

## **Implications of Foreign Companies' Reincorporation Requirement in Nigeria**

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### **Abstract**

Except with permitted exemptions, a foreign company intending to carry on business in Nigeria is required to incorporate as a separate entity, distinct from the parent company. The objective of this requirement is to control foreign corporations and promote the country's sovereignty. This restrictive measure – enshrined in section 78 of the Companies and Allied Matters Act 2020– has been criticized as diminishing foreign companies' participation in Nigeria and should, as a result, be expunged from the Act. This paper argues that in view of recent developments and contrary to the position adopted by critics, the legal implication of the restriction on foreign companies does not have such corrosive effect on the participation of foreign entities in Nigeria's economic activities. It contends that the economic benefits derivable from the provision outweigh any perceived negative impact of it. The paper, therefore, advocates its continued application in Nigeria's Company Law.

**Key Words:** Reincorporation, Foreign Companies, Investments, Nigerian Company Law

### **1. Introduction**

A foreign company can participate in business in Nigeria, either through foreign direct investment (FDI)<sup>1</sup> or through foreign portfolio investment (FPI).<sup>2</sup> To stimulate foreign participation in business in the country, the Nigerian government, in recent times, has adopted 'pro-investment' policies that appear to be more proactive and investment friendly.<sup>3</sup> As reported by the Nigerian

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<sup>1</sup>By this mode, aliens can participate directly in business in Nigeria by forming (either solely or with Nigerians) a company by engaging directly in business except those in the negative list. It is immaterial whether the alien has or does not have an existing company in his home country. Foreign Direct Investment showcases a measure of foreign ownership of productive assets, such as factories, mines and land. Here, the alien participates in the establishment and management of the business. See Onyeakachi Duru, 'Legal Overview of Foreign Participation in Nigerian Business sector' (2016) <<http://legalempowers.blogspot.com.ng/2016/08/legal-overview-of-foreign-participation.html>> accessed 28 February, 2020.

<sup>2</sup> By this mode, an alien, whether a foreigner or a foreign company, participates indirectly in business in Nigeria by buying shares in existing Nigerian companies; the foreigner purchases company stocks and bonds in Nigeria. This is usually through a stockbroker purchasing shares of publicly quoted companies or by private placement of shares of private companies or direct application for allotment in which case the Securities and Exchange Commission should be notified. Foreign Portfolio Investment can be conducted with foreign currency imported through an authorized dealer and converted to naira at the official exchange rate. See sections 12, 13 and 15 of Foreign Exchange (Monitoring and Miscellaneous Provisions) Act. See also Duru (n 1); sections 20(4), 80 and 82 of CAMA 2020.

<sup>3</sup> Tunde I Ogowewo 'The Shift to the Classical Theory of Foreign Investment: Opening up the Nigerian Market' (1995) 44(4) *International and Comparative Quarterly*, 915, 925 – 26. The author also argues at page 916 that

Bureau of Statistics, capital inflows (FDI, portfolio and other investments) reached US\$12 billion in 2017 – mainly due to policy changes and the recovery witnessed in the oil sector.<sup>4</sup> Certain laws that prohibited foreign corporations and aliens from acquiring full interests in some particular sectors of the economy were relaxed.<sup>5</sup> The justification for adopting a liberal approach in its company regulation is underscored by Nigeria’s need to strengthen its fragile economy and facilitate economic development in certain critical sectors of the economy.

Notwithstanding the apparent liberality of its provisions on company regulation, the Nigerian Company Law still has fractions of strictures that are considered outlandishly restrictive. One of such restrictions is found in section 78 of the Companies and Allied Matters Act 2020 (CAMA).<sup>6</sup> According to that section, a foreign company intending to carry on business in Nigeria must take all necessary steps to obtain incorporation as a separate entity before it can legally do so.<sup>7</sup> This provision has been viewed as counterproductive as it is capable of discouraging foreign direct investments in Nigeria.<sup>8</sup> The proponents of this view<sup>9</sup> argue that by requiring a foreign corporation to reincorporate under Nigerian law, the country stands to lose more than it can gain, since the liabilities of the incorporated company become limited and distinct from that of the parent foreign company, in line with the principle of limited liability reinforced in *Salomon v Salomon*.<sup>10</sup> Viewed from this negative perspective, the provisions of section 78 appear to have such corrosive effect on foreign directive investments in Nigeria as to sufficiently diminish the gains of foreign participation.

The problem with this view is that it is both sweeping and lopsided. Sweeping because the adherents are quick to arrive at conclusions and as such do not properly consider the full implication of that provision; and lopsided because the focus has been more on the downside of section 78 of CAMA. This paper will examine the full implication of section 78 and its economic effect and attempt a justification for its continued relevance, contrary to the prevailing view regarding the provision. By examining recent developments in other jurisdictions, especially that of South Africa where a foreign company is only required to register ‘a branch’ in the country in order to carry on business, the paper will argue that the provisions of section 78 of CAMA should

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Nigeria’s colonial history led to the distrust of foreign investments and ultimately to the enactment of anti-investment laws.

<sup>4</sup> Mosadoluwa Peace Adeleke, ‘Foreign direct investment in Nigeria’ (Nov 2018)

<<https://www.dlapiper.com/en/southafrica/insights/publications/2018/11/africa-connected-doing-business-in-africa/foreign-direct-investment-in-nigeria/>> accessed 8 March 2020.

<sup>5</sup> Ogowewo (n 3).

<sup>6</sup> Formerly section 54 Companies and Allied Matters Act Cap C20, Laws of the Federation of Nigeria, 2004.

<sup>7</sup> Section 78(1) of CAMA.

<sup>8</sup> Olufemi Amao, ‘Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinational in Host States’ (2008) 52(1) *Journal of African Law*, 98. The author argues that that section is both unnecessary and counterproductive. See also Ogowewo (n 3) 916 and 925, where the author challenged the utility of this requirement which, according to him, only has symbolic value and constitutes an unnecessary restriction on foreign investment.

<sup>9</sup>For instance Amao (n 8); Ogowewo (n 3).

<sup>10</sup> [1896] UKHL 1 [1897] AC 22.

be seen in a positive light. In this context, the paper is divided into three broad parts. The first part will examine the legal implication of section 78 and show that the section does not have such sweeping effect as has been suggested. The second part will look at the principle of separate legal personality and the economic effect of the provision of section 78 – especially as it relates to liabilities in tort and in contract – and argue that any limitation placed by that section on liabilities can still be circumvented by applying, in appropriate cases the doctrine of lifting the veil of incorporation. The third and final part, while pointing out recent developments in other jurisdictions in this area of law (notably the jurisdiction of South Africa and the United States), justifies the provision of that section and contends that the objectives of certain laws such as the Nigerian Oil and Gas Industry Content Development Act can only be met with the application of section 78.

## **2. Connotations of Section 78 CAMA 2020: Juristic Personality of Foreign Companies**

The wording of section 78(1) suggests that except a foreign company is registered in accordance with the provision of CAMA, or enjoys certain exemption pursuant to section 80,<sup>11</sup> it cannot carry on business in Nigeria or exercise the powers of a registered company, the powers which include the capacity to sue and be sued. The section provides as follows;

- (1) Subject to sections 80 and 83 of this Act, every foreign company which before or after the commencement of this Act was incorporated outside Nigeria and having the intention of carrying on business in Nigeria, shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not carry on business in Nigeria *or exercise any of the powers of a registered company*<sup>12</sup> and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under this Act.

Analytically, there are two limbs to the provisions of the section above. The first limb deals with the situation where a foreign company carries on business in Nigeria contrary to the provision of the Act. Under this limb, the business is rendered void pursuant to subsection (2).<sup>13</sup> The second limb goes to the root of the capacity of the foreign company, by forbidding a foreign company from exercising the powers of a registered company.

On the powers of a registered company, section 43(1) of CAMA provides that except to the extent that the company's memorandum or any enactment otherwise provides, a company shall for the furtherance of its authorized business have all the powers of a natural person of full

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<sup>11</sup> The provision of the section is to the effect a foreign company which falls under the categories provided thereat can apply through the Secretary of the Government of the Federation, to be exempted from registration. See also Regulation 27 of the Companies Regulations 2012.

<sup>12</sup> Emphasis supplied

<sup>13</sup> The subsection provides that any act of a company in contravention subsection (1) of this section is void.

capacity.<sup>14</sup>The powers of a natural person of full capacity necessarily include the power to sue and be sued. This then suggests that where a foreign company does not comply with the requirements of CAMA with respect to reincorporation, it cannot exercise the power to sue and be sued; an incidence of the powers of a natural person of full legal capacity.

Conversely, section 84(b) of CAMA seems to have clothed an unregistered foreign company with legal personality. The section provides that, ‘nothing ... shall be construed as affecting the rights or liability of a foreign company to sue or be sued in its name or in the name of its agent.’ This certainly presents a conflict in our laws as it concerns the juristic personality of a foreign company. Interestingly, just as there are conflicting provisions on the juristic personality of a foreign company, the courts in Nigeria have equally given conflicting decisions on the interpretations of the above provisions dealing with the legal personality of a foreign company.

In *Wema Bank v Nigerian National Shipping Line*,<sup>15</sup> the plaintiff sued for an order to compel the defendants to deliver certain goods to the plaintiff and for an order to restrain the defendants from re-shipping the said goods to the foreign company. The applicant, a West German firm represented in Nigeria by a Company incorporated in Nigeria, applied to be joined as a party to the action instituted against the respondent, the National Shipping Line Limited. The defendants, who were carriers for the foreign company, were acting on the instructions of the latter to re-ship the goods to Germany at the expenses of the foreign company. The plaintiff had contended that having regard to the provisions of section 370 (1) of the Companies Act 1968,<sup>16</sup> the German company was not a juristic person having not complied with the said section 370 (1). Therefore, the German company had no right of action and could not be joined as a party to the case. The Court held that even though foreign companies not incorporated in Nigeria are juristic persons under the laws under which they were incorporated, such companies lacked the power to sue and be sued in their own names and, therefore, the Germany company could not be joined in the action.<sup>17</sup> According to the trial Court:

The real issue in this matter is whether the applicant company is a juristic person according to Nigerian Law of the Companies Act. The first question is, I think, what is a juristic person? There are two cases in our case law of what is a juristic person. The first is *Shitta & Ors vs. Ligali & Ors* (1941) 16 N.L.R. 23 and the other is *Agbonmagbe Bank Ltd vs. General Manager, G.B.O. Ltd and Another* (1961) All NLR 116. From both cases, a juristic person may be defined as a person or entity known by the law. Such a person can sue or be sued. Can it therefore be said that in Nigeria all foreign companies not incorporated in Nigeria are by our laws not legal persons. There is no doubt that they are, but before they

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<sup>14</sup> It must be noted that the use of ‘every’ in the provision above is only to the extent of the types of companies registered in Nigeria as provided under section 29 of CAMA., to wit; companies limited by shares, companies limited by guaranty and unlimited companies all of which could be either private or public.

<sup>15</sup> (1976)2 F.R.CR.133.

<sup>16</sup>Now s 78(1) of CAMA.

<sup>17</sup> This case was, however, decided under the 1968 Act which does not have an equivalent provision of section 84(b) of CAMA.

can be vested with powers of a company, the Companies Act No 51 of 1968 laid down certain provisions to be complied with by a foreign company before it is recognized as registered in Nigeria and after registration, the company can then sue or be sued in its own name since it is then recognized by the law of Nigeria as a legal 'person'... This opinion is based on the ground that a company is a creature of the statute and until the provision of the statute have been fully complied with, the company cannot be said to have come into existence.<sup>18</sup>

The position of the trial court above, which was decided under the Companies Act of 1968, represented the law on legal personality of a foreign company until the coming into force of the Companies and Allied Matters Act in 1990.<sup>19</sup> Then in 1991, barely one year after the enactment of CAMA, the Court of Appeal, relying on the provision of section 84(b) of CAMA,<sup>20</sup> held in *Watanmal (Singapore) Ltd v Liz Odofin*<sup>21</sup> that a foreign company, even though not incorporated in Nigeria, or exempted pursuant to section 80 of CAMA, can sue and be sued as the provision of section 78 does not extend to the juristic powers of a foreign company. The facts of the case in brief are that the plaintiff, a company incorporated under the laws of Singapore entered into a contract for the supply of goods worth over one million dollars. Upon default of payment by the defendant, it instituted an action at the High Court of Lagos State for the recovery of the sum. The defendant entered a conditional appearance and protested the jurisdiction of the court to entertain the matter on the ground that the plaintiff was a foreign company resident and carrying on business outside the territorial jurisdiction of the court. The trial court, upon a finding of fact that the plaintiff was neither registered with the Corporate Affairs Commission nor given exemption by the appropriate authority, held that the claim of the plaintiff was incompetent. It further held that the plaintiff had no reasonable cause of action as the plaintiff was non-existent in the eye of the court. It, thereafter, awarded the sum of ₦3,000 in favour of the defendant/applicant. Being dissatisfied with the decision of the trial court, the plaintiff/appellant approached the Court of Appeal. The issues before the appellate court were:

- (a) whether a foreign company incorporated abroad can sue in Nigeria for services rendered or goods supplied to a Nigerian; (b) whether the Writ of Summons and the Statement of Claim disclosed a reasonable cause of action against the respondent; (c) whether the appellant by instituting the action, without more, was in contravention of section 78(1) of the Act and its action became void under section 78(2); (d) what is the proper order to be made where a court holds that it lacks jurisdiction to entertain a suit?

In resolving issues (a) and (c) above in favour of the appellant, the Court of Appeal relying on the provision of section 60(b) of CAMA 2004 (now 84(b) CAMA) held that the learned trial judge interpreted the provision of section 54(1) of CAMA too widely. According to the appellate Court:

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<sup>18</sup> *Wema Bank v Nigerian National Shipping Line* (n 15) 135.

<sup>19</sup> It was promulgated as the Companies and Allied Matters Decree 1990.

<sup>20</sup> The 1968 Act does not have an equivalent provision.

<sup>21</sup> (1998) 1 NWLR (Pt. 533).

The intent and meaning of the provisions of Section 54 of CAMA is clear, precise and unambiguous. It is only to prohibit a foreign company from running business in Nigeria without first going through the process of registration or after obtaining an exemption certificate. The section did not deal with the question of the legal personality of a foreign company.<sup>22</sup> The learned trial Judge was obviously in error to hold that a foreign company not registered in Nigeria lacks juristic personality to sue or be sued.

The learned Justice, thus, overruled the decision of the trial judge and allowed the appeal.<sup>23</sup> While this paper admits that the provision of section 84(b) of CAMA can be interpreted as giving recognition to the juristic capacity of a foreign company, nevertheless, with due respect, it disagrees with the Court of Appeal's decision that section 78(1) of CAMA does not deal with the question of legal personality of a foreign company. As was pointed out above, the second limb of section 78 (1) goes to the root of the capacity of the foreign company, by forbidding a foreign company from *exercising the power of a registered company*. In resolving the seeming conflicts between the provisions (and between the courts) as presented above, this paper is of the view that conflicts in Nigerian law on the legal personality of a foreign company can only be safely settled by placing reliance upon the *generalia specialibus non derogant* rule of interpretation. According to the rule, when two provisions are in conflict and one of them deals specifically with the matter in question while the other is of a more general application, the conflict may be avoided by applying the specific provision, to the exclusion of the more general one.<sup>24</sup> The conclusion that can be drawn from this state of affairs, therefore, is that a foreign company not registered in Nigeria or given exemption has the legal capacity to sue and be sued in the enforcement or determination of its rights.<sup>25</sup>

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<sup>22</sup> Emphasis supplied.

<sup>23</sup> It must be noted that there was no mention of the Wema Bank's case. A similar decision was arrived at in the case of *Ritz v. Techno*. The court stated in this case, distinguishing 'carrying on business in Nigeria' from 'ability to sue and be sued', held that the appellant company (Ritz), even though incorporated in Germany, has legal capacity in Nigeria. The fact in brief is that the respondent, a Nigerian company, borrowed and collected some machinery from the appellant company and used them at various trade fairs (Minna and Kaduna). However, he neither paid back the amount he collected in foreign currency nor returned the various machineries and equipment taken. In its verdict, the court held that the appellant company though foreign, can even sue in its name, without necessarily suing in the name of its agent in Nigeria. The Court further stated that it would be unjust and unfair to hold that a foreign company cannot sue to claim its legitimate right in Nigeria because it has not yet been registered under Nigerian laws. Also, in *Saeby Jernstoberi MFAS v Olaogun Enterprises Ltd*, (1999) 14 NWLR (Pt. 637) 128, the Nigerian Supreme Court, per Ayoola JSC explained the rationale of a foreign company's right to sue or be sued in a Nigerian courts thus: 'The principle of law that a foreign corporation, duly created by laws of a foreign State recognized by Nigeria may sue or be sued in its corporate name in our courts is part of the Common Law. The suggestion that a foreign company duly incorporated outside Nigeria should first be registered in Nigeria under the provisions of the Companies Act 1968 (which was the applicable statute) dealing with registration of foreign company as defined by that Act is too preposterous and patently inimical to international trade to merit any prolonged or serious consideration. It suffices to say that the Appellant Company with its registered address in Copenhagen properly sued in its corporate name'.

<sup>24</sup> See R Sullivan, *Sullivan and Dridger on the Construction of Statutes* (4<sup>th</sup> Edition, Butterworths 2002) 273.

<sup>25</sup> The decision of the Court of Appeal in *Watamal* above can only be applauded for encouraging foreign participation in Nigeria.

While the decision of the Court of Appeal remains conclusive on the question of juristic personality of a foreign company,<sup>26</sup> it must, however, be stressed that the scope of that decision is limited, at least to a large extent, to contracts entered into outside Nigeria. This is because, by the combined effect of the provision of section 78(2) of CAMA and the principle in *Sholanke v. Abed*,<sup>27</sup> contracts entered into in Nigeria by a foreign company which is neither registered nor enjoys exemption by the appropriate authority is void *ab initio* and, therefore, unenforceable by the courts in Nigeria.<sup>28</sup>

### **3. Contracts Void *Ab initio* under Section 78**

A contract can only be deemed to be illegal where the contract was entered into in Nigeria with a foreign company which does not enjoy exemption and the performance of the contract would be in Nigeria.<sup>29</sup> Also, a contract will be void *ab initio* where a foreign company has applied for exemption and while still awaiting a response from the President, enters into a contract in Nigeria.<sup>30</sup> Accordingly, the exemption must have been granted before the contract is completed. Any act which purports to give life to the contract before the exemption is approved renders the contract void *ab initio* and within the scope of the limitation placed by the principle in *Sholanke v. Abed*.<sup>31</sup> Similarly, where a foreign company, which has executed the business in which it secured an exemption for, purports to undertake an entirely new project without a fresh application for exemption, such a company is bound to incur the wrath of section 78(2), the implication being that the liabilities incurred or rights accruing from the project falling outside the permitted exemption are equally void *ab initio* and generally unenforceable.<sup>32</sup>

The inference drawn from the discussion above is that the inability to reincorporate a foreign company in line with the requirement of the provision of section 78 CAMA does not immediately preclude the foreign corporation from participating in business in Nigeria. The provision of section 84(b) of CAMA, which allows a foreign company to sue and be sued in Nigeria, readily contemplates the possibility of contractual relationships. Therefore, the statement by the Court of Appeal in *Watanmal's case*<sup>33</sup> to the effect that section 78 prohibits *a foreign company from running business in Nigeria without first going through the process of registration or after obtaining an exemption certificate*<sup>34</sup> must be read with caution, and not used to further the argument that section 78 is an excessively corrosive provision.

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<sup>26</sup> Except, of course, there is a superior interpretation of section 84(b) by the Supreme Court.

<sup>27</sup> (1962) 1 All N.L.R. 230.

<sup>28</sup> See section 78 (2) of CAMA and *Sholanke v. Abed* (1962) 1 All N.L.R. 230); see also NS Ogbuanya, *Essentials of Corporate Law Practice in Nigeria* (Novena Publishers 2010) 212.

<sup>29</sup> See *Sholanke v Abed* (1962) 1 All N.L.R. 230).

<sup>30</sup> Section 78(1) CAMA.

<sup>31</sup> (n 27).

<sup>32</sup> See section 80 CAMA.

<sup>33</sup> (n 21).

<sup>34</sup> Emphasis supplied.

#### 4. Separate Legal Personality of a Company in Nigeria and the Economic Effect of Section 78

The general principle of Company Law is that the company is in law a different person altogether from the members that constitute it.<sup>35</sup> The X & Co Ltd is an entirely different person from Mr. X, even though Mr. X started the company and managed it and owns practically all the shares. Mr. X can enter into contracts of binding legal efficacy with X & Co Ltd. and his property cannot be seized for the debts of the company. He can also lend money to the company on the security of its assets. In *Salomon v Solomon & Co Ltd*,<sup>36</sup> Salomon had a boot business. He sold the business to a company named Salomon & Co Ltd which he formed. There were seven members – his wife, daughter and four sons, who took one £1 share each and Salomon himself who took 20,000 shares. The price paid by the company to Salomon was £30,000 but instead of paying him cash, the company gave him 20,000 fully paid £1 shares and £10,000 in secured debentures. Owing to strikes in the boot industry or trade, the company was wound up. The assets of the company amounted to £6,000, out of which it was to pay £10,000 due to Salomon and secured by debenture, and a further £7,000 due to unsecured creditors. The unsecured creditors claimed that as Salomon & Co. Ltd was really the same person as Salomon, he could not owe money to himself, and that they should be paid their £7,000 first. The High Court and Court of Appeal bought this argument and decided in favour of the creditors. But the House of Lords held that Salomon was entitled to the £6,000 and the unsecured creditors got nothing. The company was an entirely separate person from Mr. Salomon. Generally, the courts consider themselves bound by the principles of *Salomon v. Salomon & Co. Ltd*,<sup>37</sup> providing that the company is a separate legal person distinct from its members.

The *Salomon* principle is codified in section 42 of CAMA and according to that section, the subscriber to a company's memorandum together with such other persons as may, from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company. This principle of separate legal personality of a company necessarily extends to a subsidiary of a company.<sup>38</sup> By section 381 of CAMA, a company is deemed to be the subsidiary of another company if it is either a member of that other company and controls the composition of its board of directors, or holds more than half in nominal value of its share capital. The first meaning deals with companies having no share capital, such as a company limited by guarantee<sup>39</sup> whose membership is primarily acquired by an agreement in writing.<sup>40</sup> The second meaning

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<sup>35</sup>See sections 42 and 43 (1) of CAMA.

<sup>36</sup>(1897) AC 22 III

<sup>37</sup> Ibid.

<sup>38</sup> See *Ebbw Vale UDC v South Wales Traffic Area Licensing Authority* ((1951)2 KB 366 and *Charterbridge Corporation v Lloyd's Bank Ltd* (1970) Ch. 62, both cited in Olakunle Orojo, *Company Law and Practice in Nigeria*, (5<sup>th</sup> edn, LexisNexis 2008) 81-83, where Pennycuik J stated that '...each company in the group is a separate entity...'

<sup>39</sup> See CAMA s 26.

<sup>40</sup> See CAMA s 79(2).

applies to a company having share capital and takes effect when a shareholder (including another company) acquires at least 51% of the nominal shares of that company. The implication appears to be that to fulfill the requirement of section 78 of CAMA, all that a foreign company has to do is incorporate another company in Nigeria and subscribe to at least one share in that company. The company so incorporated becomes a Nigerian company and thus subject to control under the Nigerian law. Consequently, to have controlling power over the Nigerian company, the foreign company should have at least 51% of the share capital or reserve such powers to appoint directors. Once a Nigerian version of the foreign company is incorporated, the Nigerian company becomes a separate legal personality with its rights and obligations distinct from the foreign company.

## **5. The Economic Implication of the Reincorporation Requirement under Section 78**

Essentially, section 78 of CAMA has economic implications which critics have relied on to justify their call for its deletion from Nigeria's company law. For Ogewewo, a company is subject to the jurisdiction of Nigerian courts, not necessarily because of incorporation in Nigeria, but by virtue of the fact that the said company is present within the jurisdiction of the court. In the common law world, the basis of jurisdiction of the courts is presence and doing business in a place is equivalent to presence. If this is the correct position of the law, then the provision of section 78 appears to be superfluous in so far as jurisdiction is concerned.<sup>41</sup> He further argues that a country that needs to attract foreign investments must have some variables within its contemplation. These will include: (i) country specific factors<sup>42</sup>; (ii) the foreign investment policy of that country,<sup>43</sup> and; (iii) the state of factors (i) and (ii) in other countries similarly situated.<sup>44</sup> The second variable will be optimal only if it is the product of a careful analysis of the first and third variables. Put differently, a country that wishes to attract foreign investment must not only formulate foreign investment policies that complement the incentives that its economy offers, but such policies must also compensate for the disincentives of investing in the country and the formulation of such policies must be done with an awareness of the country specific factors and investment policies of countries similarly situated. A country that adopts an investment policy that is not as liberal or attractive as that of another country offering the same level of incentives would lose customers in the market for investment capital to the latter country.<sup>45</sup> In this context, when Nigeria is formulating her policies, she must be aware of the policies that exist in a country similar to her (for instance South Africa). Accordingly, when the three variables are analysed in relation to Nigeria, the conclusion is that by continuing the application of section 78 of CAMA, Nigeria has little attraction for foreign investment.

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<sup>41</sup>Ogewewo (n 3) 920.

<sup>42</sup> Such as the available incentives and disincentives including risk factors, large consumer market and good infrastructure

<sup>43</sup> Including taxation policy, foreign exchange remittance and other foreign investment laws

<sup>44</sup>Countries are similarly situated when they are at the same level of development according to the World Bank classification, which is low income, middle income or high income. The main criteria for classifying countries into these groups is the Gross Domestic Product (GDP) per capita; see Ogewewo (n 3) 920

<sup>45</sup>Ibid

Apart from the fact that the requirement of re-incorporation increases the transaction cost of doing business in Nigeria and contributes to the perception of a restrictive investment regime, Ogewewo argues that it is also detrimental to Nigerian litigants who intend to forum-shop.<sup>46</sup> For example, a person who suffers injury in Nigeria as a result of corporate malfeasance by a US subsidiary (incorporated and doing business in Nigeria) and who wishes to sue the parent company in the US because of more generous personal injury laws may find it difficult succeeding in the US. This is because a US court may decline jurisdiction on the basis that the US Company in Nigeria is a separate legal entity from the parent company in the US. Nigerian litigants are, therefore, prevented by their own law from taking advantage of more generous foreign product liability and personal injury laws.<sup>47</sup> Arguing from a like disposition, Amao contends that the continued application of section 78 will only end up scaring away foreign investors.<sup>48</sup> He starts by agreeing with the point that even without reincorporation, foreign companies are still subject to Nigerian jurisdiction by the fact that they are doing business in the country, and not necessarily because they are incorporated in Nigeria. Therefore, the provision of section 78 does not have the capacity to control the attitude of foreign companies in opting for investments in Nigeria.<sup>49</sup> Similar to Ogewewo's concerns, the problem Amao identifies with the provision of section 78 hinges on the principle of limited liability, which is an incidence of corporate personality as established in *Salomon's case*.<sup>50</sup> Using the Supreme Court's decision in *Mobil Producing (Nig.) Unlimited v Monokpo*<sup>51</sup> to accentuate his point, the author submits:

A worrisome aspect of the provision in the context of this article is that it makes it easier for the parent companies of MNC subsidiaries in Nigeria to deny liability for any adverse consequence of the operations of their subsidiary, since the subsidiary is incorporated and legally recognized as a Nigerian company. This argument was canvassed in a suit brought by a community in the oil producing area against Mobil and its parent company in the US.

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<sup>46</sup>ibid.

<sup>47</sup>ibid.

<sup>48</sup> Olufemi Amao (n 8) 97. Compared with the UK Company Law on which the Nigerian Law is broadly patterned, Amao contends that the section is a departure from the provisions of the UK Law. According to the author, in England, a foreign company is not required to reincorporate but must file the names and addresses of the persons authorized to accept service on its behalf with the registrar of companies.

<sup>49</sup> Ibid. In support of this position, the learned author cites as authorities *Okura & Co Ltd v Forsbacka Jernverks Aktiebolag* (1914) 1 KB 715 and *Offshore International SA v Federal Board of Inland Revenue* (1976) 1NTC 435, where a Nigerian court held that a company incorporated in Panama, having its principal office in Texas and no place of business in Nigeria, was liable to pay tax for the operation of its business carried out through a subsidiary in Nigeria under the Nigerian Companies Income Tax Act.

<sup>50</sup> (n 36).

<sup>51</sup> (2003) 18 NWLR (Pt 852) 346, 401. He also relied on the Court of Appeal decision in *Shell Petroleum Development Company (SPDC) of Nigeria v Dr Pere Ajuwa and Honourable Ingo Mac-Etteli*, (unreported) CA/A/209/06, 27 May 2007, where the distinction was also employed by the Court of Appeal Abuja Division in granting a stay of execution of a judgment against Shell for gas flaring.

Another implication of this legislation is that it may impede the ability of Nigerians seeking redress from MNCs to approach the home jurisdiction of the parent companies.<sup>52</sup>

The Nigerian position on the reincorporation of foreign companies is in stark contrast to what obtains in the UK and South Africa. Notably in South Africa – which apart from also being on the African Continent, shares similar characteristics with Nigeria in terms of economic indices (for instance, the size of their Gross Domestic Product)<sup>53</sup> – the position is that a foreign company is permitted to register as an external company (branch office) and need not go through the process of registering as a new South African Company. In this context, under section 23 of the South African Companies Act,<sup>54</sup> an ‘external company’ must register with the Companies and Intellectual Property Commission (CIPC) within 20 business days after it first begins to conduct business, or non-profit activities, in South Africa.<sup>55</sup> A foreign company is, by virtue of the provisions of the South African’s Companies Act, regarded as conducting business in South Africa if either it is a party to at least one employment contract in South Africa, or if it is conducting such activities for a 6-month period ‘as would lead a person to reasonably conclude that the company intended to continually engage in business or non-profit activities within the Republic.’<sup>56</sup> Therefore, having even one employee in South Africa requires a company to register.<sup>57</sup> The legislative framework in section 23 of the Act sets out the level of activities that a company from a foreign jurisdiction can carry on in South Africa and the modalities through which it can carry on such business as a branch.<sup>58</sup> A foreign company will not be regarded as conducting business or non-profit activities solely by virtue of doing any one or more of the following:

- (i) Holding board or shareholder meetings in South Africa, or otherwise conducting any of the company's internal affairs in South Africa.
- (ii) Establishing or maintaining offices or agencies in South Africa for the transfer, exchange or registration of the foreign company's own securities.
- (iii) Creating or acquiring any debts in South Africa, or any mortgages or security interests in any property in South Africa.
- (iv) Securing or collecting any debt, or enforcing any mortgage or security interest in South Africa.
- (v) Acquiring any interest in any property in South Africa.

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<sup>52</sup> Olufemi Amao (n 8).

<sup>53</sup> In 2017, the US Dollar value of the South African GDP was \$301bn, while Nigeria’s was \$296bn. See J Rossouw, ‘South Africa Just Leapt Over Nigeria to Become Africa’s Largest Economy Again’ (2017) *Quartz Media LLC* <<https://qz.com/758947/south-africa-just-leapt-over-nigeria-to-becomeafricas-largest-economy-again/>> accessed 10 March, 2021.

<sup>54</sup> No 71 of 2008.

<sup>55</sup> Section 23(2). See Heather Brownell, ‘What Constitutes an “Employment Contract within South Africa?” - s. 23(2) of the Companies Act 71 of 2008’ (2012) *DeRebus Publication* <<http://www.derebus.org.za/constitutes-employment-contract-within-south-africa-s-232-companies-act-71-2008/>> accessed 23 March, 2021.

<sup>56</sup> Section 23(2)(b)).

<sup>57</sup> Emma Forbes, ‘10 Things to Know about Foreign Companies as External Companies in South Africa’ (2015) *Nortin Rose Fulbright*, <<https://www.financialinstitutionslegalsnapshot.com/2015/06/10-things-to-know-about-foreign-companies-as-external-companies-in-south-africa/>> accessed 18 March, 2020.

<sup>58</sup> Note that the Act does not use the expression 'branch', but this can be inferred from the wording of the section.

Although an external company continues to exist subject to the laws of its country of incorporation, it must appoint and register a South African resident as its public officer with the Companies and Intellectual Property Commission (CIPC). This person is responsible for compliance in South Africa, which includes the filing of annual returns and director and officer details with the CIPC. The external company is not a new legal entity separate from the foreign company.<sup>59</sup> The foreign company remains one and the same legal entity, registered in South Africa and in its place of incorporation. There will neither be a separate board of directors in South Africa nor will it have a separate existence from its foreign operations. Should the registered external company be sued, the foreign company itself will be sued. The external company's liability is, therefore, not limited to its South African operations. Should the external company become insolvent, the entire estate of the external company (including its overseas assets) will be susceptible to creditors.<sup>60</sup>

Relating this South African position to the argument of Ogewewo and Amao, the predominant rationalization appears to be that the provision of section 78 has made it possible to limit the liability of a foreign company (in tort and in contracts) to its shareholding proportion in the reincorporated Nigerian company, in line with the provisions of sections 42, 43(1) and 92 of CAMA. Section 117(1) of CAMA particularly provides that:

Prior to the winding up of a company, a member of the company with shares shall be liable to contribute the balance, if any, of the amount payable in respect of the shares held by him in accordance with the terms of the agreement under which the shares were issued or in accordance with a call validly made by the company pursuant to its articles.

The impact of this provision is that the liability of a company, in the event of winding up, is limited to the amount of shares unpaid (if any). As a result, a shareholder – and in this case a company – in the event of winding up has its liabilities limited to the amount it has invested in the target company and no more. This effect is heightened by the provision of section 42 of CAMA, which places an imaginary veil on the company from its shareholders. This veil of incorporation shuts and shields the shareholders of a company from any liabilities beyond their investments in the company, and further makes it judicially necessary for the courts to only concern themselves with the corporate identity.<sup>61</sup> Gower writes that this concept of limited liability, which is one of the incidences of separate corporate liability, means that members of a company are generally not subject to the debts of the company,<sup>62</sup> debts which may be incurred by breach of contractual obligations or damages in tort.<sup>63</sup>

Nevertheless, notwithstanding the provision of section 42 (and the principle in *Salomon's* case), there are instances where the courts have shown themselves willing to lift the veil of

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<sup>59</sup>Emma Forbes (n 57).

<sup>60</sup>Ibid.

<sup>61</sup>Funso Adaramola, *Jurisprudence* (4<sup>th</sup> edn, LexisNexis 2008) 170.

<sup>62</sup>Gower and Davies, *Principles of Modern Company Law* (8<sup>th</sup> edn, Sweet & Maxwell 2008) 37. See also John Birds *et al*, *Boye and Bird's Company Law* (4<sup>th</sup> edn, Jordan Publishing Ltd 2000) 24.

<sup>63</sup>Gower and Davies (n 62).

incorporation and set aside the separate personal liability of a company.<sup>64</sup> When the incorporation veil is lifted, members of the company will be seen as one with the company and in some circumstances, their liability will be extended beyond the statutory limitation. For instance, in *Daimler Co v Continental Rubber*,<sup>65</sup> the veil of incorporation was lifted in the interest of justice. In that case, all except one of Continental Tyre and Rubber Co Ltd.'s shares were held by German residents and all directors were German residents. The secretary was English. Continental Tyre and Rubber Co Ltd supplied tyres to Daimler, but Daimler was concerned that making payment might contravene a common law offence of trading with the enemy as well as a proclamation issued under section 1(2), Trading with the Enemy Act 1914. Daimler brought the action to determine if payment could be made, given that it was during the First World War. At first instance, Scrutton J approved the decision of the Master that the contracts were valid for summary judgment without proceeding to trial. On appeal, the Court of Appeal equally affirmed the decision, holding there would be no offence. They held that the company did not change its character because of the outbreak of war. According to them, it remained an English company regardless of the residence of its shareholders or directors either before or after the declaration of war. On further appeal, the House of Lords unanimously reversed the decisions below, saying that the company was capable of acquiring enemy character. Lord Parker said that the acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company's acts and may invest it definitely with enemy character. It must at least be prima facie relevant.

Also, in *Re FG (Films) Ltd*,<sup>66</sup> an American film company, wanting to enjoy the privileges accorded to British-made films under the Cinematographic Films Act 1943-1948, incorporated a company in England. The company had a capital of £100 divided into £1 each, 90 of which were held by an American and 10 by a Briton. The company was wholly financed by the American company with £80,000. When the Company sought to register a film in order to enjoy the tax benefits, the court lifted the veil of incorporation to determine the shareholders and held that the incorporation of the British Company was to defraud and will not be enforced. The court also held that the company was merely an agent of the American company and cannot properly be described as a British company.

Where a company carries on its business in a manner that deprives it of its own will, the court will hold the company to be an agent of the shareholders and will impute the liability of the company (agent) on the shareholders (principal). In *Wallersteiner v Moir*,<sup>67</sup> Dr Wallersteiner had bought a company called Hartley Baird Ltd using money from the company itself, in contravention of the prohibitions on financial assistance. He had got 80% of the company. Mr. Moir was one of the 20% remainder shareholders. With the intention of exposing Dr Wallersteiner's various

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<sup>64</sup> John Birds et al (n 62).

<sup>65</sup>(1916) AC 307.

<sup>66</sup>(1953) 1 WLR 483.

<sup>67</sup> (1974)1WLR 991.

dealings, Mr. Moir circulated a letter to shareholders. Dr Wallersteiner sued for libel. Geoffrey Lane J, at first instance, struck out the claim for want of prosecution, as it was apparent that Dr Wallersteiner was just wasting the time of the court. But he also entered judgment against Dr Wallersteiner. On appeal, Lord Denning MR, in a condemnatory judgment held that Dr Wallersteiner's delays were intentional and contumelious, and the action for libel should be struck out. In the course of the conclusion, he noted that various Liechtensteiner companies which Dr Wallersteiner held could be accessed to get back the ill-gotten gains, and he thought so on this basis. He went on to state thus:

I am prepared to accept that the English concerns — those governed by English company law or its counterparts in Nassau or Nigeria — were distinct legal entities. I am not so sure about the Liechtenstein concerns — such as the Rothschild Trust, the Cellpa Trust or Stawa A.G. There was no evidence before us of Liechtenstein law. I will assume, too, that they were distinct legal entities, similar to an English limited company. Even so, I am quite clear that they were just the puppets of Dr. Wallersteiner. He controlled their every movement. Each danced to his bidding. He pulled the strings. No one else got within reach of them. Transformed into legal language, they were his agents to do as he commanded. He was the principal behind them. I am of the opinion that the court should pull aside the corporate veil and treat these concerns as being his creatures – for whose doings he should be, and is, responsible.<sup>68</sup>

In *Union Beverages Ltd. v Pepsi Cola International Ltd*,<sup>69</sup> Union Beverages Ltd (UBL) entered into an agreement with Pepsi Cola Incorporated (P Inc) under which P Inc. granted UBL exclusive bottling appointment. The representative company of P Inc in Nigeria was Pepsi International Ltd (PIL) a subsidiary of P Inc. UBL, having complained of a breach of the contract, brought an action in court to restrain PIL, the subsidiary and representative of P Inc. from breaking the agreement. On appeal to the Supreme Court, it was held (amongst others):

- i. That the interlocutory injunction would not be granted against PIL because the agreement in question was between UBL and P. Inc. and not PIL.
- ii. That even if PIL was a subsidiary of P Inc, nevertheless, PIL has its own separate legal personality.
- iii. That the act of the holding company cannot be imputed to the subsidiary company, nor *vice versa*.
- iv. That there was no basis for holding PIL responsible for what P. Inc. had done.
- v. That it would have been otherwise if one company had acted as agent or servant of the other.

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<sup>68</sup>ibid at 992. Other cases in this area include *Gilford Motor Co. v Horne* (1933) Ch. 935

<sup>69</sup>(1994)2 SCNJ 181,

- vi. That if, however, the two companies were shown to be one to all intents and purposes, 'their corporate veil could be pierced and each could be held liable for the action of the other.'

It has been suggested that the decision in this case would probably have been different if UBL had adduced evidence to prove that both PIL and P Inc. were one economic entity. For example;

- i. By establishing inter-related structures, tendering a recent annual report of P. Inc. which contains consolidated accounts for the worldwide operation of the Group including PIL.
- ii. By showing that PIL does not determine its market conduct autonomously but in strict consultation with P. Inc.
- iii. By showing that P. Inc. has pervasive powers of control over PIL.
- iv. By showing technology licensing and other agreements between PIL and P. Inc. which reveal relationship of financial, technological and managerial dependence of PIL on P. Inc.<sup>70</sup>

What the above case goes to prove is that notwithstanding the fact that a foreign company maintains a separate legal personality upon reincorporation in Nigeria, it can still be subjected to liabilities beyond its investment in a Nigerian company if it can, for instance, be factually established that the two companies are a single economic unit. This position was hinted in the case of *Adams v Cape Industries Plc*,<sup>71</sup> which was concerned with the extent of liabilities within a group of companies. The respondent in this case and its subsidiaries operated a business of mining asbestos in South Africa and selling this product in various parts of the world, including in the United States. The judgments obtained in a Federal Court in Texas were concerned with the liability in tort for asbestos-related injuries, and were sought to be enforced in England against Cape. The court rejected the argument of the claimant on treating the subsidiaries of Cape and Cape as one single economic unit since there was no sufficient evidence to proof same.<sup>72</sup> Accordingly, had it been established that the wholly-owned subsidiary of Cape carried on business in the United States, there could have been a factual justification to pierce the corporate veil and hold Cape liable for the tort of its subsidiary in the United States.<sup>73</sup> It was also pointed out in this case that a subsidiary might be treated as the agent of its holding company in situations where such an inference was factually justified.<sup>74</sup>

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<sup>70</sup> Chijioke Emole, 'Rethinking Corporate Personality' *The Guardian Newspaper* (Lagos: 11 June, 1994), cited in Joseph O Orojo, *Company Law and Practice in Nigeria, Volume 2* (Sweet and Maxwell, 1984) 92-93.

<sup>71</sup>(1990) Ch 433.

<sup>72</sup>This argument was rejected because the company (CPC) through which the tortious liability was incurred was not in fact a subsidiary of Cape.

<sup>73</sup> See Gower and Davies (n 62) 202-203.

<sup>74</sup> John Birds *et al* (n 62) 42. There are also instances under the CAMA where the veil of the incorporation can be lifted. These include: where the number of directors is less than two – section 271(3) CAMA, reckless/fraudulent trading – section 672(1) CAMA, publication of names by company – section 729 CAMA, holding and subsidiary companies – Section 381 CAMA, investigation into related companies – section 369 CAMA.

## 6. Justification for the Continued Application of Section 78 CAMA

One of the rationalizations for insisting on re-incorporation appears to be that it must be within the contemplation of the legislature (in this case the Nigerian Legislature) to properly regulate circumstances where a foreign company carries on business within the former's area of jurisdiction. In such circumstances, it will only be appropriate for a Nigerian whose rights have been infringed upon to be protected; such a person should have a right of recourse against the foreign company in Nigeria and should not be compelled to institute a claim against the foreign company in its primary place of incorporation. This understanding is based on the rationale for requiring a foreign company to be incorporated in Nigeria, which is found in the English case of *South India Shipping Corp Ltd v Export-Import Bank of Korea*.<sup>75</sup>

As was pointed out earlier, the provisions of section 78 introduced the requirement of local incorporation in order to bring multinational corporations under the ambit of Nigerian company law and make them compliant to the provisions of the Act.<sup>76</sup> Apparently, the need to introduce this measure of control stems from the country's past experiences with foreign corporations.<sup>77</sup> Ogowewo submits (rightly this paper thinks) that the need for a restrictive approach to foreign investment was informed by Nigeria's experience with colonial rule, under which the economy was substantially controlled by foreign interests, a practice which has continued post-independence especially in the oil sector.<sup>78</sup> Similarly, Kachukwu opines that the sometimes anti-foreign attitude of Nigerians in terms of ownership and control of companies has its nexus from the unique historical incidents of their colonial past.<sup>79</sup>

Without doubt, Nigeria's need for economic development necessitated the liberalization of foreign participation in its economy. The influx of foreign corporations, however, brought with it some negative effects. In this context, Kachukwu explains that the post-independence period welcomed neo-colonization in its greatest forms.<sup>80</sup> The tentacles of foreign dominance on the economy were already rooted in the system such that independent Nigeria found it difficult to provide for the participation of its citizens in business activities.<sup>81</sup> Therefore, it was considered necessary to 'localize' foreign companies, which dominated their Nigerian counterparts, both economically and technologically. This situation was further exacerbated by a combination of the country's loose legal system (replete with loopholes), and a body of international treaties that appears to offer better protection to foreign participants. By and large, policy makers reasoned that foreign corporations had to be brought under the ambit of Nigerian law, in order to maximize the economic resources of the country, especially in the oil and gas sector. In this context, the Nigerian

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<sup>75</sup> [1986] 2 All ER 219.

<sup>76</sup> Such requirements include disclosure of accounts and regulation of directors and shareholders.

<sup>77</sup> Ibe Kachukwu, 'Nigerian Foreign Investment Law and Policy' (1988) 29, cited in Ogowewo, (n 3) 916.

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid* 917.

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.*

Oil and Gas Industry Content Development (NOGIC) Act (Local Content Act),<sup>82</sup> for instance, was enacted to encourage Nigerian citizens' participation in economic activities hitherto dominated by foreign nationals. The Act defines Nigerian (local) content as 'the quantum of composite value added to or created in Nigeria through utilization of Nigerian resources and services in the petroleum industry resulting in the development of indigenous capability without compromising quality, health, safety and environmental standards'.<sup>83</sup> The point made here is that the provisions of legislation like the 'Local Content Act' and the attendant benefits to Nigeria's economic development would not have been possible without the application of the provisions of section 78 of CAMA. This is because without the requirement stipulated under section 78, a foreign company would have no obligation to comply with the 'Local Content Act', since the fulfilment of section 41 of the latter Act contemplates reincorporation of a subsidiary in Nigeria, and would normally not be applicable to the foreign company itself. Admitted that a foreign company need not be incorporated in a country to be subject to the laws of that country,<sup>84</sup> certain provisions in a law may only be applicable to persons (in this case corporations) under its jurisdiction.

Recent developments seem to support this line of reasoning. For instance, the South African Company law, which going by the arguments of Ogewewo and Amao is a better alternative to the Nigerian regime, appears to be in need of change. In this context, it has been reported that the South African government is looking at legislation to enhance the regulation of foreign-owned businesses.<sup>85</sup> According to the report, the South African Small Business Development Minister, Khumbudzo Ntshavheni in September 2019 decided to set in motion legislative intervention to better regulate the participation of foreign nationals in South Africa's economy. According to the Minister, the proposed law will be based on lessons and best practices from countries such as Nigeria, Ethiopia, Tanzania, Ghana (amongst others) that have appropriate regulations on foreign corporations and their participation in their countries. While there are already several laws in place in South Africa,<sup>86</sup> the Minister believes that government would do well to look at what the rest of Africa is doing in this regard. In the words of the Minister, 'we want to strengthen the protection for the locals'.<sup>87</sup>

The critics of section 78 have compared Nigeria's company law to that of UK, and contended that since the Nigerian law is modelled along the lines of that of UK, there is no basis

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<sup>82</sup> Act No 2 of 2010.

<sup>83</sup> S 106 of the Act.

<sup>84</sup> In arguing against the provision of section 78, Ogewewo has argued stridently that a company that operates in a country is not immune to its laws merely because it is incorporated elsewhere. He cited certain laws that apply in Nigeria whose applications extend to both indigenous and nonindigenous corporations. See Ogewewo, (n 3) 924.

<sup>85</sup> Omphemetse S Sibanda, 'How Does Government Balance Regulating Foreign-Owned Business with the Drive for Investment?' *Daily Maverick* (29 September, 2019) <<https://www.dailymaverick.co.za/opinionista/2019-09-29-how-does-government-balance-regulating-foreign-owned-businesses-with-the-drive-for-investment/>> accessed 21 March, 2020.

<sup>86</sup>Including the Companies Act No 71 of 2008, with its section 23.

<sup>87</sup> Sibanda (n 85).

for allowing the continued application of section 78.<sup>88</sup> The contention of this paper is that this argument is rather lopsided as it tends to situate or confine two asymmetric jurisdictions within the same economic context. For instance, the UK has a well-structured body of laws that can well be described as hermetic. The same cannot be said of Nigeria's body of laws. For instance, Nigeria's law on mergers and acquisition is not precise in its position on cross-border mergers.<sup>89</sup> This implies that without the provision of section 78, it will be difficult for an indigenous Nigerian company to merge with a foreign unincorporated company. This would have occasioned serious financial and developmental setbacks, particularly in the petroleum industry which benefits from heavy financial investments from multinational companies. Thus, while it is possible for the UK government to subject a foreign company not registered under its laws to its company law and policy without necessarily being dominated or manoeuvred, it is difficult to say the same for Nigeria with its nascent *corpus juris*.<sup>90</sup> Therefore, contending that section 78 should be expunged in part because it is against the spirit of its 'source' is, to put it mildly, widely off the mark. Even the US, considered globally to be a stable and viable economy, is now contemplating reviewing its policies on foreign direct investments, as a result of increased security concerns. According to the US Council on Foreign Relations:

The United States is both the world's largest foreign direct investor and the largest beneficiary of foreign direct investment (FDI). But like every sovereign country, it has sought to temper its embrace of open markets with the protection of its national security interests. Achieving this balance, which has shifted over time, has meant placing certain limitations on overseas investment in strategically sensitive sectors of the U.S. economy.<sup>91</sup>

Without effective restriction on foreign participation (as provided under section 78 CAMA and under the Local Content Act),<sup>92</sup> Nigeria could run into a security challenge where the critical sectors of the economy are left in the hands of foreigners who may manipulate same for political motivations. In this context, therefore, it becomes imperative that in exercising sovereignty over its natural resources and safeguarding her national interest, the Nigerian state must have the capacity to fully control and manage the activities of foreign corporations in the country.

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<sup>88</sup> Amao (n 8) 97.

<sup>89</sup> See the provision of the Investments and Securities Act 2007. Also see particularly the Federal Competition and Consumer Protection Act (FCCPA) 2018, which repealed sections 118-128 of ISA and provides for mergers and acquisition under sections 92-103 of FCCPA 2018.

<sup>90</sup> Body of laws.

<sup>91</sup> See the US Council on Foreign Relations, 'Foreign Investment and U.S. National Security' <<https://www.cfr.org/backgrounder/foreign-investment-and-us-national-security>> accessed 8 September 2019.

<sup>92</sup> It is worth mentioning that the Nigerian Oil and Gas Industry Content Development Act in section 106 defines a Nigerian Company as a Company registered in Nigeria in accordance to the provisions of the Companies and Allied Matters Act with not less than 51 percent equity shares owned by Nigerians. It further provides that Nigerian operators and indigenous service companies shall be given first consideration in the award of oil blocks, licenses and works in the sector. Thus, to be competitive in bidding for contracts, at least 51 percent equity should be owned by Nigerian investors.

## **Conclusion**

Without doubt, the need for Nigeria to attract foreign investments must be balanced with the necessity to protect its sovereignty through control on FDI. Accordingly, as has been suggested, Nigeria is expected to have a certain margin of choice or area of manoeuvre through the exercise of public policy in creating successful indigenous capitalist economic development or at least ensuring that the activities of foreign enterprises dominating certain areas of the economy are moulded to the national interest.<sup>93</sup> Therefore, what section 78 CAMA has done is to place some level of restriction on foreign investments in order to subject the activities of foreign corporations to its domestic laws and proper regulation. Viewed from this perspective, which the critics of section 78 CAMA have often ignored, it becomes desirable to allow the continued application of that provision, otherwise Nigeria may find itself in similar situation with Ukraine in 2006, when Gazprom, a Russian giant energy firm, cut off supply of gas to Ukraine, a move which was obviously motivated by political rather than commercial interest.

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<sup>93</sup> Paul Collins, 'The Political Economy of Indigenization: the Case of the Nigerian Enterprises Promotion Decree' <[https://journals.co.za/content/afre/4/4/AJA00020117\\_95](https://journals.co.za/content/afre/4/4/AJA00020117_95)> accessed 8 March 2020.