NBA INSTITUTE OF CONTINUING LEGAL EDUCATION (NBA-ICLE)
IN CONJUNCTION WITH THE CPD COMMITTEE OF THE
NBA LAGOS BRANCH

ACQUISITION OF OIL AND GAS ASSETS IN NIGERIA

-DR.AYODELE ONI

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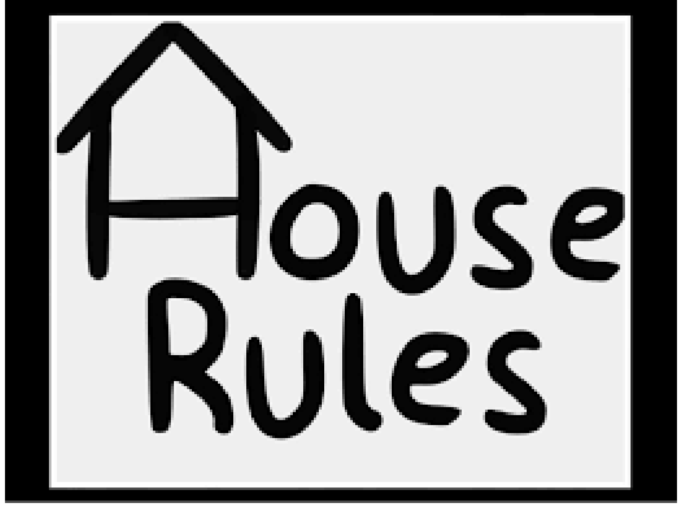

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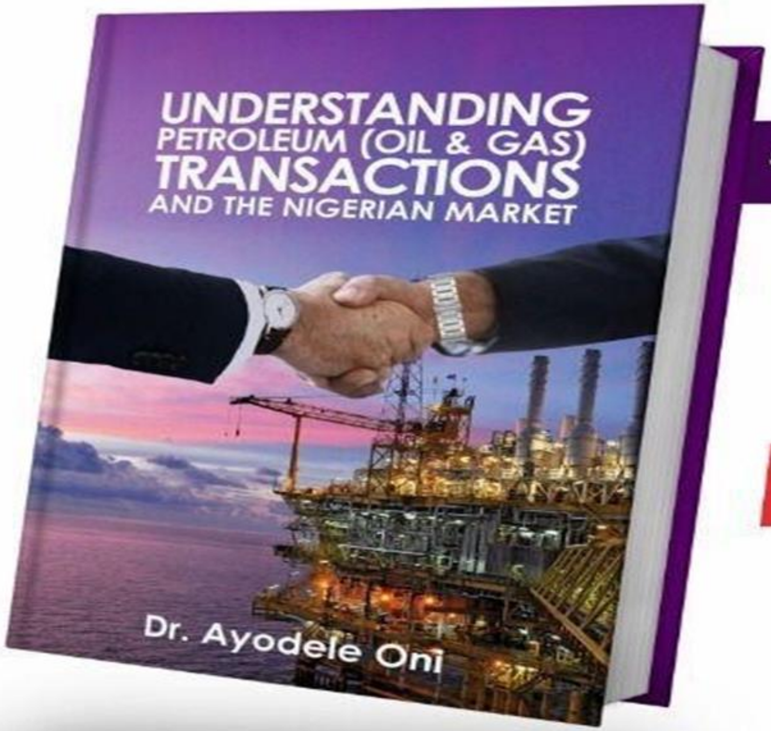

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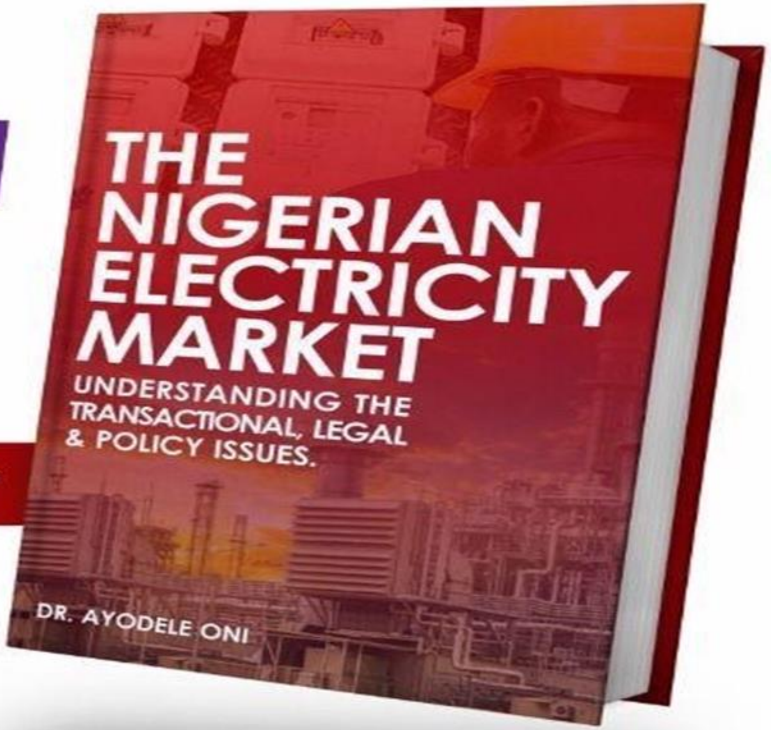

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Outline

- Due Diligence
- Acquisition procedure
- Negotiation
- Content of the Agreement and other issues

Introduction: #ProNigeria

- The introduction of the **Nigerian Oil and Gas Content Development Act,** 2010 led to increased participation of Local industry players in the oil and gas industry.

- Trends in acquisitions, divestment and financing activities for upstream oil and gas.

- International Oil Companies ("**IOC**") commenced divestment of their various interests, rights, powers, licenses and leases.

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Introduction

Acquisition-An entity acquires control over assets of another either directly or indirectly.

Legal and Regulatory Framework

- There is a sector neutral merger and acquisition control authority (Federal Competition and Consumer Protection Commission ("FCCPC")
- Requirements of Companies and Allied Matters Act (CAMA 2020) on transfer of assets and liabilities
- Approval of the Department of Petroleum Resources ("DPR")acting for the Minister.

Due Diligence

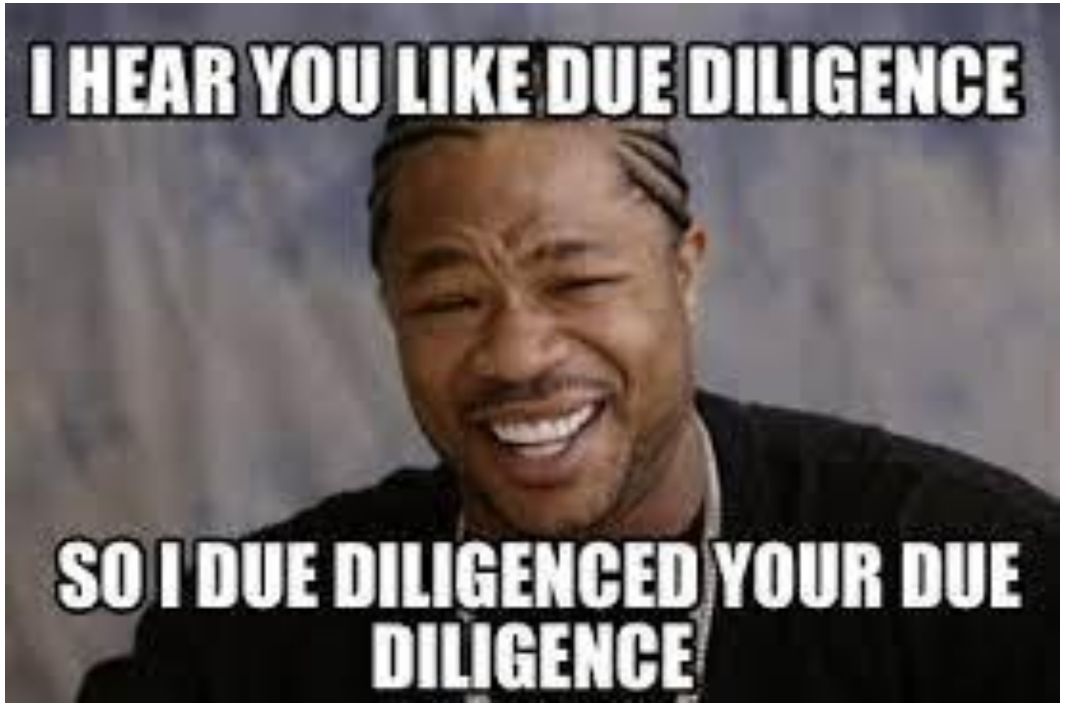
Purchasers and their financiers will conduct an extensive due diligence process to fully understand the target company or asset's obligation, liabilities and projections.

The answer may not be at the bottom of the bottle of wine, but you should at least check.

Considerations for a Due diligence

- **Nature of the deal**
  - Acquisition of participating interests in oil and gas licenses
  - Sale of shares in the companies

- **Commercial considerations**
- **Legal Consideration**
- For lenders, checks on borrower, the beneficial owners and affiliated entities.



It's all about due diligence, due diligence, due diligence

Considerations for a Due diligence

- Form of interest in oil and gas asset
  - Rights of participation granted through licenses and leases in Nigeria (Oil Exploration License ("**OEL**"), Oil Prospecting License ("**OPL**"), and Oil Mining lease ("**OML**"))
  - Regulatory compliances
  - Oil and gas permits
  - Environmental obligations
  - Tax obligations

Considerations for a Due diligence

- **Corporate due diligence**
    - Who are the share holders?
    - Any charge over shares?
    - Indebtedness?
    - Material Contracts?
    - Shareholders’ resolution?
    - Memarts

Nature of the Acquisition Vehicle for oil and gas assets

- Can be made directly by a Nigerian company
- Through bid consortium.
- **Classes of companies for bid consortia.**
  - Indigenous companies with significant local industry knowledge or relationship
  - IOC with technical expertise and operational resources

For a bid consortium

Considerations

- Proper allocations of risks, rights and obligations
- Disclosure
- Management of diverse interests
- Agreements between the parties.

Ministerial Consent for Transfer of oil and gas asset

- Holders of oil and gas licenses have to obtain consent of the Minister before transferring such right to a third party.
- (Guidelines and Procedure for obtaining the Minister's consent to the Assignment of Interests in Oil and Gas Assets, 2014)

- *Mulo Pulo Limited v. Brass Exploration Unlimited and 7 others*

Department of Petroleum Resources

Considerations

Payment of consent fees

Ministerial Consent for Transfer of oil and gas asset

Paragraph 14 of First Schedule to the Petroleum Act

***Without the prior consent of the minister, the holder of an oil prospecting licence or an oil mining lease shall not assign his license or lease or any right, power or interest therein or thereunder*".**

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Definition of Assignment

Definition of Assignment under the Guidelines

"the transfer of a licence, lease or marginal field or an interest, power or right therein by any company with equity, participating, contractual or working interest in the said OPL, OML or marginal field in Nigeria, through merger, acquisition, take-over, divestment or any such transaction that may alter the ownership, equity, rights or interest of the assigning company in question, not minding the nature of upstream arrangement that the assigning company may be involved in, including but not limited to Joint Venture (JV), Production Sharing Contract (PSC), Service Contract, Sole Risk (SR) or Marginal Fields operation.

Procedure for the acquisition of oil and gas asset

- Pre-Commencement Notification and authorization from DPR.

- State the reason for proposed assignment
  - Method of conduct of assignment
  - Technical and economic value of such assignment.
  - Nigerian indigenous companies are given priority

- After technical evaluation, the assignor submits a list of the qualified candidates for preliminary due diligence.

Procedure for the acquisition of oil and gas asset

- DPR considers the pricing of the asset.
- Proceed with commercial stage of the bidding process
- The assignee subject to respective arrangements seeks the waiver of non-assigning parties to the assignment.

Conditions for grant of minister's consent

- Assignor is precluded from imposing on the assignee crude sale/purchase agreements as a condition for consummation of the transaction.
- Assignor should not impose Domestic Supply Obligations volumes on assignee without DPR authorization.
- For sole risk asset, not more than 49% to foreigners
- If the interest is a marginal field, not more than 49% to foreigners.
- Use of an escrow account for proceeds pending receipt of consent.

Documents required for grant of Minister's consent

- Three (3) copies of any deed of assignment
- Copies of existing joint operating agreements (if applicable)
- Farm-in agreement between the assignor and assignee
- Catalogue of the applicant's exploration and production activities
- Technical and financial track records
- Technical service agreements (if any)
- Executed Sale and Purchase agreement
- Evidence of payment of consent fees

When your father has nine oil fields

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Acquisitions (Content of the Agreement)

- Description of the asset.
- Transfer of asset clause
- Consideration for Transfer and structuring of payments
- Obligations of the parties
- Liabilities (Assumed and excluded liabilities)
- Representation and Warranties

Watch out for the Content of the Agreement

The Devil is in the details.

Acquisitions- Issues Arising (Content of the Agreement)

- Representation and Warranties (This should be mutual)
  - Requisite power and authority
  - No claim, action or suits.
  - Government approvals
  - Disclosure of material assets
  - Compliance with environmental or tax requirements.
  - Seller has title to the asset

Acquisitions- Issues Arising (Content of the Agreement)

- Effect of defects or encumbrances
- Indemnity

Acquisitions- Issues Arising Negotiations

Acquisitions- Issues Arising Negotiations

- **Have a strategy,**
  - Understand the transaction
  - Know how to protect your client's interests
  - Consider all the elements of the transaction.

Acquisitions- Issues Arising Negotiations

- **Process & Tools:**
- Knowledge of the law.
- Practical experience.
- Case analysis.
- Distribute risk.
- **Tactics:** How to negotiate. When to negotiate.

Acquisitions- Issues Arising Negotiations

- Involve a lawyer knowledgeable in oil and gas transactions.

Acquisitions- Issues Arising Negotiations

Without agreements, people are just arguing.
#Draggingissues

I have more oil jokes, but they need refinement.


THANK YOU FOR LISTENING !
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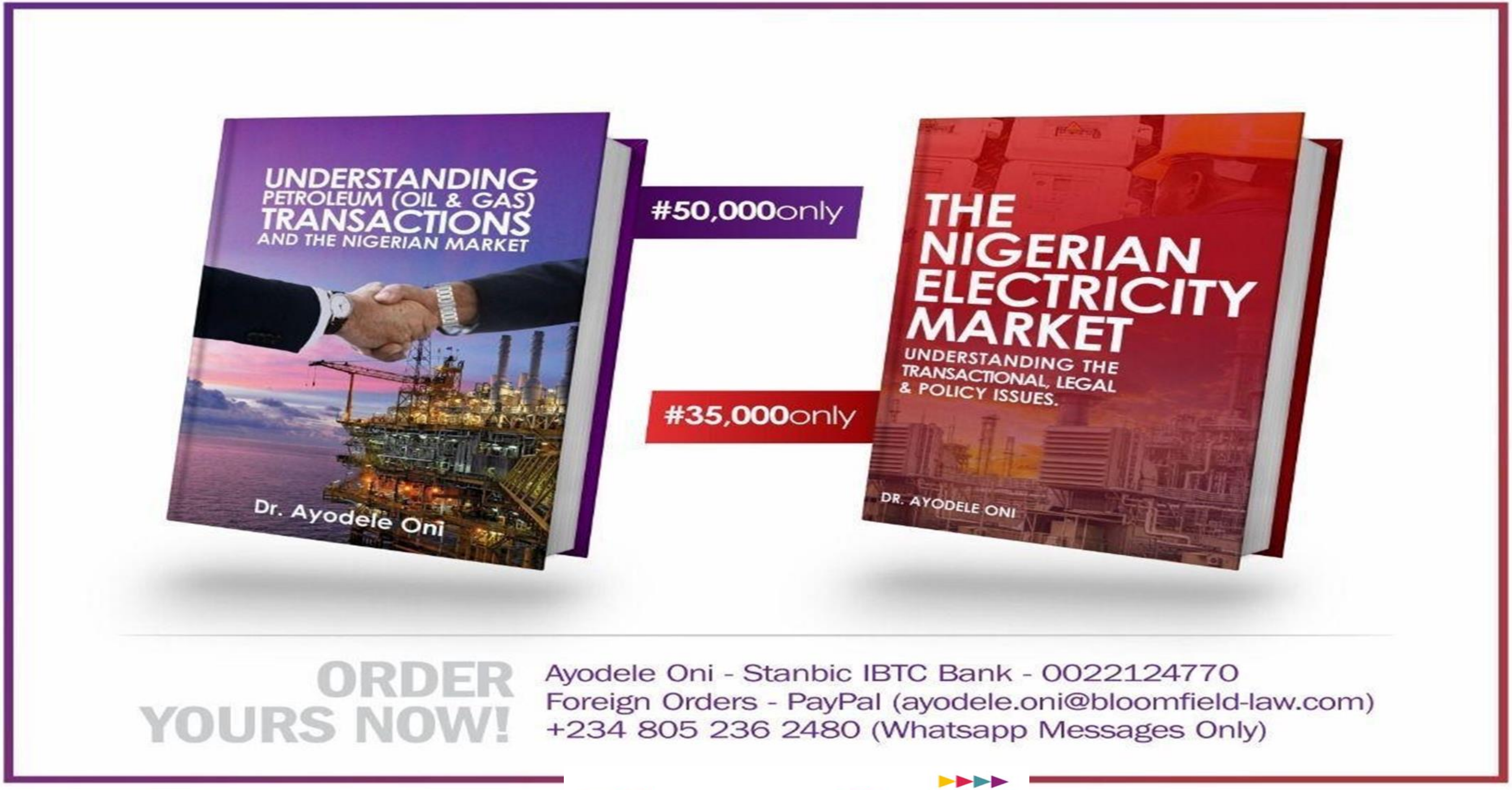

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HOST GOVERNMENT CONTRACTS

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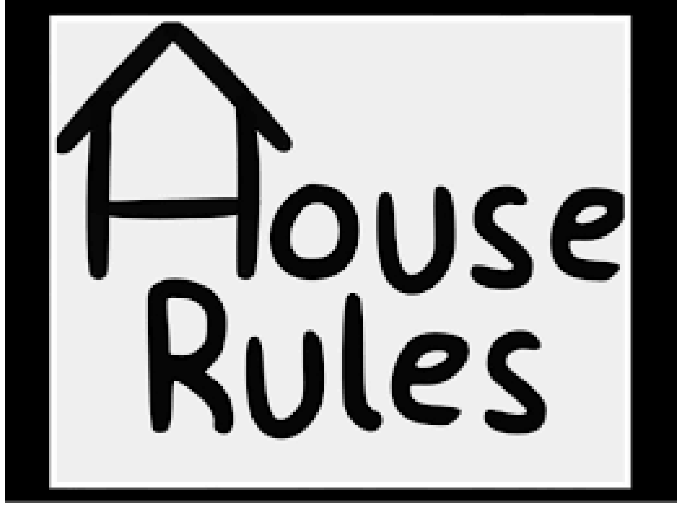

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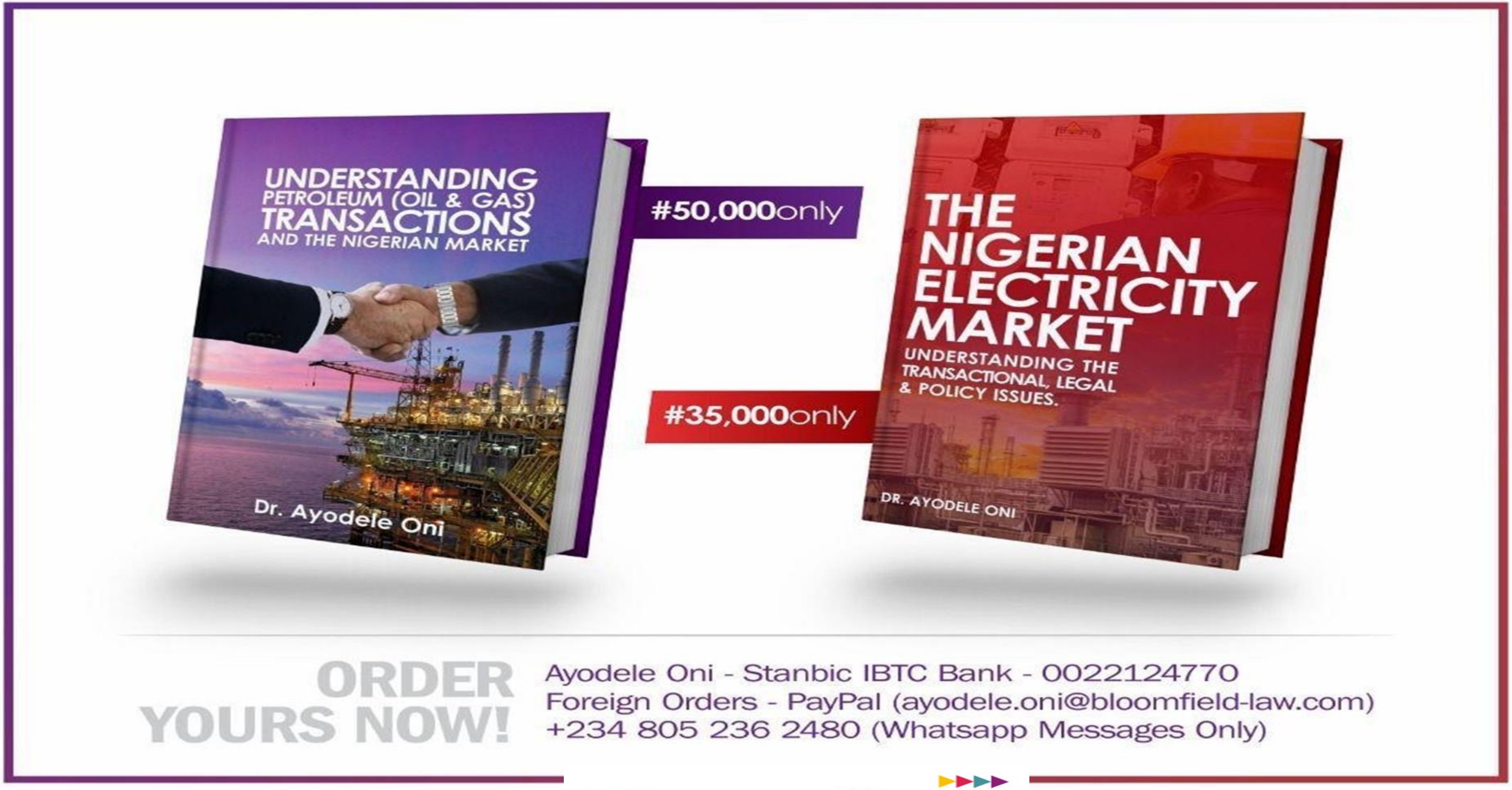

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INTRODUCTION: OIL MONEY

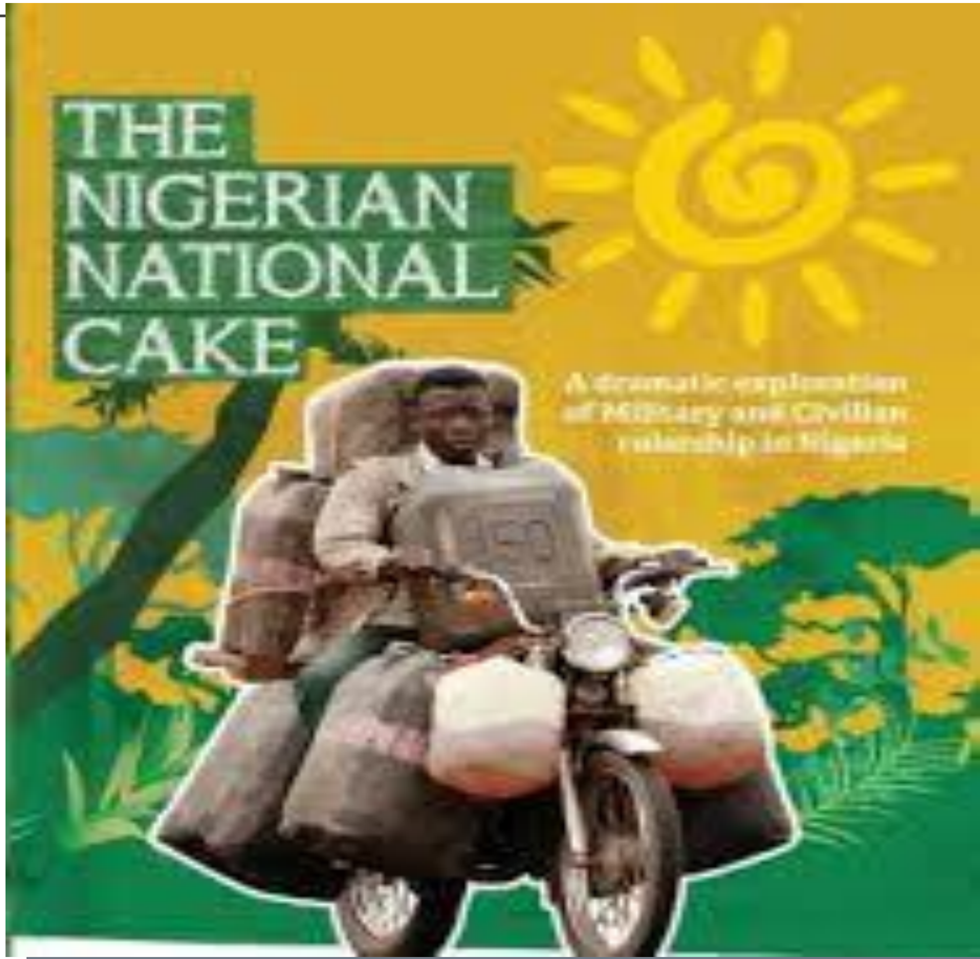
- The World consumes about 36 Billion Barrels of Oil Per Year
- Nigeria is the eleventh largest oil producer worldwide. (9% of our GDP).
- Nigeria produces about 2 million barrels of oil daily.
- In US, Oil is referred as *Texas tea.*

ALAS: INDEPENDENCE

- Oil exploration in Nigeria commenced in commercial quantity in 1958.
- **The Petroleum Act, 1959.**
  - The first concrete legislation regulating crude oil production post colonial era.
  - It controlled and still controls activities of the Nigerian Petroleum Industry.

WHO OWNS THE OIL?

- S. 44(3) of the Constitution (Ownership of crude oil is vested in the Federal Government of Nigeria.
- In South Atlantic Petroleum Ltd v Minster of Petroleum Resources
  - The Court held that petroleum resources in Nigeria are vested in the Federal Government.



If the government finds oil or diamond in your background; its for all. If drugs are found in your backyard, its yours.

Section 44(3) of the constitution –

"The entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly"

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Section 1 of the Petroleum Act

The entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State.

This section applies to all land (including land covered by water) which-

(a) is in Nigeria; or
(b) is under the territorial waters of Nigeria; or
(c) forms part of the continental shelfs; or
(d) forms part of the Exclusive Economic Zone of Nigeria.

OWNERSHIP OF MINERALS

"To whomsoever the soil belongs, he owns also the sky and to the depths."

- In most states, ownership of subsurface minerals are held by the sovereign.
- Licensees are usually required to reach an accommodation or provide compensation to the surface land owner.
- In US and Canada, ownership of subsurface minerals is tied to ownership of land.

NIGERIA: LAND OF MILK, HONEY AND OIL…

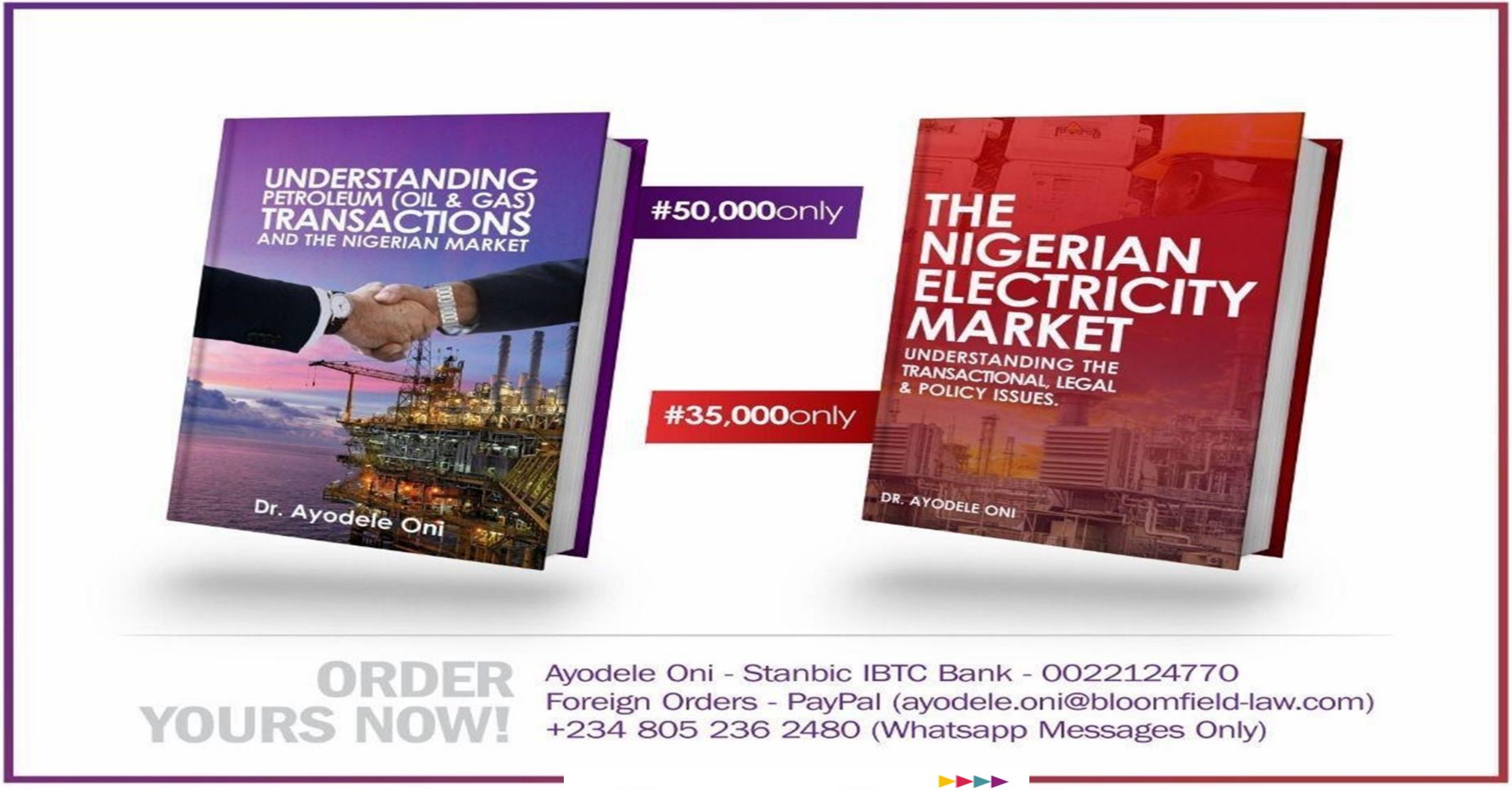
- Interested persons are granted licenses or leases to explore, prospect or mine oil and gas.
- The right to participate in oil exploration and exploitation activities can only be acquired and not owned.
- The Petroleum Act 1969, made provisions for participatory interest of Nigerian government.

BIDDING PROCESS

- Discretionary system
- **Competitive bidding**
  - Applicants usually required to pre-qualify
  - Bids are awarded solely on the basis of sealed bids
  - **Bids may be based on**
    - Royalty percentage;
    - Signature bonus; or
    - A combination of both

Considerations for bid Evaluation

- Company details
- Evidence of the company's technical and managerial capacities
- Nigerian content
- Local Community participation
- Desired fields
- Evidence of payment of application fees.



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TYPES OF HOST GOVERNMENT CONTRACTS

CONTRACTUAL ARRANGEMENT

- CONCESSIONS
- JOINT VENTURES
- PRODUCTION SHARING CONTRACTS
- SERVICE CONTRACTS
- HYBRIDS

PARTIES

- The State (through National Oil Company) E.g NNPC
- International Companies

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Basis for Petroleum Contracts

- Petroleum in its natural state belongs to the state and investors provide funds in order to explore, develop or produce oil.
- Due to the high risk nature of the petroleum industry, risks are usually apportioned between the state and the investor.
- The formal process of apportioning interests is the contractual agreement.

Concessions ("I give up…")

Tax and Royalty system

- Concessions are the original or oldest form of petroleum contracts.
- The rationale was to attract foreign investment as the States were unable to exploit their natural resources due to the lack of adequate information, skills and technology.
- The classical Concession Agreements were not mutually beneficial relationships.
- The National Oil Company ("NOC") such as the (NNPC) would sign a long- term contract where the foreign company had full control and the host country had no rights.
- New forms of concession grants an oil company through a bidding process, exclusive rights to explore, develop, sell and export oil extracted from a specified area for a fixed period of time.
- Although concessions are still being used, they are not a popular choice for NOCs because of the development of other types of contracts.
- Used in UK, North America, Norway Thailand and Australia.

Concessions ("I give up…")

Tax and Royalty system

- Advantages
  - Royalty assures the government of cash flow
  - The Investor has more security in the right to the resources in the ground.

Disadvantages

- Affronts sovereignty of the nation
- Royalty is an inflexible instrument.

Modern Forms of Concessions

Features

- Acreage and duration reduced
- Included a number of measures that allow the state to exercise more control
  - Requirement for detailed submissions
  - Robust relinquishment obligations
  - Work commitment
  - Development plan

Joint Ventures (Marriage of host State and the IOC)

- Here, the government and International Oil Companies ("**IOC**") have direct ownership of the project and the production.
- Both parties are jointly and severally liable for the obligations of the ventures.
- Has an open-ended nature.
- Its not a common arrangement.
- **In Nigeria, this was the option prior to PSCs, however, government could not fulfil its obligations.**
- JVs potentially have a lot of issues to resolve; as parties have to do things jointly.
- JVs require painstaking negotiations over an extended period of time to ensure that all matters are thoughtfully addressed and that the parties agree on how to work with each other.
- Used in Australia and Russia; and formerly in Nigeria.

Joint Ventures (Marriage of host State and the IOC)

JVs may be incorporated or unincorporated

NOC pays its share of expenditures although it may be carried through the exploration and development phase.

NOC and IOC receive share of production in proportion to their equity contribution.

IOC pays royalty, income tax.

JVs create the economic incentives of concession in form of equity to IOC but provides control to the NOC.

Production Sharing Contracts (“PSC”)

Expansion of the Nigerian oil and gas industry led to the allocations within the shallow and deep offshore areas to IOCs.

This led to the introduction of PSC (regulated by Deep Offshore and Inland Basin Production Sharing Contract Act.)

NNPC engages a competent contractor to be allocated a portion of the oil produced which is sufficient to reimburse the cost of production.

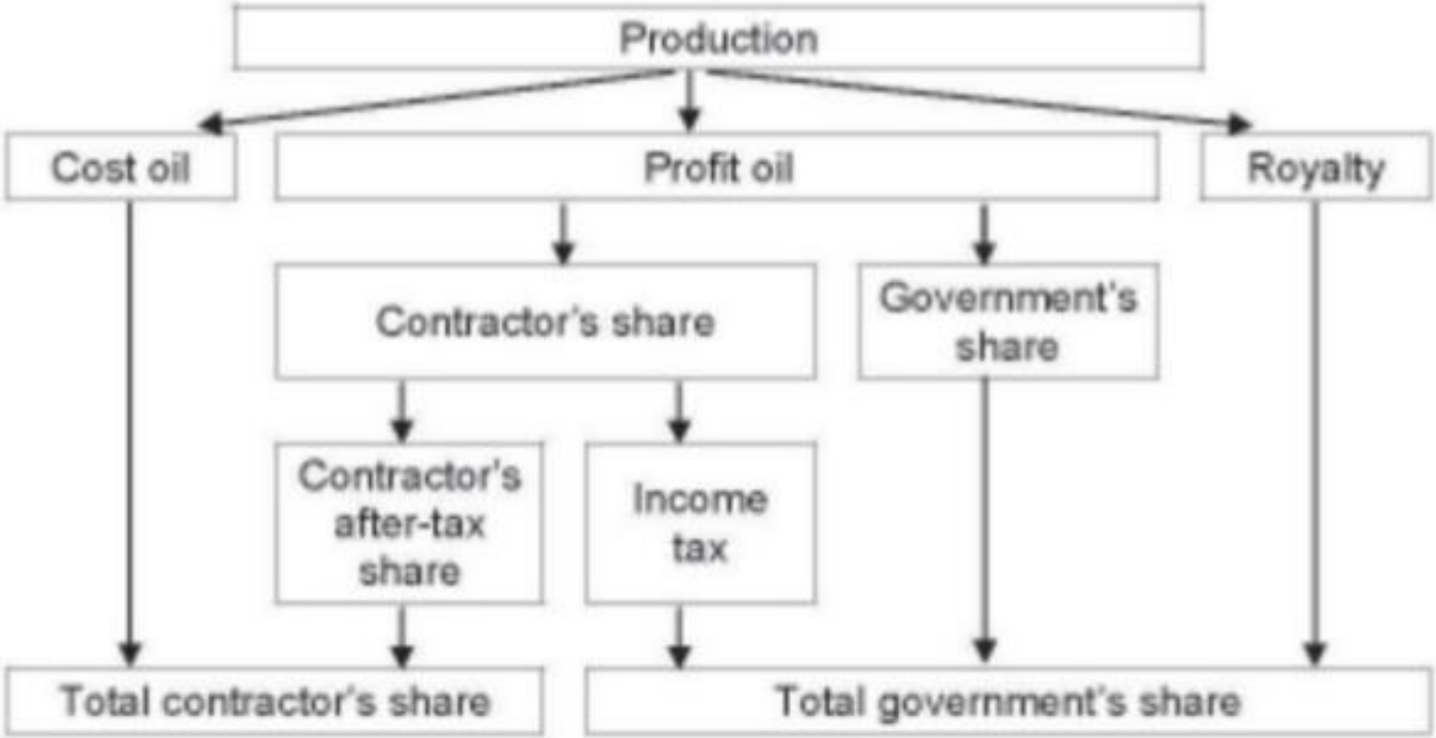
PSC

- This oil is owned by the State and the IOC is only brought in to explore the field.
- The State now has the power to regulate and decide on how to use it share of the production.
- The IOC operates at its risk and expense; if successful will recover its costs and earn a profit by receiving a share of production.
- Production not used for cost recovery is called Profit Oil. Profit Oil is shared between the State and IOC on either a fixed rate or variable share based on production volumes.
- The parties bring different strengths to the relationship and utilize resources in the most economic and effective way.
- The government can offer incentives to the IOCs during negotiations/renegotiation process.

Elements of PSC

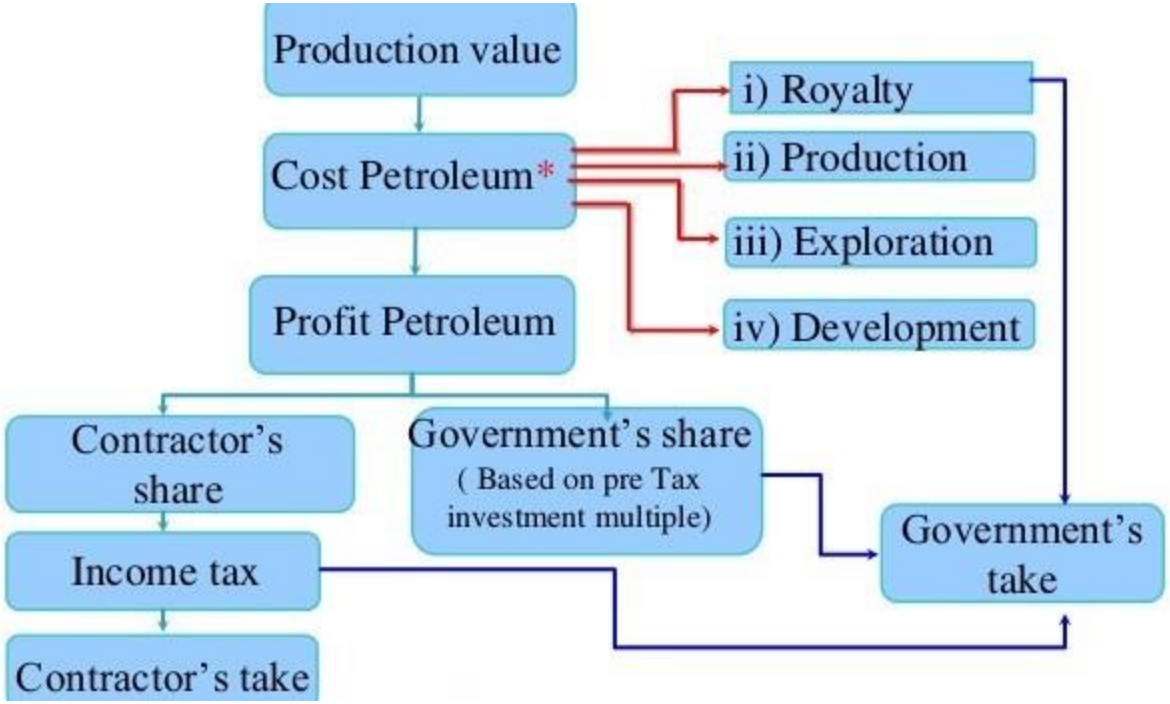
- Contractor incurs all exploration and development costs
- Cost recovered from agreed percentage of gross production
- Profit oil is shared taking into account the cost and price changes
- Contractor proceeds from PSC is liable to tax
- Work Programme
- Domestic market obligations
- PSC provides for fiscal stability
- Government participates in the contract through subsidiary companies.

Production Sharing Revenue Flow



Source: World Bank, Contracts for Petroleum Development

Cost Recovery and Profit sharing



Service Contracts ("SC")

- The service contract is not very popular in Nigeria. It came into existence in the late 1960s.
- It is different from PSC in that the recovery of and remuneration of the IOC is in cash and not crude oil.
- The IOC is engaged by the regulatory authority on behalf of the government to conduct petroleum exploration for a fee or a share in the production.
- Under the SC, where an approved exploration programme does not lead to commercial discovery, the IOC is not remunerated.
- The IOC provides the State with technical services and information related to the development of petroleum resources.
- Limited to Mexico ,Iran, Oman, formerly used in Venezuela; proposed for Kuwait.

Features of Service Contracts ("SC")

- IOC pays for all exploration and development.
- IOC recovers these expenditures, through a discounted crude purchase price, cash payments, or production take.
- State retains entire production upside, although it may grant a negotiated sliding share of oil produced service fee.
- State retains production upside, although it may grant a negotiated sliding share of oil produced.
- Service fee is usually not affected by the price of the produced oil and gas.
- There exists performance incentives to IOCs
- IOCs are subject to income tax

HYBRIDS

- Host governments are increasingly introducing hybrids of these structures
- It involves combinations of royalty, tax, JV participation, cost oil/profit oil shares and fees
- Efforts to develop a world model host government agreement have foundered because structures are becoming diverse.
- Host governments seeking structures that suit their particular needs.
- IOCs not necessarily prepared to accept similar fiscal terms in different countries.

Right to operation and production Table

Type of contract	Cost and risk	Exclusive right to operate	Right to production
License / concession {or Concession (**Tax-and-Royalty**) Contracts}	Private company	Private company	Private company
Joint venture {or Participation/ Association (or Arrangements)}	Private company	Shared	Shared
Production sharing {or Product Sharing Contract/ Agreement (PSC/PSA)}	Private company	State	Shared
Service contract	Private company	State	State

Reward and Risks

Type of Agreements	Contractor	Government
Concessions	All risk All reward	Reward is a function of production & price
Joint ventures	Share in risk & reward	Share in risk & reward
Service contracts	No risk	All risks All rewards
Hybrid	Mixed	Mixed
PSC	Exploration risk Share in reward	Share in reward

Concessions and PSCs compared

Features	Concession	PSCs
Ownership of resources	Held by the state	Held by the state
Company entitlements	Gross production less royalty	Cost oil& gas + profit oil & gas
Ownership facilities	Held by the company	Held by the state
Management and control	Typically less government control	Government participation
Government Participation	Less likely	More likely

Form of Petroleum rights and Fiscal system

FORM		FISCAL SYSTEM
❑ License or concession, with or without an agreement (North Sea).	→	Tax and royalty
❑ License or concession with joint venture (Nigeria, Venezuela).	→	Tax and royalty, participation terms
❑ Production sharing agreements (Indonesia, Syria, Egypt, Angola).	→	Production sharing, perhaps with tax and royalty
❑ Service contracts (including risk service contracts and buy-backs).	→	Fees, perhaps with production sharing
❑ Combination or hybrid arrangements	→	Various

Marginal Fields

MARGINAL FIELDS

- A Marginal Field is a non producing field whose economics is not considered robust enough using conventional development methods under the prevailing fiscal regime.
- The first marginal field bid process was in 2002. However, it did not yield the desired results.
- 24 marginal fields were awarded to 32 companies.
- **Few achievements from 2002 rounds**: increase in oil production, capacity building, creation of job opportunities.
- **Set backs**: Financial Limitations, poor infrastructure etc.
- For 2020 round, 57 fields were made available.
- New guidelines was released for 2020 round.

MARGINAL FIELDS- The Bidding Process

- Submission of application by interested companies
- Pre-qualification of interested companies
- Announcement of Pre-qualified companies
- Submission of detailed Technical and Commercial Bids by Prequalified companies
- Evaluation of Technical and Commercial Bids
- Announcement of Winning Bids.
- Payment of Application Fees, Bid Processing Fees, Competent Persons Report and Fields Specific Reports.
- Signature Bonus

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MARGINAL FIELDS AWARDS- Issues Arising

- No clear distinction between Nigerians and indigenous companies
- Previous marginal field bid rules applied a uniform signature bonus across the assets.
- In this instance, signature bonus appears to be varied and significantly higher than previous rounds
- Nomenclature differences and procedure in the Guidelines v. actual practice.
- Combination of non-consortium companies.

Whoever controls oil, controls much more than oil.

John Mccain


QUESTIONS
ANSWERS


UNDERSTANDING
PETROLEUM (OIL & GAS)
TRANSACTIONS
AND THE NIGERIAN MARKET
Dr. Ayodele Oni
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THE
NIGERIAN
ELECTRICITY
MARKET
UNDERSTANDING THE
TRANSACTIONAL, LEGAL
& POLICY ISSUES.
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