statement by the Secretary to the Federal Military Government of Nigeria to the effect that while government had invested 8 billion naira in equity shares and 15 billion naira in loans, its returns had been lower than 400 million naira to 800 million naira). Some argue that privatization is a natural corollary of the two prior economic policies of nationalization and indigenization, which the Nigerian government had pursued. These policies saddled the government with multiple economic and social undertakings. See *id.* at 7-14.

two critical areas in which the state is still the primary and dominant operator.⁵⁸ Nigeria's approach has been gradual. The government denies that it is embarking on an exercise to please the World Bank or the International Monetary Fund,⁵⁹ although few believe that those bodies will not be pleased at such reform. Furthermore, in an allusion to the tension to which this article adverted in the preceding part, this assures that the program "is not designed to share our national assets to a few rich people."⁶⁰ Nor was the country about to replace public monopolies with private ones.⁶¹ On the anticipated nexus between the privatization exercise and foreign investment, the President argued that privatization would bring in foreign technology, managerial competence, and capital, while at the same time ensuring the proper functioning of utilities, which also would attract foreign investments.⁶²

A. *The Legal Framework*

The military administration made the first attempt at privatization in 1988 via decree.⁶³ The scheme enunciated by the 1988 decree was the categorization of enterprises into four groups: those to be partially privatized; fully privatized; partially commercialized; and fully

58. OKORODUDU-FUBARA, *supra* note 57, at 7-14.

59. *Id.* Compare Jeffrey Herbst, *The Politics of Privatization in Africa*, in *THE POLITICAL ECONOMY OF PUBLIC SECTOR REFORM AND PRIVATIZATION* 246 (Ezra N. Suleiman & John Waterbury eds., Westview Press 1990) (contending that much of the current interest in privatization in Africa can be traced to the demands of foreign actors that third world countries rationalize their public sectors.), and LEWIS, *supra* note 15, at 210 (attributing the first privatization exercise of the Babangida administration to economic crisis, while noting that "[d]istributive pressures dominate Nigerian politics, and political imperatives hold sway over the nation's economy" and that these do militate against the privatization exercise). The truth appears to be that whilst the governments would relish the enormous leverage the SOEs give them over the polity, the reality of the nigh collapse of the economy stares them squarely in the face. Between the demise of those institutions and the injection of a measure of efficiency, the government will reluctantly choose the latter. Thus the impetus, which the exercise seems to garner, is a result of several factors.

60. Olusegun Obasanijo, President of Nigeria, Inauguration of the National Council on Privatization (July 20, 1999), available at http://www.nopa.net/Useful_Information/privatization/imperative.htm.

61. *Id.* A significant step in this direction is the proposal to split the power giant, NEPA, into several smaller entities prior to its privatization. Another may be the effort to enact an antitrust regime.

62. *Id.*

63. Privatisation and Commercialisation Act, (1990) Cap. 369, (Nigeria).

commercialized.⁶⁴ Partial privatization under the decree implied the divestment of only part of governmental holding in the affected enterprise. Full privatization entailed the divestiture of all the proprietary interest held by the government in the affected firm.⁶⁵ Similarly, full commercialization meant the reorganization of the enterprises with the result that they operate as profit making ventures and without subvention of any kind from the government.⁶⁶ For partially commercialized entities, the government was to still fund capital projects but not recurrent ones. As with most decrees promulgated by the military administrations, the 1988 decree was brief and contained scant substantive provisions.⁶⁷ The only other substantive part of that decree was the provision establishing a Technical Committee on Privatisation and Commercialisation (TCPC), with responsibilities for advising on the capital restructuring needs of enterprises under the purview of the decree, and generally implementing the provisions of the decree.⁶⁸

The currently operative legislation, which provides the legal framework for privatization, is the Public Enterprises (Privatisation and Commercialisation) Act of 1999⁶⁹ (hereinafter Privatisation and Commercialisation Act or the Act). The Act enacts a gradualist approach⁷⁰ to privatization. In doing so, it follows the 1988 model of

64. See Privatisation and Commercialisation Decree No. 25, (1988) § § 1 & 12 (Nigeria). (The former dealt with partial and full privatization while the latter dealt with partial and full commercialization.)

65. By the provision of § 14 of the Decree the word "enterprises" was given an expansive connotation to mean: "any corporation, board, company or parastatal established by or under any enactment in which the Federal Military Government, or any of its Departments, Ministries, or agencies has ownership or equity interest and shall include a partnership, joint venture or any other form of business arrangement or organisation."

66. See Privatisation and Commercialisation Decree No. 25, (1988) § 14 (Nigeria).

67. Decree No. 25 contained 14 sections divided into three parts.

68. See Privatisation and Commercialisation Decree No. 25, (1988) § § 3 & 4 (Nigeria).

69. There was also the Bureau of Public Enterprises Decree 1993 but this was repealed by the Privatisation and Commercialisation Act. See Public Enterprises (Privatisation and Commercialization) Decree No. 28, (1999) A1121 (Nigeria).

70. It is gradualist or intermediate if you take the entire exercise as a whole, otherwise it is arguable that for the enterprises to be fully privatized the approach is immediate or the so-called big bang.

placing SOEs into four categories: partially privatized;⁷¹ fully privatized;⁷² partially commercialized;⁷³ and fully commercialized.⁷⁴

According to the tenor of the Act, partial privatization means that the government does not fully divest its interest in the concerned SOE. Instead, it introduces a scheme whereby 51% of the shares in such an enterprise are sold to what is known as the “core” or “strategic” investor. The government retains 29%⁷⁵ of the equity, while 20% is available for subscription by Nigerian individuals. Out of the 20% available to individuals, 10%⁷⁶ (i.e. half) will be allotted to the staff of the affected enterprise.⁷⁷ The concept of “core investor” indirectly appeals to foreign investors. An investor “must not only possess the technical know-how in relation to the activities of the enterprise they wish to invest in but also possess the financial capacity to pay competitive price for the enterprise and increase their capital base.”⁷⁸ Given the paucity of both resources

Id. at Part I.

71. Public Enterprises (Privatisation and Commercialization) Decree No. 28, (1999) A1121 § 1(1) (Nigeria).

72. *Id.* at § 1(2).

73. *Id.* at § 6(1).

74. *Id.* at § 6(2).

75. The distribution was formerly 40% to core investor and 40% to the government. The National Council on Privatisation (NCP) amended schedule.

76. Section 5(3) of the Act; Originally this was one per cent, but pursuant to powers which the Act has vested in it the NCP increased it to 10%.

77. This appears to be an attempt to woo employees and to reduce their opposition to the exercise.

78. Presidential Statement, *supra* note 41. Section 34 of the Act defines “strategic investor”. Privatisation and Commercialisation Act, *supra* note 63, § 34. The Guidelines on Privatisation issued by the NCP has the following provisions on core investors:

“13.1 Core Investors or Strategic Investors can be described as formidable and experienced groups with the capabilities for adding value to an enterprise and making it operate profitably in the face of international competition. They should possess the capabilities of turning around the fortune of such an enterprise, if by the time of their investment, the enterprise is unhealthy. The major characteristics that distinguish strategic/core group investors are:

(a) They must possess the technical know-how in relation to the activities of the enterprises they wish to invest in. For example, a Core Investor into Cement Company must have access to cement production expertise with regards to optimal use of the machinery, maintenance of such machinery and other technical aspects of Cement Production such as procurement of raw materials, etc.

(b) The Core Investors must also possess the financial muscle, not only to pay competitive price for the enterprise they wish to buy into but also to turn around its fortune, using their own resources without relying on the Government for funds. Each Core/Strategic Investor

locally, the dual requirements would work in favor of foreign investors. This is consistent with the general intendment of the exercise to attract foreign investments. It is also pertinent to mention that the sale of the shares available to Nigerians shall be done on the basis of equality of Federal Constituencies.⁷⁹ When there is an over-subscription, “no individual subscriber shall be entitled to hold more than 0.1 per cent equity shares in the . . . enterprise.”⁸⁰ Significantly, the critical enterprises, such as the National Electric Power Authority (NEPA) and Nigerian Telecommunications Limited (Nitel), are in the list of entities to be partially privatized.⁸¹ This reflects the ambivalence with which many people still view privatization. The government has yet to wholeheartedly embrace privatization.⁸² It is questionable whether this approach is beneficial or not. On one hand, considering the strategic nature of these enterprises, there may be need for the government to retain some form of interest in them. However, experience has shown once the government is

is expected to prepare a Short/Medium/Long term plan for the development of the enterprise and indicate how it will be financed.

(c) The Core Investor must have the management know-how to run a business profitably in a competitive environment where market forces dictate the business environment.

13.2 Given the magnitude of investment level in the utilities earmarked for privatisation, the lack of absorptive capacity of the Nigerian Capital Market, our low technological level among other reasons, it is quite obvious that there is need to utilise the services of core investors in the new dispensation.

13.3 In consonance with S(4) of the Privatisation Act, privatised enterprise which requires participation by Strategic Investors may be managed by the Strategic Investors as from the effective date of privatisation on such terms and conditions as may be agreed upon.

National Council on Privatization, *supra* note 43, at Article 11. On the other hand, strategic investors will work hand in hand with the existing Management for a certain transition period.” Guidelines on Privatisation and Commercialisation, http://www.nigeriaembassyusa.org/guide_priv.shtml (last visited Dec. 9, 2005).

79. Privatisation and Commercialization Act, *supra* note 63, at § 5.2. This result is consequent on the amendment effected by the NCP. Originally the emphasis was on equality of States. *Id.*

80. Privatisation and Commercialization Act, *supra* note 63, at § 5.4. It is arguable whether this is an adequate safeguard against monopoly. Amakon Uzochukwu, *Privatisation Models: A Comparative Experience*, in READINGS ON PRIVATISATION 36, 36 (Eze Onyekpere LL.B (Hons.) B.L. ed., 2003).

81. Kevin Egerue, *Privatise Nitel, PHCN Fast*, DAILY CHAMPION (Lagos), Aug. 29, 2005 (on file with author).

82. Herbst attributes the ambivalence to the political roles SOEs play in Africa. As a result, he argues, governments would not wholeheartedly commit to privatization. He thus suggests a more realistic and lasting solution that would involve incremental reforms to improve public sector operations along with selected divestment. *See* HERBST, *supra* note 59, at 234-251. Indeed the control of these huge SOEs is seen as one of the attractions of governance and many politicians factor them in their political calculations.

involved, it may call the shots irrespective of the amount of its shareholding.⁸³ As a result, such an arrangement may not augur well for attracting the much needed foreign capital. Foreign investors usually are particular about stability and some form of certainty. They are aware of the legal, political, and other constraints in redressing governmental intermeddling in enterprises.⁸⁴ It is suspected that this incongruence made the National Council on Privatisation⁸⁵ (NCP) amend the ratio of the percentage of ownership in partially privatized SOEs, from 40:40 to 51:29, in favor of core investors. It is doubtful if such an enhanced and clear majority provides a sufficient assurance that the government will allow the core investors the required free hand to turn the ailing, partially-privatized enterprises around.

Full privatization entails the divestment of the entirety of the government's shareholding in the enterprise.⁸⁶ In most of the companies involved, the government is only part holder of the stocks. Thus, in this case, privatization is the transfer to the private sector of the government's already limited interest in the companies.⁸⁷ The firms in this category, including companies in the oil industry such as Unipetrol PLC, National Oil and Chemical Company PLC, and African Petroleum PLC, are not as strategic as those for partial privatization. As in the partially privatized companies, the shares available for sale are to be allocated on an equitable geographical spread using the equality of Federal Constituencies as a basis, and "[n]ot less than 1 per cent of the shares" are to be made available to employees of the enterprises.⁸⁸

As we saw earlier, privatization, in the broad sense, encapsulates commercialization. This is because, in its wide connotation, privatization

83. ERNST & YOUNG, *supra* note 15, at 111 (alluding to the unwillingness or inability of government to relinquish control completely, but noting that private investors and governments usually make uncomfortable bed partners). In the past government has been known to appoint and remove directors of companies in which it had an interest without reference to constitutive documents of such companies. *Id.*

84. Dr. Aboubacar Fall, Issues Relating to Capital Flows in Africa: The African Development Bank Perspective 4 (March 2003) (unpublished report, on file with UNITAR), *available at* http://www.unitar.org/dfm/AssessmentReport2003/Luanda/Unpublished/Capital_Flows_Africa.pdf.

85. Privatisation and Commercialization Act, *supra* note 63, §9.1. The NPC is a body created under the Privatisation and Commercialisation Act. *Id.*

86. NATIONAL COUNCIL ON PRIVATISATION, *supra* note 43, at 54.

87. Otive Igbuzor, *Privatisation in Nigeria: Critical Issues of Concern to Civil Society*, in READINGS ON PRIVATISATION 36, 36 (Eze Onyekpere LL.B (Hons.) B.L. ed., 2003).

88. Public Enterprises (Privatisation and Commercialization) Decree No. 28, (1999) A1121 § 5(2)-5(3) (Nigeria).

encompasses every attempt by the state to make the SOEs operate with the same level of efficiency as obtained in the private sector. This is at the heart of the Nigerian approach to commercialization. For firms to be partially commercialized, the implication is that "such enterprises so designated will be expected to generate enough revenue to cover their operating expenditures. The government may consider giving them capital grants to finance their capital projects."⁸⁹ On the other hand, full commercialization "[m]eans that enterprises so designated will be expected to operate profitably on a commercial basis and be able to raise funds from the capital market without government guarantee. Such enterprises are expected to use private sector procedures in the running of their businesses."⁹⁰

The strict or narrow interpretation of privatization may exclude both forms of commercialization, because the legal ownership of the enterprises, or equities therein, remains vested in the government. However, commercialization effects the removal of the subsidies they hitherto enjoyed from the government. These enterprises are therefore not available for foreign direct investment. But the bulk of the enterprises in both categories provide social and other important services⁹¹ to the economy. And to the extent that they operate at their optimum, they definitely would contribute to an environment that is very attractive to foreign investors.

The Act creates an ad-hoc body known as the Public Enterprises Arbitration Panel, which is responsible for effecting prompt settlement of any dispute between an enterprise and the National Council on Privatization (NCP or "the Council") or the Bureau of Public Enterprises (BPE or "the Bureau").⁹² This is by virtue of Section 28, which provides:

(1) The Panel shall have power to arbitrate –

....

- (a) in any dispute raising questions as to the interpretation of any of the provisions of a Performance Agreement; or
- (b) in any dispute on the performance or non-performance by any enterprise of its undertakings under a Performance Agreement.

89. NATIONAL COUNCIL ON PRIVATISATION, *supra* note 43, at 54.

90. *Id.*

91. Example the parks, the Railways Nigerian Television Authority, Nigerian National Petroleum Corporation, etc.

92. Privatisation and Commercialization Act, *supra* note 63, at § 27(1).

(2) A dispute on the performance or non-performance by any of the parties to the Performance Agreement shall, in the case of a commercialised enterprise, lie to that Panel providing that such reference may be made after all reasonable efforts to resolve the dispute have been made and have not been proved.

(3) The ruling of the Panel shall be binding on the parties and no appeal shall lie from a decision of the Panel to any court of law or tribunal.⁹³

It is not exactly clear why the jurisdiction of the Public Enterprises Arbitration panel is so narrowly defined. It may be presumed that “enterprise” as used in Section 28 of the Act refers to an enterprise, which is the subject of privatization. The underlying premise of privatization is that the government wants to sell all or part of its interest in such enterprise or, in the case of commercialization, to stop subsidizing it. The NCP and the BPE are both creatures of the government through a law. Is it contemplated that the Council or the Bureau should enter into negotiations with the enterprises? If the Council or the Bureau correctly interprets its powers and functions under the Act, can an enterprise legally impede the exercise of those powers or functions? It would seem that any dispute that may arise between the Council or the Bureau and an enterprise would *ipso facto* implicate the interpretation of the Act. Curiously, the Panel is not given power to interpret the Act. It would seem that the contemplated disputes⁹⁴ may relate to sale of government’s interest and may involve core investors or other persons interested in acquiring the shares of an enterprise. If so, Section 28 is unclear because a prospective investor cannot be referred to as an “enterprise,” within the meaning of section 28. This is a lacuna, which may militate against foreign investments. Most prospective investors try to familiarize themselves with the dispute settlement mechanisms in the countries of their interest. If Section 28 was meant to signal a quick and fair dispute settlement mechanism, it does a poor job of it, and if it does not, that is an avoidable omission.

93. *Id.* at § 28.

94. Section 28’s reference to Performance Agreement suggests that the “enterprise” referred to is the enterprise after privatization or commercialization. This also leaves out the question of a dispute relating between an investor and the Council or Bureau relating to the sale of government’s interest.

B. Institutional Framework

The Privatisation and Commercialisation Act creates two bodies directly charged with implementing the privatization program. The first is the NCP,⁹⁵ which is composed of persons holding certain important portfolios in the government and others appointed by the President. Its functions are generally policy related and supervisory.⁹⁶ It determines the broad guidelines for effectuating the privatization program. The second body is the BPE or Bureau,⁹⁷ which is headed by a person, designated Director General.⁹⁸ The Bureau's functions are essentially to execute the policies set by the NCP and to provide secretarial support to the NCP. Both bodies are to work in tandem to ensure that all aspects of the privatization program are carried out effectively and properly.

For all intents and purposes, the BPE is like an agent of the NCP, albeit a statutorily appointed one. This is because the BPE carries out the decisions of the NCP, although the former may make recommendations to the latter. Yet, in a curious departure from established drafting tradition in the country, the Bureau is statutorily made a body corporate and invested with perpetual succession.⁹⁹

What makes this provision even more significant is that the Act is silent on whether the NCP has similar attributes. The anomaly is that the principal may not ordinarily¹⁰⁰ be amenable to lawsuits at the same time as the agent. An overly ambitious Director General of the Bureau may also exploit this apparent oversight to flout the directives of the NCP. The availability of the Bureau as the clearinghouse, and with authority to bind the government on issues of privatization is salutary. It provides the one stop shop for the foreign investor interested in the privatization program.¹⁰¹

C. Foreign Investment Incentives in Nigeria

Foreign investment is broadly defined as "the institutional, individual, or governmental acquisition of assets in a foreign country. It includes both direct investment and portfolio investment and encompasses both public

95. Privatisation and Commercialization Act, *supra* note 63, at Part II Section 9(1).

96. *Id.* at § 11.

97. *Id.* at § 12.

98. *Id.* at § 17.

99. *Id.* at § 12(2).

100. It is arguable that the Provisions relating the Public Enterprises Arbitration Panel enable NCP to bring, and to be subject to, proceedings in that panel.

101. However, under the Nigerian Investment Promotion Commission Act 1995 every enterprise in which a foreigner has an interest has to register with the Commission.

authorities and private firms.”¹⁰² There is a tendency to distinguish this broad understanding from the narrower context of foreign direct investment, which some see as “any investment in another country which is carried out by private companies or individuals as opposed to government aid.”¹⁰³ Different countries may define foreign direct investment differently. The internationally accepted standard definitions of foreign direct investment are rather technical, and are contained in the Balance of Payments Manual¹⁰⁴ and the Detailed Benchmark Definition of Foreign Direct Investment.¹⁰⁵ According to the former, foreign direct investment refers to investment made to acquire lasting interest in enterprises operating outside of the economy of the investor.¹⁰⁶ The foreign entity or group of entities that make the investment is called the “direct investor,” while the unincorporated or incorporated enterprise in which the direct investment is made is referred to as a “direct investment enterprise.”¹⁰⁷ The direct investor’s purpose is to gain an effective voice in the management of the enterprise. The Balance of Payments Manual and the Detailed Benchmark Definition of Foreign Direct Investment suggest a threshold of 10% equity ownership as the stake significant or sufficient to give effective voice in the management.¹⁰⁸ The BD3 of the OECD would exclude any 10% ownership if it can be proven that it does not allow the investor an effective voice in the management of the direct investment enterprise. Similarly, it would include a holding of less than 10% ownership if the direct investor nonetheless maintains effective voice in the management.¹⁰⁹ It is pertinent to note that effective voice in the management of the direct investment enterprise is not tantamount to control of the enterprise. Of course, it is doubtful if ownership of 10%

102. Osaheni Victor Iyayi, *Foreign Investors’ Perceptions of Nigerian Public Policy on Foreign Investment 10 (1988)* (Ph.d dissertation Golden Gate University) (on file with the Golden Gate University Library).

103. *Id.* at 10 (quoting DAVID W. PEARCE, *MACMILLAN DICTIONARY OF MODERN ECONOMICS* 159 (London: Macmillan 1986)).

104. *BALANCE OF PAYMENTS MANUAL* (International Monetary Fund, 5th Ed., 1993), available at <http://www.imf.org/external/np/sta/bop/bopman.pdf> (last visited Dec. 9, 2005).

105. *OECD BENCHMARK DEFINITION OF FOREIGN INVESTMENT* (Organization for Economic Co-operation and Development, 3RD Ed., 1996), available at <http://www.oecd.org/dataoecd/10/16/2090148.pdf> (last visited Dec. 9, 2005).

106. *See*, United Nations Conference on Trade and Development Glossary – Foreign Direct Investment (FDI), <http://www.unctad.org/Templates/Page.asp?intItemID=3164&lang=1> (last visited Dec. 9, 2005) [hereinafter *World Investment Directory*].

107. *Id.*

108. *Id.*

109. *Id.*

interest in an enterprise is sufficient to vest control of the firm, unless the other 90% is totally diluted in terms of lack of homogeneity or cohesion among its holders. The test is the ability to have a voice. In most cases, possession of 10% ownership would constitute the holder into a block that cannot be easily ignored. Ownership of the requisite interest may be in the nature of equity capital, the reinvestment of earnings, and the provision of intra-company loans.¹¹⁰ However, portfolio investment is not thought to entail any interest in the management of the enterprise, and is therefore considered to fall outside the purview of foreign direct investment.¹¹¹

Generally, Nigeria is a member of most of the multilateral trading and financial institutions of the world.¹¹² It makes a deliberate effort to attract foreign investors.¹¹³ As a result, concomitant with the privatization exercise, which opens the SOEs to private investment, are other incentives all geared toward that goal. Initially, the Nigerian Enterprises Promotion Act had put a limit on the percentage of shares that a foreigner might hold in a Nigerian firm.¹¹⁴ This has been relaxed. Subject to a few exceptions relating to sensitive issues of national security, a foreigner may now wholly own a Nigerian company.¹¹⁵ The 1995 Nigerian Investment Promotion Commission Act (NIPC) has provisions assuring the protection of investment by foreigners.¹¹⁶ According to the NIPC Act, no enterprise shall be nationalized or expropriated by any Government of the Federation and no person who owns, whether wholly or in part, the capital of any enterprise shall be compelled by law to surrender their interest, in the capital, to any other persons.¹¹⁷ Similarly, the Federal Government may not acquire an enterprise unless the acquisition is in the national

110. *Id.*

111. *Id.*

112. Some examples include the World Trade Organization, United Nations, International Monetary Fund, ICSID, etc.

113. The benefits of foreign direct investment are (i) it provides needed capital to supplement the host country's savings; (ii) it fills the gaps between the actual amount of capital and resources generated by government revenue, foreign exchange, and managerial skills and the planned amount of capital and resources needed to achieve development targets; (iii) it alleviates the foreign exchange trade gap and fills gaps in projected tax revenue; and (iv) it results in the transfer or improvement of technology. *See* Iyayi, *supra* note 13, at 63–69. The drawbacks of foreign direct investment are (i) it lowers domestic savings and investment rates by disrupting competition; (ii) it inhibits growth of indigenous companies; (iii) it perpetuates uneven development; (iv) it inhibits development in farming; and (v) it limits rural to urban migration. *See id.* at 67–69.

114. Investment Promotion Commission Decree No. 16 (1995) § 17 (Nigeria).

115. *Id.*

116. *Id.* at §§ 25 and 26.

117. *Id.* at § 17.

interest or for a public purpose under a law which makes provision for (a) payment of fair and adequate compensation and (b) a right of access to the courts for the determination of: (i) the investor's interest or right, and (ii) the amount of compensation to which they are entitled. Such compensation shall be paid without undue delay, and authorization will be given for its repatriation in convertible currency where applicable.¹¹⁸ Aliens may bring money into the country through authorized dealers and obtain a certificate of capital importation.¹¹⁹ Such capital is guaranteed unconditional transferability and repatriation of funds with regard to earnings and capital. In conjunction with the privatization exercise, these incentives open Nigeria to foreign investment and, all things being equal, promote capital inflow to the country.

V. IMPACT OF PRIVATIZATION ON FOREIGN INVESTMENTS IN NIGERIA

The intentions reflected in the privatization program are lofty. However, the Nigerian experience reveals that the theoretical and legal frameworks are only a starting point in using privatization to attract foreign investment. Other important variables must be present before privatization can have the desired positive effect on foreign investment. Among these variables are political stability and democracy. As indicated in Part IV, the military administration in Nigeria first started the privatization exercise in approximately 1989. In 1990, the exercise resulted in sixteen million dollars revenue.¹²⁰ This increased to \$35 million in 1991, \$114 million in 1992, \$541 million in 1993, and then declined to \$24 million in 1994.¹²¹ The data for the years 1995 through 1998 are not available.¹²² For those familiar with the political history of Nigeria, one recalls that the latter years were the height of the military dictatorship and represented a period during which the country suffered the worst international isolation due to the repressive regime that ran its affairs. The lesson is that absent a credible and stable polity, privatization laws and programs are not worth the paper on which they are written.

118. *Id.*

119. Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree No. 17 (1995) (Nigeria).

120. Privatization in Sub-Saharan Africa: Region Fact Sheet, <http://www.ipanet.net/documents/WorldBank/databases/plink/factsheets/SSA.htm> (last visited Oct. 1, 2005).

121. *Id.*

122. *Id.*

For the exercise, which started in 1999, the jury is still out. However, the indicators are mixed. It would seem that foreigners are still wary of the political climate in the country. This is not helped by the various crises, which the country has witnessed since the inception of civilian administration in 1999.¹²³ The president has embarked on numerous trips overseas with the declared purpose of wooing investors. Yet, it would seem that the latter are still cautious. Recently, the Director General of the Bureau of Public Enterprises lamented that foreign investors were slow in participating in the exercise.¹²⁴

The privatization exercise is yet to find core investors for three of the most prominent SOEs.¹²⁵ The electricity company NEPA is also embroiled in controversy. The opposition of its employees to the exercise is sufficient to discourage any foreign investor. No one would like to use his capital to acquire a controversy. The Bureau received a bid from a "foreign firm" for the telephone company, NITEL. Yet, the prospective core investor could not pay and the Bureau claimed it had forfeited its deposit, which was actually sourced from a local Nigerian bank. Even though this dispute is in arbitration, the Bureau has entered into a contract with a firm¹²⁶ for the management of NITEL pending its privatization. The Nigerian Airways issue illustrates the problem of administrative fight for turf. The supervising Ministry for that SOE and the Bureau are both laying claims to

123. There have been religious crises and tensions regarding the introduction of sharia in some parts of the country; there have also been ethnic crises in the Niger delta region; and in 2002, the Miss World beauty pageant, which had commenced in Nigeria, had to be moved to the United Kingdom where it was completed.

124. Interview with Mr. Nasiru el-Rufai, Director General of the Bureau for Public Enterprises (BPE) in Lagos, Nigeria published in *The President's Rebuke on the Airways Matter was the Lowest Point in my Career*, THE GUARDIAN CONSCIENCE, NURTURED BY TRUTH, Apr. 27, 2003, at 4, at <http://www.news.biafranigeriaworld.com/archive/2003/apr/27/0061.html> (where the Director General, Mr. Nasiru el-Rufai stated: "I clearly want to see new monies coming into the Nigerian economy, which is one of the objectives of the programme. But you see, you cannot force that, because President Obasanjo has gone on several foreign trips to woo foreign investors, that has not forced foreign investors to come. So what are you going to do? Are you going to say because I have no foreign investors I will not do anything?").

125. NEPA, NITEL, and Nigeria Airways have yet to privatize. Embassy of the Federal Republic of Nigeria, Guidelines on Privatisation & Commercialisation available at http://www.nigeriaembassyusa.org/guide_priv.shtml (last visited Dec. 9, 2005).

126. Levi Anyikwa, *Govt Names Dutch Firm as New Managers for NITEL*, THE GUARDIAN, Jan. 15, 2003, available at <http://www.ijawcenter.com/news/news-page0030115.html> (last visited Dec. 9, 2005). The new manager, Dutch firm Pentascope International, but this may not be treated as foreign investment, since the firm is just to turn NITEL around and perhaps make it more attractive to investors.

the authority to privatize the Nigerian Airways.¹²⁷ One wonders how foreign investors are to be attracted to such a firm. It is also surprising that the President and his advisers did not think it proper to resolve the controversy in time. It continues to fester and does damage to the quest for foreign investment.

The privatization program enunciated by the 1999 law, the second piece of legislation on privatization of SOEs, resulted in overall gross revenue of 60.2 billion naira and an overall net proceed of 58.04 billion naira at the end of 2002.¹²⁸ This was with the conclusion of the second phase of an anticipated three-phase exercise. Significantly, of the 43 enterprises privatized under the two phases, none was acquired by a foreigner or other foreign entity. The nearest was the failed attempt by a "British" firm to acquire NITEL.¹²⁹ That firm lost its deposit when the sale could not go on and it was discovered that the deposit was actually sourced locally. Even if the deal had materialized, it would still not have marked a true foreign investment, because it was a foreign acquisition only in principle. The sad conclusion is that on the first of the two dimensional nexus between privatization and foreign investment, that is the direct injection of foreign capital through direct acquisition by foreigners of the SOEs, the Nigerian exercise has not had any positive impact. The only inquiry left is whether the privatization program has indirectly boosted foreign investment in Nigeria.

This second aspect of the inquiry is hamstrung by the paucity of data on these investments. The National Investment Promotion Commission is the agency charged with promoting investments in the country.¹³⁰ Ideally, as part of its statutory duties, the Commission should keep record of foreign investment inflows into the country. Therefore, it should be a ready and available source of authentic data on foreign investment trends in Nigeria. Unfortunately, statistics and data upkeep do not seem to be a

127. This factor of lack of cooperation from bureaucrats and politicians is not an insignificant problem. Ernst & Young warn that: "Between the possibility of war or civil disorder on the one hand, and heavy-handed government interference on the other, lies the possibility that local politicians will treat privatization as political football in order to further their own ends, to the detriment of the investment." ERNST & YOUNG, *supra* note 15, at 63.

128. Unofficial report from the Bureau of Public Enterprises.

129. BPE is in the process of again putting forward NITEL for sale. Hamisu Muhammad, *BPE to Conclude Sale Next Month*, DAILY TRUST (Abuja), Sept 20, 2005 (on file with author)

130. See Nigerian Investment Promotion Act (1995)

prime issue for the agency.¹³¹ Fortunately, there are other sources and available records that illustrate, until 1960, over ninety per cent of total investments in Nigeria were under foreign ownership.¹³² With independence and the nationalism surrounding the new status, local participation continued to increase. This of course led to a reduction in the percentage of foreign investments in the country. In 1967, the value of total cumulative foreign direct investment in Nigeria was 64.2 million naira.¹³³ This continued to increase and by 1977, the value was 519.7 million naira.¹³⁴ By 1978 it was 323.9 million naira, and by 1981 the inflow of direct foreign investment in Nigeria was valued at 492.8 million naira.¹³⁵ From 1985 – 1995 the annual average of direct foreign investment in Nigeria was \$921 Million. By 1998, the value had increased by 14% to \$1,051 million.¹³⁶ Ironically, in 1999, which was the year of the reinvigorated privatization program, there was a reduction with the foreign direct investment inflow to Nigeria declining by 4.4% to \$1,005 million.¹³⁷ This decline continued in 2000 when the country received \$930 million worth of foreign investment,¹³⁸ a 7.5% decrease in the value received in 1999. 2001 and 2002 saw respective increases of 18.7% and 16%. The value of foreign direct investment in 2001 was \$1,104 million and \$1,281 million in 2002.¹³⁹

The data illustrate that the flow of direct foreign investments into Nigeria suffered a small decline in 1999, the year the privatization program was re-launched, and the following year (2000). But in subsequent years (2001 and 2002), it seemed to improve substantially. It is therefore arguable that although foreign direct investment in the nature of acquisition of the privatized firms remained unaffected by the privatization

131. This writer made several attempts to collect such data from the agency but was only advised that the agency registered 119 foreign companies since 1999 with a total of \$586 as of May 2003; See e-mail from NIPC (on file with author).

132. J. K. ONOH, *THE NIGERIAN OIL ECONOMY: FROM PROSPERITY TO GLUT 4* (Palgrave Macmillan 1983).

133. *Id.*

134. *Id.* at 13 (citing the Central Bank of Nigeria, *ECONOMIC AND FINANCIAL REVIEW* Vol. 6, no. 2, December 1968; vol. 14 no. 1 March 1976; and vol. 17, no. 2, December 1979).

135. THOMAS J. BIERSTEKER, *MULTINATIONALS, THE STATE, AND CONTROL OF THE NIGERIAN ECONOMY* 262 (Princeton University Press 1987).

136. United Nations Conference on Trade and Development, N.Y., U.S. and Geneva, Switz, 2003, *World Investment Report, FDI Policies for Development: National and International Perspectives*, available at http://www.unctad.org/en/docs/wir2003ch2_en.pdf (last visited Dec. 9, 2005)

137. *Id.*

138. *Id.*

139. *Id.*

program, the latter has continued to exert a positive impact in the broader area of general foreign investment in the country.

Critics may charge that the improvement could be owed to the return of democracy in the country in the same year that the second privatization program was instituted, and that the increases seen in 2001 and 2002 reflect a gradual return of international confidence in the Nigerian polity. Such an assessment may not substantially detract from the influence of the privatization program. This is because the deregulation contained in the economic policies of the civilian administration is but one strand in the overall reform of the political economy of Nigeria. The privatization program is a concomitant strand, which complements the deregulation program. In addition, it is a well accepted notion in international economics that international agencies act as catalysts for foreign investments. In other words, the attitude of such agencies toward a particular country provides a barometer on the suitability of investments therein.

The World Bank, the International Development Agency, the United Kingdom Department for International Development and the United States Agency for International Development have actively participated in the Nigerian privatization program.¹⁴⁰ They have not only provided substantial grants for the smooth and efficient implementation of the program, but have assisted with technical resources and manpower. Foreign investors are known to track the activities of multilateral agencies and those of the leading developed countries such as the United States and the United Kingdom. Such investors allow their investment decisions to be substantially informed by the activities or attitude of such prominent agencies, or at the very least take such attitudes into consideration when deciding whether or not to pursue an investment in a country. It does not therefore require complicated analysis to conclude that the pronounced and active support of the World Bank and other agencies toward the privatization program in Nigeria has been interpreted by investors as a positive, if tacit, endorsement of the exercise and of the broader economic climate in the country. Thus, the surge in foreign direct investment in Nigeria in 2001 and 2002.

Consequently, the answer to the question of whether the privatization program has had any impact on foreign direct investment in Nigeria is in the affirmative. It has provided a positive and enabling environment that is conducive to improved foreign investments in Nigeria, even though such investments in the privatized enterprises have remained largely unaffected. Perhaps, one way that foreign interest can be significantly aroused in direct

140. *Id.*

acquisition of the SOEs is for the government to reconsider the approach of partial privatization. Given the controversies inherent in government, and among departments, foreign investors may not be comfortable with an arrangement in which they are partners with such disorganized body.

Similarly, the regulatory framework such as competition rules, or regulations on standards should be introduced or strengthened. Unfortunately, Nigeria still lacks a competition regime. Although both the Bureau and the Council are working hard to push an antitrust statute, their proposed bill is still a draft and is yet to make it to the National Assembly. This is still the case more than 15 years after the country started the privatization program. The need for coherent and effective competition law cannot be overemphasized. It should be at least an adjunct, if not a precursor to a successful privatization exercise. Had such a regime been in existence, the initial opposition to the privatization program could have been substantially softened. Foreign investors are comfortable with a predictable and stable environment. They are aware that the absence of clear and tested standards will, in the future, entail *a posteriori*, *ad hoc*, and, *ad hominem* regulations. Such retrospective enactment and application of rules will detract from the assurances contained in the laws and distort the economy.

VI. CONCLUSION

Although privatization is controversial, it is necessary for revamping the Nigerian economy. The structural and institutional frameworks established by the Nigerian government for achieving that objective appear sound. However, those frameworks are only a first step in the long journey of attracting foreign capital by transferring SOEs into private hands. The implementation of the arrangement is equally important. If confidence is lacking, or if it is mired in unnecessary controversy, the lofty objectives may remain a *will-o-the-wisp*. Also, the factors of social and political stability are fundamental. The government should act promptly to resolve outstanding controversies regarding some of the SOEs. In addition, it should strengthen regulations. Above all, it should improve the security situation in the country. These are vital if the privatization program is to have the desired goal of attracting foreign investments into the country. With the transition of the civilian administration to another such administration¹⁴¹ in 2003, it is hoped that the international community will now banish every misgiving about politics in Nigeria. Finally, the most

141. Some critics, however, charge that the transition was fraught with electoral fraud and that the ruling party is on the verge of making Nigeria a *de facto* one party state.

populous country in Africa is ready, able, and willing to take its position in the comity of free and stable nations. This should give foreigners additional assurance on the viability, durability, and profitability of investments in Nigeria.

