



# ***Key Implications of the Immigration Regulations 2017 [and the Ease of Doing Business]***

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## **Proem –**

I am not an immigration lawyer! Happy to be invited, always passionate about discussing, proposing, critiquing reforms that could improve ease of doing business. So I (*a business regulatory lawyer*), am happy to be here to speak and learn from this esteemed audience of accomplished immigration lawyers.

I will essentially be speaking as a ‘reform missionary’:



# Thought Leadership Perspectives

December 2020

## Musings II: Is Business Permit Under the Immigration Act Still Tenable in Nigeria?



Afolabi Elebiju

Sometime ago, I published '*Musings: Nigerian Business Landscape Improvement issues*' (*Musings I*). Originally published in my '*Taxspectives*'

column in *THISDAY Lawyer*, 29.05.2012, p.7 (as 'Why Government Must Acquire a Business Mindset...'), it is also available as a LeLaw Thought Leadership Insights piece amongst others at: [www.lelawlegal.com](http://www.lelawlegal.com). Subsequently, the *Nigerian Immigration Act, No. 8 of 2015 (IA)*, was enacted, repealing its predecessor, *IA, Cap. I-1, LFN 2004* (originally enacted in 1963). *The Immigration Regulations 2017* issued pursuant to the *IA* followed; and most

Nigeria ranked 131<sup>st</sup> out of 190 countries (20<sup>th</sup> In Africa). Part of how the Federal Government (FG) can put action behind its intent to keep improving Nigeria's *Ease of Doing Business*' rankings, is to remove Mol's BP.

Clearly, Nigeria (like other sovereigns) reserves the right to control the entry and exit of foreigners into her territory; being the apparent rationale for issuing different kinds of visas, etc.<sup>4</sup> Such right is exemplified for example by *sections 37-39 IA*<sup>5</sup> and no one can reasonably challenge that. This article examines in greater detail why the Mol's BP requirement, as a prerequisite to



## Excerpt (I):

*“This sequel takes up my argument in **Musings I** that the requirement of Business Permit (BP) approval by the Mol is now a regulatory anachronism in Nigeria’s statute books, and contributes to bureaucracy that slows down the wheels of business.<sup>1</sup> My respectful view is that the Mol’s BP is an impediment that weighs down on Nigeria’s ranking on the global Ease of Doing Business, and ought to have attracted the reform minded attention of the hard working Presidential Enabling Business Environment Council (PEBEC) to recommend that the Federal Government dispenses with it.”*



## Excerpt (II):

“Clearly, Nigeria (like other sovereigns) reserves the right to control the entry and exit of foreigners into her territory; being the apparent rationale for issuing different kinds of visas, etc.<sup>4</sup> Such right is exemplified for example by sections 37-39 IA<sup>5</sup> and no one can reasonably challenge that.”

[Footnote 4: “See **Awolowo v. Sarki**[1966] 1 All NLR 178 – where it was held that it within the discretionary powers of the Minister of Internal Affairs to refuse entry to the Appellant's expatriate counsel of choice, who therefore could not defend him at criminal proceedings for treasonable felony. It was further held that such refusal was not a breach of the Appellant's fundamental human right to fair hearing under the 1963 Constitution, as the Appellant could engage other counsel and the said expatriate is not entitled to entry into Nigeria as of right.”]



April 2020<sup>1</sup>

Thought Leadership | *Afolabi Elebiju*

# *Vestiges: Do We Still Need the Industrial Training Fund (ITF)?*

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## Introduction

The *Industrial Training Fund Act, Cap.19 Laws of the Federation of Nigeria (LFN) 2004, (ITFA)*, originally enacted in 1971, established the Industrial Training Fund (ITF) to comprise sums provided by the Federal Government and



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# 1. The *Immigration Regulations 2017*: Legal Basis and Other Issues –

***Immigration Act No. 8 of 2015 (IA) – substantive predecessor was 1963 IA ('52 years'):***

## ***Section 36 (Entry for Business Purposes):***

***- 36(1)(b):***No person other than a citizen of Nigeria shall on his own account or in partnership with any other person practice a profession or establish or take over any trade or business whatsoever or register or take over any company with limited liability for any such purpose, without the consent in writing of the Minister given on such [conditions] by or on behalf of such persons, as the Minister may prescribe.” – **‘Interloper provision’**

***Cf. 36(1)(a):***No person other than a citizen of Nigeria shall accept employment (not being employment with the Federal, State or Local Governments) without the consent in writing of the Comptroller-General of Immigration” – **No concerns on this.**

Also, no issues on **sections 37 (Residence Permit), 38 (Employment of Immigrants) and 39 (Revocation or Variation of Permit)**



## The *Immigration Regulations 2017 (ImmRegs)*: Legal Basis and Other Issues (cont'd)

**Section 112 IA** empowers the Minister to make regulations necessary or expedient to give effect to the **IA**. Note: **ImmRegs** issued **54 years** after its 1963 predecessor (**Reg.78 ImmRegs** revoked 2 1963 sister regulations).

Quaere: How did immigration miss out on regulatory reforms since the 80s?

### Some *ImmRegs* Provisions:

#### **Reg. 4:**

“(1) **The authorisation of the Minister for the establishment of a profession, business or trade in Nigeria** shall, subject to such conditions as the Minister may impose, take the form of a [BP] prescribed in the First Schedule to these Regulations.

(2) Nothing in any [BP] shall entitle the holder of such permit to enter or remain in Nigeria unless such person is in possession of a valid residence permit or appropriate valid visa for residential purposes...

(3) A [BP] may, at any time, be revoked, varied or cancelled by the Minister.

(4) Every person to whom a [BP] has been issued shall notify the Minister or the Comptroller-General within twenty-one days of any change in the name, nature, or address of the business or trade”



## The *Immigration Regulations 2017 (ImmRegs)*: Legal Basis and Other Issues (cont'd)

**Section 36(1)(b)** and **Reg 4(1) and (3) Imm Regs** vests the Minister with 'fearsome' discretion: "as the Minister may prescribe"; "subject to such conditions as the Minister may impose"; and "A [BP] may, **at any time, be revoked, varied or cancelled by the Minister**". Cf. **section 39 IA**: "resident permit or other permit under this Act" revocable by the C-GI does not include BP.

*ImmRegs* has **no defining provisions** on how the extreme **Reg 4(3)** discretion is to be exercised, thereby representing a sword of Damocles or **excessive regulatory pressure** on BP holders – it is an Achilles heel. Exposure to pressure points in Nigerian regulatory regime not good from a corruption/transparency perspective.

Cf. 'Location'. Can officials not be more interested in non-compliance than otherwise? Should they?

How can a BP that is effectively the substratum of a foreign investment be potentially revocable at the whim of the Minister? Imagine a 'worst case scenario': if we have a 'rogue Minister' at the MoI – will there be damage?



## The *Immigration Regulations 2017 (ImmRegs)*: Legal Basis and Other Issues (cont'd)

### Questions:

Is exercise of **Reg 4(3) ImmRegs** discretionary revocation/cancellation power not tantamount to an expropriation or even antithetical to investment guarantees and assurances of **sections 24 and 25 NIPC Act**, and thereby a reputational risk?

In substance *is BP not surplusage*? If the CAC has already incorporated a company, with *approved objects* per its Memorandum and Articles of Association, what is the Mol approving again? Why duplicate regulatory function? Why can't the Mol rely on other regulatory agencies like the CAC?

**'Blackmail'**: no EQ without BP, sector regulators like NURC and NMDPRA (successors to DPR) will not grant approvals/give clearances without BP. Geographical location/scope of business issues: exposure to potential corruption.



## The *Immigration Regulations 2017 (ImmRegs)*: Legal Basis and Other Issues (cont'd)

### Questions (cont'd):

What is the interplay of such revocation/cancellation order on sectoral regulatory powers, *especially where the sector regulator considers the BP holder as being of good (operational) compliance status?*

*Aside from issues of national security, should we not trust the judgment of sectoral regulator given the latter's comparative technical know how? Will the discretion have benefited from sectoral regulatory input, including the NIPC's?*

Could *Bilateral Investment Treaty (BIT)* provisions come into play for qualifying investors/investments?

More importantly, should **section 36(1)(b) IA** and **Reg 4(1) ImmRegs** which derive from **section 36** still be in our statute books given **NIPC Act** provisions?

No need to delve into constitutional law (interpretations of statutes/implied repeal, etc) and administrative law incidences.

**Next slides 5 slides – 'Spot the Difference'**



## IA/ImmRegs

**Section 36(1)(b)** – evolution from 1963 Immigration Act, through Cap. 350 LFN 1990, Cap I-1 LFN 2004 and now IA . Cf. **Mainstreet Bank v. Chahine** [2015] 11 NWLR (Pt. 1471), 479 – provisions held to be mandatory.

**Section 112** – basis for ImmRegs

**Reg 4** – already discussed

**Reg. 5 (Residence Permits)** – no issues, other than efficiency of administration. Cf. **Oliver v. DIL** [2009] 10 NWLR (Pt.1150), 467 CA – employer, not employee bears the latter's immigration responsibility.

**Para 2.0, (Available Services)**, of 'Handbook on Expatriate Quota Administration (Revised 2020)' (the Handbook): "2.1 Grant of [BP]: This is a certificate issued on the authority of the Minister of Interior to wholly foreign owned or joint venture companies intending to do business in Nigeria **to enable them operate legally**. The certificate remains valid as long as the company's operations does not infringe upon the law of the land which may lead to its revocation "

## NIPC Act

**Section 4 (Functions of the Commission)** – NIPC "shall encourage, promote and co-ordinate investment in the Nigerian economy and accordingly, shall: (a) be the agency of the [FG] to co-ordinate and monitor all investment promotion activities to which this Act applies; (b) initiate and support measures which shall enhance the investment climate in Nigeria ...; (c) promote investments in and outside Nigeria through effective promotional means; (d) collect, collate, analyse and disseminate information about investment opportunities and sources of investment capital, and advise on request, the availability, choice or suitability of partners in joint-venture projects; (e) register and keep records of all enterprises to which this Act applies; (f)... (g)...(h) maintain liaison between investors and [MDAs], institutional lenders and other authorities concerned with investments; (i) provide and disseminate up-to-date information on incentives available to investors; (j) assist incoming and existing investors by providing support services; (k) evaluate the impact of the Commission in investments in Nigeria and make appropriate recommendations; (l) advise the Federal Government on policy matters, including fiscal measures designed to promote the industrialisation of Nigeria or the general development of the economy; (m) perform such other functions as are supplementary or incidental to the attainment of the objectives of this Act."

## FEMMP Act

**Section 15 (Investment of foreign currencies and capital in enterprises or securities in Nigeria):** "(1) Any person may invest in any enterprise or security, with foreign currency or capital imported into Nigeria ... in accordance with the provisions of this Act. (2) ... (3)... (4) Foreign currency imported into Nigeria and invested in any enterprise pursuant to subsection (1) of this section shall be guaranteed unconditional transferability of funds, through an Authorised Dealer in freely convertible currency, relating to - (a) dividends or profits (net of taxes) attributable to the investment; (b) payments in respect of loan servicing where a foreign loan has been obtained; and (c) the remittance of proceeds (net of all taxes) and other obligations in the event of sale or liquidation of the enterprise or any interest attributable to the investment."



## IA/ImmRegs

*Para 2.2 the Handbook: “Amendment of [BP]: This is a facility in which a certificate is issued to reflect changes in a Company’s details/ information.”*

Note **Reg. 5(7) Imm Regs** echoing **section 37(11) IA** – PRV for investors who have minimum annual thresholds of capital into Nigeria as may be specified in the National Visa Policy or equivalent.

**Reg. 11(4)** exception for ECOWAS citizens. Q- outlook for other Africans given **AfCFTA**?

**Reg. 28 (Liability of Householders)**

**Reg 38 (Power and Procedure for issuance of Nigerian passports)** – **service quality delivery?**

Dual nationality – import of ‘right of egress’ and ancillaries per SC in *Agbakoba v. DSS* (entry with expired passport scenarios)

‘Diaspora Policy’ and tax considerations

## NIPC Act (NIPCA)

**Section 5 (Powers of the Commission)** – NIPC “shall have power to (a) **do all things which by this Act or any other enactment are required or permitted to be done by the Commission**; and (b) do such other things as are necessary or expedient for the performance of its functions under this Act.”

**Section 17 (Enterprises Eligible for Participation):** “Except as provided in section 18 of this Act and subject to this Act, **a non-Nigerian may invest and participate in the operation of any enterprise in Nigeria.**”

**Section 18** precludes both Nigerians and non-Nigerians from investing in “negative list” enterprises as defined in section 31.

**Section 19** mandates foreign enterprises to undergo local incorporation/registration under the **Companies and Allied Matters Act (CAMA)** and clearly provides that the **NIPCA** does not exempt any applicable sectoral start-up compliance or maintenance requirements. Note that **section 19 NIPCA** was merely confirming **sections 54 CAMA 2004 LFN/ & 78 CAMA 2020 provisions.**

## FEMMP Act (FEMMPA)

**Section 35 (Application to the State):** - “**This Act shall bind the State** and apply to transactions by a Government Department or other person acting on behalf of the State.”

**Section 37(2):** “If the provisions of any other law, including the enactments specified in subsection (1) of this section, are inconsistent with those of this Act, the provisions of this Act shall prevail and the provisions of that other law shall, to the extent of the inconsistency, be void.”

**NB:** Although this **section 37(2) FEMMPA** supremacy clause is now spent (being effective only against existing legislation as at the time it was enacted), but is the provision not saying something about the seriousness of the government intent to liberalise the investment environment then?



**Section 20 (Registration of enterprise with the [NIPC])** “(1) An enterprise in which foreign participation is permitted under section 17 of this Act shall, before commencing business, apply to the [NIPC] for registration. (2) The Commission shall, **within fourteen working days from the date of receipt of completed registration forms, register the enterprise if it is satisfied that all relevant documents for registration have been duly completed and submitted** or otherwise advise the applicant, accordingly.”

**Section 25 (Guarantees Against Expropriation)**  
“(1) Subject to subsections (2) and (3) ...: (a) **no enterprise shall be nationalized or expropriated by any Government of the Federation; and (b) 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** (2) There shall be **no acquisition of an enterprise to which this Act applies by the Federal Government, unless the acquisition is in the national interest or for a public purpose and 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 the investor’s interest or right and the amount of compensation to which he is entitled.** (3) Any compensation payable under this

**Section 26 (Dispute Settlement Procedures)**

provides that when investment disputes arise, “all efforts shall be made through mutual discussion to reach an amicable settlement” failing which, same may be submitted to arbitration “within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties”; or any agreed machinery for settlement of investment disputes or failing agreement, under the ICSID framework.

**Section 27 (Assistance to Enterprise):** “The [NIPC] shall provide an enterprise with such assistance and guidance as the enterprise may require and shall act as liaison between the enterprise and the relevant [MDAs] and such other public authorities.”

**Section 31 (Interpretation):** “ ‘Enterprise’ means an industry, project, undertaking or business to which this Act applies or an expansion of that industry, undertaking, project or business or any part of that industry, undertaking, project or business and, where there is foreign participation, means such an enterprise duly registered with the Commission”;



**Section 31 (Interpretation):** “*‘Negative list’ means the list of those sectors of investment prohibited to both foreign and Nigerian investors, that is (a) production of arms, ammunition, etc.; (b) production of and dealing in narcotic drugs and psychotropic substances; (c) production of military and para-military wears and accoutrement, including those of the Police and the Customs, Immigration and Prison Services; and (d) such other items as the Federal Executive Council may, from time to time, determine;’*”



## Questions/'Food for Thought':

- The referenced **IA and ImmRegs** provisions made sense during the 'strict' control regime of the Nigerian economy typified by indigenisation policy and related legislation like the **Nigerian Enterprises Promotion Decrees/Acts**: original enactment and revisions in 1972, 1977 and 1989.

They are **now a sore thumb** after liberalisation of the late 1980s, culminating in the **NIPCA** and **FEMMPA** in 1995 (both respectively repealing the 'stricter' **NEP** and **Exchange Control Acts**). Cf. with repeal of pro-monopoly provisions in favour of public corporations like the *Nigerian Mining Corporation*, *Nigerian Coal Corporation*, *NITEL*, *NEPA* etc, prior to more broadbased sectoral reform legislation like **Nigerian Minerals and Mining Act**, **NCC Act**, **Electric Power Sector Reform Act**, etc.

**“The requirement for registration of foreign enterprises in Nigeria by the NIPC should normally dispense with the requirement for [BP] from the FMI. However, in view of the provisions of the Immigration Act and Immigration Regulations, FMI still requires foreign investors to obtain [BP] [for both wholly foreign owned and joint venture entities] as a pre-condition for obtaining expatriate quota approval.”** – KPMG, **'Investment in Nigeria'** (8<sup>th</sup> ed., (May 2021), p.67). Emphases supplied.



## ***Questions / 'Food for Thought':***

- *How reasonable is it for a wholly owned Nigerian business being acquired wholly or in part by foreign investors, to now require BP? The 'lawfulness' of the business has not changed! MoI can always regulate expatriate immigration, which is a different issue altogether (if the investors require expatriate quota/residence permit).*
- *What is the value of the MoI intervention since the M&A transaction relates to an existing business and the FCCP (under the **FCCPA**), will (irrespective of turnover), also have oversight of same?*
- *Is MoI likely to screen as unsatisfactory, prospective investors that the CAC, FCCP and sectoral regulator find okay to proceed with the transaction?*
- ***Regulatory efficiency needs to be our watchword in Nigeria.*** BP regime actually contradicts NIPC's statutory OSIC (One Stop Investment Centre) model. ***Fast-tracking an unnecessary process is still inefficient;*** rather, we should streamline and fast-track necessary ones. *What is the benefit of speed when travelling in a wrong direction?*



## **Questions / ‘Food for Thought’ – Excerpts from Musings II:**

**“What is the Continuing Rationale for BP in Nigeria?” ‘Headlines’:**

- “Nigeria has liberalised her business environment since the late 1980s and continues to promise even more reforms for the purposes of improving the ease of doing business (EDB) and Nigeria's investment competitiveness.”
- “Mol’s documentation requirements for BP reinforces that it is an unnecessary requirement.”
- “Nigerian law mostly require regulators to treat businesses equally, irrespective of related foreign or local ownership stakes.”
- “Local content development or expatriate quota (EQ) are not coterminous with BP: Government’s unimpeachably valid objective of fostering local content development and capacity utilisation, for example by discouraging, nay actively sanctioning the long term employment of expatriates at the expense of suitably qualified Nigerians,<sup>17</sup> are totally different issues from, and not co-terminous with, Mol’s BP. Those objectives can be effectively championed, and monitored without BP; there are sufficiently robust provisions vide the Nigerian Oil and Gas Industry Content Development Act 2010<sup>18</sup> and the Local Content Executive Orders in this regard.<sup>19</sup>



## **Questions / ‘Food for Thought’ – Excerpts from Musings II:**

**“What is the Continuing Rationale for BP in Nigeria?” ‘Headlines’ (cont’d):**

- *“Light but effective regulation is the preferred and optimal business regulatory model.” “Like the sons of Issachar in 1Chronicles 12:32, we must ‘understand the times’ and know what Nigeria ought to do. As Jesus chastised the Pharisees in Matthew 23:4 and Luke 11: 46, there is no point in overlaying people with burdens too heavy to bear.”*

- *“BP is actually a form of ‘blackmail’ ”. Legislation like the **NCDMB Act 2010** assumes that BP and EQ/RP are co-terminous.*

- *“Professional standards and requirements are also in the mix.” Professional bodies, sectoral regulators and the market will handle capacity issues better than the Mol.*

*“Mol’s BP approval process re-engineering”*

*“Security check issues:” Why should prospective investors be subject to more rigorous checks than other immigrants? Checks for visas and permits should or are in practice the same for all expatriates.*



## Questions / 'Food for Thought' – Excerpts from Musings II:

“Conclusion:

To borrow the title of the ‘Overview’ of DB 2020: **‘Tackling Burdensome Regulation’** must be a constant focus of government and all stakeholders. **It is a journey and not a destination. Nothing exemplifies this more than the finding in DB 2020 that Nigeria was the 10 most improved economy but was not amongst the two African economies in the top 50 rankings (Mauritius 13<sup>th</sup> and Rwanda 38<sup>th</sup>).**

Because it is ‘not yet uhuru’, **it is imperative that government’s reformist agenda be underpinned by a great sense of urgency, which makes following through inescapable.** The consistent advocacy of organisations like the Nigerian Economic Summit Group (NESG) and Nigerian Association of Chambers of Commerce Industry Mines and Agriculture (NACCIMA) amongst several others have helped thus far in the reform journey. **They and the business citizenry must not lower their tempo in reform advocacy.”**

Emphases supplied.



## A Peep at our Neighbours: **Ghana**

**Q:** “What are the main work and business permit categories used by companies to employ expatriates?”

**A:** “Companies that have the intention of employing foreign nationals to work in their organisation are required under the Immigration Act, 2000 (Act 573), to obtain work and residence permits for the expatriates. The work permit allows the expatriate to work in Ghana, whereas the residence permit allows the expatriate to live in Ghana...”

- PwC, ‘**Doing Business and Investing in Ghana**’ (April 2020), p. 23:  
<https://www.pwc.com/gh/en/assets/pdf/doing-business-and-investing-in-ghana-2020.pdf>

**Quaere:** ‘Steeper’, discriminatory capital requirements (for foreign owned businesses) practiced by Ghana is less objectionable?



## A Peep at our Neighbours: **Ghana**

- JV with (at least 10%) Ghanaian participation, minimum US\$200,000 foreign partner contribution;
- Wholly owned foreign entity: equity capital of US\$500,000; and
- Trading entity: (wholly or partly foreign owned) minimum US\$1 million equity capital. – PwC (*supra*), p. 20.

### “Ghana Immigration Service (GIS)

*Employers of foreign nationals are required to:*

- *obtain work and residence permits for their expatriates and renew same;*
- *notify the GIS on the departure of their expatriates from Ghana; and*
- *file annual returns on the status of their expatriates with the GIS.” – PwC (*supra*), p. 21*



# Starting a Business in Ghana

Home Invest In Ghana

## Step 1: Business Registration at Registrar General's Department (RGD)

All enterprises are expected to fill out the relevant Application Forms, which serve as the Company's Regulations. All companies must have an auditor, who must be a member of the Institute of Chartered Accountants, but should not be an officer or servant of the company or be an employee or partner of such persons. When all such forms have been filled satisfactorily and relevant fees paid, a Certificate of Incorporation and a Certificate to Commence Business are issued.

[Click to access basic Costs and Fees applicable at the Registrar General's Department office.](#)

## Step 2: Register with the Ghana Investment Promotion Centre (GIPC)

The Ghana Investment Promotion Centre (GIPC) is responsible for registering all Enterprises in Ghana.

### Application Procedure:

Investors are required to complete [Investor Registration Forms \(Form GIPC/R1\)](#) in duplicate. Within five (5) days from the date of orderly receipt of these forms (and its attachments) the GIPC will formally register the investment.

### INVEST IN GHANA

- Why Ghana
  - Political Stability
  - Market Access Offers
  - Taxes & Incentives
  - Work Force
  - Infrastructure
- Doing Business in Ghana
  - Starting a Business
  - Cost of doing Business
  - Laws & Regulations
- Enhanced Business Environment
- Priority Sectors
- Our Collaborators



## Rwanda: Starting a Business

“ This process involves simultaneously obtaining the certificate of incorporation (business registration), Tax Identification Number (tax registration) and the Social Security registration for employee pension submission. Below, you can see how you can start, add or cease business activities in Rwanda

### 1.REGISTRATION

#### **Registering a local company**

**Cost:** Free

**Requirements:**

- Copy of ID/Passport
- Complete two copies of Memorandum of Association Art 14 (downloaded on our website [here](#))

#### **Registering a branch of a foreign company**

**Cost:** Free

**Requirements:**

- Power of attorney to present the company in Rwanda.**(Notarised)**
- A duly authenticated copy of the memorandum Articles of Association. **(Notarised)**
- Certificate of Registration/Incorporation issued by the registration authority in the country of incorporation. **(Notarised)**
- Notarised resolution from the authorized agency authorizing to open a branch.
- Passport copies of the shareholders/directors.
- List of directors residing in Rwanda (at least One)...”

<https://www.visitrwanda.com/investment/how-to-invest/starting-a-business/>



## Resolution - Go forward Action Steps:

### A. Litigation – Declaratory Relief:

Upon incorporation, a Nigerian company with foreign participation can approach the Federal High Court for declaratory reliefs that **section 36(1)(b) IA** is superfluous, ultra vires, obsolete and therefore should not apply. Or better still, Nigerian co-shareholders in such companies can be joint plaintiffs with the company.

*The question of its constitutionality may also be canvassed, amongst others, for being discriminatory. Cf. ss. 17(3) & 42 1999 Constitution – opportunity to secure adequate means of livelihood and suitable employment, cum right to freedom from discrimination. Arguably, there is an implied right not to be subjected/regulators should not be allowed to impose burdensome regulation?*

Cf. erstwhile (repealed) **section 7 SEC Act** prescription for regulatory (SEC) approval of share transfers in companies with foreign participation - why do we still have a BP equivalent for start-up companies with both Nigerian and foreign participation?



## A. Litigation – *Declaratory Relief (cont'd)*:

Litigation is good – will provide clarity on BP regulatory *intra vires*, and advance immigration regulatory jurisprudence and practice. Cf. **Dr. Priye Iyalla-Amadi v. C-G Nigerian Immigration Service & Anor. Suit No. FHC/HC/CS/198/2008** - but for litigation, wives will still be requiring the approval or concurrence of their husbands to apply for international passports!

In **DSS v. Agbakoba [1999] 3 NWLR (Pt. 595), 314** the SC held that: seizure of the Respondent's passport by officers of the SSS was held to be an unconstitutional infringement of his right to freedom of movement. In any event, seizure or withdrawal of passport required strict compliance with statutory prescriptions. Also, a commentator opined forcefully that: *“the fact that acquiring a passport is not free of charge but comes at a fee, gives the holder of a passport a proprietary right over it until the expiration of the passport.”*

**NALI** can view such litigation as a **public service initiative (a form of CSR)**, in addition to ultimately benefitting all stakeholders. Akin to CSOs like SERAP and HURIWA's public interest litigation.



## A. Litigation – Declaratory Relief (cont'd):

Incidentally, a BP related challenge may actually succeed for the following additional reasons:

- The **NIPCA**, although earlier in time than **IA** (being a 1995 legislation vs. 2015), and should ordinarily be subservient to the **IA**, is actually superior on the issue of foreign investment. **IA provides generally for foreign investment unlike NIPCA which is specifically enacted for foreign investment.**

- On the authority of the trial and appellate decisions in **NDDC v. Nigeria LNG (2009) 1 TLRN 25; (2011) 4TLRN 1**, absent an express repeal, an inconsistent subsequent legislative provision will not necessarily prevail over the prior one.

*Cf. NDDC v. NLNG* analogies of repeal implications on private and special Acts; assurances vs. burdensome impositions. In summary, it may be time to ‘bite the bullet’.



## A. Litigation – *Declaratory Relief* (cont'd):

- Can current passport and NIN glitches ground an action because: having a passport issued is a right and not a privilege (per **Agbakoba**), on SERVICOM and **Executive Order on Ease of Doing Business No. 001 2017 (EDB-EO)** grounds. How are these rubbing off against Mol's service charter? *“To render to Nigerians and foreigners alike, diverse internal security and other ancillary services that are highly qualitative, efficient, courteous and transparent.”*

*SERVICOM is still extant: “SERVICOM, is a solemn compact as well as an institutional mechanism conceptualized to fight against service failure by ensuring that organs of government in Nigeria deliver to citizens and other residents in the country, the services to which they are entitled to.”*

*Cf. EDB-EO's provisions on “**Transparency in MDAs**”, “**Default Approvals**”, “**One Government Directive**” and “**Entry Experience of Visitors and Travellers**”. Shortage of booklets defeats timelines for issuance of passports, and potentially represents a breach of the **EDB-EO** that could ground action for damages by frustrated applicants. **EDB-EO** probably a stronger basis than *Servicom*.*

- ‘Headboy’ regulatory approach vs. ‘Collaboration’ – *we are in this together!*



## B. *Repeal Advocacy: PEDEC/NALI*

NALI can prompt PEDEC to push for repeal of the **IA** provisions on the ground that such would make for more efficient start up timelines for Nigerian companies with foreign participation.

In these days of urgency to take business viable technology enabled ideas quickly to market, BP can be a reason why someone may decide to locate the business in Rwanda, Botswana or Mauritius, rather than Nigeria. The ***African Continental Free Trade Area Agreement (AfCFTA)*** to which Nigeria was a belated signatory, has made issues of Nigeria's competitiveness even more compelling than ever.

***NALI members will lose money*** (lost fees from erstwhile BP engagements), but this will be offset by monies to be made from overall regulatory system efficiency. Also, it is not all about money!

Time to focus on optimal (light and effective regulation), rather than the 'blackmail' that the BP regime currently represents.



### **C. IA/ImmRegs Evaluation/Performance Review (as subset of EDB Reform Initiatives:**

Apart from my ‘uninformed’ criticisms, it is important for stakeholders (especially the MoI and immigration practitioners) to review extant regulatory regime and initiatives – *what is working and what is not working? How can both be improved? ‘52 and 54 year hiatuses’, inexcusable henceforth.*

*Continuous process improvement critical because: the less (or the ‘smarter’) the bureaucracy, the better for business; and the better for government through businesses’ contribution to the public fisc and the economy generally. Regulatory efficiency audit to debottleneck glitches generally for EDB purposes.*

The fact that the World Bank has suspended its **Doing Business** ratings must not affect the pace of Nigeria’s EDB reform efforts – it is not a ‘PR’ issue, although that helps. **Immigration critical to business and especially to tourism – a sector where Nigeria has not yet scratched its earnings potential.**



## Conclusion:

Nigeria needs to repeal **section 36(1)(b) IA** – to scrub the statute book of anachronism and get rid of spider webs! Like Elijah asked (in **1 Kings 18:21**), how long shall we go halting between two opinions?

*We must be looking at business start-up regulatory (including immigration) compliance requirements with ‘a country competitiveness lens’.* Nigeria cannot afford to be a laggard! Ghana, Rwanda, Mauritius, Kenya, South Africa, Egypt, etc cannot be eating our lunch!

We cannot afford a false sense of complacency – because of absence of ‘local’ regulatory competition (e.g. only the MoI (C-G) issues passports, grants resident permits). Truth is that there is international competition for capital, tourists, etc and immigration regime is a critical factor.



## Conclusion – From Mol Press Release:

*“The Federal Government once more reaffirms commitment to the Ease of Doing Business with stakeholders in order to ensure the smooth flow of foreign investors and investment into Nigeria. The Permanent Secretary of Interior, Dr Shuaib Belgore stated this when the ... (VP-HR) Shell Nigeria, ... paid a working visit to his office in the [Mol], Abuja.*

*The [PS] reiterated that amongst others the mandate of the Ministry include the formulation and implementation of Policies and Programmes of government that enhances internal security, public safety, **an enabling business environment for domestic and foreign investors** and the maintenance of citizenship integrity, all of which are key pillars in the priority areas of President Muhammadu Buhari’s administration.”*

*Cf. with **burden of proof on companies** from Mol (the custodian of information and data) in respect of PUR review pursuant to Mol’s notice on ‘**UPDATED GUIDELINES ON ADMINISTRATION OF EXPATRIATE QUOTA AND OTHER BUSINESS INSTRUMENTS**’.*



## Conclusion:

**However, it is not all gloom.** Mol has apparently been digitising its operations, and ensuring seamlessness (nil or minimal glitches/downtimes), will always be key.

Ongoing sensitisation must continue to be as robust as possible. For example:

*“The Minister thus invites all Stakeholders to visit the Ministry’s Website [www.ecitibiz.interior.gov.ng](http://www.ecitibiz.interior.gov.ng) for more information and further details on the current guidelines and adhere to it forthwith.”*

Heartwarming that changes/updates in immigration facilities (e.g. visa on arrival for business related purposes and Africans), etc are always being announced to the wider public.

Stakeholder involvement too must be acknowledged – regulatory alerts by the Big Four, immigration practitioners, law firms, etc. That is the way to go.



## Conclusion:

Ref. Previous Slide: “*However, it is not all gloom.*” Amendments to Nigerian tax laws through the three **Finance Acts** in 2020 (two) and 2021 good examples of overhauling antiquated provisions to bring the law apace with business realities. Same for the recent signing of the **Companies and Allied Matters Act 2020** and the **Petroleum Industry Act 2021**.

Needed: *Operational disciplined mindset switch* exemplified by the **EDB-EO**, other policy initiatives and global best practices: to lighten compliance burden, do the hard work to cut out complexities for positive user experience and customer satisfaction. Not one that assumes public will continue to bear the burden of regulatory inefficiency as such harms the economy and Nigeria’s image.



## Conclusion:

***Reg 52 Imm Regs (Offences by a Body Corporate):*** these underscore the imperative of NAILs' members continued work to ensure that their clients are in optimal immigration compliance status given the reputational, financial and other risks otherwise: terms of imprisonment and/or fines for directors, managers, secretaries of corporate violators; fines and potential winding up order for corporate violators. ***Reg. 53*** also has provisions for administrative fines and penalties.



# *Questions?*