Resource Nationalism On The Rise In Sub-Saharan Africa? Possible Reasons And Fixes Using Nigeria As A Case Study.

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Abstract
While host governments are agreed on the point that the inflow of foreign direct investment is a necessary economy booster, enough is not done by the host governments to curb the increasing nationalistic treatment meted out to foreign investors.Discourse in this article revolves around resource nationalism in select sub-Saharan African countries, highlighting the trends, possible reasons, and fixes – using Nigeria as a case study.This article, therefore, explores the varied rationales and motivation for the nationalistic policy initiatives by host governments in sub-Saharan Africa and shines a beaming light on Nigeria, the 'Giant of Africa' giving glaring examples of resource nationalism. Issues revolving around the Federal Government's ultimatum to oil contractors to make retroactive payments; the flight of the two of the largest banking institutions from Nigeria; and the misfortunes of one of the largest African mobile telecommunications (MTN) in Nigeria are discussed at length.The paper concludes by providing possible fixes and nuggets of advice that should aid in either halting or diminishing the effect of policy initiatives, dubbed as nationalistic, by the host governments.
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1. Introduction

The United States of America, Europe and, more recently, China, have taken a keen interest in Sub-Saharan Africa over the years by investing billions of dollars in the different sectors (particularly the energy and mineral resources sector), in the region. The inflow of foreign direct investment ("**FDI**") is a nation's economy booster. As such, host governments often introduce various fiscal incentives, policies and negotiate multilateral and bilateral treaties to increase investors' appetite.

Despite the efforts made to attract FDI, there have been an increasing trend of nationalistic treatment by various host governments in sub-Saharan Africa, in relation to natural resources and assets which are considered key and strategic to the state. This treatment by host governments could be termed '*resource nationalism'* or simply, the crystallization of political risks in sub-Saharan Africa.

Discourse in this article would revolve around resource nationalism in select sub-Saharan African countries, highlighting the trends, possible reasons and fixes – using Nigeria as a case study.

1.1 Resource Nationalism.

Resource nationalism has been described as '*the increasing use of control of natural resources to advance policy goals-both economic and foreign policies'*[1], *'an expression of [the]…'obsolescing bargain' where once oil has been discovered and the investment sunk in development, relative bargaining power switches in favour of the host government, which then tries to increase its fiscal take by unilaterally changing the terms of the original contract*[2]*', '…a set of policies as well as the justifications given to policies that increase government intervention intervention in resource development'*[3].

Resource nationalism is not an alien concept unique to the African continent, as there exists policy initiatives in other non-African countries, dating back 20-30 years, which could be dubbed as '*resource nationalism'.* Examples of such polices include the: i) stringent demands for national shares in natural resources joint ventures (as in Kazakhstan, Russia); ii) outright prohibition on international oil company production (as in Saudi Arabia), and iii) nationalization (as in Bolivia and Venezuela)[4], e.t.c.

2. A journey around sub-Saharan Africa.

In recent times, host governments in sub-Saharan Africa, particularly those rich in natural resources – although lacking capital, technical and technological expertise, have begun to take a more hardline approach to resource nationalism which presents a threat to investors, making investment in the region increasingly risky.

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[1] Stanislaw, J (2008) *Power Play: Resource Nationalism, the Global Scramble for Energy and the Need for Mutual Interdependence*, Deloitte Deloitte US, 2008.
[2] Stevens, P (2008) *National oil companies and international oil companies in the Middle East: Under the shadow of government and the resource nationalism cycle*, JWELB 2008, Volume 1 No 1.
[3] Ait-Laoussine, N (2008) *Middle East Economic Survey*. Retrieved 17 February 2019 from http://www.mees.com/postedarticles/oped/v51n44-5OD01.htm
[4] Ward, H (2009) *Resource nationalism and sustainable development: a primer and key issues,* IIED Working Paper (online), pages 8-9.

Although the rationale and motivation for the policy initiatives are country-specific, key drivers are the intent of the host governments to: i) capture a greater value from the resource sectors through increased state participation, higher taxes and royalty rates; ii) redistribute wealth and counter the effect of colonialism and its antecedent economic policies; iii) fund capital projects and 'win political points' for elections[1], e.t.c. In the following paragraphs, the author takes the trip around a select number of countries in sub-Saharan Africa – and highlights examples of the manifestation of the nationalistic attitude of the host governments, in those countries.

2.1 Zambia.

In March 2018, the Zambian Revenue Authority claimed the sum of US $ 7.9 billion in taxes from the Canadian copper producer, Quantum Minerals for unpaid import duties. It is argued that the tax demand is only a smoke screen and a back channel to pay off outstanding international loans[2]. The veracity of such arguments cannot – and have not, been verified by the author of this article.

2.2 Tanzania.

As the mining industry is the mainstay of the Tanzanian economy, it should therefore not come as a shock to the investor community to find out that from 2017, till date, several reforms have taken place in the sector. These reforms include the amendments to the 2010 mining act and the promulgation of new regulations which introduces: i) a minimum of 16% non-dilutable free-carried government interest in mining companies operating under a mining licence; and ii) a local content ownership requirement of 5% by an indigenous Tanzanian company in order to be eligible for a grant of new mining licences[3].

A major criticism of these changes emanates from the birthing process which involved a rushed parliamentary pass through (sometimes for a period of 6 days), under a presidential certificate of urgency without any prior public participation or commentary of the proposed amendments.

2.3 Democratic Republic of Congo (DRC).

A similar review of its mining code was undertaken by the government of the DRC. On 9 March, 2018, President Joseph Kabila signed a revised mining code which increased the royalty rates on *strategic minerals* such as cobalt and copper by introducing a 10% windfall profit tax, into law. The Prime Minister justified this government action by stating that:

> If we look at the situation today, cobalt-where a tonne costs US$ 30, 000 in 2007 and now goes for US$ 85, 000 per tonne-is a metal that is both rare and strategic, so the state wants to extract profit….we cannot accept a situation where, despite a price evolution for commodities, this does not profit the country, it only profits investors[4].

The above statement highlights a key driver of resource nationalism – that is – the need to increase government revenues.

2.4 South Africa

In South Africa however, the driver for resource nationalism is slightly more complex than the need to increase government revenue, although it may be a bye-product. The main drivers are the need by the South African government to: i) redistribute wealth and eliminate the effects of the apartheid policies; and ii) retain political hegemony.

In September 2018, the South African cabinet approved the mining charter which enforces a minimum of 30% broad-based black economic shareholding and a 5% free- carried interest rate, for historically disadvantaged South African mining employees. The approval of the charter followed the withdrawal of the Mineral and Petroleum Resources Development Amendment Bill which had been stuck in the legislative process for years, as a result of its draconian provisions[5], that arguably, would discourage foreign investment.

In addition to the changes in the mining law, the South African government has in recent times, considered

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[1] It is not unusual for the incumbent government to campaign for political office by promising to review legislations and contracts governing the exploration and use of natural resources with the hope of 'nationalising' such sectors and increasing government revenue; see Africa Practice: Risk & opportunity Snapshots (February 2012) *Africa Resource Nationalism: Creating Shared Advantage*, Issue 122. Retrieved 15 February 2019 from http://www.africapractice.com/wp-content/uploads/2013/06/Africa-Resource-Nationalism-Snapshot_Feb2012.pdf.

[2] 'According to a 2017 report from the International Monetary Fund (IMF), Zambia's total external debt at the end of 2016 stood at approximately $8 billion (36.5 percent of GDP). But Zambia's finance minister, Margaret Mwanakatwe, trying to restore investor confidence, announced in June 2018 that Zambia "will not fail to pay its debt'- see Boateng, K. (2018, September 17) What rising resource nationalism in Africa means for mining investor. *Global Risk Insights*. Retrieved 14 February 2019 from https://globalriskinsights.com/2018/09/resource-nationalism-africa-investors/.

[3] Ibid

[4] Klassa, A. (2018, March 14) Cobalt a "strategic" metal under new Congo mining code. *The Financial Times*. Retrieved 12 February 2019 from https://www.ft.com/content/f4d3567c-277b-11e8-b27e-cc62a39d57a0.

[5] Such as changing the requirement for local processing of minerals.

the idea to amend section 25 of the constitution to explicitly permit expropriation of land without compensation, as a means of redressing the apartheid depression. This suggested amendment of expropriating land without the payment of 'fair and equitable compensation' could potentially breach South-Africa's international law obligations and subject the government to numerous court challenges, alongside investor-state arbitration claims, costing the country (both in cash and investor confidence) more than the perceived market value of the expropriated assets.

3 Nigeria – The 'Giant' of Africa.

The author intends to further elaborate on the increasing trend of nationalistic attitude of host governments and the impact on the economy, by using Nigeria as the case study. The author would, at the end of this piece, attempt to recommend the way forward for potential and existing investors looking to invest in the country – and the region.

Nigeria is not immune to the recent trend of nationalism sweeping across the sub-Saharan Africa. In the last couple of months, 3 (three) main events have occurred, namely: i) the ultimatum given to Production Sharing Contracts ("**PSC**") contractors by the Federal Government of Nigeria ("**FGN**"); ii) MTN on the wrong side of the law?; and iii) the flight of HSBC and UBS from Nigeria. Each of these events will be discussed in turn:

3.1 FGN's ultimatum to PSC contractors.

On 17 October, 2018, the Supreme Court of Nigeria ("**SCN**") delivered as a Consent Judgment (arising from an adopted Terms of Settlement dated 5 April, 2018, reached by the Attorneys-General of Bayelsa, Rivers and Akwa-Ibom State – and the Federation) (individually referred to as "**AG**" and collectively, as "**AGs**") following a suit instituted by the AGs of Bayelsa, Rivers and Akwa-Ibom State, against the AG of the Federation ("**AGF**"). The crux of the claim bordered on the failure of the FGN to review and adjust the FGN's share of revenue, thus affecting their individual state derivation, when the price of crude oil exceeded US$ 20 per barrel in line with section 16 of the Deep Offshore and Inland Basin Production Sharing Contract Act[1] ("**PSC Act**").

By the terms of the consent judgment, the SCN approved the constitution of a body by the AGF and the AGs of Bayelsa, Rivers and Akwa-Ibom State, responsible for drawing up the mechanism for achieving the review contemplated in section 16 of the PSC Act, in order to retroactively recover the amount determined to have been allegedly due to the FGN, from the date the crude oil price exceeded US$ 20 (i.e from August 2003 till date).

A review of the consent judgment raised so many questions, such as: i) the manner in which the review process be conducted and implemented; ii) would the PSC contractors be part of the review process?; iii) can statutory imposition of pecuniary burden operate retrospectively?; and iv) what sharing ratio would be deemed '*economically beneficial'* as stipulated in section 16 of the PSC Act[2]?

While the dust emanating from the consent judgment remained unsettled, the FGN, through its recovery agent, Trobell International, in a series of letters dated on or about the 14 January, 2019, gave a 14 day ultimatum to PSC contractors (inclusive of international oil companies) to pay outstanding oil revenues, as unilaterally determined by the government, on their PSCs. The letter threatened a number of sanctions in the event of non-compliance with its contents, such as the: i) termination of the PSCs; ii) exercise of 'shut in' rights; iii) filing of a complaint in the 'international fora under the Foreign Corrupt Practices Act in the United States of America – and other related international protocols…'[3].

This draconian act by the FGN has instilled a degree of fear in the minds of investors, who have been mandated to pay billions of dollars[4], being the outstanding principal sum and interest owed to the FGN, in default of adjusting the accruals. In view of this, it is expected that the PSC contractors would institute series of challenges (both domestically and in the international fora against this act of the FGN, particularly querying the: i) interpretation of the consent judgment; ii) constitution of the review committee (if set up in accordance with the consent judgment); and iii) legality of the retrospective effect of the sanctions, imposed on the PSC contractors – and e.t.c.

3.2 MTN on the wrong side of the law?

MTN has had a bitter-sweet experience in the Nigerian market. Despite Nigeria being its largest market and accounting for a huge chunk of its profits, it has been made to pay huge sums (representing fines) and be subject to several sanctions for a myriad of reasons, over the last couple of years. The misfortunes of MTN started in

[1] Cap D3, Laws of the Federation of Nigeria (LFN), 2004
2 An in-depth review of section 16 of the PSC Act, the consent judgement and the options available to the PSC Contractors was well considered in a Templars Though Leadership article titled 'A coup against PSC Contractors?'.
3 Iriekpen, D. (2019, January 24) FG Orders IOCs to Pay Outstanding Oil Revenues on PSCs. *This Day Newspaper.* Retrieved 18 February 2019 from https://www.thisdaylive.com/index.php/2019/01/24/fg-orders-iocs-to-pay-outstanding-oil-revenues-on-pscs/,
[4] For examples, Statoil, now Equinor, was required to pay US $5,561,689,751.43.

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2015 when it was required by the Nigerian Communications Commission to pay a fine of about US$ 5.2 billion for failing to deactivate about 5.1 million unregistered SIM cards. This fine was ultimately reduced to ₦ 50 billion following diplomatic appeals and settlement out of court.

Not long after, in August 2018, MTN was ordered by the Central Bank of Nigeria ("**CBN**") to refund the sum of US$ 8.134 billion allegedly repatriated from Nigeria in breach of the applicable foreign exchange regulations. Additionally, in September 2018, the AGF via a letter to MTN, demanded that MTN pays the sums of ₦ 242, 244, 452, 215.97 and US$ 1,283, 610,357.86 in allegedly outstanding import duties, withholding and value added taxes.

While MTN seems to have resolved the case with the CBN bordering on the repatriation of funds using irregularly issued certificates of importation ("**CCI**") by agreeing to pay a settlement sum of US$ 53 million, the tax claim remains pending. In response to the tax claim however, MTN instituted an action in the Federal High Court against the AGF averring that its actions are unconstitutional and amounts to a usurpation of the powers of the Federal Inland Revenue Service, the Minister of Finance and the Nigerian Customs Service. In its claim, MTN seeks amongst other reliefs, an order of interlocutory injunction to restrain the AGF, his agents, privies or any other person or group of persons acting on his authority from signing into effect to the decisions, demands and directives in the AGF's letter until the suit has been determined.

MTN appears confident of its challenge to the tax claim, as the MTN Corporate Relations Executive, Tobe Okigbo, in a press briefing stated that:

> MTN has conducted a detailed review of the claims and provided evidence of tax remittance to the Attorney General's office. The Attorney General's notice indicates that he is rejecting this evidence. We believe that all taxes due to the Nigerian government have been paid and these allegations have not been raised by any of the revenue generating agencies that MTN engages with regularly, and from whom MTN has received numerous awards of compliance[1].

3.3 The flight of HSBC & UBS from Nigeria.

About the same time MTN was entangled with the various allegations bordering on tax impropriety and CCI irregularities for repatriated funds, two of the largest banking institutions in the world closed down their representative offices in Nigeria and fled the country.

While no official reasons were given for the flight of HSBC and UBS from Nigeria, there have been wild speculations for their departure. A reason which appears to have stuck is the unattractive economic outlook of the country, worsened by the rising foreign debt profile and the uncertainty surrounding the outcome of the 2019 presidential elections.

Interestingly, HSBC had, in July 2018, predicted doom for the Nigerian economy if President Muhammadu Buhari wins the 2019 presidential elections and if there is indeed no real economic diversification plan from oil. The HSBC report triggered a damning response from the FGN in a message conveyed by the Minister of Information and Culture, Alhaji Lai Mohammed who stated that:

> …We have …read that the international financial institution, HSBC said that Nigeria's economic development will be stunted if President Buhari gets a second term…Let me state clearly that these reports are based on fake premises and, therefore, qualify as fake news…It is a psychological warfare by those who have been badly hit by our policies…our fight against corruption has meant that many financial institutions, especially banks that fed fat on the proceeds of corruption are no longer able to do that…Therefore, it is natural that these institutions…would not wish to see another term for this administration…The truth, however, is that only the good people of Nigeria will determine who presides over the affairs of the country, not any bank…irrespective of their influence or self-importance…'[2].

The Nigerian anti-graft agency – the Economic and Financial Crimes Commission ("**EFCC**") also responded to HSBC's prediction in a statement titled '*The story of HSBC'* accused HSBC of laundering '*more than US$ 100 million for the late dictator, late General Sani Abacha in Jersey, Paris, London, Switzerland and Geneva'*[3]. The EFCC also accused the bank of laundering millions of dollars for over 50 Nigerians including

1 Awoljulugbe, O (2018, September 4) MTN to FG: Re-opening $2bn tax arrears claim 'is sad'. *The Cable.* Retrieved 12 February 2019 from https://www.thecable.ng/mtn-responds-tax-arrears-claim-says-sad-case-reopened.

2 Polycarp, N. (2018, November 3) Breaking: Two banks, HSBC, UBS close their offices in Nigeria. *Vanguard Newspaper.* Retrieved 16 February 2019 from https://www.vanguardngr.com/2018/11/breaking-hsbc-ubs-close-their-offices-in-nigeria/

3 '…Part of Abacha's assets yet to be recovered are: US$ 12 million in HSBC Fund Admin Ltd with account number s-104460 in Jersey; US$ 20 million in HSBC Life (Europe) with account number 37060762 in UK and US$ 1.6 million in HSBC Bank plc with account number 38175076 in UK…' see- Ebuzor, C. (2018, September 16). EFCC accuses HSBC Bank of money laundering, vows to recover Abacha's loot. *Pulse Newspaper.* Retrieved 12 February 2019 from https://www.pulse.ng/news/local/2019-prediction-efcc-accuses-hsbc-bank-of-money-laundering-vows-to-recover-abachas/dx47s8t.

politicians and threatened that it '*shall not rest on its oars until every penny belonging to the FRN is repatriated to Nigeria'*[1].

> With these sorts of commentary depicting the negative attitude of the government towards international financial institutions like HSBC, it is therefore not surprising that these financial institutions have taken the bold step to shut down their operations in Nigeria and leave the shores of the country, possibly for fears of targeted, unfavourable government policies and punitive sanctions.

3.4 Impact of the above-mentioned events.

The preceding paragraphs have attempted to provide very recent examples of what may be termed as "nationalistic attitudes" of the FGN, arguably driven by the need to raise government revenue and fund the national budget.

Given this trend, one may wonder what its impact will be on the Nigerian economy. The simple answer is that the rise in the nationalistic attitude of the FGN culminated in the above-mentioned events, have dealt a severe blow to the economy, by reducing investor confidence and the inflow of foreign investment into the country.

Recent statistics released by the *United Nations Conference on Trade and Development* ("**UNCTAD**") reveals in its global investment trends monitor that, the inflow of FDI into Nigeria fell by 36% from the previous year, culminating in only about US$ 2.2 billion worth of inflow of FDI[2]. This statistical report does not come as a surprise because the investment climate of a country is very much dependent on favourable macroeconomic policies, political certainty and stability. The public perception of a country's treatment of investors in-country would also play a key role in helping potential investors decide whether or not to invest in the country, or some other country that guarantees profitable returns on investment with favourable governmental policies and fiscal incentives.

4 Way Forward And/Or Advice to the Foreign Investor.

Given the increased risk faced by investors investing in Nigeria and the sub-Saharan Africa, the author in this section provides nuggets of advice and possible fixes that may aid in either halting or diminishing the effect of policy initiatives, dubbed as nationalistic, by the host governments.

4.1 Comply with Local Laws

This might seem obvious, but it is the root cause of most of the problems faced by, and an antecedent to the sanctions imposed on, foreign investors. The MTN example illustrated above is a case in point. The allegations by the CBN and AGF against MTN bordered on breach of the applicable laws governing the repatriation of funds and the payment of taxes respectively. The failure of MTN to comply with the laws on the issuance of CCIs, conversion of dollars to naira and vice versa, alongside the repatriation of funds, resulted in the messy headlines, the CBN demand for refunds of money repatriated on irregularly issued CCIs and the imposition of steep fines on commercial banks, such as Diamond Bank, Standard Chartered Bank and Citi Bank – for the role played in the CCI issuance and fund repatriation.

4.2 Participate in Politics and Legislative Watch.

Foreign investors can no longer afford to be lukewarm about the politics of the investee country. They should thus track and monitor laws and regulations emanating from the legislative houses and regulators. They should also, in appropriate circumstances, lobby politicians to initiate bills that would be beneficial to their interests. Through their corporate social responsibility initiatives, foreign investors should engage interest groups and educate the youth on the dangers of political apathy, encouraging them to take an interest in politics and comment on draft proposed laws and policies advertised for commentary.

*4.3 Know the Terms of the Applicable Treaties and Investment Promotion and Protection Agreement ("**IPPA**").*

Sub-Saharan African countries, Nigeria included, have signed up to a number of bilateral and multilateral investment treaties which seeks reciprocal promotion and protection of investments in the territories of participating countries, by: i) ensuring fair and equitable treatment of the investments of nationals in the participating countries; ii) providing for the transfer of profit, dividend, capital gains etc, in freely convertible currency without undue delay or restriction;[3] iii) providing for the settlement of all disputes by the International

[1] Ibid.

[2] UNCTAD (2019), *Global FDI Flows Continue their slide in 2018. Rebound expected in 2019, but underlying trend remain weak,* Investment Trends Monitor, Issue 31: page 5.

[3] For example, see article 5 of the Bilateral Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Federal Republic of Nigeria.

Centre for Settlement of Investment Disputes either through conciliation or arbitration; and iv) prohibiting the expropriation of investments made by the nationals of the counterparty country except on grounds of public interest and complying with due process of law subject to the payment of just compensation which shall represent the genuine value of the investment affected – and e.t.c.

In order to benefit from the protections offered by such treaties or IPPA, the author suggests that foreign investors should: i) ensure that such an investment treaty exists between its home country and the potential investee country; ii) confirm that the relevant treaty or IPPA have, not only been signed by the relevant state actors, but also domesticated, where necessary[1]; iii) route its investment through a jurisdiction that has an enforceable treaty or IPPA with the investee country, where no treaty or IPPA exists between the investee country and the investor's home country, so as to take advantage of the investment assurances and protections provided in the relevant treaty or IPPA.

4.4 Have a Formidable Legal Team.

Having a formidable legal team cannot be over-emphasized. The value and benefit far outweighs any financial inconvenience borne out of the legal fees to be paid upon engagement of the formidable legal team. A formidable legal team would: i) ensure that you have well defined contractual protections such as stabilization clauses; ii) gallantly represent your interest in any ensuing arbitration or litigation claims; iii) give bankable legal opinions and thought leadership pieces to help you navigate your investment in Nigeria; and iv) assist in the eventual winding up of the company in the event that a decision is taken to leave Nigeria.

4.5 Purchase Political Risk Insurance.

It is worth considering hedging the potential political risks in the investee country or purchasing political risk insurance particularly where such investee country is in Sub-Saharan Africa. This will offer a certain degree of comfort and protection to the foreign investors, in the event that anticipated political risks insured against, crystalizes. Usually, such insurance contracts would have a subrogation clause permitting the relevant insurer to step in the shoes of the foreign investor and wait the whole haul of going through the dispute resolution mechanism provided for in the contracts, in order to get compensated for any breach of the terms of the contract.

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[1] For example, under Nigerian law, a treaty must be signed and domesticated by the Nigerian legislature before it can become enforceable within Nigeria. See section 12 (1) of the Constitution of the Federal Republic of Nigeria, 1999 as amended which provides that "*No treaty between the Federation and other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly".*

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