Analysis of Foreign Investment Protection Regimes in the Petroleum Sector in Nigeria - 1995 - 2013: Options for Reform

A thesis submitted to the University of Manchester for the degree of Doctor of Philosophy in the Faculty of Humanities

2014

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School of Law
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Word Count (main text together with footnotes): 83,709
Abstract

This thesis examines the current regulatory frameworks for foreign investment protection and reforms thereto in the petroleum sector in Nigeria. The analysis is conducted from international law perspective. Thus, the current regimes of IIAs reflected in both the substantive and procedural terms are bedevilled by unbalanced framework in the allocation of rights and duties to the contracting parties. Strictly speaking, the parties do not set out from the outset to draft an unbalanced terms of IIAs. However, the preponderant inflow of investment from the developed to developing countries almost always make the latter bear the brunt of any unbalanced prescription of the terms of the IIAs. Thus, the definitions of such substantive terms as investment, fair and equitable treatment, umbrella clause, and regulatory expropriation constitute a significant cause of concern for economic imperatives of the capital importing countries. Similarly, the incessant lack of consideration for the regulatory and economic interest of the host state in the arbitral awards is creating concern among the capital importing countries. Consequently, a re-appraisal of existing regimes becomes necessary both in the substantive definition and the arbitral construction of these substantive terms to ensure a balance of interests in international economic relation.

These substantive and procedural terms do not operate in vacuum but apply to host state like Nigeria together with other local investment regulatory rules. Although various studies establish different challenges to foreign investment in Nigeria such as, inter alia, lack of harmonised investment regimes and complicated registration procedures, one issue that is evidently less considered is the institutional influence in the implementation of investment regulation. Thus, institutional factors are the heart of Nigeria investment challenges. These institutional factors mirrors itself in poor human and social capital ratio needed for enhanced service delivery. Thus, for any meaning headway to be made in strengthening the inflow of foreign capital to Nigeria economy, tackling of other challenges is incomplete until human capital development is aligned with social capital development.

The University of Manchester
Doctor of Philosophy
Collins Chikodili Ajibo
2014
Declaration

No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institution of learning.

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Dedication

This thesis is dedicated to my late Dad who could not live long enough to see me grow, and my eldest brother for his avowed commitment to see me through my educational pursuit.
Acknowledgement
The contributions of many people made this PhD a reality. The contribution of Dr Yenkong Hodu Ngangjoh is particularly unique in this perspective. From start to finish, he patiently read every draft, line by line, and page by page, making useful corrections and suggestions as well as referrals to relevant materials to aid my research. His supervision and constant guidance is highly appreciated. Similarly, the rigorous and robust guidance of Dr Carolyn Abbot is highly valued. Her consistent guidance on methodology and emphasis on simplicity and consistency in structure ensured this PhD becomes a success. I must also thank Dr Nuno Ferreira for his patience in reading the early drafts, making useful criticism on conceptual framework, before he left to University of Liverpool.

Other colleagues of mine both within and outside The University of Manchester also contributed in one way or the other to make this PhD journey a success. On this note, I wish to thank Dr Tim O. Umahi and Dr Emeka F. Ngwu for their encouragement during the early stage of this programme. Of course, I would not forget my fellow PhD sojourners such as Dr Chinenyeze Amaechi, A. Francis, D. Wurasola, A. Santiago, and S. Nadia. Last, but by no means the least, my gratitude goes to my family – Mum, I.K. and my eldest brother for their constant support throughout the duration of this PhD. To you all, I say accept my sincere gratitude for your contribution in one way or the other to ensure a successful completion of this PhD.
### Abbreviations

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<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
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<tr>
<td>BIICL</td>
<td>British Institute of International and Comparative Law</td>
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<td>BIT</td>
<td>Bilateral Investment Treaties</td>
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<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
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<td>CSR</td>
<td>Corporate Social Responsibility</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECHR</td>
<td>European Court of Human Rights</td>
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<td>EFCC</td>
<td>Economic and Financial Crimes Commission</td>
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<td>FET</td>
<td>Fair and Equitable Treatment</td>
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<td>FRN</td>
<td>Federal Republic of Nigeria</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>IIA</td>
<td>International Investment Agreements</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>ISA</td>
<td>Investment and Securities Act</td>
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<td>IST</td>
<td>Investment and Securities Tribunal</td>
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<td>LFN</td>
<td>Laws of the Federation of Nigeria</td>
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<td>MAI</td>
<td>Multilateral Agreement on Investment</td>
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<td>MERCOSUR</td>
<td>Southern Common Market</td>
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<td>MIGA</td>
<td>Multilateral Investment Agreement Agency</td>
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<td>MTFI</td>
<td>Multilateral Treaty on Foreign Investment</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>NBS</td>
<td>National Bureau of Statistics</td>
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<td>NGOs</td>
<td>Non-Governmental Organizations</td>
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<td>NIE</td>
<td>New Institutional Economics</td>
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<td>NIPC</td>
<td>Nigeria Investment Promotion Commission</td>
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<td>NNPC</td>
<td>Nigeria National Petroleum Corporation</td>
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<td>NOSDRA</td>
<td>National Oil Spill Detection and Response Agency</td>
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<td>OSIC</td>
<td>One Stop Investment Centre</td>
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<td>PHC</td>
<td>Petroleum Host Community Fund</td>
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<td>PIB</td>
<td>Petroleum Industry Bill</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<td>PSC</td>
<td>Production Sharing Contract</td>
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<td>SEC</td>
<td>Securities and Exchange Commission</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>UNEP</td>
<td>United Nations Environment Programme</td>
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<td>World Trade Organization</td>
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- Market Abuse Directive 2003/6/EC (MAD)
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ICSID Convention, adopted 18 March 1965, entered into force, 14 October 1966

ILC Articles on State Responsibility 2001

Multilateral Investment Guarantee Agency 1998

Trade Related Aspect of Investment Measures (TRIMs) 1995

Vienna Convention on Law of Treaties 1969


Nigeria-Turkey BIT, 2 Feb 11

Nigeria-UK BIT, 11 Dec 1990, entered into force 11 Dec 90

US Model BIT 2012
Chapter 1
Introduction

1.1 Background

The investment outlook of Nigeria continues to be unimpressive despite significant liberalisation to attract foreign investments.¹ Among the list of best investment destinations for ease of doing business in 2010, Nigeria was rated a dismal 137 out of 183 economies of the world.² Moreover, the United Nations Conference on Trade and Development (UNCTAD) investment report publication on investment profile in Nigeria paints a dismal picture of Nigeria as lacking conducive environment for investment owing to uncertainties of investment laws and policy as well as institutional lapses.³ Similarly, the UNCTAD ‘Blue Book on Best Practice in Investment Promotion and Facilitation’ in Nigeria highlights challenges to foreign investment which include, inter alia, absence of linkages between foreign investment and the rest of the economy; poor diversification of Nigeria investment profile, and lack of harmonised investment regimes.⁴ In its report on climate of investment in Nigeria, the Economic and Financial Crime Commission (EFCC) and National Bureau of Statistics (NBS) point out obstacles to foreign investments in Nigeria which include, inter alia, complicated registration procedures; arbitrary changes to law; multiple tax regimes;

¹ Foreign investment invariably includes portfolio investment (securities) and foreign direct investment. See Chapter 2 below for a detailed discussion on this.
insecurity, and corruption. In addition to the above internal issues, there are similarly external dynamics evidenced in unbalanced substantive and procedural terms that underpin international investment agreements (IIAs ie both investment treaties and contracts) between capital exporting countries (developed countries - foreign investors) and capital importing countries (developing countries - host states) that affect Nigeria investment outlook.

These problems are particularly acute in the petroleum sector due to its contribution to the Nigeria economy. Petroleum sector accounts for about 85% of Nigeria total revenues earning and 52% of the country’s gross domestic product (GDP). It therefore constitutes the most strategic sector of the Nigeria economy. Thus, the net effects of the aforementioned problems have been increased stagnation of the economy and a resultant low economic output. The dismal investment outlook in Nigeria challenges the viability of existing foreign investment protection law and policy, and perhaps, lends credence to a paradigmatic shift in foreign investment protection policies and strategies in Nigeria. Thus, this research is informed by a compelling necessity to search for solutions to these catalogues of woes militating against favourable foreign investment protection climate in Nigeria.

6 Note that by virtue of section 12 of 1999 Constitution of the Federal Republic of Nigeria (FRN), treaties must be ratified by National Assembly for it to become law. Note also that aside from BITs constituting authoritative source of international investment protection, free trade agreements equally embody protective terms, such as, inter alia, Andean Pact; Association of Southeast Asian Nations (ASEAN); Common Market for Eastern and Southern Africa (COMESA); Southern Common Market (MERCOSUR); North American Free Trade Agreement (NAFTA); Southern African Development Community (SADC); and Economic Community of West African States (ECOWAS).
7 Note that capital importing countries and developing countries are used interchangeably. Although increasingly, there is a reverse flow of investment from developing to developed countries (meaning some developed countries are becoming capital importers), this research intends to concentrate on the traditional investment flow – from developed to developing countries.
It is necessary to note that the specific period of 1995 – 2013 is chosen for a number of reasons. First, 1995 constitutes the year Nigeria investment regime was totally liberalised with the dismantling of restrictive foreign investment practices, thus, paving the way for the enactment of the following legislation. (i) The Nigeria Investment Promotion Commission (NIPC) Act No 16 of 1995 - which strengthens the framework of investment protection and deregulation. (ii) Foreign Exchange (Monitoring and Miscellaneous Provisions) Act No 17 of 1995 – which dismantles hitherto barriers to repatriation of capital. Secondly, between 2000 to 2013 various investment legislation came on board particularly the Local Content Act of 2000 (aimed at creating linkages between petroleum investment and the rest of the economy); and the current Petroleum Industry Bill 2008 later reformulated into PIB 2012 (aimed at consolidating all petroleum legislation as well as better advancing governmental interests).

1.2 Research Questions and Objective:

The research focuses on the reform of the regulatory approaches to foreign investment protection in the petroleum sector in Nigeria. The main objective of this research is to analyse the problems associated with the current investment protection regimes in the petroleum sector in Nigeria, and discuss possible reform options. The objective of this research would be achieved by responding to the following three questions:

1. To what extent are the substantive terms and the procedural terms of the current investment treaties concluded by developing countries, and by implication, Nigeria, reflective of the country’s interest?

\[10\) Note that other legislation particularly National Oil Spill Detection and Response Agency Act 2006 No. 15 (NOSDRA) came on board as well but the game changer remains the foregoing owing to their far reaching and revolutionary character on the foreign investment outlook.
2. To what extent do institutional factors undermine effective implementation of investment regulation in Nigeria?

3. What are the optimal approaches to protection of foreign investment in the petroleum sector that best advance the economic interest of Nigeria without undermining investment protection?

The manner in which these objectives will be fulfilled is discussed further in section 1.5 below. Prior to that, section 1.3 discusses the contributions that this thesis makes to existing knowledge and understanding, and section 1.4 considers the methodological approach adopted.

### 1.3 Knowledge Gap and Contributions of the Research

Despite the existence of a significant volume of literature in international economic law encompassing, among others, international investment law, a noticeable gap exists in the scholarship relating to investment protection, particularly as it pertains to investment protection in the Nigeria petroleum sector. Existing literature in this sphere concentrate primarily on analysis and suggestion on ways capital importing countries should reform and re-align their investment legislation and policies to strengthen investment promotion and protection of investment of capital exporting countries, and punitive measures to the former for failure to do so. There is virtually no literature that argues for a re-conceptualisation of the framework of IIAs (both the substantive and procedural framework) through the application of the emergent principle of global distributive justice.\(^\text{11}\) Note that the theory of global distributive justice underpins this research, and is expansively discussed in Chapter 2 below.

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to embed equality and a level playing field between the capital importing countries and the capital exporting countries. A similar gap in the scholarship exists in the domestic sphere where the implementation of these IIAs as well as the subsidiary national investment legislation yields itself to institutional challenges. Thus, previous researchers identified institutional problem affecting the implementation of investment law and policies in Nigeria but failed both to classify the components of these institutional problems and proffer solutions.

Thus, this thesis differs from the preceding by approaching the subject-matter from different perspectives. Having identified that under the substantive section of IIAs, the existing investment treaties and contracts embody only the duties of the host states and the rights of foreign investors; this thesis makes a case for a re-conceptualisation of the substantive terms of investment treaties and contracts to embed equal rights and duties of both foreign investors and host states. The implication of the preceding would be that future IIAs would have to provide for equal duties and rights of both parties (foreign investor and the host state), in contrast to the current paradigm. Similarly, given the legitimacy and credibility problem besetting the procedural framework for the settlement of investment disputes under the International Centre for Settlement of Investment Disputes between the States and Nationals of Other Contracting States (ICSID), and the controversy surrounding the surreptitious introduction of the proportionality doctrine and margin of appreciation

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13 Proportionality doctrine has equally permeated other international institutions particularly the European Court of Human Rights (ECHR) and World Trade Organisation (WTO) for dealing with normative conflict. See Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism', *Columbia Journal of Transnational Law*, 47 (2008-2009), 72-75.
doctrine - a concept borrowed from European Court of Human Right (ECHR)\textsuperscript{14} - the thesis canvasses for an ideologically-neutral remission doctrine (note that the doctrine is a product of author’s coinage and therefore unknown in the contemporary scholarship), aimed at balancing the conflicting interests of the parties - the capital exporting countries and capital importing countries - the latter to which Nigeria belongs.

Similarly, the implementation of investment law and policies is undermined by recurring institutional challenges. Thus, this thesis is the first to dissect the subsets of these institutional challenges by, (i) linking other challenges identified in section 1.1 above by the UNCTAD and the World Bank to institutional factors, since any legal and policy imperatives must have to be implemented by the human workforce; (ii) tracing the recent origin of human capital conundrum (a subset of these institutional challenges) largely to section 14 of the 1999 Constitution of Federal Republic of Nigeria (FRN) (which stipulates that employment should be based on geographical origin rather than merit), while making a case for merit-driven workforce; (iii) identifying the subsets of social capital problems as they affect investment establishment (largely ignored in extant scholarship),\textsuperscript{15} and recommending that human capital development should go hand in hand with social capital development.

In the final analysis, a re-conceptualisation of both the substantive and procedural term of IIAs would notionally embed equality, fair play, and a level playing field between the capital exporting countries and the capital importing countries. From the practical point of view, on the other hand, such a re-conceptualisation would entail that foreign investors would be held to performance requirement benchmarks and responsible investment paradigm (these


two conditions are copiously discussed in Chapter 6), but without prejudice to the obligation of the host state to investment protection.

The various recommendations emanating from this research, it is submitted, would constitute a useful guidepost to developing countries involved in any future multilateral, plurilateral, and/or bilateral investment fora, in addition to benefits that inure, specifically, to Nigeria within a national institutional context. In the first place, it offers a blueprint to developing countries of negotiating strategies to optimise their interests, without prejudicing the developed countries' interests. Secondly, it articulates the problems besetting the current investment regimes and the agendas for solutions. Aside from these foregoing benefits that accrue to Nigeria as a developing country, the institutional problems highlighted, and the reform options proffered would provide an authoritative future roadmap for both legislative and policy efforts in Nigeria. Specifically, the implementation of the recommendation options to solve the social capital problem, largely ignored in extant literature, would mark a watershed in shoring up the spirit of patriotism, honesty, selflessness, dedication, diligence, innovation, trustworthiness, altruism, among others, that would, in the long run, ameliorate the institutional impediments to increased inflow of foreign capital to the Nigeria economy.

1.4 Research Methodology

This thesis is a library-based study, using both the primary and secondary resources to construct a legal analysis of the current investment protection regimes and conceptualise reform options thereto, in the petroleum sector. The pattern adopted is analysis of Nigeria investment protection law and policy in the light of international law. Comparative evidence particularly from comparable economies with Nigeria and case studies including published data from international institutions such as, inter alia, the World Bank, UNCTAD,
international oil companies (IOCs) operating in Nigeria, are used to further illustrate and buttress the position canvassed herein.

This thesis relies on the library-based legal analysis method owing to the fact that the objective being explored here relate to the analysis of the inadequacies besetting the current provisions of the legal instruments and institutional code of practice, and reform options thereto. Secondly, relevant agencies hardly grant interview and/or respond to a survey nor assist in any empirically-related research because of possible political backlash, necessitating the adoption of a library-based research by this thesis. Illustration of the foregoing which equally constitutes a limitation to this research is shown by the refusal to assist with materials by certain agencies in Nigeria. Thus, attempts to get some materials from the Nigeria Investment Promotion Commission (NIPC), One Stop Investment Centre (OSIC), and the Nigeria Securities and Exchange Commission (SEC), were met with rebuff. These organisations claim not to have the relevant materials sought. But the true situation is that they are not willing to give out these materials for fear of victimisation from the political authorities, particularly if the outcome of their actions (ie the content of the data) turns out to be embarrassing to the government. Despite these limitations, the research made reasonable findings and proffers a roadmap for the future.

Because the research substantially makes a case for equality, fairness, and a level playing field in international investment relation - a radical departure from the existing scholarship in this sphere – the theory of global distributive justice is chosen. Although justice itself is an elusive concept with no generally definable scope, its essence is quite decipherable. Thus, the notion of justice invariably mirrors equity, fairness, and equality, which constitute the hallmark of the arguments of this research. As noted, the demand for global distributive justice is not restricted to wealth transfer from the capital exporting
countries to capital importing countries, but encompasses ‘changes in the rules and institutions’ regulating international economic relations.\textsuperscript{16}

Unlike the theory of global distributive justice relied on by this research, other theories particularly the New Institutional Economic (NIE) theory\textsuperscript{17} might be necessary but not actually apposite to this research. Although the principles of the NIE theory are relied on in Chapter 4 to explain the theoretical aspect of the nature of institutions \textit{generally}, the theory suffers serious deficiency when it comes to the question of equality, fairness, and equity, which this thesis advocates (and these precepts are the proper province of the theory of global distributive justice that underpins this research). That having been said, the next section would dwell on the layout of the research structure before full discussion in the subsequent chapters.

1.5 Research Structure

This research is organised into seven chapters:

\textit{Chapter 1:} Introduction. This chapter sets out the background of the research, the research questions and objective, the knowledge gap and contributions of the research, the research methodology, and the research structure, while leaving the theoretical framework in Chapter 2.

\textit{Chapter 2:} Conceptual Framework of Investment Protection. The chapter analyses the theoretical constructs underpinning the protection of foreign investment in the petroleum


sector in Nigeria. The historical impetus for the institution of international law protection of foreign investment, an offshoot of the minimum standard of treatment of aliens, is to protect the economic interest of capital exporting countries.\textsuperscript{18} This is further buttressed by the internalisation theory of foreign direct investment which postulates that firms invest overseas for economic reasons. The Ricardian comparative advantage theory holds only little sway as the incentive for international business given the mobility of factors of production across borders.\textsuperscript{19} Although Hymer’s industrial organisation theory was ground breaking, it nonetheless failed to account for market structural weakness and bounded rationality, and therefore is ineffective as a basis for foreign investment.\textsuperscript{20} Consequently, internalisation theory in conjunction with eclectic theory remains the generally accepted theories of why firms engage in foreign direct investment.\textsuperscript{21} The convergence of both internalisation and eclectic theories is that firms engage in foreign direct investment to minimise transaction costs and maximise profits.\textsuperscript{22} Consequently, global distributive justice (which underpins this research) should operate to embed equal sharing of burdens and benefits\textsuperscript{23} as well as rights and duties, to enable the host states to maximise the benefits of foreign investment.

It might be contended that the argument for global distributive justice derives from moralistic impulse\textsuperscript{24} and as such should not be obligatory. Nonetheless, if justice is viewed through the lens of domestic application, it would be easily deduced that its operation is anchored on legal and enforceable foundation. In a similar vein, the application of global distributive justice arguably ought to mirror domestic conception and operation. In other words, it must have to transcend moralistic impulse deriving its validity from legal and enforceable foundation.

The chapter analyses the arguments underpinning both compensable and non-compensable regulatory expropriation including the reparation standard, and valuation principles.\textsuperscript{25} It concludes by canvassing for global distributive justice to underpin the investment relation between capital importing countries and capital exporting countries to create a balance of interests. The next section turns to the regime of IIAs.

\textit{Chapter 3: Investment Protection and Multilateral Regime.} The chapter evaluates the ongoing argument over the unbalanced regime of IIAs (epitomised by BITs), concluded between capital exporting countries and capital importing countries (like Nigeria).\textsuperscript{26} This is against the backdrop of the fact that the substantive obligations embedded in BITs concluded between capital exporting countries and capital importing countries echo only the protection of investment without effectively embodying equivalent obligations of the former to enable the latter to maximise the gains of such investment. The chapter analyses the unbalanced framework from the prism of the substantive provisions of BITs concluded by Nigeria. In this vein, substantive terms protective of foreign investment particularly the emerging and potential implication of the open-ended definition of investment, the standards of treatment


both the absolute and the relative standard, umbrella clause, and expropriation provisions are examined. The chapter concludes that the current framework is inequitable to the disfavour of capital importing countries like Nigeria. To this end, a regime of Multilateral Treaty on Foreign Investment (MTFI) that will embody equal obligations is canvassed. Such equality is justifiable under the theory of global distributive justice. However, embedding such equality in any future MTFI, reflected in both the substantive and procedural framework alone, does not ipso facto eliminate the obligation incumbent on Nigeria to reform other aspects of investment rules that argues for enhanced capital importation.

Beyond examination of the arguments that underscore the condition precedent to admission of investments, the chapter juxtaposes the motives for the conclusion of IIAs both from the developed and developing countries perspectives, and its implications. The chapter then evaluates the unbalanced substantive terms of investment treaties. Owing to inherent lop-sidedness, the chapter calls for the institution of a multilateral regime that would equitably define and prescribe a balanced investment regime, arguing that previous failed effort is attributable to its exclusionary stance of not sufficiently taking the interest of developing countries on board. Apart from the above, the factors that inure to Nigeria specifically form the focus of discussion in Chapter 4.

Chapter 4: Challenges to Capital Importation. The chapter explores the challenges militating against the realisation of the philosophical basis of foreign investment liberalisation in the petroleum industry in Nigeria. The legal and institutional framework of foreign investment protection in Nigeria were conceptually instituted to provide assurance to foreign investors to invest, with the resultant spill over of skills, technology, and cross-sectoral linkages with indigenous firms in the country. However, constraints to the realisation

of these goals remain. Relying on the principles of the New Institutional Economics (NIE) theory, the chapter demonstrates how institutional factors particularly poor qualitative human and social capital undermine implementation outcome. These institutional challenges straddle the entire investment implementation landscape from the nature of petroleum contractual approaches to the institutional lapses that underlie the SEC enforcement of disclosure rules. This is because other challenges identified above in section 1.1 by the UNCTAD and the World Bank are attributable to poor human and social capital, since poor human and social capital undermines efficient implementation of legal rules and policies. The chapter therefore argues for better capacity building and the shoring up of social capital among the institutional workforce in investment establishment.

Beyond the first section that examines the conceptual issues that underpin NIE theory, the chapter, in second section, evaluates various contractual approaches for the exploration and production of petroleum products in Nigeria and its status in international law. These regimes include the production sharing contract (PSC); joint venture; and service contract. This section acknowledges that the current framework is no longer tenable and requires radical restructuring to create a level playing field. The third section examines the massive capital flight in the Nigeria capital market from foreign portfolio investors, and the failure of the SEC to live up to its enforcement of disclosure obligation in this regard. Apart from the preceding, other misalignments particularly the impacts of political strife as well as the multiplicity of fiscal regimes on the investment climate are discussed. In Chapter 5 that follows, the procedural framework for the settlement of investment disputes is considered (Chapter 3 being the substantive framework).

28 Groenewegen et al, Institutional Economics: An Introduction at 32.
Chapter 5: Settlement of Investment Disputes. This chapter examines the teleological premise for the institution of the framework for the settlement of investment disputes through ICSID and the controversy surrounding its attainment. Section 27 NIPC Act and a significant number of BITs\(^{31}\) concluded by Nigeria stipulate the framework of the ICSID as the dispute settlement platform. However, ICSID has been dogged by a legitimacy crisis since its stance appears to conflict with the philosophical basis for its institution, namely fostering international economic cooperation for economic development of both contracting parties.\(^{32}\) This chapter acknowledges that ICSID seems to have failed in its obligation to institute balance and fairness given that awards in a significant number of cases go against capital importing countries like Nigeria.\(^{33}\)

Although ICSID remains the prevailing framework for the settlement of investment disputes,\(^{34}\) the exhaustion of local remedies might be required in some cases as a precondition for ICSID.\(^{35}\) Some tribunals appear to hold the view that local remedies requirement constitutes a precondition for the institution of arbitration.\(^{36}\) Conversely, it has been stated that such compliance is merely a procedural issue and does not constitute a precondition for ICSID jurisdiction.\(^{37}\) The implication is that it could be disregarded in circumstances of potential futility of embarking on such an exercise, particularly where ‘the cost involved in


\(^{33}\) UNCTAD, ‘Reform of Investor - State Dispute Settlement: In Search of a Roadmap’.

\(^{34}\) Note that ICSID was intended to obviate national constraints in maintaining action. For instance, action against a foreign sovereign must satisfy some onerous requirements of State Immunities Act of 1978 and Foreign Sovereign Immunities Act of 1976 in the UK and the US respectively, if brought in these countries. See James Crawford et al, Foreign Investment Disputes - Cases, Materials and Commentary (Netherlands: Kluwer, 2005) at 11 - 13.


proceeding further considerably outweighs the possibility of any satisfaction resulting’. It could be argued therefore that the local remedies rule might appear to cater for the interest of the developing countries host state like Nigeria, but it is no more than a mere formality, given that an investor can abandon (or alternatively employ delay tactics thereby frustrating its operation) the remedy mid-stream on expiration of the stipulated deadline.

Developing countries stripped of the potency of local remedies rule might find solace in the constituent of credible arbitrators. Although the appointment of arbitrators cannot be said to be anti-capital importing countries, such appointments equally do not eliminate the possibility of bias in favour of the capital exporting countries, given that ICSID is an arm of the World Bank, and the major shareholders of the latter are capital exporting countries. The institution of an appellate ICSID could nominally ameliorate the situation, but it could fall prey to the same weakness bedevilling the current ad hoc system. Consequently, scholars have proffered various options for the solution of this ICSID legitimacy crisis.

While some argue for a sole effect doctrine, others angle for purpose and effect doctrine. In the same vein, while a case is made for the proportionality doctrine which applies the four-way tests of judging the legitimacy, suitability, necessity, and finally the proportionality of host state action vis a vis the investors’ interest, others argue for margin

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40 UNCTAD, 'Reform of Investor - State Dispute Settlement: In Search of a Roadmap', 1-2; OECD, 'Improving the System of Investor - State Dispute Settlement', 3 (outlining the challenges to investor-state arbitration and potential reform options).

41 Sole effect doctrine determines the sole effect of impugned actions of the state on the economic interest of the investor while purpose and effect doctrine considers the purpose of the state actions vis a vis its effects on the investor. See Rudolf Dolzer, 'Indirect Expropriations: New Developments?', *New York University Environmental Law Journal*, 11 (2002-2003), 79.

42 See Mathews, 'Proportionality Balancing and Global Constitutionalism', 72-75.
of appreciation;\textsuperscript{43} and even a combination of both (ie the proportionality and margin of appreciation doctrines).

Although proportionality doctrine might appear elegant, doubts are almost always resolved in favour of investors, thereby disrupting host state interest.\textsuperscript{44} The application of margin of appreciation doctrine could provide the relevant deference to regulatory interest of the host state. However, it has a controversial heritage, and therefore might be opposed by jurisdictions in other climes.\textsuperscript{45} In fact, it is the contention of this chapter that the remission doctrine should hold sway. The crux of the preceding doctrine would be the remission of compelling regulatory issues to the host state national institutional competence. The essence is to balance the interest of the parties and embed a level playing field in investment relation. These balancing of interest and a level playing field equally accord with the doctrinal tenet of the global distributive justice that underpins this research. Apart from the need for a remission doctrine to solve the legitimacy crisis in the settlement of investment disputes through ICSID, foreign investors may equally be obliged to performance requirement and responsible investment in certain circumstances, which forms the focus of the next chapter.

\textit{Chapter 6: Performance Requirements and Responsible Investment}. This chapter affirms that, in the final analysis, the regimes of performance requirement and responsible investment should constitute a trade-off for host state protection of foreign investment.\textsuperscript{46}

\textsuperscript{43} Letsas, 'Two Concepts of the Margin of Appreciation', 706-24.
\textsuperscript{44} See Tecmed, S.A. v United Mexican States, ICSID Case No. ARB (AF)/00/2, Award of May 29, 2003, particularly para 122 and 151, at 47 – 60, where despite the consideration of proportionality doctrine the tribunal still found for the investor claimant; Continental Casualty Company v. Argentina Republic, ICSID Case No. ARB/03/9, Decision on Annulment, September 16, 2011, particularly paras. 137 and 285, at 41 – 54, 110 – 113, where the tribunal still proceeded to issue an award against Argentina after consideration of the proportionality principles.
\textsuperscript{45} A clear case of this opposition is illustrated by lack of unanimity exhibited by scholars, in respect of the applicability of the ‘proportionality doctrine’ and ‘margin of appreciation’, in a conference attended by the author titled: ‘Twentieth Public Meeting of the Investment Treaty Forum - The Litigation of Public Law Concepts in Investor-State Arbitration – Practical and Theoretical Considerations’, organised by the British Institute of International and Comparative Law (BIICL), Bloombury, London, on 10/05/2013.
Such a trade-off is further justified on the ground of the internalisation and eclectic theories of foreign investment that reaffirm the beneficial effects of foreign investment to transnational corporations. The analysis is undertaken from two standpoints: performance requirement through the framework of the Local Content Act 2000; and responsible investment through the instrumentality of the current Petroleum Industry Bill (PIB). In the following Chapter 7 below, which constitutes the last chapter, conclusion, recommendations and area of further research are articulated.

Chapter 7: Conclusion. The concluding chapter re-examines the research objective through the prism of the three research questions formulated, and to what extent they have been addressed in the preceding chapters. Equally, recommendations that would enable Nigeria to optimise its investment potential, while not prejudicing foreign investors’ interests, are presented. Such recommendations will, hopefully, constitute a roadmap to developing countries involved in any future multilateral, plurilateral, or bilateral investment negotiation. Similarly, they also provide a blueprint for future legislative and investment policy in the petroleum sector in Nigeria. In Chapter 2 below, the conceptual framework of investment protection is discussed, and then subsequently, other chapters follow.

Chapter 2
Conceptual Framework of Investment Protection

2.1 Introduction
This chapter explores the conceptual framework that underpins investment protection. The scope and limit of the obligation of the host state vis a vis the foreign investor remains polarised depending on the ideological standpoint of the contributor. While it is generally accepted that host states may exercise police powers vis a vis the foreign investor there are still divergences as to whether there is condition precedent to its exercise or not. The implication of this uncertainty spans out to whether certain regulatory expropriation could be labelled as an exercise of police power, hence non-compensable; or whether every expropriation is compensable but in varying degrees. Where the liability of host state is established, the standard of compensation under customary international law remains similarly controversial. And what valuation principles constitute the general norm? Should it be fair market value, or net book value method, or discounted cash flow, or a combination thereof? In the application of the valuation principles, does the Hull standard feature? Similar divergences underpin the unbalanced regimes of IIAs (eg BITs). These divergences between the capital exporting countries and the capital importing countries usually reflect ideological preferences and biases. Indeed, since both the internalisation theory and eclectic theory of foreign investment postulate that firms engage in international investment to reduce transaction costs and maximise profits, it is only equitable that global distributive justice should similarly underpin the interpretation of the content of these IIAs. The application of this global distributive justice would lessen the preceding divergent interests by embedding equity, equality, and a level playing field among the contacting parties.
The chapter is divided into four sections with sub-sections. Beyond the definitional construct of foreign investment, the second section focuses on the conceptual arguments that underscore regulatory expropriation and compensation. These cover divergences characterising the exercise of police powers; compensable and lawful non-compensable takings; the status of Hull standard under customary international law; and the standard of valuations under the customary international law. The third section deals with the theory of global distributive justice and why it should underscore the investment relation between capital importing countries and capital exporting countries. The last section concludes.

2.2 Definitional Construct of Foreign Investment

Foreign investment could be classified into foreign direct investment (FDI) and portfolio investment. Foreign direct investment involves international investment necessitating ‘a resident entity in one economy obtaining lasting interest in another economy.’47 Lasting interest presupposes a long-term relationship between the foreign investor and the investment as well as a significant degree of managerial influence on the venture by the foreign investor. A portfolio investment, on the other hand, is defined as ‘cross border transactions and positions involving debt and equity securities’ which is not captured by the definition of foreign direct investment.48

The above IMF Balance Payment Manual definition emphasising long term interest however differs from corresponding asset-based definition adopted in virtually all IIAs lately.49 The illustrative fact is evidenced by the current 2012 US Model BIT.50 A significant


48 Ibid., at 110.

proportion of investment promotion and protection regimes entered lately incorporate the preceding wide definition of investment.\textsuperscript{51} While a broad definition of this nature may be beneficial to a foreign investor since it covers wide and unforeseen equivalent of investments which obviates potential future renegotiation, it could on the contrary, clip the development initiatives of the recipient countries of foreign investment.\textsuperscript{52}

Private foreign investment under discussion (ie FDI) is distinguished from public foreign investment such as the World Bank loans to states which come with significant conditionalities. This thesis is concerned only with private foreign investment. Note also that private foreign investment involves both foreign direct investment and portfolio investment. Again this thesis does not expansively deal with portfolio investment. In similar fashion, investment in the services sector particularly financial services, legal services, among others, as envisaged by the General Agreement on Trade in Services (GATS)\textsuperscript{53} are strictly not the focus of this thesis.


\textsuperscript{52} UNCTAD, ‘Scope and Definition,’ at 61-62.

\textsuperscript{53} WTO, 'General Agreement on Trade in Services', GATS/SC/83, 15 April, 1994.
2.3 Expropriation and Compensation

2.3.1 Police Power Conundrum

Note that classical expropriation has been a subject of intense scholarly writings from time immemorial. Taking (expropriation or nationalisation) constitutes a part of the absolute and non-contingent standard of treatment in similar fashion to such substantive terms as FET, full protection and security, and currency transfer provision. The terms ‘expropriation,’ ‘nationalisation’ or ‘regulatory takings’ (also known as ‘creeping expropriation’) are sometimes used interchangeably. However, there is a tenuous distinction characterising the terms. Thus, while expropriation simpliciter concerns compulsory acquisition of assets by the state, nationalisation relates to a large scale economic restructuring resulting in the deprivation of assets of investors. Creeping expropriation or regulatory takings, on the other hand, entails regulatory action - which could be in the form of an enactment, law and other legal instruments as well as its implementation - by the state that undermines the economic value of private investment. It must be pointed out that classical expropriation is seemingly

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56 Takings will be used interchangeably with expropriation to denote expropriation, nationalisation and creeping expropriation of assets except where specific explanation warrants individual use of the terms.

57 Lorenzo Cotula, 'The Regulatory Taking Doctrine', International Institute for Environment and Development (2007), 1. In Metalclad Corporation v United Mexican States, (ICSID Case No. ARB (AF) 97/1), Award of August 30, 2000, para. 103 the tribunal noted that, expropriation ... includes not only open, deliberate ... takings of property ... but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state.


a by-product of the past now.\textsuperscript{60} According to one commentator, '[n]ot only has expropriation activity largely ended', in some countries ‘it is being reversed in very literal terms, by reversion to the former owners.’\textsuperscript{61}

Nevertheless, expropriation can in principle be conceptualised into three broad headings.\textsuperscript{62} (i) indirect and direct expropriation; (ii) arbitrary dispossession of investment without relevant justification under the exercise of police powers for public regulation under international law; (iii) revocation or abandonment of contractual commitments relied on by investor. However, under contemporary scholarship the burning issue has been regulatory expropriation also known as ‘acts equivalent to expropriation,’ ‘acts tantamount to expropriation,’ ‘indirect expropriation,’\textsuperscript{63} among others.\textsuperscript{64}

In practice however the continuing conundrum has been the delineation between lawful expropriation in state exercise of police powers to regulate public interest, public health, public moral, environment, taxation, amongst others, requiring no compensation,\textsuperscript{65} and unlawful expropriation requiring compensation. International law does not seem to offer

\textsuperscript{60} For early expropriatory cases see, Norwegian Shipowners Claims (Norway v US), (1922), 1 RIAA 307; and Certain German Interests in Polish Upper Silesia Case (Germany v Poland), 1926, PCIJ Rep. Series, A. No 7, (May 25).
\textsuperscript{61} OECD, ‘‘Indirect Expropriation’’ and the ‘‘Right to Regulate’’ in International Investment Law, Working Papers on International Investment, Number 2004/4 (2004), 2 (noting that direct expropriation is rare lately but acknowledging the emergence of instances of acts tantamount to expropriation in regulatory measures).
\textsuperscript{64} Illustration are article 5 of Nigeria-UK BIT; article 6 of Nigeria-Netherlands BIT, to mention just a few. See UNCTAD, ‘Bilateral Investment Treaties, Country-Specific Lists of BITs’.
a clear cut guideline in this regard. This dilemma seems to be acknowledged in the following words -

[i]f investment is to be promoted as a driving force for sustainable development, fair and equitable treatment of investors is indispensable, including non-discrimination and compensation in cases of expropriation. On the other hand, regulatory authority of governments needs to be safeguarded if the state is to continue to fulfil its essential functions to protect the public interest in areas like the environment, health and safety, market integrity and social policies.  

Although doubts underscore the borderline between lawful and unlawful expropriation, certain areas continue to be regarded as proper exercise of police powers, hence non-compensable.  

Such governmental actions include fines or forfeiture to suppress or punish crime; taxation; regulation pertaining to planning, environment, public health, public safety; and confiscation as sanction for violation of domestic laws, among others.

Although investment treaties are freely concluded between two sovereign states, and as such it could be argued that police powers could be contracted out, it appears the reverse is the case. The reason is not unconnected with the status of police powers as an aspect of customary international law. Arguably, legitimate state exercise of police powers that has incidental effect of diminishing the value of investment requires no compensation. As noted by Oliver Wendell Holmes in the case of Pennsylvania Coal Co. v Mahon, 260 US 393, 413 (1922),

> government could hardly go on if to some extent values incident to property could not be diminished without paying ... some values are enjoyed under an implied limitation and must yield to the police powers.

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69 UNCTAD, 'Expropriation', at 85-86.
Granted, presumably, that the exercise of police powers require no compensation. Now further questions remain regarding additional conditionality for validity of its exercise. Does it mean that police power constitute a self-standing doctrine requiring no additional conditionality for validity of its exercise? Or does state exercise of police power still amenable to customary international law standards of public policy, non-discrimination, and due process? 

Extant literature exhibits dissonance of views in this sphere of investment law. A number of authors seemingly analyse the state exercise of police power as self-standing doctrine requiring no additional conditionality. Conversely, both the Harvard Draft Convention on International Responsibilities of State for Injuries to Aliens and the Restatement (Third) of Foreign Relations of United States acknowledge that the exercise of such power is not invalid provided that it is not discriminatory. The Harvard Draft provides additional ground for the validity of state exercise of police powers to the effect that it ought not to amount to a departure from the principles of justice recognised by principal legal jurisdictions of the world. Chapter Eleven, Part Five of article 1106(6) NAFTA apparently grants a measure of police powers to the state as well. However, its exercise (in similar vein as the preceding) must not be arbitrary and unjustifiable or constitute a disguised restriction on international trade and investment.

Indeed, it can be argued that legitimate state exercise of regulatory powers for public purpose which is not unjustifiably discriminatory deserves no compensation. Arguably, the status of police powers as a customary international law ought to preclude

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70 Tecnicas Medioambientales Tecmed, S.A. v United Mexican States (ICSID Case No. ARB (AF)/00/2), Award of May 29, 2003, para. 119, at 45.
71 Sornarajah, The International Law on Foreign Investment at 357.
73 See section 712 of Restatement (Third) of Foreign Relations of United States.
compensation. The divergences on exercise of police powers equally have significant implication on the component of lawful and unlawful expropriation.

2.3.2 Lawful versus Unlawful Expropriation

The recurrent jurisprudential question eliciting profound polarisation between capital-exporting countries and capital-importing countries remains where and when compensation applies as well as the minimum standard of compensation for expropriation of foreign investments. Divergence continues to underpin situational application of compensation.\(^4\)

One school of thought postulates that whether expropriation is lawful or unlawful compensation applies; but the only difference pertains to the degree of payment.\(^5\) Thus, in lawful expropriation the degree of compensation is lesser. On the other hand, where expropriation is unlawful the threshold of compensation is higher. This view does not seem to take cognisance of the operation of police powers requiring no compensation.

The foregoing view is juxtaposed with another school of thought that postulates that only cases of unlawful expropriation attract compensation. Thus, where expropriatory actions satisfy the tenets of legality such as governmental regulation, no compensation is claimable.\(^6\)

This position apparently acknowledges the possibility of state exercise of police powers under international law. Arguably, the preceding accords more with sense of justice and sovereignty. Beyond the preceding, another question that remains is the compensation standard where compensation applies - whether Hull standard or not.

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\(^5\) See ADC v Hungary, ICSID Case No. ARB/03/16, Award of October 02, 2006, para. 496-497 at 93-94; Ioannis Kardassopoulos & Ron Fuchs v Republic of Georgia, ICSID Case Nos. ARB/05/18 & ARB 07/15, Award of March 03, 2010, para.502-511 at 161-165.

\(^6\) J Martin Wagner, 'International Investment, Expropriation and Environmental Protection', *Golden Gate University Law Review*, 29 (1999), 465 (arguing that legitimate state exercise of police powers require no compensation under international law).
2.3.3 Hull Standard

Hull standard envisages payment of prompt, adequate, and effective compensation, but this is by no means accepted by comity of nations.\textsuperscript{77} Prompt compensation here entails that the payment must be contemporaneous with expropriation including interest calculated from the time of taking till the time of compensation.\textsuperscript{78} However, this requirement may pose a significant balance of payment problems to the expropriating state. The historic practice seemed to have allowed for a reasonable time or deferred payment, depending on the circumstances of each case.\textsuperscript{79} Adequate compensation is equivalent to ‘fair market value’ of the investment expropriated.\textsuperscript{80} However, requiring ‘adequate’ or ‘full’ compensation in all cases of compelling social and economic reforms necessitating expropriation may be illusory. Indeed, in such cases, ‘equitable’ or less than full compensation may suffice.\textsuperscript{81} Effective compensation implies payment in convertible currency that is internationally transferable. But this is hardly adhered to in state practice owing to exchange controls measures and other fiscal policies.\textsuperscript{82}

Certainly, the Hull standard continues to be controversial not only in principle but also in application, given the right of states to regulate under eminent domain recognised by international law.\textsuperscript{83} Although the US has over the years contended that prompt, adequate, and


\textsuperscript{79} Weston, "Prompt, Adequate and Effective": A Universal Standard of Compensation?, 736-37.

\textsuperscript{80} Merill, 'Incomplete Compensation for Takings', 112.

\textsuperscript{81} Weston, "Prompt, Adequate and Effective": A Universal Standard of Compensation?, 737-38.

\textsuperscript{82} Merill, 'Incomplete Compensation for Takings', 112.

\textsuperscript{83} Martin Domke, 'Foreign Nationalizations: Some Aspects of Contemporary International Law', \textit{American Journal of International Law}, 55 (1961), 590; Adeoye Akinsanya, 'International Protection of Direct Foreign
effective compensation mirrors the crystallised international minimum standard of compensation among the civilised world, this is far from the truth.

The clarity of the legal position is further compounded by the conflicting interpretation of precedent traditionally relied on to prove the existence of obligation to pay prompt, adequate and effective compensation. The two cases often cited to justify this standard - Chorzwon Factory Case and Norwegian Shipowners Case, only made reference to payment of ‘fair compensation’ and ‘just compensation’ respectively. Thus, the requirement of ‘prompt, adequate and effective’ compensation does not seem to constitute the crystallised customary international law standard of compensation in this regard. According to one commentator,

[i]t is nothing short of absurd to pretend that the protestation of the rule of full, prompt and adequate compensation ... in all circumstances is representative of customary international law.

Sornarajah, equally, questions the wholesale application of the twin equitable principles of unjust enrichment and the doctrine of acquired rights which justify full compensation to

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85 Oscar Schachter, 'Editorial Comment, Compensation for Expropriation', *American Journal of International Law*, 78 (1984), 122-23 (noting Hull standard is not applicable in all situations under international law).

86 *Germany v Poland*, [1928] P.C.I.J. (Ser. A) No. 17 at 47.


88 Schachter, 'Editorial Comment, Compensation for Expropriation', 123.

instances of expropriation. On the other hand, Rudolf Dolzer maintains that the Hull doctrine might have represented the position of international law at that point in time.

Further legitimacy crisis of the Hull standard is illustrated by developing countries, championed by the Latin American countries that mounted a formidable opposition to the normative import of the Hull doctrine through the institution of the Calvo doctrine. The normative basis of the Calvo doctrine postulates national treatment of foreign investors who are subject to national laws and municipal jurisdiction. Thus, it constitutes a total repudiation of both the substantive and practical significance of the Hull standard. However, the forces of globalisation and significant liberalisation of economies of Latin American countries to attract foreign investment and trade have taken centre stage lately, necessitating some of them to soft-pedal on the Calvo doctrine, gradually embracing the Hull standard, albeit reluctantly.

A number of them are now parties to BITs and signatories to the ICSID Convention that incorporate the Hull standard and international arbitration respectively. Thus, Mexico has apparently ceded to the Hull standard having assented to the NAFTA obligations (even though Article 27 of the constitution still embodies the Clavo Clause), incorporating essentially Hull standard in event of expropriation. Chapter 11 of NAFTA stipulates that expropriation must be (a) based on public purpose; (b) without discrimination; (c) based on due process; and accompanied by prompt payment of fair market value with consequential interest.

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Nonetheless, certain Latin American countries continue to espouse and adhere to the
doctrinal tenet of the Calvo doctrine by necessary implication in their international
investment agreements. Thus, all ANCOM\textsuperscript{94} countries continue to assert national treatment of
foreign investors, national jurisdiction of investment dispute; and continued resistance to
obligation of compensation under traditional Hull doctrine even though significant
 liberalisation has taken place to attract foreign investments there.\textsuperscript{95} Moreover, the
decolonisation process of the post World War Two challenged the theoretical validity of the
Hull formula, further putting it in disarray.\textsuperscript{96}

The resultant Resolution 1803 (a consequence of decolonisation) made no mention of
payment of ‘prompt, adequate and effective’ compensation but instead used ‘appropriate
compensation.’ However, it has been argued that ‘appropriate compensation’ is synonymous
with the traditional Hull doctrine of ‘prompt, adequate and effective compensation.’\textsuperscript{97}
Nevertheless, if this were the case, the Resolution would have said so in clear terms.\textsuperscript{98}
Consequently, it could be argued that irrespective of the status of the Hull standard prior to
the General Assembly Resolution 1803, it does not seem to represent the customary
international law compensatory standard in the years subsequent to the Resolution.\textsuperscript{99}

\textsuperscript{94} ANCOM stands for Andean Common Market. The group consist of Bolivia, Colombia, Ecuador, Peru and
Venezuela.
\textsuperscript{95} Eduardo A. Weisner, ‘ANCOM: A New Attitude Towards Foreign Investment?’, \textit{University of Miami Inter-
\textsuperscript{96} Levy, 'Note, NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of "Prompt,
Adequate and Effective" Standard', 433. The UN General Assembly instituted 'appropriate compensation' as
the standard of compensation implicitly rejecting the Hull standard. And in what seemed a reaffirmation of the
theoretical relevance of the Calvo doctrine, provided in Article 2(c) of the 1974 Charter of Economic Rights and
Duties of States, inter alia, that in event of controversy as to the applicable standard of compensation, the
matter might be settled in accordance with host states law and tribunals.
\textsuperscript{97} Stephen M. Schwebel, 'The Story of the UN’s Declaration on Permanent Sovereignty over Natural
\textsuperscript{98} Patrick M. Norton, 'A Law of the Future or a Law of the Past? Modern Tribunal and International Law of
\textsuperscript{99} Levy, 'Note, NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of "Prompt,
Adequate and Effective" Standard', 437. According to one commentator, Hull formula is more or less the US
preferred customary international law position. See Jean Raby, 'The Investment Provision of Canada-United
States Free Trade Agreement: A Canadian Perspective', \textit{American Journal of International Law}, 84 (1990), 419.
standard is more or less the theoretical standard, whereas customary international law compensatory regime diverges significantly from the standard in practice.\textsuperscript{100}

\subsection*{2.3.4 Shifting Attitude of Developing Countries}

Although developing countries like Nigeria oppose Hull doctrine in multilateral forums, they paradoxically embrace BITs that incorporate the same Hull standard.\textsuperscript{101} It has been argued that this apparent inconsistency (while not least indicating a change of mindset of the developing countries) is indeed informed by the necessity to attract foreign investments among developing countries.\textsuperscript{102} Professor Sornarajah however postulates that the chaotic state of international investment law consequent upon the undermining of the Hull doctrine made developing countries to conclude BITs in order to ‘clarify’ on the applicable legal regime in event of investment disputes.\textsuperscript{103} But such a claim of mere clarification is doubtful, given that BITs impose far more protection of foreign investments than any multilateral framework, including the Hull doctrine.\textsuperscript{104} Another possible explanation of the inconsistency is that developing countries derive a lot of benefits from treaties.\textsuperscript{105} Although Dolzer’s submission is contested by Guzman, nevertheless, it finds convergence with the view of other scholars.\textsuperscript{106}

The preceding might underscore developing countries motive but it nonetheless obfuscates and obscures developed countries intention in engaging in foreign investment.

\textsuperscript{100} Merill, 'Incomplete Compensation for Takings', 112.
\textsuperscript{104} Guzman, 'Why LDC's Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', 668.
\textsuperscript{105} Dolzer, 'New Foundations of the Law of Expropriation of Alien Property', 567.
\textsuperscript{106} Sullivan, 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain', 78.
Although it might appear that developing countries are the sole beneficiaries of foreign investment, internalisation theory of foreign direct investment indicates that investors also benefit, since according to the theory, firms invest overseas for economic reasons. Ricardian comparative advantage theory no longer holds sway as a justification for foreign investment given the mobility of factors of production across borders.\textsuperscript{107} While Hymer’s industrial organisation theory was groundbreaking, it nonetheless failed to account for market structural imperfections and bounded rationality, and therefore ineffective as a basis for foreign investment.\textsuperscript{108} Consequently, internalisation theory in conjunction with eclectic theory remains the generally accepted theories of why firms engage in foreign direct investment.\textsuperscript{109} The convergence of both remains that firms engage in foreign direct investment, instead of licensing or franchising, to minimise transaction costs and maximise profits. In addition to the controversy surrounding the Hull standard, the question of whether restitution or compensation should hold sway remains controversial as well.

\section*{2.3.5 Restitution versus Compensation}

It is instructive to note that compensation becomes necessary only if \textit{restitutio in integrum} is impossible. The International Law Commission Articles on State Responsibility (ILC) emphatically followed the restitution standard enunciated in \textit{Chorzow Factory Case}.\textsuperscript{110} In that case it was stated that ‘reparation must, as far as possible, wipe out all the consequences of the illegal act’ as well as ‘re-establish the situation which would, in all probability, have

\begin{footnotesize}
\begin{enumerate}
\item Teece, ‘Reflections on the Hymer Thesis and Multinational Enterprises’, 126.
\item \textit{Chorzow Factory case}, (Germany v Poland), (1928) PCU Rep Series, A No. 13, at 47 (Sept. 13); TEXACO Overseas Petroleum Company/California Asiatic Oil Company v The Government of the Libyan Arab Republic, \textit{Award of January 19, 1977, 17 ILM, 1 (1978) at 37, para. 3} where the tribunal applied \textit{restitutio in integrum}, consequently ordering the Libyan authority specific performance of the contract.
\end{enumerate}
\end{footnotesize}
existed if that act had not been committed’. The ruling is no less than *restitutio in integrum*.

Following from this case, article 35 of ILC Articles on State Responsibility provides, inter alia, that ‘a state responsible for an internationally wrongful act is under an obligation to make restitution’ provided reversion to such a *status quo ante* is possible; and that it is not disproportionate ‘to the benefit deriving from restitution instead of compensation.’ Article 36 of the same ILC Articles on State Responsibility similarly provides that in event of *restitutio in integrum* being impossible, compensation should be paid. The quantum of compensation ought to cover ‘any financially assessable damage including loss of profits’ as long as the claimants could establish it.

The combined effect of both article 35 and article 36 of the ILC Articles indicates that restitution remains the general standard of reparation in cases of internationally wrongful acts of the state including cases of expropriation of foreign assets. However, where reversion to *status quo ante* is impossible, compensation becomes the available option by the delinquent state using various valuation methods.

### 2.3.6 Valuation Principles

Where expropriation is conceded, it must be for public purpose and must not be discriminatory. Sornarajah, however, argues that the public purpose requirement has lost

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111 *Chorzow Factory case, (Germany v Poland), (1928) PCIJ Rep Series, A No. 13, at 47 (Sept. 13).*


114 See Article 36(2) of the ILC Articles on State Responsibility.

its effectiveness in this modern time. Moreover, what amounts to discrimination depends on the circumstances of each case since certain discriminatory measures may be justified on the ground of social and economic equilibrium. Where compensation finally applies the question of what method to adopt remains controversial. While the capital exporting countries favour fair market value or going concern assessment, the capital importing countries prefer net book value method. This dichotomy is hardly surprising given that net book value seemingly proves less burdensome to the economic objectives of the capital importing countries, since interest and future profits are excluded. Sornarajah, however, criticises the valuation principles as unnecessary.

In fact, whether fair market value, net book value, or discounted cash flow applies or a combination of approaches applies is arguable, and may depend on the circumstances of each case. In certain circumstances fair market value applies - including interest though future profit remains doubtful. The implication is that recovery of future profit might not constitute an aspect of customary international law.

Charter Treaty, 'The Energy Charter Treaty and Related Documents', (2004) at 57 (noting expropriation must be, inter alia, for public purpose, non-discriminatory, conform to due process); Article 1110 of NAFTA, see NAFTA, 'Investment, Services and Related Matters', (outlining the requirement of expropriation to include, inter alia, public purpose, non-discrimination).

Sornarajah, The International Law on Foreign Investment at 407.


Gainer, 'Nationalization: The Dichotomy between Western and Third World Perspectives in International Law', 1569. Note that the preponderant of opinions seem to be in favour of fair market value though it can be contracted out. See Bishop, Foreign Investment Disputes - Cases, Materials and Commentary at 1309 – 10; CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, UNCITRAL Final Award of March 14, 2004.

Sornarajah, The International Law on Foreign Investment at 450.


See Re: Columbian-Peruvian Asylum, November 20, 1950, ICJ, where the ICJ noted the uncertainties under international law regarding loss of future profits to the effect that -
Fair market value appears to strike the right chord with a significant number of investors since it constitutes ‘the price a willing buyer would pay to a willing seller in circumstances’ where ‘each had good information, each desired to maximize his financial gain, neither was under duress or threat’). This would be the case where symmetrical information exists between the two parties. Unlike fair market value, net book value constitutes the ‘difference between the total assets of the business cum total liabilities as shown on its books’. In practice this approach could conflate the ‘moment of expropriation’ with the ‘moment of valuation’ consequently reducing investor compensatory take, which explains why investors abhor it. Discounted cash flow becomes relevant in valuing income of a limited period such as wasting assets.

It is unclear which valuation standard is applicable on finding of a breach on each particular case. The situation is not mediated by International Law Commission’s Articles on State Responsibility which merely examines each of the above valuation methods, leaving open the applicable regime. The arbitral jurisprudence offers little or no guidance either, since arbitral decisions lack a consistent approach. The valuation standard espoused by the OECD tends to reflect the ‘genuine value of the property.’ On the other hand, the World

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See Starrett Housing Corp. v Government of the Islamic Republic of Iran (1987) 16 Iran-U.S.C.T.R. 112 at 201; World Bank Guidelines on the Treatment of Foreign Direct Investment, para. 3 of Part IV stating that fair market value is ‘determined immediately before the time’ the taking of the property happened or information regarding the taking is made public.


Bank Guidelines on the Treatment of Foreign Direct Investment seem to accord with a fair market value method of valuation.\textsuperscript{128}

Thus, it cannot be contended with certainty that fair market value constitutes the prevailing valuation method of compensation, since there is no unanimity on the applicable standard.\textsuperscript{129} Consequent on the divergences, the next section would discuss the global distributive justice. It is contended that the application of the theory of global distributive justice would not only streamline divergent interests of capital exporting countries and capital importing countries in this sphere but also embed equality, fairness, and a level playing field in international economic relations.

\subsection*{2.4 Theory of Distributive Justice}

Rawls propounded two basic theories of justice in his seminal book: ‘A Theory of Justice’\textsuperscript{130} that profoundly changed the conception of justice hitherto dominated by the utilitarian theory of maximisation of social welfare for the greatest number of people.\textsuperscript{131} The proper province of allocative efficiency of coercive authority and/or law occupied the minds of theorist and philosophers for ages. Egalitarians canvass for equal distribution of economic assets, with allowable exceptions. By contrast, libertarians’ argument is that individuals should be at liberty to retain their possessions honestly acquired within the bounds of law, with limited

\begin{thebibliography}{99}
\item[128] See article IV (3) of the World Bank, ‘Guidelines on the Treatment of Foreign Direct Investment’.
\item[129] However, if the foregoing position is the case it is, arguably, contradicted by the practice of capital importing countries in significant number of BITs concluded which incline towards fair market value. Article 6(2) (b) of the 2012 US Model BIT is illustrative. Available: http://www.state.gov/documents/organisation/117601.pdf, accessed: 20/10/2013. Similarly, significant volume of BITs concluded by Nigeria incorporates fair market valuation approach in contrast to net book value method. In similar vein, judicial construction of fair market value under Nigeria legal regime apparently corresponds with fair market value under international law at least in certain respects. See for instance, Commissioner of Lands v Aneke [1973] 3 ECLR (Pt. 1) 207, 210-221 where it was held that fair and adequate compensation entails valuation based on current value of the expropriated goods.
\item[130] Rawls, A Theory of Justice.
\item[131] Utilitarian theory, in nutshell, advocates the maximisation of the welfare of the greatest number of people. The theory however fails to account for the interest of the minority number of people left out of the equation.
\end{thebibliography}
exceptions. Rawls belongs to the school of egalitarianism\textsuperscript{132} owing to his conception of justice, inter alia, from the standpoint of redistribution of resources.

Rawls was primarily concerned with domestic distributive justice. The first principle postulates that ‘each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others’. The second principle embodies two notions of justice. The first notion states that ‘social and economic inequalities’ should be structured in such a way that both are (a) ‘reasonably expected to be to everyone’s advantage’ (known as difference principle or distributive obligation of justice), and (b) ‘attached to positions and offices open to all’\textsuperscript{133} (second notion).

The postulate of the first principle relates, inter alia, to political liberty together with the associated rights particularly, freedom of expression, right to free assembly, right to personal liberty, and freedom of thought.\textsuperscript{134} The first notion of the second principle advocates equal distributive justice of wealth and resources in society. In other words, there should be an equal distribution of economic assets except where inequitable distribution would benefit the least advantaged than would have been the case if it were equal distribution. The second notion, by contrast, postulates fair opportunity for all.

This thesis will however not rely on the whole gamut of Rawls theory but primarily be limited to the first notion of the second principle of justice only - ie the difference principle underpinning distributive justice obligation. Rawls theory conceptualises that ‘free and rational persons concerned to further their own interests would accept in an initial position of equality’ (original position); an arrangement that would create associative equality among them.\textsuperscript{135} The theory hypothesises the application of justice ‘behind a veil of


\textsuperscript{133} Rawls, \textit{A Theory of Justice} at 60.

\textsuperscript{134} Ibid., at 61.

\textsuperscript{135} Ibid., at 11.
ignorance”¹³⁶ where all concerned, not knowing their status in life, would ultimately choose the position of equality as underpinning their associative existence.

Rawls difference principle (or principle of distributive justice) is an attempt to construct a theoretical model of redistribution of economic assets in cases of material inequality. Rawls however limited the theory to correction of economic imbalance afflicting the least advantaged within a given political institution. Accordingly, Rawls is satisfied to ‘formulate a reasonable conception of justice for the basic structure of society conceived … as a closed system isolated from other societies.’¹³⁷

Rawls proposition for redistribution obligation has been strongly criticised for ignoring the doctrine of sanctity of property honestly acquired, untainted by any fraud or breach of law.¹³⁸ Indeed, libertarians like Nozick are in no doubt that property honestly acquired by nature; or from transfer; or through rectification of injustice of past acquisition ought to be retained by the possessor in contrast to coercive redistribution of economic assets as advocated by Rawls.¹³⁹ Rawls is equally criticised for failure to set out succinctly the benchmark for classifying the worst off in the society.¹⁴⁰ Despite the above criticisms, Rawls work provided a formidable premise on which global distributive justice can be constructed and justified.

2.4.1 Justification of Distributive Justice in Global Setting

What may seem, arguably, a controversial spot on Rawls supposedly elegant theory of justice is his reluctance to apply it to the international distributive obligation. International setting would have to be guided by different rules, he reasoned. Although Rawls subsequently

¹³⁶ Ibid., at 12.
¹³⁷ Ibid., at 8.
conceded that development aid might be given to underdeveloped regions of the world, he never equated such assistance to national distributive justice which he propounded.\textsuperscript{141}

Irrespective of Rawls domestic conception of distributive justice,\textsuperscript{142} it can be demonstrated that international distributive justice obtains. Indeed, if domestic society could be conceived from the hypothetical original position under the veil of ignorance (as propounded by Rawls), nothing obviates corresponding conception of original position underpinning international setting with consequential application of global distributive justice.\textsuperscript{143} The ‘intuitive’ bottomline is that Rawls was wrong to restrict the scope of principle of distributive justice to a domestic setting; indeed such principles obtain globally.\textsuperscript{144} It might have been argued that since Rawls conception of distributive justice is based on the existence of an overarching national political institution able to effect redistributive obligations, analogous redistributive justice may not obtain under an international context in the absence of a supranational sovereignty.\textsuperscript{145} However, such argument ignores the philosophical premise of distributive justice which is anchored on the realisation of the goal of equality, fairness, and a level playing field. Thus, the reality of global economic interdependence justifies the existence of a universal basic structure for the application of international distributive

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\textsuperscript{142} Rawls, A Theory of Justice at 8. It has been postulated that Rawls reluctance to apply distributive justice to international context might have been based on two implicit grounds: first, Rawls presupposed that distributive justice applies to similarly situated societal basic structure where each person has shared obligations to another. Secondly, he presupposed that international setting lacks this shared basic structure characteristic of domestic societies for distributive justice to be applied. See, Arash Abizadeh, 'Cooperation, Pervasive Impact, and Coercion: On the Scope (Not Site) of Distributive Justice', Philosophy and Public Affairs, 35/4 (2007), 318.
\textsuperscript{143} Beitz, Political Theory and International Relations at 128-29, 51.
\textsuperscript{144} Barry, The Liberal Theory of Justice - a Critical Examination of the Principal Doctrines in a Theory of Justice by John Rawls at 128-33.
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principles. This cosmopolitan version of distributive justice could also be viewed from the perspectives of contractarianism, rights based approach, and society of states.

Broadly speaking, the notion of distributive justice could be conceived as universal or relative; or as noted, relational or non-relational. Both are united on the applicability of distributive justice but differ on the territorial scope of normative application. This plurality of application of distributive justice that allows a dual-dimensional application, nationally and internationally, would better create a balance of interests. This approach evidently recognises two-dimensional application of distributive justice: domestic and global application. Its strength lies on the recognition of the intrinsic features of justice which justify not only national application but also global relevance.

2.4.2 Global Distributive Justice in Investment Context

Global distributive justice has been applied across a broad spectrum of international issues ranging from global economic equality, human rights, trade justice, culture, among others. The domain of global distributive justice is therefore not restricted to the redistribution of world resources to redress economic inequality, but forays out to other aspects of inequality in international relation in the context of the rights-duties matrix. Indeed, nothing precludes the application of the principles of distributive justice in the context of the investor-state rights-duties matrix given its diffuse application in contemporary literature. Arguably, it can be reflected in both the substantive and procedural terms of IIAs.

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Such an outcome would entail redesigning the current IIAs in a manner assigning equal rights and duties to both parties in contrast to contemporary practice characterised by duties of host states to investors and the rights of investor vis-a-vis the host states. Thus, the theory of global distributive justice is not restricted to wealth transfer from capital exporting countries to capital importing countries only. Indeed, it encompasses equally ‘changes in the rules and institutions’ regulating international economic relations.152

Although it can be contended that the application of global distributive justice to balance the rights and duties of parties might be resisted by foreign investors, there is a credible means of obliging them. This could be achieved by mapping out an investment treaty template in a multilateral setting (for a full discussion of the contours of any such a multilateral treaty, see Chapter 3 below), embodying the spirit of distributive justice. This could provide the necessary legal coerciveness. Parties to IIAs would be reminded that they have the freedom to negotiate IIAs in a manner apposite to them. However, they cannot contract out the distributive justice principle that would underpin such a multilateral template. Note that the essence of the application of global distributive justice is not meant to emasculate the rights or interests of investors; rather it is intended to balance the interest of both parties.

2.5 Conclusion

The conceptual undercurrents of investment protection have been the subject of divergent academic postulations. While customary international law grants host state a measure of police powers to regulate for overall public interest, the question of whether there is precondition to its exercise remains. The Harvard Draft Convention on International

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Responsibilities of State for Injuries to Aliens\textsuperscript{153} along with the Restatement (Third) of Foreign Relations of United States\textsuperscript{154} acknowledges that the exercise of such powers is not invalid provided that it is not discriminatory. The Harvard Draft provides additional ground for the validity of state exercise of police powers to the effect that it ought not to amount to a departure from the principles of justice recognised by the principal legal jurisdictions of the world. In a similar vein, Chapter Eleven, Part Five of article 1106(6) NAFTA grants a measure of police powers to the state as well. However, its exercise must not be arbitrary and unjustifiable or constitute a disguised restriction on international trade and investment. Nevertheless, Sornarajah argues that the exercise of police powers requires no precondition for its validity. The implication of this uncertainty filters into whether certain regulatory expropriations are lawful hence non-compensable, or whether all expropriations are unlawful and therefore compensable, though each with varying degrees of compensation, depending on the circumstance. Arguably, the exercise of police powers ordinarily ought not to be qualified with compensation as long as it is not unjustifiably discriminatory.

Although \textit{restitutio in integrum} constitutes the general standard of reparation under customary international as established in \textit{Chorzow Factory Case} and reiterated in Article 35 of ILC Article, compensation remains the prevailing standard in circumstances where reversion to \textit{status quo ante} is impossible. But even where compensation applies divergence as to the standard remains. Despite the fact that developing countries incorporated the Hull standard in a significant number of IIAs, they nonetheless eschew such a standard in a multilateral setting. Similarly, while capital exporting countries favour fair market value or going concern assessment in the configuration of valuation principles, the capital importing countries prefer book value method, since it tends to limit their financial liability.


\textsuperscript{154} See section 712 of Restatement (Third) of Foreign Relations of United States.
It could be argued that the theory of global distributive justice should underpin the investment relation between the capital importing countries and the capital exporting countries to resolve these divergences. The application of the theory of global distributive justice would not only streamline the divergent interests of the parties in this sphere but also embed equality, fairness, and a level playing filed in international economic relation. The validity of this position is reinforced by the postulation of internalisation and eclectic theories that foreign firms reap huge profits as incentive for international investment. In other words, the application of global distributive justice should constitute a trade-off for investment protection. In the following chapter below, the unbalanced substantive terms of IIAs are discussed followed by the application of the global distributive justice to restructure them.
Chapter 3
Investment Protection and Multilateral Regime

3.1 Introduction

This chapter explores the philosophical premise that underpins the conclusion of IIAs, epitomised by BITs, and the unbalanced substantive terms embedded therein. Once in compliance with admission requirements particularly local incorporation, obtaining expatriate quotas, and business permits, the relevant investor can establish business presence in Nigeria. The post admission stage is, however, governed almost always by the provision of the IIAs between the relevant parties. These IIAs are characterised by lopsidedness and inequities to the discomfiture of the developing countries like Nigeria (BITs for instance define the duties of host state and rights of investors only). Although BITs, prima facie, evince equality, nevertheless since investment flow is significantly from the developed to developing countries, the latter almost always constitute the host states, thereby bearing the brunt of any inequitable prescription of the IIAs. Such inequitable substantive terms are illustrated by the rulings in the cases of Alpha Projektholding GMBH v Ukraine;\textsuperscript{155} SGS Societe Generale de Surveillance SA v Philippines;\textsuperscript{156} Compania del Desarrollo de Santa Elena, S.A. v Costa Rica,\textsuperscript{157} pertaining to fair and equitable treatment (FET), umbrella clause, and regulatory expropriation respectively, to mention just a few. Consequently, it is argued that the institution of a Multilateral Treaty on Foreign Investment (MTFI) that would embed equity and fairness through balancing of rights-duties of both parties should be pursued.

The chapter is structured into seven sections. The first section focuses on the trajectories of admission requirements. The second section explores the rationale behind the

\textsuperscript{155} Alpha GMBH v Ukraine, ICSID Case No. ARB/07/16, Award of October 20, 2010, para. 420.
\textsuperscript{156} SGS Societe Generale de Surveillance SA v Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, January 29, 2004, 1-68.
\textsuperscript{157} ICSID Case No. ARB/96/1, Final Award of February 17, 2000, para. 72.
conclusion of IIAs such as the BITs by both the capital exporting countries and capital importing countries, like Nigeria. The third section centres on the relationship between these BITs and the Nigerian law as well as the implication of article 42 of the ICSID Convention. The fourth section examines the core substantive terms of unbalanced BITs regimes, and its detrimental effects to the economic objectives of the host state. The fifth section examines the comparative practices of capital exporting countries amongst themselves. The sixth section the postulate for the institution of MTFI to correct the imbalance characterising investment relation, while the last section concludes.

3.2 Entry and Establishment

Following significant liberalisation of entry and establishment\textsuperscript{158} of foreign investment in Nigeria by the Nigeria Investment Promotion Commission (NIPC) Act of 1995, foreign investors can now invest in virtually all sectors of the economy except the negative lists.\textsuperscript{159} With a maximum crude oil production capacity of 2.5 million barrels per day, Nigeria ranks as Africa's largest oil producing country and the sixth largest producer in the world.\textsuperscript{160} Intending investor must however first and foremost obtain local incorporation of the company.

\textsuperscript{158} The approaches to admission and establishment could be based on, 'investment control model', 'selective liberalization model', 'regional industrialization programme model', 'mutual national treatment model', and 'combined national treatment/most favoured nation treatment model'. For a comprehensive discussion on these see, UNCTAD, 'Admission and Establishment', \textit{UNCTAD Series on Issues in International Investment Agreements} (New York: United Nations, 2002) at 2-14.

\textsuperscript{159} Negative lists include production of arms and ammunition, dealing in narcotic drugs and psychotropic substances; production of military and para-military wears and accoutrement; and such other items as the Federal Executive Council may from time to time determine. See sections 18, 33 of NIPC Act.

3.2.1 Requirement of Local Incorporation

Foreign investor intent on investing in Nigeria must first and foremost secure local incorporation of the company or subsidiary as a separate entity.\textsuperscript{161} Such steps constitute a condition precedent to doing business or exercising the powers of a registered company in Nigeria. Such an action must be completed through the Corporate Affairs Commission – the agency charged with the responsibility of incorporating companies in Nigeria.\textsuperscript{162} A local incorporation can be undertaken through a power of attorney (designed to lapse after relevant incorporation) granted to a Nigerian solicitor acting as an agent of foreign investor. In addition to the incorporation requirement, the foreign subsidiary or branch must equally register with the Nigerian Investment Promotion Commission (NIPC) before commencing business as well as apply for further approvals.\textsuperscript{163}

The implication of the preceding is that where a foreign company sets up operation in Nigeria without complying with the mandatory legal requirement of local incorporation, such a company does not qualify as an incorporated entity with all the relevant rights and privileges of a legal personality under the Nigerian law.\textsuperscript{164} In fact, investment of such a company which has failed to fulfil the national condition precedent for admission would be devoid of protection under international law. Illustrative of the foregoing is the case of \textit{Mihaly International Corporation v Republic of Sri Lanka}.\textsuperscript{165} The claimant in this case

\textsuperscript{161} The obligation to re-incorporate is a by-product of the Companies Act of 1968. See illustrative sections 369 and 370 of Companies Act 1968. For the incorporation documents and procedures as well as the checklist of steps needed to establish new companies with foreign shareholdings in Nigeria see Appendix: Annex I and Annex II respectively.

\textsuperscript{162} Section 54 of CAMA 2004 LFN and section 19(1) NIPC Act. Note that business activities in Nigeria may be carried out in the form of public limited company; private limited company; unlimited liability company; company limited by guarantee; a subsidiary of foreign company; partnership/firm; sole proprietorship; incorporated trustees. See sections 21 – 26 of CAMA 2004; see also, NIPC, 'Procedure for Incorporating a Business Enterprise by a Foreign Investor in Nigeria - the Legal Framework for Business Activities'.

\textsuperscript{163} Such further approvals could be business permits and expatriate quota. See sections 19(2) and 20(1) of NIPC Act.

\textsuperscript{164} Section 54 (2) of CAMA; J Olakunle Orojo, \textit{Company Law and Practice in Nigeria} (2nd edn., London: Sweet and Maxwell, 1984) at 142.

\textsuperscript{165} ICSID Case No. ARB/00/2, award of March 15, 2002.
incurred expenses in a bid to secure a contract for the construction of power station in Sri Lanka, without fulfilling the condition precedent for the establishment of the relevant investment. Rejecting the claimant argument for the existence of investment, the tribunal maintained that the claimant failed to establish evidence of admission of such investment and therefore such expenditures did not qualify for protection.

The requirement of local incorporation has, however, been faulted on the ground that it increases the transaction costs of doing business in Nigeria, and runs contrary to contemporary way of doing business through the establishment of a branch office. Certainly, foreign companies can set up operations in such industrial countries as the UK and EU merely by establishment of a branch office. Further legislations governing overseas business admission, establishment and operations in the UK can be found viz: the Overseas Companies Regulations 2009/1801; the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009/1917; the Overseas Companies (Execution of Documents and Registration of Charges) (Amendment) Regulations 2011.

However, the establishment of the foregoing branch office in these industrial countries does not exempt the affected foreign branch company from the onerous compulsory disclosure requirements and the duty to deliver returns legally incumbent on national publicly quoted companies. Besides, a branch office remains hardly apposite for operation of large

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171 Section 1046 of UK Companies Act 2006 provides, inter alia, the powers of the Secretary of state to make regulations requiring ‘overseas company’ to register particulars if the company sets up a branch in the UK.
scale investment particularly oil drilling and exploration as is the case in Nigeria. Nonetheless, where the relevant foreign company business intent in Nigeria does not involve substantial projects, arguably, it would be pertinent to make a provision allowing such a company to engage in business merely by establishing a branch office.

In certain circumstances however, a foreign company may be exempted from the requirement of local incorporation. In that respect, the relevant company would be required to comply with the provision of section 56 of Company and Allied Matters Act (CAMA) 2004, by applying to the National Council of Ministers for exemption. The National Council of Minister reserves the discretion to grant such an exemption subject to conditions it deems fit. The status of such exempted company shall be regarded as unregistered and the provision of the law applicable to unregistered companies applies to it mutatis mutandis.

Furthermore, foreign companies may, as distinct from local incorporation or exemption, set up representative offices in Nigeria. Nonetheless, such a representative office cannot conduct business or conclude any contracts and/or negotiate letters of credit for the purpose of the relevant business. Such an office constitutes only a liaison office and must be registered with the Corporate Affairs Commission (CAC). On securing local incorporation, the prospective foreign investor is expected to apply for business and residence permits. Sections 1047-1059 list out the specificity of particulars as well as further obligation to disclosure and deliver returns. Section I (article 2-6), section II (article 7-11) and section III of Eleventh Company Law Directive list out corresponding duty of disclosure and duty to deliver returns incumbent on foreign branch. The above suggestion will require a radical revision of the current Investment law since foreign companies cannot legally operate in Nigeria through the establishment of office. See section 56 of CAMA for the categories of companies that may be exempted as well as the application procedure for exemption.
3.2.2 Permits and Work Requirements

The investor, depending on the nature of the business, can apply for a business visa\textsuperscript{175} with duration of 90 days.\textsuperscript{176} The investor must however demonstrate sufficient funds for maintenance, a valid return ticket, and a letter of invitation from the companies indicating the reason for the travel, and acceptance of immigration responsibilities.\textsuperscript{177} Experience, however, indicates that obtaining a business visa is cumbersome and oftentimes restrictive undermining the drive to attract foreign capital. Investors providing such ‘specialized skilled services’ such as repairs and after sales installations must apply for temporary work permits instead of a business visa lapsing less than three months.\textsuperscript{178}

It must be noted that the transient nature of the duration of the regime of business visa and temporary work permits disqualifies it as having the characteristics of lasting interest to be apprehended by the definition of foreign investment under the IMF Balance of Payment Manual. Thus, for foreign investors properly so called, the proper procedure is to apply for Business Permits (BP) as well as Expatriate Quota (EQ). It is the responsibility of the Federal Ministry of Internal Affairs to grant Expatriate Quota on discretionary basis to companies’ intent on investing in Nigeria.

Expatriates on entering the country must regularise the Subject to Regularisation Visa (STR) to acquire a ‘Combined Expatriate Residence Permit and Alien Card’ (CERPAC).\textsuperscript{179}

\textsuperscript{175} There are three types of visas a foreigner may apply for: ordinary visa, diplomatic visa, and Gratis Courtesy visa. See NIPC, 'Immigration Procedure and Requirements'. See further Appendix: Annex III for immigration procedures and requirements.

\textsuperscript{176} The business visa is only meant for investors coming to Nigeria for business discussion and therefore does not entitle the relevant investor to employment or remuneration.

\textsuperscript{177} Nigeria Immigration Service, 'Business Visa/ Entry Permit'. See also Nigeria Immigration Service, 'Explanatory Note'.

\textsuperscript{178} Nigeria Immigration Service, 'Temporary Work Permit'.

\textsuperscript{179} CERPAC is meant for an expatriate residing and working in Nigeria and lasts for two years, see, Nigeria Immigration Service, 'CERPAC'. See also section 8(1) of Immigration Act 1990 (as amended) which provides, inter alia, that a non-citizen of Nigeria may not take employment, except with federal or state government, without the prior consent of the Comptroller-General of Immigration. Section 33 of the same Act states the application to the Comptroller-General must indicate the existence of expatriate quota vacancy and acceptance of immigration requirements.
Alternatively, the expatriate can obtain a Permanent until Reviewed Status available to owners/CEOs of foreign companies subject to employment of a Nigerian as a deputy CEO. Economic Community of West African States (ECOWAS) nationals are however exempted from the EQ requirements but must still be registered.

The prospective foreign investor on fulfilling immigration requirements and incorporating the relevant subsidiary must thereafter apply to NIPC for Certificate of Business Permit and Expatriate Quota, including pioneer status if qualified.

NIPC shall register the relevant company within fourteen working days of receipt of the completed and submitted application for the registration, ‘if it is satisfied that all relevant documents have been duly completed and submitted’, or ‘otherwise advise the applicant accordingly’. Arguably, the foregoing obligation is discretionary. Nonetheless, such discretion is overridden once a relevant application forms is duly submitted and completed in the appropriate manner. In fact, a foreign enterprise reserves the right to apply to municipal court for an order of mandamus compelling the NIPC to effect registration where relevant documents have been duly completed and submitted but still refused registration.

Additional conceptual issue arising from the aforementioned is whether the NIPC would be liable for negligent advice in the event that a foreign investor, acting under the advice, incurs liability. It is arguable if the NIPC gives such an advice with the intention to

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181 Application is to NIPC through Form 1, in conjunction with the Ministry of Internal Affairs. For the list of required documents, see, NIPC, ‘Foreign Investment Requirements and Protections’.
182 The Industrial Development (Income Tax Relief) Act of 1971 ascribed certain service and manufacturing companies as Pioneer Status. Such companies enjoy 5 years tax break. NIPC facilitates the grant of such Pioneer Status.
183 See section 20(2) NIPC Act. Section 4 NIPC Act sets out in broad terms the statutory responsibilities of the Commission which generally encompass the duty to, inter alia, ‘encourage, promote and coordinate investment in the Nigerian economy’. By section 5 NIPC Act, the Commission shall, in addition to the foregoing functions, have power to do any other things required to be done by the NIPC Act or any other enactment. Beside its statutory responsibilities, the Commission negotiates other incentives on behalf of investing companies particularly Pioneer Status.
184 See section 20(2) NIPC Act. Section 1(2) NIPC Act states that the Commission is a ‘body corporate, with perpetual succession and a common seal’ that may ‘sue and be sued in its corporate name’.

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create a legal relation with the relevant foreign investor. Indeed, such an advice could be said to have been given without legal liability attached whatsoever, and the investor is at liberty to take or leave it.

In addition to registration, the investor must apply for Expatriate Quota. Such application must disclose existence of skill deficit in the relevant area in Nigeria; and a proposed training programme for a Nigerian understudy to take over from the foreigners subsequently. However, the requirement of the Nigerian understudy has been criticised by UNCTAD.

UNCTAD recommends that the country jettison the current understudy approach in favour of the ‘Extended EQ Scheme’ entailing the assessment of industry-wide training performance ‘to ensure that expatriate hire goes hand in hand with local skills development’. There is hardly any doubt that this approach will synchronise the grant of EQ with the company-wide skill development. Nonetheless, as Nigeria is a country rife with executive corruption and poor implementation of policies, it is doubtful if the ‘company-wide training performance’ approach will be implemented by the relevant industries over the current approach.

Although national law regulates admission of foreign investment, the operation of other substantive terms is nevertheless within the proper purview of IIAs particularly BITs. The discussion of this forms the focus of the next section.

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185 The accompaniments of the application include, inter alia, bio-data of the expatriate particularly, names, addresses, nationalities, job designations, academic as well as working experience.
186 UNCTAD, 'Investment Policy Review - Nigeria', at 44.
187 Ibid., at 45.
3.3 Investment Treaties as Mechanisms for Protection

BITs have become the prevailing international legal framework for the protection of foreign investments since the first BIT was signed between West Germany and Pakistan in 1959. The currency of BITs becomes necessary in absence of a multilateral investment treaty. The situation is not tempered by customary international law which does not evince sufficient precision to regulate foreign investment. BITs now embody far reaching protective obligations assumed by capital importing countries more than what was ever contemplated by customary international law, which was never accepted by capital importing countries. According to UNCTAD, more than 2500 BITs have been concluded not only between developed countries and developing countries, but also among developing countries themselves.

Although a significant number of BITs contain virtually identical standard provisions - classified as either absolute or relative standard - the status of these terms under

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194 While absolute standards of treatment encompass such terms as FET, full protection and security, expropriation, and currency transfers, since the terms are non-contingent, relative standards relate to such terms as national treatment and most favoured nation clause (MFN) regarded as contingent standard.
international law remains doubtful. Nevertheless, it has been argued that the preceding identical characteristics equate BITs to customary international law of foreign investment. \(^{195}\) On the other hand, others justify such similarly-worded BITs terms as multilaterising investment protection; \(^{196}\) or evidential of global administrative law or global governance for providing authoritative administrative law review-like state actions. \(^{197}\) It is farcical however to insist that mere similar wording of terms in IIAs provides justification for existence of a multilateral regime or custom. Indeed, the multitude of BITs universe amount to no more than uncoordinated and private-ordered treaties tailored to contracting parties’ preferences, but lacking the attributes of a truly multilateral regime or custom. \(^{198}\) In the same vein, crystallisation of a custom is not a ‘mechanical exercise based on mere quantitative considerations’. \(^{199}\) Certainly, ‘the mere prevalence of similarly worded treaty language, however numerous, will not, without more,’ amount to a ‘binding obligation in custom.’ \(^{200}\) Consequently, BITs are mere ‘*lex specialis*’ deriving its validity from the parties thereto only and therefore not tantamount to customary international law. \(^{201}\) The current BITs universe cannot particularly acquire the character of custom given that they lack the two constitutive

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elements of a custom: consistent state practice and *opinio juris* of states.²⁰² The reality seems to be that as the number of BITs continue to proliferate, it manifests identical characteristics in certain provisions which invariably sediment into potential custom and seem less and less like mere *lex specialis*.²⁰³

Irrespective of the status of BITs, developing countries consider its conclusion as the most credible mechanism for inducing inflow of foreign investment from the developed countries. According to UNCTAD, the global inflows of foreign direct investment (FDI) in 2010 was in the region of more than $1.2 trillion with a projected rise in 2011 to $1.3 – 1.5 trillion, and even a higher prospect in 2012.²⁰⁴ Of these percentages, developing countries attracted more than half of the global (FDI) inflows from the developed countries.²⁰⁵ A significant volume of these foreign investments are governed by the provisions of the IIAs. Being part of these developing countries, Nigeria is by no means unaffected by the current BITs tide. UNCTAD report indicates that as of June 1, 2011, Nigeria has concluded twenty three bilateral investment treaties.²⁰⁶

Although capital importing countries and in this context Nigeria increasingly adopt BITs, it does not seem there is empirical certainty on its utility. For instance, some empirical

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²⁰⁵ *Ibid., at 6-7.*

²⁰⁶ *Nigeria first signed BIT with France on February 27, 1990 but the BIT with UK was the first to come into force among all others on December 11, 1990. For the details and a list of BITs concluded by Nigeria, see UNCTAD, 'Bilateral Investment Treaties, Country-Specific Lists of BITs'.*
researches suggest that BITs have a tendency to promote and protect foreign investments. Subsequent empirical research, however, seems to find little or no correlation between investment decisions and the existence of BITs. In fact, the determinants of inward flow of foreign investments are influenced largely by macro-economic forces (such as exchange rate volatility, inconvertibility of currency, growth in the economy), size of markets, availability of natural resources, existence of viable infrastructure and institutions, political stability, quality of labour, among other factors. Similar empirical findings on the determinants of inflow of foreign investment to Nigeria arrived at the same conclusion. Certainly, BITs can only act as a complement not as a substitute to good regulatory environment of the host states.

The implication of the above findings is that the existence of the BITs does not, *ipso facto*, induce inflow of foreign investment. Arguably, the prospective foreign investors still undertake an overall assessment of the economic, political, legal and other institutional capabilities of the host state before arriving at an investment decision. This by no means entails that BITs are totally devoid of any value. Indeed, BITs constitute a formidable framework for investment protection; and its conclusion underlines favourable investment

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207 Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?', *World Development*, 33 (2005), 1582.
climate of the capital importer.\textsuperscript{212} As underscored by Dolzer, the mere conclusion of BITs by capital importing countries constitutes a powerful ‘signal’ to other capital exporting countries that the relevant country is not only conducive to foreign investment, but is equally disposed to accord adequate protection to foreign investment.\textsuperscript{213}

\textbf{3.3.1 Developing versus Developed Countries Perspectives}

From developing countries perspective, BITs constitute a necessary mechanism to lure the much needed foreign capital to stimulate stagnant economies.\textsuperscript{214} There is no doubt that a properly harnessed foreign investment constitutes a powerful economic boost to the recipient economy. This may happen through, inter alia, increased inward flow of foreign capital to under developed sectors of the economy; employment generation; technological spillovers; and foreign exchange from exports.\textsuperscript{215} In the case of Nigeria in particular, empirical research indicates that the inward flow of foreign investment is positively correlated with the growth of the Nigeria economy.\textsuperscript{216} Earlier research, however, found less dramatic linkage between foreign investment and the Nigeria economy.\textsuperscript{217} The lack of linkages does not, however, detract from the findings of a positive correlation of inward flow of foreign capital to the rest of the economy.

From the developed countries perspective, the existence of BITs has become the most effective vehicle to bind the host states to the protection of not only the prospective

\textsuperscript{212} Todd Allee and Clint Peinhardt, 'Contingent Credibility: The Reputational Effects of Investment Treaty Disputes on Foreign Direct Investment', (2008), 2-3 (arguing that the tendency to breach BIT constitutes a negative reputational effect capable of scaring away potential foreign investors).

\textsuperscript{213} Stevens, \textit{Bilateral Investment Treaties} at 12.

\textsuperscript{214} UNCTAD, 'Bilateral Investment Treaties and Their Relevance to a Possible Multilateral Framework on Investment: Issues and Questions', \textit{Note by the UNCTAD Secretariat} (1997), 7.


investment but also existing investment. Indeed, foreign investors resort to the signing of BITs to extract ‘credible commitments’ from the host states to be under the jurisdiction of the international arbitral institutions apparently governed by international law. The implication of this is that BITs introduce transparency in investment relations and limit the tendency of the host state to resort to expropriation as well as the breach of other terms of the investment treaty. The legal obligation replicated by the following scenario has been likened to tying the legislative and executive discretion of the host states.

3.3.2 Unequal Bargaining

Unequal bargaining power ensures the perpetuation of the imposition of these BITs protective terms on the capital importing countries by the capital exporting countries. Capital exporting countries prepare model BITs on ‘take it or leave’ it basis, knowing the developing countries are desperate to attract foreign capital. Consequently, there is little or no room for negotiating the terms of the BITs by the capital importing countries which may give room for the variation of the crystallised standard terms. However, BITs do not take away the right of the host state to regulate entry and establishment of foreign investment. Similarly, the text of BITs embodies the notion of equality reflected in national treatment, MFN, and non-discrimination provisions and generally speaking, is not skewed to favour capital exporters. Nonetheless, foreign investment usually flows from the developed countries to the

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220 See Alpha GMBH v Ukraine, ICSID Case No. ARB/07/16, Award of October 20, 2010, para. 420 at 147.
developing countries (this discourse recognises the emerging trends of reverse flow of foreign investment from the developing countries to developed countries, but is concentrating on the traditional flow of foreign investment, given that greater volumes of investment still flow from developed to developing countries).\(^\text{224}\) The implication of the foregoing is that developing countries almost always bear the brunt of the harsh prescriptions of most BITs.

Although BITs seem to have as their goal the promotion and protection of foreign investments between the contracting states,\(^\text{225}\) the texts of BITs, arguably, pander significantly more to the protection of the investment of the capital exporting countries than the promotion of investment in capital importing countries. The preamble to most BITs does, as a matter of fact, state economic cooperation and development in the host state as the goal of conclusion of the agreement, but preambles do not seem to create any legally binding rights and obligations.\(^\text{226}\) Similarly, the capital exporting countries are not under any legal obligation to promote investment in the host states by way of mandating their nationals to invest in the host countries.\(^\text{227}\) Thus, it could be argued then that the philosophical underpinning of BITs is essentially the protection of economic interests of the capital exporters with no obligation on the foreign investor to contribute to the economy of the host state.

Against this backdrop, it has been acknowledged that more elaborate investment promotion provisions ought to be incorporated into investment agreements rather than the current scanty provision characterising investment relations between capital exporting

\(^{224}\) UNCTAD, 'World Investment Report: Overview', at 1.

\(^{225}\) UNCTAD, 'Bilateral Investment Treaties and Their Relevance to a Possible Multilateral Framework on Investment: Issues and Questions', at 7.

\(^{226}\) The relevance of a preamble lies in the fact that it forms part of the context of an agreement in accordance with article 31 of the VCLT. See UNCTAD, 'Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking', at 3.

\(^{227}\) Ibid., at 26.
countries and capital importing countries. A graphic example is for the investment treaties
to acknowledge that,

... a developing country commitment to improve transparency or to set up an
investment promotion agency could be made contingent on the prior provision of
technical assistance by the home country [developed country to developing
countries].

UNCTAD outlines further the merits and demerits of incorporating such a commitment.
Firstly, a commitment by the home country (ie of foreign investor) to facilitate investment in
the host country could give the former a competitive advantage in a scramble for foreign
investment among capital exporters. Secondly, it could enable the host country to channel
investment to the areas of ‘special interest.’ The flip side however is that such an obligation
to promote investment may be considered as an additional layer of burden on the part of the
home state (ie the developed country), constituting a disincentive to accept such a scenario.
Moreover, the home country may be already satisfied with the current predominant
investment protection provisions dotting IIAs and therefore, may be disinclined to accept
changes thereto.

While the above propositions of the UNCTAD may constitute a step in the right
direction, they ought to be supplemented with specific and/or positive duties of foreign
investors. In other words, investment agreements should go beyond hortatory statement to
promote investment, as noted by UNCTAD above, and incorporate a roadmap of positive
obligations assumed by foreign investors to contribute to the economic development of the
host state. A classical instance of achieving such a balance is to incorporate both the
substantive duties and procedural rights of both the foreign investor and that of the host
state in IIAs. For instance, a BIT could incorporate provisions on obligations of a foreign

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228 UNCTAD, 'Investment Promotion Provisions in International Investment Agreements', UNCTAD Series on
229 Ibid., at 70.
investor to the host state such as the duty to, inter alia, facilitate skill acquisition, blueprint of technological transfer, and sustainable investment. A similar scenario obtains in certain agreements concluded by the EU which incorporate collaboration on ‘transfer of technology between the Union and the third party.’ The protection of foreign investments could be made contingent on compliance by the foreign investor with the above propositions.

The merits of foregoing balanced normative framework are manifold. Firstly, it will constitute a manifestation of equity and fairness on the part of both parties. Secondly, suing foreign investors for breaches may facilitate the crystallisation of the corresponding duties of foreign investors through arbitral jurisprudence (in similar vein as there are current duties of host states to foreign investors). The implication of such crystallisation is that it may later constitute an authoritative evidence of custom, thereby being regarded as obligatory by contracting parties. Most importantly, the tenets of global distributive justice demand that inequality (both institutional and normative) in international relation be redressed. As noted, demand for global distributive justice is not restricted to wealth transfer from the capital exporting countries to capital importing countries; but encompasses ‘changes in the rules and institutions’ regulating international economic relations. Certainly, such a reconception of the spirit of IIAs therefore accords with the abiding equality and justice principle of the theory of global distributive justice. Balancing of investment relationship is further justified by the flip side of foreign investment which has been largely ignored in the extant literature.

231 Nardin, Law, Morality, and the Relations of States at 268.
3.3.3 The Flip Side

Writers have largely ignored the positive impact of foreign investment on foreign companies, concentrating instead on its effects on the economy of the host states. For instance, there is hardly any empirical research on the positive impact of foreign investment on the foreign investor in terms of, inter alia, the quantum of financial returns. This may be due to the reluctance of such foreign investors to disclose such largesse for obvious reason of possible backlash from the host country. However, it can be argued that were an empirical research to be undertaken on such cost-benefit margin, it would be discovered that foreign companies profit to such a great extent that they may benefit even more than the host state.\textsuperscript{232} Foreign investors hardly put in their capital where there is little or no prospect of reaping huge dividend as the relevant companies were not set up for charitable purposes.

The foregoing position is accentuated by the theory of internalisation and eclectic theory of foreign direct investment widely regarded as the most valid theories of why firms engage in foreign direct investment.\textsuperscript{233} Both theories recognise that firms invest overseas, instead of exporting or licensing, to internalise the ownership advantages, the overall endpoint being to minimise transaction costs and maximise profits.\textsuperscript{234} This lends credence to the necessity for balanced IIAs obligations as a trade-off for the host state’s obligation to protect foreign investment.\textsuperscript{235} Indeed, investment tribunals should not only recognise the balancing of contending interest but also take account of interconnections characterising investment treaties with other international treaties particularly the international human

\textsuperscript{232} Sornarajah, \textit{The International Law on Foreign Investment} at 49-50.
\textsuperscript{233} Rugman, 'Internalization Is Still a General Theory of Foreign Direct Investment', 574; Dunning, 'The Eclectic Paradigm as Envelope for Economic and Business Theories of MNE Activity', 163-64.
\textsuperscript{234} Ibid.
\textsuperscript{235} In chapter six below, it is contended further that the regimes of performance requirement and responsible investment are justified as a trade-off for economic benefits of foreign investment to IOCs given the theories of internalisation and eclectic paradigm.
rights treaties and international environmental treaties necessary for sustainable development while ruling on investment issues.\textsuperscript{236}

It might be contended in some quarters that foreign investors would hardly assume such obligations. Instead, they would have recourse to a country with less stringent regulatory framework. This contention is, however, countered by the fact that any articulation and incorporation of such investor-host state duties ought to be coordinated at a multilateral level, potentially through the auspices of the UN.\textsuperscript{237} The framework of the UN could serve as a veritable platform for providing a benchmark and/or template of investment treaties with non-derogable\textsuperscript{238} core provisions. Parties to investment treaties would be free to customise their investment treaties to their needs and interests provided that they do not contravene the non-derogable provisions of the multilateral template.

Nigeria as part of the capital importing countries would be in a unique position to reap the benefit that would underpin such a restructured investment regime given the strategic nature of its oil and gas industry. However, that depends on the relationship between IIAs and Nigerian laws the analysis of which forms the focus of next section.

3.4 Status of International Investment Agreements

3.4.1 Ratification

The legal implication of BITs \textit{vis a vis} the municipal law calls for a closer analysis, given that treaties entered into by Nigeria are not self-executing. According to section 12(1) of the 1999 Constitution, no treaties entered into by Nigeria acquire the force of law except if ratified by the National Assembly. Similarly, Section 12 (2) of the 1999 Constitution empowers the


\textsuperscript{237} In depth analysis of such multilateral effort is provided hereunder.

\textsuperscript{238} Non-derogable provisions should include the afore-mentioned duties of the foreign investor without prejudice to investment protection.
National Assembly to make law for the federation or any part thereof for the purpose of implementing a treaty. It is settled that once a BIT is ratified by the National Assembly, a foreign investor acquires the right to sue not only under international law but also under Nigeria law particularly in Nigeria courts. However, where an investment treaty entered into by Nigeria is not ratified by the National Assembly, the rights of foreign investors become doubtful. It could be argued that such unratified investment treaties enjoy enforcement under international law, given that article 2 of the Vienna Convention on the Law of Treaties (VCLT) stipulates, inter alia, that a treaty entered into between two states is governed by international law. Equally, article 27 of the VCLT provides that states may not rely on their internal laws (in this case section 12 of the 1999 Constitution) as a justification to evade international treaty commitments.\(^{239}\) The implication of these provisions is that a prospective foreign investor may seek an available forum outside Nigeria to sue the latter in the event of investment disputes.

However, such foreign investors do not have the *locus standi* to sue in Nigeria courts on the basis of unratified BIT, since such unratified treaties do not form part of the corpus of Nigeria law. The preceding scenario by no means deprives Nigeria courts of the jurisdiction over the infraction of other municipal laws committed by the foreign investors.

### 3.4.2 Article 42(1) of ICSID

A different conclusion obtains however with regard to the question of the law applicable in investment disputes under the jurisdiction of ICSID to which Nigeria is a party. For instance, all BITs entered into by Nigeria elected the facility of ICSID for the settlement of investment disputes that may arise.\(^{240}\) The pertinent question in the event of investment disputes in which

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\(^{239}\) See also article 32 of the ILC Articles on State Responsibility.  
\(^{240}\) See UNCTAD, *Bilateral Investment Treaties, Country-Specific Lists of BITs*. 

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Nigeria is a party would be - which law would be applicable? The preliminary answer to the foregoing would first and foremost be located in the text of the relevant investment agreement. This brings the relevance of article 42 of the ICSID Convention into perspective.

The substance of article 42(1) is that tribunals,

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\text{shall decide dispute in accordance with such rules of law as may be agreed by the parties [first arm]. In absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable [second arm].}\]

\((\text{Emphasis added})\).

The text of the preceding article 42(1) might look innocuous and straightforward but far from it. In the main, the first arm of the provision appears to defer to party autonomy to contract which is well recognised in investment contracts. Certain basic approaches are discernible from BITs practice arising from party autonomy: some BITs provide that dispute shall be determined in accordance with the treaty itself. Others provide that the applicable law in the event of a dispute shall be the treaty (BIT) in consonance with international law. Still for others, the applicable rules are the treaty, the principles of international law, and the law of the host state.

Unlike the first arm of article 42, the controversial scenario however appears to be the circumstances where BITs omit the choice of applicable law as envisaged by the second arm of article 42(1) of the ICSID. There would be little or no difficulty where the applicable law can be inferred from the parties’ pleadings. But where no inference can reasonably be

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241 The rules of international law might not be different from the sources of law as embodied in article 38(1) of the Statute of the International Court of Justice.


244 The tribunal inferred the existence of such choice of law clause from the pleadings of the parties in the first BIT case to proceed to merits award under the ICSID: Asian Agricultural Products Limited v Democratic Socialist
drawn by such an omission, the situation becomes arguable. For instance, the BIT between Nigeria and the United Kingdom leaves open the applicable law in the event of disputes.\textsuperscript{245} Article 9(5) of that treaty merely states, inter alia, that the tribunal shall determine its own procedure. The question in this circumstance is - would the applicable law be Nigeria law (host state); or home state law (UK); or international law; or a combination of regimes?

The uncertainty underpinning this kind of omission has long been acknowledged.\textsuperscript{246} Despite this, it could be discerned that the rules of international law become relevant only where the host state law is 'not well adapted to settlement of the dispute or in case of flagrant violation of the law of nations.'\textsuperscript{247} In other words, as long as the host state law does not violate the crystallised principles of international law particularly the principles of \textit{pacta sunt servanda} and peremptory norms of international law,\textsuperscript{248} the host state law remains the applicable law in default of choice of law.\textsuperscript{249} The interpretation derivable from the foregoing arguably entails that the Nigerian law will be resorted to in accordance with the second arm of article 42(1) - requiring 'the application of the Contracting host state’s law’ - including its rules on the conflict of laws- ‘and such rules of international law as may be applicable’. This would apparently confine the role of rules of international law to correctional and supplemental role. This position appears to be bolstered by the case of \textit{Klockner v Republic of Cameroon}, where the tribunal noted that the role of international law is both complementary

\textsuperscript{\textit{Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award of the Tribunal, June 27, 1990, para. 24 at 534. See also Wena Hotels Limited v Republic of Egypt, ICSID Case No. ARB/98/4, Award of December 8, 200, para. 79.}}
\textsuperscript{245} See UNCTAD, ‘Bilateral Investment Treaties, Country-Specific Lists of BITs’.
\textsuperscript{248} Article 53 of VCLT defines peremptory norms \textit{or jus cogens} as a norm accepted and recognised by comity of nations as a whole from which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character. Examples would include piracy, genocide, and slave trade, among others.
(in the sense of filling the lacuna that might exist in the contracting state’s law) and corrective (ie overrides the contracting host state laws in event of conflict between the two).\textsuperscript{250}

Although ICSID rulings do not have precedential value, the \textit{travaux preparatoires} of ICSID and the subsequent commentaries appear to acknowledge the foregoing dual role.\textsuperscript{251} The implication of this seems to be that the host state law remains the applicable law - in default of the first arm of the provision - unless the complementary and corrective roles of international law are necessitated. Mere lacuna in the host state law to provide for a particular remedy together with mere inconsistencies that underline the state law vis a vis international law does not \textit{ipso facto} constitute a justifiable ground for automatic invocation of the supplemental and corrective role of international law.\textsuperscript{252} In other words, a proof of violation of peremptory norms of international law (by the host state law) would be required to trigger the supplemental and corrective role (of international law) under article 42(1).

However, it does not seem that there is a consistent approach in this jurisprudential sphere. Indeed, other tribunals have time and again ignored the contracting host states’ law in preference to international law even when the complementary and corrective role of international law is not necessitated. Illustrative of this scenario was the case of \textit{MTD Equity Sdn. Bhd. & MTD Chile SA. v Republic of Chile,}\textsuperscript{253} where the tribunal established that mere existence of the BIT implied that the merits of the case would be governed by international law. Similarly, in the case of \textit{ADC v Hungary,}\textsuperscript{254} the relevant BIT omitted a choice of law clause. The arbitral tribunal established that an agreement under the BIT to arbitrate entailed

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\item[\textsuperscript{250}] Klockner v Republic of Cameroon, ICSID Case No. ARB/81/2, Decision of Ad hoc Committee on Annulment Proceeding, May 03, 1985, para. 69 at 112.
\item[\textsuperscript{251}] Christoph H Schreuer, \textit{The ICSID Convention: A Commentary} (2nd edn.; Cambridge: Cambridge University Press, 2009) at 617-18. See also article 32 of VCLT on the supplementary role of \textit{travaux preparatoires}.
\item[\textsuperscript{252}] Reisman, 'The Regime for \textit{Lacunae} in the ICSID Choice of Law Provision and the Question of Its Threshold', 374-75.
\item[\textsuperscript{253}] MTD Equity Sdn. Bhd. & Chile S.A. v Chile, ICSID Case No. ARB/01/7, Award of May 25, 2004; 44 I.L.M. 91 ICSID.
\item[\textsuperscript{254}] ADC v Hungary, ICSID Case No. ARB/03/16, Award of October 2, 2006, para. 290; Middle East Cement v Egypt, ICSID Case No. ARB/99/6, Award of April 12, 2002, para 86.
\end{itemize}
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that the BIT was the applicable law which, by implication, meant that international law governed the disputes. This ruling clearly contradicts the second arm of article 42(1) that stipulates the application of host state law in absence of the governing law. A similar scenario was replicated in *LG&E v Argentina*.\(^{255}\) The arbitral tribunal did not literally apply international law as the implicit choice of law embedded in the BIT after its discussion. However, the conclusion of the tribunal on the applicable law lent credence to the foregoing position. According to the tribunal, it would first apply the BIT as the choice of law, but in absence of clear provision therein, then general international law would be resorted to, and finally, Argentine municipal law.

It is unclear why arbitral tribunals, time and again, gloss over the application of the contracting states’ law in absence of the choice of law clause, in favour of international law. One possible explanation for this approach might be that arbitral tribunals’ distrust for contracting host state laws as being below the standard required by international law.\(^{256}\) This is more so given that a significant number of contracting host states parties to BITs are developing countries whose laws are almost always viewed with suspicion by foreign investors. So, naturally the spill over effect would influence the arbitral tribunals’ interpretation of the provision of the Convention. Whether or not the preceding postulation captures the rationale for such non-adherence to the text of the Convention is open to doubts. Nevertheless, even if the preceding explanation reflects the reality, adherence to it clearly violates the text of article 42 which does not characterise or classify the standard of the state law. As long as the international law is not deployed to play a supplemental and corrective

\(^{255}\) *LG&E v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, para 85.

role, its application by arbitral tribunal for any other reason would amount to excess of power.  

Parties to BITs that elect the facility of ICSID as a forum for the settlement of any investment disputes envisage procedural certainty. Part of this certainty includes application of a host states’ law in absence of a choice of law clause, in accordance with the provision of article 42(1) of the Convention. Further examination of the investment treaty terms hereunder inserted in BITs would illustrate to a greater degree the unbalanced normative disposition of substantive terms.

3.5 Substantive Terms

The potential outcome of litigating the terms of BITs concluded by Nigeria is open to varied permutations since none of such BITs has been litigated before the ICSID or any other forum. Examination of the trajectories of these IIAs forms the focus of this section. Substantive terms include the provision on definition of investment; fair and equitable treatment standard (FET); protection and security; non-discrimination; umbrella clause; national treatment;

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257 Note that in his post-ICSID Convention analytical and legislative history lecture, Dr Aron Broches, the Chairman of ICSID drafting committee, clarified on grounds of application of international law under article 42(1) viz - (i) where parties agreed on the applicability of international law (ii) where the state law stipulates its application; (iii) where the subject matter is automatically regulated under international law (treaty between two state parties to dispute); (iv) where the state law violates jus cogens (corrective role). See Aaron Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, in Reisman, the Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold', 379-80. See also article 52(1) (b) ICSID Convention on excess of power as one of the grounds for the annulment of award.

258 Note that Article 2 of the VCLT stipulates that a treaty is an agreement concluded between two states governed by international law. See also Banifatemi, 'The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process', 399 (arguing that international law should constitutes an overarching legal framework overriding host state law in the context of application of article 42(1) of the ICSID Convention).

259 The procedural terms are dealt with in chapter five below.

MFN; expropriation; repatriation of capital, among others depending on the nature of the treaty.\textsuperscript{261}

\subsection*{3.5.1 Burdensome Nature of Protected Interests}

Although the determinants of existence of investment are the relevant definitional provision of investment treaties, IMF Balance of Payment Manual equally presents a guiding template.\textsuperscript{262} Long term interest embodied in the IMF definition contrasts markedly with open-ended and asset-based definitions of investment and investor embodied in a significant number of BITs.\textsuperscript{263} A prototype of this open-ended and asset-based definition is the 2012 US Model BIT that covers virtually everything of economic value.\textsuperscript{264} Similarly, a significant number of BITs concluded by Nigeria incorporate these broad and open-ended definitions.\textsuperscript{265} For instance, article 1(a) of the Nigeria BIT with the United Kingdom provides, inter alia, that ‘invest ment means \textit{every kind of asset} and in particular, \textit{though not exclusively}, includes...’ \textbf{(emphasis added) (punctuation omitted)}. It is unclear whether the preceding broad-based definition overrides the corresponding but narrow definition embodied in NIPC or not.\textsuperscript{266} Arguably, the latter definition ought to supersede the former,\textsuperscript{267} but the arbitral tribunal might be more disposed to adopting the former.\textsuperscript{268}

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\textsuperscript{261} Note that BIT terms analysed here are those not only relevant in the circumstance but also most controversial.
\textsuperscript{262} IMF, 'Balance of Payments and International Investment Position Manual', at 100.
\textsuperscript{263} Aaken, 'Fragmentation of International Law: The Case of International Investment Protection', 6. Though determining the nationality of natural persons may not be controversial, it is usually not easy locating the nationality of a juridical entity. Nationality of a juridical person may be determined by place of incorporation, by seat or control model. However, in \textit{Barcelona Traction Light and Power Company Limited (Belgium v Spain)} (1970), \textit{ICJ Reports} 3, the ICJ ruled that the place of incorporation determines nationality of a juridical person.
\textsuperscript{265} See UNCTAD, 'Bilateral Investment Treaties, Country-Specific Lists of BITs'.
\textsuperscript{266} Section 31 of NIPC Act. Note that for an investment dispute pertaining to a breach of investment treaty to be entertained by the arbitral tribunals, the investment to which the dispute relates must pass a double-barrelled test (double keyhole approach): first, the investment must be coterminous with its definition in the provision of the relevant treaty between the parties. Secondly, the meaning of the investment in the governing
The broad definition of the preceding nature may be beneficial to foreign investors since it covers broad equivalent of investment, consequently obviating potential future renegotiation. However, it could, on the contrary, clip the developmental initiatives of the recipient countries of foreign investment. One potential consequence of such definitions is the tendency to create an atmosphere of unpredictability in investment relation between the parties. The foreign investors may sue for every conceivable interference with the investment. On the other hand, the host state is constantly haunted by the possibility of a breach of a provision whose operation has no limit.

Most importantly, an open-ended definition could lead to a dramatic protection of what otherwise would have been a national investment, which may undermine the quest to attract foreign capital by developing countries. Such a possibility would emerge where a Nigerian national supposedly incorporated a company in a country other than Nigeria but (the relevant country) concluded a BIT with Nigeria; and thereafter (a Nigerian national) invested in Nigeria with funds originating from Nigeria. The case of Tokios Tokeles v Ukraine is illustrative. In this case, a Ukrainian national incorporated a company in Lithuania where he held ninety nine per cent of the shares, leaving only one percent with a Lithuanian national. He later set up a subsidiary company in Ukraine. In the ensuing interference with the subsidiary by the Ukrainian authorities, the claimant (Tokios Tokeles) sued for the breach of the terms of the Lithuania-Ukraine BIT. The BIT adopted the characteristic open-ended definition of investment to the effect that it constituted, inter alia, ‘every kind of asset’ with no limit on the categories of investment falling within the protection of the BIT.

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267 For a detailed analysis of how a broad-based definition could be curtailed, see UNCTAD, 'Key Terms and Concepts in IIAs: A Glossary', at 94-96.
268 On issues arising on interpretation of treaties by local courts see, Christoph H Schreuer, 'The Interpretation of Treaties by Domestic Courts', British Year Book of International Law, 45 (1972), 255.
269 Investment treaty must not be contrary to the definition embodied in article 25 of ICSID. See Malicorp Ltd v Egypt, ICSID Case No. ARB/08/18, Award February 07, 2011, para. 107 at 31.
270 Tokios Tokeles v Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004.
The respondent (Ukraine) argued that the investor was a Ukrainian national who merely floated the company in another country (Lithuania) and that he (the investor) constituted the owner of the majority of shares of the company. The respondent argued further that the claimant did not prove that the fund used for the investment was from outside the Ukraine. The respondent concluded, therefore, that allowing the claimant the protection of the Lithuania-Ukraine BIT would defeat the object and purpose of setting up the ICSID, which is the settlement of investment dispute between contracting state party and nationals of another contracting state party. Rejecting the contention of the respondent, the tribunal held that the Ukrainian investor constituted a foreign investor since the place of incorporation of the parent company was outside Ukraine (i.e. Lithuania). The tribunal reasoned further that, even if the funds used for the investment in the Ukrainian subsidiary were entirely from the Ukraine, such a scenario by no means deprived the investor of the protection under the Lithuania-Ukraine BIT.

The above ruling constitutes a significant concern to developing countries sourcing for foreign capital like Nigeria. Indeed, the ruling can be faulted on two grounds: (1) nationality criterion: the essence of ICSID Convention is that a foreigner invests capital in a contracting host state. Both the preamble to the ICSID convention and article 1 of the Convention setting out the purpose of the establishment of the ICSID make it clear that the investment that qualifies for international settlement under the framework of the Convention is the one between contracting states and nationals of other contracting states. In other words, a Nigerian national cannot for instance invest in Nigeria and expect to avail itself of the ICSID facility in the event of a dispute.\footnote{It should be noted that the place of incorporation and registered office (control test might be relevant in certain circumstances) determines the nationality of a juridical person under international law. See Barcelona Traction Light and Power Company Limited (Belgium v Spain) (1970) ICJ Reports 3.}
(2) Origin of capital criterion: the tribunal in *Tokios* dismissed the origin of capital as a criterion for judging the existence of foreign investment.\(^{272}\) Of course, it begs the question how an investment can be properly classified as ‘foreign’ if there is no movement of capital across borders. In fact, the expectation of a significant number of countries that conclude BITs is that a foreign investor should transfer foreign capital for the purpose of investment to the contracting host states.

The foregoing reasoning appears to be the line of thought followed in *SGS v Philippines*,\(^{273}\) where the arbitral tribunal, relying on the previous ruling in *SGS v Pakistan*,\(^{274}\) established that there is existence of foreign investment where there is ‘an injection of funds into the territory ... [of a contracting state different from the state of the investor]’\(^{275}\) for the carrying out ‘...’ of the relevant investment. The foregoing ruling, indeed, indicates that a movement in capital across borders is relevant to a finding of existence of foreign investment.\(^{276}\) In other words, the origin of capital is, arguably, relevant in determining whether foreign investment is, in fact, made.

Although a host state is entitled to contract out such a cumbersome and open-ended definition, such a possibility is hampered by the regulatory race to the bottom to attract investment.\(^{277}\) The situation is not mediated by non-definition of the term ‘investment’ by article 25 of the ICSID Convention, leading to conflicting stance that currently underpins ICSID jurisprudence in this sphere. Thus, in the case of *Phoenix Action, Ltd. v Czech*
Republic\textsuperscript{278} the arbitral tribunal relying on the previous test established in Salini \& anor. v Morocco\textsuperscript{279} reaffirmed that a foreign investor must prove the following in favour of the host state before a finding of an existence of investment is made in its favour, viz: (i) a contribution to the economy in the form of money or assets; (ii) investment lasting for some duration; (iii) investment involving some risks; (iv) evidence of economic activity in the host state; (v) investment made in accordance with the host state’s laws; and (vi) investment made \textit{bona fide}.\textsuperscript{280}

However, not all arbitral decisions lean in favour of the above test of investment. Referring to article 25 of the ICSID Convention, the tribunal in GEA Group v Ukraine,\textsuperscript{281} noted that the Convention was not drafted with a ‘strict, objective definition of ‘investment’. It is therefore doubtful that a one-size-fits-all definition should be applicable for all purposes and in all circumstances. A similar doubt on the propriety of introducing a test of investment was expressed in the case of Malaysia Historical Salvors SDN BHD v The Government of Malaysia.\textsuperscript{282} The tribunal noted that the objective criteria set for the test of investment may or may not be ‘plausible,’ but the intention of the drafters of the ICSID Convention as evidenced in the ‘\textit{travaux preparatoires}\’ hardly supports such an objective criteria for the test of investment.

Although article 25 of the ICSID Convention left open the definition of investment, it does not also prohibit the requirement of certain conditions to be proven to justify a finding in favour of foreign investor. Arbitral tribunals may not be bound by the doctrine of precedent; nonetheless any balanced construction of the open-ended definition of investment (and

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\item \textsuperscript{278} Phoenix Action, Ltd. v Czech Republic, ICSID Case No. ARB/06/5, Award of April 15, 2009, para. 96 at 38.
\item \textsuperscript{279} Salini \& anor. v Morocco, ICSID Case No. ARB/00/4, Decision on jurisdiction, July 23, 2001, para. 52.
\item \textsuperscript{280} For the sake of convenience, the foregoing criteria will be called ‘the test of investment’ in the course of this discourse.
\item \textsuperscript{281} GEA Group v Ukraine, ICSID Case No. ARB/08/16, Award of March 31, 2011, para. 313 at 41.
\item \textsuperscript{282} Malaysia Historical Salvors SDN BHD v The Government of Malaysia, ICSID Case No. ARB/05/10, Award of April 16, 2009, para. 69.
\end{itemize}
investor) should be underscored by equal arbitral inquiry as to whether the test of investment is satisfied. Such equal consideration of issues introduces equity and fairness to the investment relation between the two contracting parties. It also lessens the strain on developing countries host states like Nigeria grappling with open-ended and broad-based definition of investment, without prejudice to investment protection.

3.5.2 Catch-all Construction

Aside from the open-ended definition of investment above, the interpretative paradigm employed in fair and equitable standard (FET) constitutes another controversial term of investment treaties which is a source of concern to developing countries like Nigeria. Undoubtedly, it has unabashedly become the common mantra employed by a significant number of foreign investors to capture the diffuse host states actions or inactions, where the alleged acts are not caught specifically by any of the terms characteristically inserted in investment treaties. The phrase has acquired the connotation of catch-all stratagem that apprehends every conceivable host states regulatory action that either impinges negatively on foreign investments or deemed to have a potential to do so by the foreign investors. The predisposition of most foreign investors to resort to this term, and the penchant of most arbitral tribunals to employ fluid construction of the term mostly in favour of foreign investors create regulatory tension between the host states and foreign investors. Arguably, there are ought to be a balancing of the interests of these two contending but mutually inclusive parties.

FET now constitutes a significant part of most BITs. It is consequently reflected in all BITs concluded by Nigeria. The term has no objective definition widely accepted by all commentators. On one hand, it has been equated to the controversial international minimum standard of treatment of aliens. On the other hand, it has been argued that it incorporates a standard beyond that required by the international minimum standard. UNCTAD, however, appears to view the standard based on the circumstance of each treaty. The OECD working paper on issues of international investment equally notes that the construction of the term may depend on the circumstance of each case. Accordingly, it acknowledges that the wording of each treaty, the context, ‘the object and purpose’, the ‘negotiating history’ as well as ‘other indications of parties’ intent would have to be considered before drawing a conclusion on its meaning in a particular circumstance.

The above-mentioned uncertainty characterising the normative content of this standard appears to have given the arbitral tribunals’ wide latitude of discretion to construe the term with virtually no consideration of the legislative and/or regulatory powers of the host states. Although the term has not been the subject of litigation in any of the BITs concluded by

285 Stevens, Bilateral Investment Treaties at 58.
287 Stevens, Bilateral Investment Treaties at 60.
288 UNCTAD, 'Fair and Equitable Treatment', UNCTAD Series on Issues in International Investment Agreements (III, 1999) at 40. Note also the divergence underpinning FET vis a vis denial of justice under international law. Thus, in Rumeli v Kazakhstan, ICSID Case No. ARB/05/16, Award of July 29, 2008, para. 654, the tribunal considered that there is basically no distinction between FET and denial of justice under international law. On the other hand, in the case of Loewen v USA, ICSID Case No. ARB (AF)/98/3, Award of June 26, 2003, para. 242, the tribunal acknowledges the distinction between FET and much broader aspect of denial of justice. See also Jan Paulsson, Denial of Justice in International Law (Cambridge: Cambridge University Press, 2005) at 72-84 (noting the distinction between breach of international obligation and that of denial of justice under international law).
289 See OECD, 'Fair and Equitable Treatment Standard in International Investment Law', OECD Working Papers Series on International Investment (2004/3, 2004) at 40; Tudor, The Fair and Equitable Treatment Standard in the International Law of Foreign Investment at 66-68 (noting that FET has a different normative content from the minimum standard, and that the meaning of FET depends on the peculiarity of a particular IIA).
Nigeria it could be theorised that the unbalanced principles that underpin its interpretation elsewhere apply to Nigeria *mutatis mutandis*.

Thus, ICSID tribunals have in a number of cases established a breach of FET where there are inter alia - a breach of the legitimate expectations of the investors;\(^{290}\) inconsistent governmental action impinging on the investment;\(^{291}\) arbitrary changes to regulatory framework;\(^{292}\) and/or lack of stable legal climate for operation of investment;\(^{293}\) and transparency of legal rules.\(^{294}\)

The concept of transparency entails that the legal framework regulating the investment is clear, precise and accessible in consonance with what an investor legitimately expects from the host state.\(^{295}\) The literal implication of the foregoing is that where, for instance, a foreign investor invests in Nigeria based on the extant legal framework any future adjustment to the law which may be prejudicial to the investor’s expectation constitutes a breach. Driven to the extreme, it entails that once a foreign investor appraises the legal framework and invests, the national legal status quo ante ought to remain frozen. This appears to be the tenor of reasoning of the arbitral tribunal in the case of *Alpha Projektholding GMBH v Ukraine*.\(^{296}\) The arbitral

\(^{290}\) Duke Energy & anor. v Ecuador, ICSID Case No. ARB/04/19, Award of August of 18, 2008, para. 340; Tecmed v United Mexican States, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003, para. 154 (noting that the principle of good faith immanent in international law requires protection of investments made with legitimate expectation at the time of the investment); LG&E Energy Corp. & anor. v Argentina, ICSID Case No. ARB/02/1, Decision on liability, October 6, 2006 (noting state obligation not to breach legitimate expectation of the investor at the time of investment).

\(^{291}\) MTD Equity Sdn. Bhd. & MTD Chile S.A. v Republic of Chile (ICSID Case No. ARB/01/7), Award of May 25, 2004, para. 164.


\(^{293}\) Metaclad Corporation v United Mexican States (ICSID Case No. ARB (AF) 97/1), Award of August 30, 2000, para 99 (lack of transparency and unpredictable regulatory framework constituted a breach of FET). See contrary ruling in AES Summit Generation Ltd. v Hungary ICSID Case No. ARB/07/22, Award of September 23, 2010, para. 9.3.39, 9.3.30 & 9.3.34 at 61 (noting the sovereign right of state to adjust its regulatory framework to meet changing circumstances, and the inviolability of sovereign legislative rights).

\(^{294}\) Metaclad Corporation v United Mexican States (ICSID Case No. ARB (AF) 97/1), Award of August 30, 2000, para 99. See also Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice', *The Journal of World Investment & Trade*, 6(3) (2005), 373-74; Catherine Yannaca-Small, 'Fair and Equitable Treatment Standard in International Investment Law', *OECD Survey on International Investment* (2005), 104.

\(^{295}\) UNCTAD, 'Fair and Equitable Treatment', at 51.

\(^{296}\) *Alpha GMBH v Ukraine*, ICSID Case No. ARB/07/16, Award of November 08, 2010, para. 420 at 147.
tribunal relying on the previous case of *Tecmed v United Mexican States*,\(^{297}\) noted that the obligation of FET standard demands that, in relation to a foreign investor, the host state acts in a consistent manner, free from ambiguity, so that the foreign investor would know in advance ‘any and all rules and regulations that will govern’ the prospective investment. According to the tribunal, the host state is also obliged not to revoke ‘pre-existing decisions and permits’ on which the investor relied on to make the investments.\(^{298}\) (Emphasis added).  

The preceding reasoning seems to indicate that the host state must know beforehand all the dynamics of economic and social forces which might justify future changes to legal framework, and bring these to the notice of the foreign investor otherwise it would be liable. Undoubtedly, such a requirement would be unduly insensitive to the unforeseen macro-economic forces along with political upheavals unforeseeable by any government. Arguably, the interpretation of FET should be underpinned by a corresponding application of the doctrine of *clausula rebus sic stantibus*\(^ {299}\) to create a balance of the contending interests of both parties. This doctrine seems to be recognised by article 62 of the VCLT. It stipulates, inter alia, that fundamental change of circumstances can, in certain circumstances, justify the modification of the obligations assumed by a party to a treaty. This would be the case where the subsistence of such circumstances constituted a fundamental ‘basis of the consent of the parties to be bound by the treaty;’ and such a change completely alters the obligations yet to

\(^{297}\) *Tecnicas Medioambientales Tecmed, S.A. v United Mexican States (ICSID Case No. ARB (AF)/00/2), Award of May 29, 2003, para. 154, at 61-62.*  
\(^{298}\) In contrast to above two cases see the case of *Saluka Investments B.V. v Czech Republic, UNCITRAL, Partial Award of March 17, 2006, para. 305 at 66* (noting that the legitimate expectation of the host state ought to be taken into account as well).  
\(^{299}\) This doctrine recognises that a treaty will not be binding if the condition under which the treaty was entered changes to a substantial extent.
be performed by the parties.\textsuperscript{300} It is immaterial that the doctrine does not constitute explicit part of the investment agreement.\textsuperscript{301}

However, the potential problem likely to be faced by a tribunal applying this doctrine to an investment treaty is whether such a change in circumstances of the host state is fundamental enough to be caught by the foregoing article 62(1) of the VCLT. Exigencies of macro-economic forces and regulatory issues ought to be fundamental enough to justify a deviation of the host state from the obligations assumed in a treaty, and thus, afford necessary justification for the application of the doctrine.\textsuperscript{302}

Furthermore, a more balanced and equitable construction of the term could be anchored on an additional premise. Indeed, an allegation of a breach of fair and equitable standard should be underlined by a concomitant arbitral enquiry into the investors’ conduct.\textsuperscript{303} Already there seems to be converging views that allegations of FET be underscored by a jurisdictional test requiring the investor claimant to prove four ingredients – existence of alleged state action or omission; damage to the foreign investor; causal link between the act or omission and the damage; and finally, discharge of burden of proof by the investor.\textsuperscript{304} Indeed, any sustenance of allegations of a breach of FET by an investor should be contingent on the ability of the investor to demonstrate compliance with the foregoing test. FET being an approximation of equitable principle, any party relying on it ought to satisfy the fundamental

\textsuperscript{300} See article 62(1) (a-b) of the VCLT.


\textsuperscript{302} AES Summit Generation Ltd. v Hungary ICSID Case No. ARB/07/22, Award of September 23, 2010, para. 9.3.39, 9.3.30 & 9.3.34 at 60- 61; Impregilo S.P.A. v Argentine Republic, ICSID Case No ARB/07/17, Award of June 21, 2011, para 290 and 291 at 68 (noting that legitimate expectation of the investor does not entail non-alteration of the national legal framework provided such an alteration is not unreasonable); Parkenings-Compagniet AS v Lithuania, ICSID Case No ARB/05/8, Award of September 11, 2007, para. 332 (noting the sovereign right of the host state to ‘enact, modify or cancel a law at its own discretion’ absent agreement to the contrary).


\textsuperscript{304} Tudor, The Fair and Equitable Treatment Standard in the International Law of Foreign Investment at 135 - 39. See also article 5 of 2012 US Model BIT that tends to define and limit the scope of FET.
principle on which its validity depends. The foregoing proposition is in consonance with the
time-honoured equitable maxim that whoever comes to equity must come with clean hands.

3.5.3 Standards of Security

The obligation to accord full protection and security is a cardinal feature of a significant
number of BITs in addition to the requirement of fair and equitable treatment standard.\textsuperscript{305} The
term is part of the absolute standard of treatment given that it is non-contingent, in contrast to
the relative standards of treatment such as MFN and national treatment which are
contingent.\textsuperscript{306} The quantum of protection necessitated by this term remains in doubt.
However, the 2012 US Model BIT seems to offer some clarification. It provides that the level
of security required is the same as ‘the level of police protection required under customary
international law’.\textsuperscript{307} In other words, the host state is required to provide the same level of
protection and security to international investments as that required under the customary
international law minimum standard for the treatment of aliens. The implication is that the
host state liability is limited to that of due diligence simpliciter in contrast to absolute
liability.\textsuperscript{308} Almost all BITs concluded by most states lately include this standard. Similarly, a
significant number of BITs concluded by Nigeria incorporate this obligation except, curiously
enough, the Nigeria-Turkey BIT.\textsuperscript{309}

\textsuperscript{306} Fair and equitable treatment, expropriation and transfer of funds provisions constitute other non-
contingent standard, since they provide the standard of treatment of an investment without specifying how
other parallel investments and/or investors are to be treated. This contrasts sharply with the relative standard
like national treatment and MFN detailing standard of treatment of an investment by reference to treatment
received by other investments and/or investors.
\textsuperscript{307} See article 5 of 2012 US Model BIT.
\textsuperscript{308} Christoph Schreuer, ‘Full Protection and Security’, \textit{Journal of International Dispute Settlement}, 1(2) (2010),
353.
\textsuperscript{309} See article 2(2) of the Nigeria-UK BIT; article 3(2) of the Nigeria-Netherlands BIT; article 5(1) of the Nigeria-
Germany BIT; article 4(1) of the Nigeria-Spain BIT; article 2(2) of the Nigeria-Finnland BIT; article 2(2) of the
Nigeria-Korea BIT. But curiously enough, Nigeria-Turkey BIT omitted the obligation.
Although the term has not been a subject of litigation under any of the BITs concluded by Nigeria, it can be argued that it captures unjustifiable instances where government forces or agents demolish or destroy investments of foreigners. However, it is doubtful whether host states are liable for the actions of third parties in relation to whom the host government has little or no control. An imaginary scenario is: will the Nigerian government be held liable for the havoc wreaked on foreign companies operating in the delta region of Nigeria ostensibly caused by the militants fighting government there? The answer to the above question would seem to be negative. In the case of *Asian Agricultural Products Limited (AAPL) v Republic of Sri Lanka,*\(^{310}\) the Sri Lanka security forces destroyed the claimant’s farm in a fight with the local rebels. In the ensuing arbitral proceeding, the claimant argued, inter alia, that Sri Lanka’s obligation to accord full protection and security to its investment was tantamount to a strict liability under international law.

In rejecting the contention of the claimant, the tribunal reaffirmed that the standard of protection and security under customary international law is the due diligence standard rather than that of strict liability. According to the tribunal, even if stronger words like ‘constant’ and/or ‘full’ are used to indicate the parties’ intention to impose stricter protection and security, that does not, *ipso facto,* alter or elevate the required international standard of due diligence to strict liability.\(^{311}\)

The substance of this ruling entails that the responsibility of the host state is only limited to giving reasonable protection to the covered foreign investment. The host state is not expected to be an absolute insurer and guarantor of the security of foreign investment. In other words, the responsibility of the host state is not an absolute responsibility for all injuries

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\(^{310}\) *Asian Agricultural Products Ltd. v Republic of Sri Lanka,* ICSID Case No. ARB/87/3, Award of July 27, 1990, para. 3 at 527.

to foreigners. In *AES Summit Generation Ltd. v Hungary* the tribunal noted that the obligation of full protection and security involves the responsibility of the host state to provide reasonable measures to protect the covered investment and the availability of a legal framework for the foreign investor to protect it.

In summary, the host government cannot be held liable for the destruction of investments which was not foreseeable by the government. Such cases of non-liability will equally involve circumstances where the reasonable action of the host government (as is the case with Nigeria) to uproot militants results in losses to investment of foreign companies. Similarly, the Nigeria government remains, arguably, exonerated from liability in cases of common pilferage of industrial equipment of foreign investors. In such a case, the foreign investor is expected to avail itself of the municipal legal framework for seeking appropriate remedies and punishment of the culprit rather than resorting to the ICSID framework.

### 3.5.4 Other Protective Standards

National treatment and MFN constitute of two relative standards applied in international trade and investment relation may enjoy convergence in eschewing discrimination but theoretically their mode of operation differs. There is hardly any doubt that

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313 AES Summit Generation Ltd. v Hungary, ICSID Case No. ARB/07/22, Award of September 23, 2010, para. 13.3.2 at 91-92.
315 See GEA Group v Ukraine, ICSID Case No. ARB/08/16, Award of March 31, 2011, para. 246-249, 267 at 67 and 72.
316 National treatment is a significant part of international trade agreements and is traceable to article III of GATT. For an exhaustive discussion of national treatment see, UNCTAD, 'National Treatment', *UNCTAD Series on Issues in International Investment Agreements* (New York: United Nations, 1999) at 8.
national treatment standard is a term protective of foreign investor since it is inserted into investment treaties to ensure that foreign investors are not treated less favourably than national investors. MFN, by contrast, assures a level playing field between competing foreign investors by ensuring none receive more favourable treatment than the other within the relevant host country. This research has no intention whatsoever to engage in an extensive discussion of national treatment and MFN, since they are not strategic as such to the objective of this research.

Another protective standard similar to the preceding is the umbrella clause that imposes a duty on the contracting host state party to observe any obligations it entered into with the foreign investor of the other contracting state. The term ‘umbrella clause’ is historically traceable to article 4 of the 1956-1959 ABS Draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries (the ABS Draft). It has been widely embraced by almost all BITs regime as a basis for stabilising international investment since in practice its operation is tantamount to *pacta sunt servanda*. However, the term could also be excluded by choice. A number of BITs signed by Nigeria incorporate this clause: Article 2 of the UK-Nigeria BIT containing the clause provides that ‘[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.’

There has not been a consistent approach to the interpretation of the clause by the arbitral tribunals. Nevertheless, the indication seems to be that its construction is

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321 See article 5(3-6) of 2012 US Model BIT.
322 See also other umbrella clauses in Nigeria BITs: article 3(4) Nigeria-Netherlands BIT; article 4(2) of the Nigeria-Spain BIT which curiously added such obligation must be in accordance with the ‘internal applicable law.’
unnecessarily wide, which may affect the host state. It appears to elevate all contractual breaches to a breach of international obligation.\textsuperscript{323} Even a breach of any national law by the host states which impacts directly or indirectly on the foreign investor seems to be caught by the umbrella clause if the reasoning of the arbitral tribunal is anything to go by. For instance, where a Nigerian government or any of its agents are liable for any contractual breaches against a foreign investor, it may be caught by the umbrella clause of the BIT signed by the home country of the foreign investor. Arguably, such a scenario will virtually freeze the regulatory authority of the host state. The above scenario was demonstrated in \textit{SGS Societe Generale de Surveillance SA v Philippines}.\textsuperscript{324} The issue in contention was the breach of a contractual agreement (financial default) between the claimant (SGS) and the Philippines. As the Swiss-Philippines BIT contained an umbrella clause, the claimant’s argument that the breach of the contractual agreement constituted a violation of the umbrella clause of the BIT\textsuperscript{325} was endorsed by the tribunal. According to the tribunal, a breach of an independent contractual commitment with a foreign investor even under national laws equates to a breach of the umbrella clause of the BIT.\textsuperscript{326}

The foregoing construction elevates a breach of contractual obligation by host state to a violation of an international obligation thus making more onerous the duties of the host states in relation to foreign investors.\textsuperscript{327} It goes without saying therefore that most capital

\begin{itemize}
\item \textsuperscript{323} Yannaca-Small, 'Interpretation of the Umbrella Clause in Investment Agreements', 22.
\item \textsuperscript{324} \textit{SGS Societe Generale de Surveillance SA v Republic of the Philippines}, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, January 29, 2004.
\item \textsuperscript{325} \textit{SGS Societe Generale de Surveillance SA v Republic of the Philippines}, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, January 29, 2004, para. 44 at 16.
\item \textsuperscript{326} \textit{SGS Societe Generale de Surveillance SA v Republic of the Philippines}, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, January 29, 2004, 1-68, para. 127 at 48.
\item \textsuperscript{327} Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration', \textit{Law & Practice of International Courts & Tribunals}, 4 (2005), 9 (noting that the effect of umbrella clause in investment agreement includes incorporation of investment contract commitments into treaty breach). See also \textit{SGS Societe Generale de Surveillance SA v Islamic Republic of Pakistan}, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, August 06, 2003, para. 167 at 364 (which had similar facts with \textit{SGS v Philippines}, but the tribunal ruled that a breach of contractual obligation does not equate to treaty breaches.
\end{itemize}
importing countries concluding BITs hardly envisaged the clause would be given such a sweeping interpretation. It is considered that a proper boundary ought to be drawn when applying this clause. A breach of a contractual obligation ought not to be elevated to a treaty breach unless the parties explicitly evinced the willingness in the investment treaty. In addition to the foregoing, regulatory taking constitutes another term of IIA bedevilled with significant unbalanced interpretation which forms the focus of the next section.

3.6 Implication of Takings of Investment

Nigeria embarked on large scale nationalisation (known as the indigenisation and commercialisation programme)\(^{328}\) of foreign interests in 1972 and 1977, through the promulgation of Nigeria Enterprises Promotion Decrees (NEPDs)\(^{329}\) to facilitate economic empowerment of the masses and the overall economic development.\(^{330}\) This period was characterised by a restrictive foreign investment policy reflecting the dependency theory of foreign investment.\(^{331}\) It was not until in 1995 when the Nigeria Investment Promotion and Commission Act (NIPC Act),\(^{332}\) was promulgated (thereby repealing the restrictive Nigeria Enterprises Promotion Decrees), that foreign investment policy became liberalised.\(^{333}\) The

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328 Indigenisation involves progressive transfer of ownership from foreign investors to nationals. See Ogowewo, 'The Shift to the Classical Theory of Foreign Investment: Opening up the Nigerian Market', 916-917.
331 Ogowewo, 'The Shift to the Classical Theory of Foreign Investment: Opening up the Nigerian Market', 916.
332 See also The Nigeria Investment Commission Decree No. 32 of 1988.
333 Following restrictive indigenisation policies of 1970s, steps to open up Nigerian economy to foreign investors started in 1980s. The Industrial Coordination Committee Decree No. 32 of 1988 (IDCC), the precursor of the current NIPC, was set up to take charge of entry and establishment of investment of foreign interests. However, it was not until in 1995 that the Nigerian Enterprises (repeal) Act abolished IDCC and Nigeria Enterprise Promotion Decree of 1972 (as amended in 1977 and 1988) that imposed significant restrictions on foreign ownership; while the NIPC succeeded IDCC as agency in charge of entry and establishment of foreign
NIPC Act, in consonance with the 1999 Constitution, incorporated a number of assurances and guarantees to foreign investors against expropriation along with the payment of compensation.

3.6.1 Compensatory Regime

Under both the NIPC Act and the 1999 Constitution, no person is to be deprived of a private property without compensation. Section 44(1) of the 1999 Constitution (as amended) provides that ‘no moveable property or any interest in an immoveable property’ shall be compulsorily taken ‘and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria’ except on the condition that prompt compensation is paid; and the complainant is given access to a court of law, or any equivalent body for the determination of his right.

Thus, a foreign investor in Nigeria is protected from expropriation (compulsory taking and compulsory acquisition are used by the constitution). Where expropriation occurs nonetheless, prompt compensation is provided as well as fair hearing in high court or any other relevant tribunal. The Constitution does not, however, define the meaning of ‘prompt compensation.’ It could be argued that prompt compensation meant here is tantamount to prompt, adequate and effective standard of compensation as established by the Hull doctrine. (Emphasis added).

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334 The arguments that underscore compensation for regulatory takings in the US revolve around three premises. (i) The theory of cost internalisation argument (government must internalise the cost of regulation or overregulation through compensation. (ii) The theory of insurance argument (government ought to provide a kind insurance to investors). (iii) The theory of fairness argument (compensation should be paid to avoid few victims bearing the brunt of general governmental regulation). For an incisive discussion of these arguments see Vicki Been, 'Does an International "Regulatory Takings" Doctrine Make Sense?’, New York University Environmental Law Journal, 11 (2002), 49-51.
The Constitution discreetly avoided the international law criteria constituting a justification for an expropriation (i.e. requirement of, inter alia, public purpose, non-discrimination). However, in the case of *Osho v Foreign Finance Corporation* involving the government seizure of a private property of an individual, it was held, inter alia, that any compulsory acquisition of a private property by the state must be justified on the grounds of public purpose and payment of appropriate compensation.

The implication of this ruling is that despite the absence of public purpose requirement in the Constitution, it still constitutes one of the grounds for lawful expropriation. Although *Osho’s case* dealt with the local seizure of private property of a citizen, as distinct from a foreign enterprise, it could be argued that the principle encapsulated by the case applies to foreign investors *mutatis mutandis*.

It must be noted that the foregoing Nigeria compensation regime does not apply to takings of property to satisfy public duty, which includes, inter alia, satisfaction of tax, penalties and forfeitures for breach of law, satisfaction of judgements of the court; and takings consequent upon private contractual duty such as takings pertaining to leases, tenancies, and mortgages. In these forgoing instances, the investment of a foreigner can justifiably be taken to satisfy both the public and private contractual duties. This sphere, particularly the public duty dimension, therefore constitutes proper exercise of police powers of state which attract no compensation.

Although the 1999 Constitution omitted the international law criteria for sovereign expropriatory actions, the Nigeria principal investment legislation – the NIPC Act

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337 See section 44(2) of the 1999 for a detailed public duties and private contractual obligations falling outside the compensation regime of the Constitution.

338 For expansive list of areas covered by exercise of police powers, see, UNCTAD, 'Expropriation', at 79-80.
specifically incorporated the standard in section 25. According to the section, an enterprise of a foreign investor shall not be nationalised or expropriated except, inter alia, on the ground of national interest and public purpose. The NIPC Act neither defines the meaning of ‘nationalised and expropriated’ nor stipulates the categories of acts constituting them. It could be argued that since the NIPC Act is investment legislation, the meaning attributed to the terms ought to conform to its international law definition.

Moreover, a significant number of BITs concluded by Nigeria eschew expropriation under any guise, except the requirement of public purpose; non-discrimination; and due process are satisfied.339 Thus, the combined effect of the judicial position, the NIPC Act and the BITs concluded by Nigeria is recognition of the international law requirements of public purpose, due process, and non-discrimination as conditions for expropriation.340 Sornarajah, however, argues that the public purpose requirement has lost its effectiveness this modern time.341 This would seem to suggest that a host state may justifiably expropriate foreign enterprise without being obliged to comply with the requirement of public purpose.

Similarly, what amounts to discrimination in itself may well depend on the circumstances of each case since certain discriminatory measures may be justified on the ground of social and economic equilibrium.342 For instance, a break-up of foreign monopoly of certain sectors of the economy for breach of competition regulation, which has the consequence of empowering indigenous companies, may arguably be justified on ground of social and economic equilibrium.

339 See UNCTAD, 'Bilateral Investment Treaties, Country-Specific Lists of BITs'. Such BITs include article 5(2) of the Nigeria-German BIT, article 6 of the Nigeria-Netherlands BIT, article 5 of the Nigeria-UK BIT, article 6 of the Nigeria-Spanish BIT, article 5 of the Nigeria-Finland BIT, to mention just a few.
340 See Section IV (1) of World Bank Guidelines on the Treatment of Foreign Direct Investment; article 13 of Energy Charter; See article 1110 of NAFTA.
341 Sornarajah, The International Law on Foreign Investment at 407.
While the Constitution incorporates the standard of prompt compensation, the NIPC Act supplements it with a requirement of payment of fair and adequate compensation.\textsuperscript{343} The NIPC Act does not however define the meaning of ‘fair’. It is not clear whether fair compensation here replicates adequate compensation or postulates an autonomous standard.\textsuperscript{344} However, the Black Law Dictionary defines fair in the context of valuation to mean adequate compensation.\textsuperscript{345} In addition, NIPC Act requires payment without undue delay and in a convertible currency.\textsuperscript{346} The latter requirement is arguably equivalent to international standard of effective compensation.

The cumulative effect of the provision of the 1999 Constitution and the NIPC Act compensation regime is the incorporation of traditional Hull standard of prompt, adequate and effective compensation. Thus, the Nigerian substantive investment law epitomised by NIPC Act, arguably, is consonance with the doctrine of compensation enunciated by Hull at least in theory. Similarly, a significant number of BITs\textsuperscript{347} concluded by Nigeria incorporate either the Hull standard expressly or at least its spirit by necessary implication, as a standard of compensation where expropriation occurs nonetheless. The conformity of Nigerian principal investment legislation to the Hull standard of compensation contradicts the contemporary antagonistic stance espoused by a significant number of capital importing countries against the Hull standard of compensation. It could be argued however that the current scramble for foreign investment among capital importing countries of which Nigeria forms a part has somehow undermined the traditional hostility to the Hull standard of compensation.

\begin{footnotesize}
\textsuperscript{342} See section 25 (2) of the NIPC Act.
\textsuperscript{345} Section 25 (3) of the NIPC Act.
\textsuperscript{346} See UNCTAD, ‘Bilateral Investment Treaties, Country-Specific Lists of BITs’.
\end{footnotesize}
3.6.2 Comparative Practice

It is uncertain if automatic compensation applies to every regulatory taking. A careful examination of comparative practices of major capital exporting countries particularly the US, Canada as well as Western Europe does not disclose a consistent practice of compensation regarded as obligatory by them nor are there such compensatory practices among a significant number of capital importing countries in cases of regulatory expropriation. The jurisprudence of the European Court of Human Rights that evolved from the interpretation of Article 1 of Protocol No. 1 of the European Convention on Human Rights (the Convention) relating to the right to possession emphasises the issue further. The preceding indicates that, in certain circumstances, regulatory takings without compensation are allowable on grounds of, inter alia, public interest or 'general interest or to secure the payment of taxes or other contributions or penalties'. This means that public interest or general interest requirements or the need to secure the payment of taxes or other contributions

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348 Larry Karp et al, 'Police Powers, Regulatory Takings and the Efficient Compensation of Domestic and Foreign Investors', Economic Record 86 (2010), 368 (noting that the traditional practices of industrialised states have been to pay compensation for outright expropriation but no compensation in regulatory expropriation).


350 In Canada not only is it required that the alleged government act results in denial of the claimant’s economic use of the property but the particular governmental act must result in acquisition of property interest in the matter complained of. See Matthew C Porterfield, 'State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations', North Carolina Journal of International Law and Commercial Regulation, 37 (2011), 182-83.

351 Thus, it could be stated that while ECHR jurisprudence indicates that there can be no compensation in certain circumstances, international standard does not specifically acknowledge this point. See Helene Ruiz Fabri, 'The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for "Regulatory Expropriation" of the Property of Foreign Investors', New York University Environmental Law Journal, 11 (2002), 171.


or penalties override the right to possession under the ECHR jurisprudence. The preceding clearly indicates proper exercise of police powers of the state which attracts no compensation.

The inconsistencies of compensation practices that underpin regulatory expropriation arguably deprive the practice the customary character under international law. However, proponents of customary character of the foregoing may have to rely on treaty practice and/or synthesised arbitral decisions to justify such a compensation for regulatory takings in contrast to its justification under customary international law.

Although allegations of regulatory takings have not been contested against Nigeria in any of the BITs concluded so far, certain conceptualisations could tentatively be made. Where for instance a foreign investor sets out to invest in Nigeria (in circumstances where there exists a BIT between the home country of investor and Nigeria) and such an investment is made impossible owing to the breach of investment clauses of the BIT by Nigeria government or any of its agents or principalities, whether an allegation of indirect expropriation or breach of investment backed expectation could justifiably be maintained depends on the circumstances. In the case of Parkerings-Compagniet AS v Lithuania, the tribunal ruled that a breach of investment agreement amounts to indirect expropriation where the constituted authority acted in its capacity as a sovereign using 'sovereign powers.' Thus the preliminary question would be for the tribunal to determine whether the alleged expropriatory action emanates from a sovereign authority or not.

It is hard to argue that a sovereign government like Nigeria would be held liable for regulatory takings or breach of investment backed expectation owing to a refusal to grant application for oil exploration licence, oil prospecting licence or oil mining lease to a foreign

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354 Fabri, 'The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for "Regulatory Expropriation" of the Property of Foreign Investors', 153.
356 Parkerings-Compagniet AS v Lithuania, (ICSID Case No. ARB/05/8), Award of September 11, 2007, para. 443; Azurix Corp. v Argentina, (ICSID Case No. ARB/01/12), Award of July 14, 2006, para. 316.
enterprise after due consideration of the relevant application. However, a different result would obtain where such a licence or a lease has already been granted to a foreign enterprise to operate, but later unjustifiably revoked by the Nigeria government before the commencement of work by the former. In such a scenario, the foreign investor may justifiably argue for creeping expropriation which breaches not only the provision of the applicable BIT but also the investment-backed expectations of the investor. Illustrative of the foregoing is the case of *Federal Government of Nigeria v Zebra Energy Ltd.*\(^{357}\) The respondent company in this case was granted oil prospecting licence (OPL) 248 to search for oil but the licence was later revoked by the government. It was held by Supreme Court of Nigeria that the government was in breach of its obligation. Similar principle was illustrated in *Oil & Gas Ltd v Ministry of Petroleum Resources & anor*\(^{358}\) where similar revocation of Oil Prospecting Licence (OPL) by the Nigerian government was held to be unjustifiable.

However, the effect of changes to fiscal regime embarked upon by the government on regulatory expropriation is unclear. It could be argued that whether such a measure constitutes a breach or not depends on its effect on the relevant investment. This was the case in *Archer Daniels Midland Company & anor. v United Mexican States.*\(^{359}\) The claimant, in the instant case, contended that the imposition of tax on its product resulting in reduction in its profit constituted an act of expropriation. The tribunal applied the ‘effects test’ and noted that the act of expropriation is made out where there is substantial interference which deprives the investor of the returns on the investment. In the instant case however, the tribunal ruled that the loss of profit consequent on the tax did not result in deprivation of the

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\(^{358}\) *Oil & Gas Ltd v Ministry of Petroleum Resources and anor, Suit No. FHC/L/CS/481/2000, unreported.*

\(^{359}\) *Archer Daniel Midland Company & Anor. V The United Mexican States, ICSID Case No. ARB(AF)/04/5, Award of November 21, 2007, para. 240 at 74, para. 246.*
physical assets of the investor and the economic use of the investment, and therefore did not justify a finding of expropriation.\textsuperscript{360}

Arguably, where the action of the host state undermines the returns on investment without legal justification, the purported act may constitute indirect expropriation. However, where the exercise of regulatory powers is \textit{bona fide} for public purpose, and non-discriminatory, to safeguard public interest but invariably undermines the economic value of the relevant investment it ought to be justifiable under police powers.\textsuperscript{361} The preceding conclusion is seemingly in line with reasoning of the tribunal in \textit{Methanex v United States}, where the tribunal stated, \textit{inter alia}, that where the regulatory action is devoid of discrimination, done for public purpose, and in accordance with due process, the resultant regulatory measures cannot be regarded as expropriatory, and therefore compensable except in circumstances where the host governments have previously made commitments to that effect.\textsuperscript{362}

Nonetheless, articulating and constitutionalising the foregoing uncertainties that underpin international investment law into a multilateral treaty on foreign investment (MTFI) could provide an authoritative elucidation of the law. To this end, the discourse now turns.

\textsuperscript{360} See also \textit{Tecnicas Medioambientales Tecmed SA v The United Mexican States, ICSID Case 106, ARB No (AF)/00/2, Award, (29 May 2003) at 115} (noting that expropriation occurs where the investor is ‘radically’ divested ‘of the economic use and enjoyment of its investments, as if the rights related thereto ... had ceased to exist’.


\textsuperscript{362} \textit{Methanex Corporation v United States, Final Award, August 3, 2005}, p.278, part4 chapter D, para. 7. See however contrary ruling in \textit{Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine, ICSID Case No. ARB/08/8, award of March 01, 2010}, para. 305, to the effect that once a measure is found expropriatory the state is liable for compensation irrespective of the fact that it was done for public purpose. In other words, the fact that governmental act is done for public purpose does not remove compensatory obligation. Note also the case of \textit{Charles Arif v Republic of Moldova ICSID Case No. ARB/11/23, Award of April 08, 2013}, para. 420 at 104 to the effect that invalid rights cannot be expropriated.
3.7 Multilateral Treaty on Foreign Investment (MTFI)

It is a known fact that IIAs and international trade regimes remain the facilitator of global trade and investment through which globalisation and liberalisation are manifested. Economic liberalisation in its extreme case would entail total dismantling of barriers to free flow of capital across borders; but this is not currently the case since the host state still retains the right to regulate entry and establishment of investors.\(^{363}\) With the demise of centrally-controlled economic model, the liberal economic model with its emphasis on liberalisation and forces of markets has triumphed over other theories of political economies.\(^{364}\) Proponent of globalisation argues that globalisation has increased prosperity for all and sundry.\(^{365}\) On the other hand, the renowned former World Bank economist, Joseph Stiglitz, is in no doubt that globalisation has aggravated uneven economic relations between the capital importing countries and capital exporting countries.\(^{366}\) Globalisation has been executed in such a way that it favours the capital exporting industrialised countries to the detriment of the capital importing countries, he argues.\(^{367}\) In the area of investment for instance, the unbalanced normative regime between capital importing countries and capital exporting countries has translated into further impoverishment of certain part of the world particularly Africa and Latin America.\(^{368}\) The graphic illustration of the foregoing scenario is reflected in the current unbalanced IIAs regimes. There is no doubt, though, that the developing countries signing IIAs know from inception that they have got to make concessions to attract foreign

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\(^{363}\) Vandevelde, 'Investment Liberalisation and Economic Development: The Role of Bilateral Investment Treaties', 514.


\(^{367}\) Ibid., at 214.

investment. However, the current situation of the developing countries epitomised by the prevailing pro-investors arbitral rulings indicate that investment treaties have become

... an open invitation to unhappy investors tempted to complain that a financial and business failure was due to improper regulation, misguided macroeconomic policy or discriminatory treatment by the host government and delighted by the opportunity to threaten the national government with a tedious [and] expensive arbitration.369

Thus, it is considered that the foregoing unbalanced framework of IIAs can be ameliorated by the institution of a multilateral treaty on foreign investment ((MTFI).370 Note that previous efforts by the OECD371 and WTO372 were unsuccessful. The essence of such an MTFI is manifold. It will ensure a level playing field among unequal parties – developed and developing countries in investment relations. The regulatory race to the bottom will arguably shrink to almost zero level, since the MTFI would constitute a non-derogable standard. So there is no opportunity for competition among developing countries to attract foreign capital through relaxation of regulatory rules. Arguably, such a treaty framework will constitute a better safeguard to the interest of both parties than the current inequitable BITs regime.

3.7.1 Past Failed Attempt

Although previous attempt to negotiate a Multilateral Agreement on Investment (MAI) under the auspices of OECD in 1995373 failed, that was due to its inherent exclusionary stance. Developing countries were, by and large, excluded from the negotiation. Moreover, the texts

371 Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where from Now?', 1033.
373 Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where from Now?', 1033.
of the draft echoed only the protection of foreign investments with no regard to the corresponding obligations of foreign investors to the host states. Developing countries were, therefore, justified to oppose the draft independent of the hostilities that emanated from the human rights groups and other NGOs. In a similar vein, negotiation on trade related investment measures (TRIMs) under the framework of the WTO remains stalled. The Singapore issues pertaining to, among other topics, the relationship between trade and investment remain deadlocked up to the Doha round of WTO meetings. Thus, a multilateral investment treaty eluded both the OECD and WTO, with issues polarised along the divide of the developed countries and developing countries.

The same polarisation characterising multilateral negotiations above underpins scholars’ position regarding the contours of any prospective multilateral investment agreement. A constitutionalisation of a pro-foreign investor multilateral investment treaty that would embody the existing substantive rules and procedural framework for the settlement of investment in BITs has been canvassed. On the other hand, a multilateral investment treaty in the form of a ‘General Agreement on Direct International Investment’ embodying effective balance between capital importing countries and capital importing countries has earlier been made in the past. However, the rationale for such a ‘General Agreement on Direct International Investment’ tended to allay the fears of capital importing countries and thereby facilitate the reduction of barriers to entry and establishment, and in no way related to balancing of interest of both parties in accordance with the tenor of this

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374 Christoph (eds.), The Oxford Handbook of International Investment Law at 126-29.
376 Ibid.
discourse. Other scholars argue for a minimalist approach in contrast to the increasing dense network of BITs.\textsuperscript{380} The minimalist approach would be underscored by jettisoning the current overarching universalist model characterising the current investment treaties, and substituting it with contractual approaches negotiated on case by case basis between the potential foreign investor and the host state.\textsuperscript{381} The minimalist model seems to recognise the necessity for the institution of a level playing field in IIAs.\textsuperscript{382}

MTFI canvassed by this discourse leverages the above suggestions since it is anchored on the regime of equality and a level playing field. One common characteristic of the foregoing past failed attempts is their lack of cognisance for the interest of developing countries. Thus, MTFI proposed in this research should be able to fashion out a comprehensive article of rights and duties of both the foreign investor and host state (satisfactory to both parties) in contrast to the current system characterised by the rights of foreign investors and duties of the host state.

Apart from the capacity of such an MTFI to engender a level playing field in investment relation,\textsuperscript{383} it would as well embody specific duties of investors without prejudice to investment protection. Such potential duties (of investors) would include: the duty to make a credible contribution to the overall economic development of the host states; the duty to promote investment in the host state territory, and duty to acknowledge the regulatory rights of the host states.

Arguably, such a re-ordering of the normative obligation of IIAs by instituting equality and fairness is captured by the doctrinal tenet of the theory of distributive justice.

\textsuperscript{381} Jason Webb Yackee, 'Do We Really Need BITs? Toward a Return to Contract in International Investment Law', (2008), 137-38.
\textsuperscript{382} Yackee, 'Toward a Minimalist System of International Investment Law?', 338-39.
The theory of global distributive justice applies not only to a re-allocation of resources but also to the reform of global institutions and rules regulating international economic relations, and in this case, the regimes of IIAs. Indeed, global distributive justice could be conceptualised from a similar hypothetical original position applied to domestic distributive justice by Rawls; thus entailing that ‘free and rational persons concerned to further their interests would accept in an’ original ‘position of equality as defining the fundamental terms of their association’. Acceptance of such equality by the parties to investment agreements then forms the philosophical premise of equal obligations and rights assumed by both parties. This in essence entails that the burdens and benefits of investment treaties ought to be equitable distributed between the foreign investor and host state. This is equally captured by justice as fairness precept espoused by Rawls.

Although the institution of MTFI is canvassed, the framework for negotiation still needs to be properly defined since previous efforts failed. The discussion of this framework would be the focus of the next section.

3.7.2 Institutional Framework for MTFI

Another significant issue arising is the institutional framework through which such a multilateral regime would be negotiated since previous attempts failed. It has been suggested that such a multilateral negotiation could take place under the auspices of the any of the three

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384 Nardin, Law, Morality, and the Relations of States at 268.
385 Beitz, Political Theory and International Relations at 128, 51.
386 Rawls, A Theory of Justice at 11.
388 Rawls, A Theory of Justice at 11.
institutions such as the WTO, ICSID, UNCTAD\textsuperscript{389} or World Bank \textit{simpliciter} since it facilitated ICSID.\textsuperscript{390} Although each of these institutions has a significant wealth of experience in investment-related issues, it is considered that they play complementary roles in the event of a convening of such a multilateral investment negotiation. In other words, the forum for such a negotiation should arguably be a self-standing framework independent of the above three institutions. The relevance of WTO in the negotiation of investment matters is, indeed, controversial. The so called ‘Singapore issues’ were still stalled during the Doha Round of negotiation.\textsuperscript{391} Subsequent efforts in this direction have been muted. In fact, the WTO framework does not seem to be a veritable platform for the negotiation of such a multilateral investment regime.

The negotiation through the ICSID framework would likely suffer from lack of comprehensiveness of membership. A number of countries are not signatories to the Convention. Even some of the previous signatory states, such as Ecuador and Bolivia, later pulled out after becoming disenchanted with the inequitable operation of the Convention. Conversely, negotiation through the framework of the United Nations seems to present the most attractive option. The UN not only enjoys institutional credibility more than the WTO and ICSID but also constitutes a global village ostensibly boasting of universal membership. It has equally an impressive pedigree in consensus-building and establishing compromise among contending parties. Multilateral institutions such as the WTO, ICSID, and UNCTAD could provide expert advice and guidance. Negotiation through a self-standing ad-hoc multilateral framework instituted under the auspices of the UN would leverage other platforms including UNCTAD, since the latter has formed opinions on a significant number of investment-related issues, and thus, stands the danger of being accused of bias.

\textsuperscript{389} Christoph (eds.), \textit{The Oxford Handbook of International Investment Law} at 135-38.
\textsuperscript{391} WTO, ‘DOHA WTO Ministerial 2001: Ministerial Declaration’. 
Thus, it is considered that the UN ought to seize the momentum and facilitate the emergence of a multilateral investment agreement in the form of MTFI that would redress the current inequitable regimes of IIAs and therewith embed equity, equality, and a level playing field between the home state of the investor and the host state of investment. Nigeria largely playing host to foreign investment stands in a unique position to optimise opportunities offered by such a restructured legal order.

3.8 Conclusion

Developing countries like Nigeria liberalise their economy and loosen legal strictures to attract much needed foreign capital. They also conclude international investment agreements (IIAs) to underscore their readiness to protect investment which is expected to foster economic transformation. However, the substantive terms of these IIAs epitomised by BITs are largely unbalanced and inequitable, to the detriment of economic imperatives of the host state. This research offers useful suggestions on better ways of harnessing the regimes of IIAs to ensure a balanced investment relationship. First and foremost, IIAs should be underpinned by the incorporation of the rights and duties of both the investor and host state. The mechanics of the current system is characterised merely by the rights of the investors and duties of the host state.392

Specifically, the broad-based and amorphous construction of the term ‘investment’ clips the development imperative and policy discretion of the host state. It could lead to protection of virtually everything of economic value which is antithetical to economic philosophy of the host state. On this wise, the conditions laid down in the Salini Test,393 and

392 Note that the current regimes of IIAs do not classify the rights and duties of parties as such, but, since foreign investment flows from developed countries to developing countries, the latter almost always bear the brunt of inequitable prescriptions of IIAs, since they constitute the host states. 393 Salini & anor. v Morocco, ICSID Case No. ARB/00/4, Decision on jurisdiction, July 23, 2001, para. 52.
reinforced in *Phoenix Action, Ltd. v Czech Republic* \(^{394}\) ought to be augmented and not undermined by the case like *GEA Group v Ukraine*. \(^{395}\) Secondly, FET has been interpreted against the host state in significant ways viz - a breach of the legitimate expectations of the investors; \(^{396}\) inconsistent governmental action bearing on the investment; \(^{397}\) arbitrary changes to regulatory framework; \(^{398}\) lack of stable legal climate for operation of investment; \(^{399}\) and transparency of legal rules. \(^{400}\) Consequently, it is argued that the interpretation of FET should be underpinned by a corresponding application of the doctrine of *clausula rebus sic stantibus*, to create a balancing of contending interests of both parties. Thirdly, ordinary contracts ought not to be conflated with treaties simply to ground the liability of host states. \(^{401}\) Treaty is specie of international law; while contract is governed by its own synthesised rules (except where the parties unambiguously want to conflate both). Fourthly, justifiable regulatory expropriation ought not to be compensable in contrast to the position established in *Santa Elena Case*. This is in line with the approach followed by the jurisprudence of major capital exporting countries. For instance, under the jurisprudence of the ECHR, regulatory takings without compensation are allowed on the grounds of, inter alia, public interest or ‘general interest or to secure the payment of taxes or other contributions or penalties’. \(^{402}\)

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\(^{394}\) *Phoenix Action, Ltd. v Czech Republic, ICSID Case No. ARB/06/5, Award of April 15, 2009, para. 96 at 38.*

\(^{395}\) *GEA Group v Ukraine, ICSID Case No. ARB/08/16, Award of March 31, 2011, para. 313 at 41.*

\(^{396}\) *Duke Energy & anor. v Ecuador, ICSID Case No. ARB/04/19, Award of August of 18, 2008, para. 340.*

\(^{397}\) *MTD Equity Sdn. Bhd. & MTD Chile S.A. v Republic of Chile (ICSID Case No. ARB/01/7), Award of May 25, 2004, para. 164.*

\(^{398}\) *Tecmed, S.A. v United Mexican States (ICSID Case No. ARB (AF)/00/2), Award of May 29, 2003, para. 154.*

\(^{399}\) *Metaclad Corporation v United Mexican States (ICSID Case No. ARB (AF) 97/1), Award of August 30, 2000, para 99; AES Summit Generation Ltd. v Hungary ICSID Case No. ARB/07/22, Award of September 23, 2010, para. 9.3.39, 9.3.30 & 9.3.34 at 61.*

\(^{400}\) Schreuer, ‘Fair and Equitable Treatment in Arbitral Practice’, 373-74.

\(^{401}\) *SGS Societe Generale de Surveillance SA v Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, January 29, 2004, 1-68.*

These myriad issues could be well articulated in a multilateral setting crystallising MTFI. Although previous efforts by the OECD and WTO in this respect were deadlocked, fresh momentum ought to be seized by the UN to build a consensus that would redress the current inequitable regimes of IIAs, and therewith embed equity, equality, and a level playing field.

Although inequitable regimes of IIAs are problems worth redressing, there are still other challenges to capital importation peculiar to Nigeria. This spans from the trajectories of petroleum contractual agreements adopted by the government to challenges of disclosure to protect portfolio investors, among others. These challenges are successively linked to institutional factors. The discussion of these challenges and the reform options forms the focus of Chapter 4 shortly.
Chapter 4
Challenges to Importation of Capital

4.1 Introduction

The chapter examines other challenges to capital importation to Nigeria aside from inequitable regimes of IIAs discussed in Chapter 3. It is contended that constraints to capital importation remain. ⁴⁰³ Although there are constraints such as administrative red tape; misalignment inherent in petroleum contractual agreements; poor disclosure or inadequate enforcement thereof; and multiplicity of fiscal regimes, this thesis contends that institutional factors ⁴⁰⁴ emerge as the recurring theme that straddles all other challenges. Contrary to the position in contemporary literature that fails to correlate institutional factors with other challenges to capital importation, this thesis demonstrates that institutional factors constitute the paramount factors that shape efficient implementation in Nigeria. Drawing from the principles of New Institutional Economic (NIE) theory, ⁴⁰⁵ this chapter shows how institutional factors undermine implementation of all aspects of investment regulation in Nigeria. Consequently, it is canvassed that there is an urgent need to shore up human capital as well as social capital ratio to redress the preceding.

The chapter is divided into five sections. The first section discusses the relationship between the NIE theory and institutional factors, and postulate that its effect straddles the implementation of every aspect of investment regulation in Nigeria. The second section evaluates the misalignment that underscores petroleum contractual models in relation to its status under international law. The third section examines how failure of disclosure regime in Nigeria capital market affects capital flight. The fourth section dwells on how misalignment

that reflects in political strife and lack of systematised fiscal regimes undermines inflow of capital. The fifth part concludes.

4.2. Institutional Factors

The claim by new institutional economics (NIE) theory of the relevance of institutional factors in determining organisational outcomes is well acknowledged by theorists and scholars, and need no over-flogging here. However, for the avoidance of doubts a snapshot might be necessary. The postulate of NIE theorists is that institution constitutes: (a) written rules and agreements that regulate contractual dealings and corporate governance; (b) constitutions, laws and regulations that govern society, politics, finance; and (c) generally unwritten codes, beliefs, norms of behaviour that underpin any structurally hierarchical organisation. In other words, NIE is simply concerned with how to design ‘effective and efficient institutions to structure behaviour in such a way that the system performs better’. The environment in which the institution is embedded matters equally. The implication is that the nature of institutions both enables as well as constrains outcome. Thus, the amalgam of these formal and informal factors shape performance outcome of any organisational arrangement. NIE is associated with transaction cost economics, property rights, and agency problem, each or a combination of which enables or constrains institutional efficiency. Unlike the neoclassical economics theorists’ assumption of existence of perfect

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408 Groenewegen et al, Institutional Economics: An Introduction at 32.
409 Ibid., at 26 - 31.
411 Oliver E. Willaimson (ed.), Industrial Organization, ed. Oliver E. Willaimson, ‘Transaction Cost Economics: The Governance of Contractual Relations’, (Cheltenham: Elgar Publishing, 1996) at 233. Note that transaction cost economics which is at the heart of the NIE has been criticised as not been good enough a theoretical
market, rationality of economic agents, and cost-free nature of transaction costs, NIE claims incompleteness of information and cognitive limitation of economic players. Consequently, these lead to uncertainty together with unforeseen eventuality and results as well as increasing transaction costs. In other words, the performance of any market economy hinges largely on the formal and informal institutions and organisational arrangement that determine private transactions and cooperative behaviour. In contrast to old institutional economics (OIE), NIE does not jettison neoclassical economic theory or attempt to proffer new answers to the ‘traditional questions of economics – resource allocation and the degree of utilisation’. Instead it (ie NIE) attempts to answer new questions, why institutions act the way they do, asserting that institutions matter.

The literature in NIE is vast with many strands and spin-offs of arguments. Nevertheless, the upshot of NIE theory can roughly be said to postulate that the nature of the institution (formal and informal rules as well as the environment) determines productive outcomes. An efficient and well-ordered institution has greater probability of efficient outcomes than a misaligned institution; and this straddles all institutions – economic, legal, political, and any other hierarchically organised arrangement. This by extension entails that the economic disparity between developed and developing countries could be partly attributed to institutional barriers afflicting the latter.

This conclusion transcends economics, foraying into other disciplines not least the legal discipline.

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415 Groenewegen, Institutional Economics: An Introduction at 36.

416 Shirley (ed.), Handbook of New Institutional Economics at 3.
Thus, this NIE theory is not only relevant to institutional factors discussed in this chapter but also shape its performance. Institutional factors are analysed in this context to underscore its overarching presence in determining investment regulation outcomes in Nigeria. In other words, institutional factors constitute the touchstone of a better outcome.

**Caveat:** although this thesis draws from the principles of NIE theory to explain the nature of institutions generally, that by no means entails that the NIE theory underpins this research. In fact, the global distributive justice remains the most apposite theory relied upon by this research, since, unlike the global distributive justice theory, the NIE theory is inappropriate and inapplicable to equality and balanced investment relation argument which is critical to this research.

Thus, institutional influences straddle implementation of the whole investment regulation encompassing investment promotion agencies, petroleum contractual agreements, enforcement of disclosure rules in capital market, implementation of fiscal regimes, and the political factors. A graphic representation of the overarching influence of institutional factors in investment outcomes in Nigeria would be illustrative at the outset -
The interrelationship of each of these variables with institutional factors straddles the entirety of this research, and would come to light as discussion of the concepts proceed hereunder.

4.2.1 Multiplicity of Investment Institution

Multiplicity of investment institution constitutes another distinctive feature of institutional problems that underlines implementation of investment regulation. To counter the problem together with the resultant inter-agency rivalry bedevilled by conflicting regulatory frameworks, ‘arbitrary use of discretion in granting approvals; limited transparency;’ bureaucratic bottlenecks; ‘and poor service orientation’ \(^{417}\), one stop investment centre (OSIC) was established. OSIC is like a ‘clearing house’ where various agencies \(^ {418}\) are concentrated in one location to facilitate prompt, efficient, and transparent services to foreign investors.\(^{419}\) OSIC services to foreign investors include, inter alia, granting of entry approvals and permits necessary to allow investors establish investment; facilitation of post-entry approvals, granting of permits and licences in liaison with the relevant agencies with statutory powers.\(^{420}\)

The establishment of the One Stop Shop (OSS) - ie OSIC - has tremendously reduced obstacles involved in doing business in Nigeria.\(^{421}\) Investors can now obtain all the permits, approvals and information required for investment in one destination. However, further constraints remain.\(^{422}\) The policy objectives informing the granting of approvals and other permits by various agencies under OSS sometimes conflict with the core mission of the NIPC to make the country the preferred investment destination. Moreover, while inter-agency

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\(^{418}\) For a list of agencies under OSIC see Annex IV.

\(^{419}\) There are also free and export processing zones for investors, see Annex V.

\(^{420}\) For a comprehensive range of services offered by OSIC, see OSIC homepage, OSIC, 'Our Services'.

\(^{421}\) For a detailed lists of the agencies and the relevant services offered to investors, see NIPC, 'Investors' Guide at the OSIC'.

rivalry has, by and large, diminished it has not been eliminated completely. The under-funding of NIPC, regarded as a public good that does not charge fees for most of its activities and therefore ought to be funded from the public treasury to maintain investors’ confidence in accordance with international practice, is another impediment to full realisation of its goal of investment promotion and protection activities. The World Bank ‘Doing Business’ publication 2013 provides a further dismal picture of the business environment in Nigeria, out of 185 economies of the world ranked.423 The ranking hereunder illustrates the position of Nigeria in doing business indicator,

![Diagram of Doing Business Indicators]

Source: 2013 World Bank Doing Business Database

The above unenviable position of 119 in starting up business and 70 in overall investor protection out of 185 world economies ranked leaves much to be desired. The situation

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constitutes a significant source of concern, since previous World Bank rankings painted a similar gloomy picture of investment profile in Nigeria.\textsuperscript{424} Indeed, the overall business environment needs to be strengthened to foster investment.

Arguably, NIPC needs to ‘negotiate protocols of cooperation with other agencies participating in OSIC’,\textsuperscript{425} to ensure convergence of objectives with other participating agencies. Also better funding of the NIPC could enhance capacity building, tapping of latest IT technology, and lessen the risk of predisposition to corruption among the officers. Above all, there is a need for policy stability to provide some levels of certainty to prospective foreign investors.\textsuperscript{426} Aside from the preceding, other institutional issues undermining optimal implementation of investment regulation are examined hereunder.

\textbf{4.2.2 Human Capital}

Poor quality of manpower charged with implementation of investment regulation strikes at the core of institutional factors.\textsuperscript{427} The quality of human capital can make or mar positive outcomes of any institutional establishment.\textsuperscript{428} Inefficient human capital affects implementation of investment regulation in many significant respects. For instance, it undermines investor confidence ie when there is poor service delivery. Secondly, it damages Nigerian investment profile – when investors become disenchanted and therefore avoid investing in Nigeria, owing to poor service delivery. By and large, poor human capital

\begin{itemize}
  \item \textsuperscript{424}World Bank, 'Doing Business 2012 - Economic Profile: Nigeria', at 8.
  \item \textsuperscript{425}For a blueprint of the recommended reform options, see UNCTAD, 'Investment Policy Review - Nigeria', at 26.
  \item \textsuperscript{426}UNCTAD, 'Best Practices in Investment for Development: How to Attract and Benefit from FDI in Mining - Lessons from Canada and Chile', Investment Advisory Services (Geneva: United Nations, 2011) at 89-91.
\end{itemize}
obstructs capital inflow – the consequence of the above instances. As noted by the World Bank, the effectiveness of institutional sector (such as the civil service) is dependent on functional efficiency (result-oriented); not necessarily mere existence (form) nor simply complying with best practice.\(^{429}\)

The human capital predicament may not be unconnected with flaws in the recruitment process but that is not all. Although the recruitment process is ostensibly stated to be transparent and merit-driven, the realities hardly bear such imprints. Recruitment is carried out sometimes based on party or ethnic affiliation rather than merit. The consequence can be described as putting a square peg in a round hole, which eventually filters out in unpalatable implementation outcomes. The situation is exacerbated by section 14 of 1999 Constitution of FRN which apparently constitutionalises and justifies mediocrity. Subsection 3 states that

\[\text{[t]he composition of the Government of the Federation or any of its agencies ... shall be carried out in such a manner as to reflect federal character ... thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnic or sectional groups in that Government or any of its agencies.}\]"\(^{430}\) (Emphasis added).

This section (popularly called the federal character) celebrates personality rather than skill, merit, and expertise. It emphasises employment contingent on geographical setting and sectional affiliation rather than merit. Such a scenario constitutes a clog in the wheel of economic development and by extension, the drive for eventual industrialisation. To this end, the said subsections should be scrapped. It should be replaced with a subsection stipulating that candidates are recruited both in federal and state institutions respectively strictly based on their requisite skills and expertise. Furthermore, such an amendment should be bolstered by outsourcing recruitment to independent and impartial recruiters to avoid the manipulation of the section to thwart the intendment of such a reform.


\(^{430}\) See section 14 (3-4) 1999 Constitution. Note that the nagging effect of these subsections span out to other institutions. However, the petroleum sector remains the most strategic sector of the Nigeria economy.
Note that the usual argument employed by proponents and adherents of the federal character is that it uplifts the disadvantaged group. To this end, it could be argued that it shares the same philosophical symmetry with affirmative action policies. However, what the proponents fail to realise is that affirmative action policies are embarked upon to redress historic injustices perpetrated by one group in order to perpetuate economic and political domination over the others, often classified as inferior race, as was the case in the South Africa and US.\(^\text{431}\) These preconditions for institution and implementation of affirmative action are clearly absent in Nigeria’s historic experience. Undeniably, no section of the country can clearly equate Nigeria’s historical experience with the historical racial segregation in South Africa, nor the US. Not only that, even the US (South African affirmative policy was equally challenged)\(^\text{432}\) affirmative action policy is currently standing on a shaky and uncertain foundation, judging from emanation arising from the June 24, 2013 US Supreme Court case of *Abigail Fisher v University of Texas*,\(^\text{433}\) where the court - lead judgement delivered by Kennedy J. – ruled that competence and requisite qualifications constitute grounds for enlistment rather than origin.

Aside for the preceding, low incentive for efficient service delivery constitutes additional aspect of the human capital conundrum. Some of the qualified workforce charged with investment services delivery are not incentivised enough to put in their best effort. This situation is evident in shirking of responsibilities prevalent among many institutions in Nigeria. Although it may be argued that the situation can be ameliorated by incentive

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\(^{432}\) Piero Foresti, Laura de Carli and others v Republic of South Africa, ICSID Case No. ARB/AF/07/1, Award of August 04, 2010.

packages, it is actually more complicated than just that. In fact, incentives packages without corresponding strengthening of institutional checks and balances will arguably not solve the problem. It can be argued further that retraining could provide a veritable channel through which a change in the performance outlook of the workforce will be enhanced, but the utility of such episode remains debatable. Indeed, such a retraining has been in place in the face of the prevailing inefficient implementation performance. In the final analysis, the amalgam of varying factors may be needed to checkmate the situation particularly the recruitment of workforce not only based on merit but also passion for the job.\(^{434}\)

Similar to the foregoing, over-bloated workforce constitutes another significant drain on efficient service delivery in implementation of investment regulation. There are simply too many people doing essentially the same thing as well as others being in the payroll without doing any significant work to justify their payments. The literal fallout of the preceding is diversion of funds meant for efficient quality delivery to overhead cost. No doubt the preceding undermines optimisation of funds that would engender better implementation outcomes.

### 4.2.3 Social Capital

Another institutional factor with significant influence on capital importation in Nigeria is the social capital.\(^{435}\) Although social capital has various contours, it is clearly acknowledged that its core dictate constitutes a plethora of informal values or norms that guide and/or facilitate well-ordered behaviour.\(^{436}\) Social capital differs from human and physical capital in many significant ways: it is relative to society; it is a public good rather than being personalised;

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\(^{436}\) Ibid.
and it involves accretion of values resulting from group investment in time and effort unlike human and physical capital.\textsuperscript{437}

Generally speaking, informal values of social capital critical to enhanced service delivery include the qualities of honesty, diligence, civility, patriotism, efficiency, result-oriented, enthusiasm, trustworthiness, altruism, selflessness, among others. These qualities might not have been codified into legal rules and therefore not legally enforceable. However, accretion of these qualities into virtual habit by a given entity such as the civil service incharge of implementation of investment regulation could engender functional efficiency and qualitative outcomes. Arguably, this social capital is still in short supply in Nigeria and ought to be supplemented to enhance investment service delivery.\textsuperscript{438} In the course of reading this work, it would be perceived by the reader that the deficit in these social capital and human capital ratios (discussed above) contribute, in one way or the other, to low output and/or poor investment service delivery, which eventually affects capital importation to Nigeria.

4.2.4 Stalling of Decision

Another subset of institutional factor is what can be called ‘decision stalling’. This simply means the act of deliberately stalling decision on a matter for no justifiable cause. ‘Decision stalling’ is symptomatic of deficit in social capital ratio by the relevant person or entity. Strange as it may seem, there is this prevalent indifferent attitude to efficient outcomes among the government workforce in a significant number of offices in Nigeria. Government interest is treated as no-man’s interest and therefore not attended to with due diligence and


industry it ought to receive. Investment establishment is no exception in this regard. The problem may not be unconnected with disillusionment characterising the performance of the political class. This disenchantment appears to have permeated various institutions not least implementing establishment of investment regulation.

Thus, stalling of decision occurs in a situation where investment establishment deliberately delays (stalls) decision on an issue (such as application for permits, quotas and/or approvals) from investors. Reflection of the preceding is arguably evident in calculated delays in granting of approvals and permits to prospective as well as existing investors.\textsuperscript{439} For instance, a foreign investor may apply for a permit or an approval and the relevant employee in an investment establishment because of disincentive for diligence or requiring gratification (but would not like to mention it expressly) deliberately delays decision on the outcome, citing reasons such as logistical problems. The essence of such tactics is to make the relevant applicant desperate and frustrated thereby forcing him/her to part with certain sum to engender an expedited outcome. By the foregoing action, the relevant employee would get the required gratification without expressly asking for it.

Institutional issue of this nature is not only injurious to foreign investors’ interest but also undermines the inflow of foreign capital - the spirit that underpins investment regulation. The situation is not tempered by setting benchmarks or deadlines for investment decisions, since certain level of discretion almost always resides with government civil servants. In recognition of this complexity, the World Bank acknowledges that public sector reform ‘is a challenging area in which to offer assistance.’\textsuperscript{440}

Similar to the above is selective implementation of investment regulation for personal or group aggrandisement, unconnected with institutional gain. The preceding occurs in

circumstances where allocation is made for revamping a particular ministry to enhance efficient service delivery. In such a scenario, installation of low quality components to save money not for institutional gain but for individual enrichment usually constitutes the order of the day. Similarly, the management sometimes deliberately stall implementation of policies involving huge financial expenditure so that at the turn of the year the unspent allocation funnels into individual coffers. Thus, emphasis is on individual goal rather institutional goal. Although an oversight function as well as prosecution for corruption might have been necessary in these circumstances, their utility is undermined by the wider impacts of the tentacles of corruption which affect vital fabric of Nigeria institutions. In other words, the culprit would unabashedly deploy the loot to compromise any punitive move. Undoubtedly, this undermines the efficient outcome of implementation of investment regulation.

Although no one-size-fits-all recommendation exists, a recognition and identification that there exists institutional problems in this sphere is ‘as much as [finding] what the solution is’. Indeed, any ‘sustainable institutional change requires that thousands of paid agents change their behaviour’ in significant ways. Indeed, this is no less than a necessity to shore up the social capital needed for enhanced efficient service delivery. Arguably, qualitative social capital ratio that underpins institutional effectiveness and functional efficiency continues to remain significantly unenviable in Nigeria.

Having identified the core part of the institution factors, the rest of this chapter will now delve into the discussion of other challenges to capital importation which appear, prima facie, to be self-standing challenges but invariably yield to institutional factors in one way or the other. The starting point is the analysis of the implication of the framework of petroleum

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441 World Bank, 'Engaging for Results in Civil Service Reforms: Early Lessons from a Problem-Driven Engagement in Sierra Leone', at 3.
442 World Bank, 'Better Results from Public Sector Institutions', at 1.
contractual agreements adopted by Nigeria with the international oil companies (IOC), followed by other issues.

4.3 Petroleum Contractual Agreements

In a bid to engender greater inflow of foreign capital coupled with increased oil revenue, various petroleum contractual approaches have been utilised by the country depending on the necessity of the circumstance. It can be stated that the fiscal regimes that underpin international petroleum exploration and production are generally classified into concessionary regimes (epitomised by payment of royalties and taxes) and contractual approaches. The primary distinction between the two relates to the scale of ownership of the petroleum wealth and the nature of taxation imposed. While International oil companies enjoy the right to title of petroleum resources exploited and produced and remit royalties and taxes under concessionary regime, the sovereign title to all petroleum resources resides with the host government under the contractual agreements model. The necessity for a recoceptualised petroleum contractual model is justified on the ground of global distributive justice that advocates a level playing field and equity in economic relation. Unlike in the past characterised by concessionary fiscal regime, Nigeria currently utilises various contractual approaches to petroleum exploration and production namely: joint ventures, production

Note that in addition to the contractual arrangements discussed hereunder, there are also other petroleum contractual arrangements such as management contract and contract of service. However, the foregoing will not be discussed giving its marginal effect to the issue at stake.


Section 2 of Petroleum Act of 1969 (as amended) grants sovereign right to all petroleum deposits to the Federal Government of Nigeria. See also section 44 (3) 1999 Constitution.
sharing contract, and risk service contract. A radial illustration of Nigeria petroleum contractual framework would be instructive at the outset.

![Radial illustration of Nigeria petroleum contractual framework]

Source: Author

4.3.1 Joint Ventures

Following the harsh regime occasioned by concession arrangement, the host government pushed for greater participation both in the managerial decisions and control of petroleum operations. While IOCs preferred that host government participation be limited to sharing of profit, the host government demanded more ‘control over operations’ in the form of joint ventures. Joint ventures generally constitute ‘an association of persons engaging in a

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447 Kamal Hossain, *Law and Policy in Petroleum Development* (New York: Nichols Publishing, 1979) at 120. Three contractual models underpin the joint venture contract: classical model that leverages on the precision of the expectation of the parties over flexibility of clauses therein; neoclassical models marked by less precision; and relational model which envisages flexibility of the regime as circumstances dictate. For a
common undertaking to generate a product to be shared among the participants’. It is noteworthy however that a joint venture is a creature of circumstances structured to reflect the demands of the operation and parties involved. In the context of petroleum operations, it involves two or more international oil companies entering into an agreement for joint development of jointly held oil prospecting licences or oil mining leases (OMLs) and facilities. Joint ventures can be equity joint venture or contractual joint venture. Equity joint venture leverages host government (‘or its national oil company’) with a better participatory framework by providing for a partnership with IOCs, whereby each has a certain percentage of equity shares in a separate operating company. Unlike equity joint venture, contractual joint venture (otherwise known as joint structure) does not have the features of a separate operating company and no joint ownership of petroleum produced; each party owns fifty per cent share of the petroleum product at well-head.

Joint ventures constitute a unique international contractual arrangement in oil and gas exploration for sharing of costs and benefits proportional to the equity interest, giving the risks and cost implication of such an exploratory exercise. However, the concentration of different firms for joint exploration has been criticised as anti-competitive and monopolistic and, therefore, may lead to collusion in the fixing of the eventual prices of petroleum products by the joint venture parties.

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449 NIPC, 'Oil and Gas - Joint Ventures'.
450 Joint venture arrangement was first employed by ENI (an Italian multinational) in 1957. See Hossain, Law and Policy in Petroleum Development at 121.
451 This type of arrangement was exemplified by the joint venture arrangement between Pan American Oil Company and the National Iranian Oil Company on April 24, 1958. For an exhaustive discussion on pros and cons of joint ventures see ibid., at 120-38.
Under Nigeria joint ventures, the Memorandum of Understanding embodies, inter alia, incentives to stimulate the interest of joint venture partners to raise the exploration level. It also stipulates modes of allocation of income among joint venture partners, including payment of profits, royalties, and taxes. Joint ventures are structured into participating agreement, operating agreement and heads agreement. Joint operating agreement sets out the basis of the relationship between the joint venture partners and the Nigerian state representative – the Nigeria National Petroleum Corporation (NNPC).  

Unlike the production sharing contract discussed below, where the overall risks of exploration are borne by IOCs though subject to recoupable rule if oil is discovered in commercial quantities, the joint sharing of risks in joint venture agreement arguably entails that the host government may incur some irrecoverable costs should a given joint venture arrangement fail to yield commercial petroleum deposits. As a consequence of the foregoing challenges as well as the cash calls burdens on NNPC, and the necessity of raising crude oil production, the Federal Government of Nigeria adopted, in significant part, the production sharing contract mechanism.

4.3.2. Production Sharing Contract (PSC)

PSC was originally introduced in Indonesia in 1966 (before it branched out to other parts of the world) as a protest against the oppressive concession arrangements. Under the arrangement, the international oil companies bear all the risks pertaining to funding, exploration, development and production of petroleum resources within the allotted acreage. Whatever quantity of oil discovered remains the property of the host country since IOCs are

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454 For the list of six joint ventures partnership between NNPC and IOCs that result in production of about 97% of oil, see Nigerian National Petroleum Corporation, 'Joint Venture Operations'.

455 For the a chronicle of the events that led to the introduction of PSCs as well as PSC modus operandi, see Robert Fabrikant, 'Production Sharing Contracts in the Indonesian Petroleum Industry', *Harvard International Law Journal*, 16 (1975), 310-12.
regarded as mere contractors. The IOC is, however, entitled to recoup the production expenses involved (called cost oil) from net revenues thereafter. IOCs are also entitled to recover equity oil (‘oil to guarantee return on investment’) and ‘dispose of the tax oil’ (oil to offset royalties and tax duties) ‘subject to NNPC approval’ before profit oil.\textsuperscript{456} The eventual profit accruable (profit oil in case of oil contracts or profit gas in gas contracts) will only emerge after deduction of expenses involved and payment of royalty to the Federal Government of Nigeria. Such eventual profit is equally taxed and shared between the Federal Government of Nigeria and IOC in accordance with the predetermined manner provided for in the PSC.

The introduction of PSC contractual mechanisms was necessitated by the Nigerian government’s desire to exercise significant control and ownership over petroleum operations in contrast to the concession model.\textsuperscript{457} PSCs have the inherent advantage of limiting government financial exposure, (unlike the joint venture with its cash call burdens on NNPC) since the overall costs of exploration are borne by the IOCs, unless otherwise stipulated. PSCs are equally imbued with reasonable flexibility, unlike concession arrangement, entitling the host government to vary the contract where exploration contravenes any of the provisions of the contract.\textsuperscript{458} PSC is seen by the government as an avenue for advancing not only the revenue generation base, but also improving the technical capabilities of the Nigerian operatives for ultimate takeover of petroleum operations.\textsuperscript{459}

Nonetheless, the foregoing objectives are hampered by a lack of effective incentive on the part of the IOCs to transfer technology to host country operatives, fearing ‘loss of

\textsuperscript{456} NIPC, ‘Production Sharing Contract’.
\textsuperscript{457} For the list of Nigerian PSC arrangements with IOCs see Annex VI.
\textsuperscript{458} Jenik Randon, ‘The ABCs of Petroleum Contracts: License-Concession Agreements, Joint Ventures, and Production-Sharing Agreements’, (2005), 70.
Besides, the percentage of crude oil allocated as cost oil under PSC can be arbitrary and subject to rent seeking to the detriment of the host country. Equally, the absence of an effective institutional monitoring mechanism for cost recovery when commercial discovery is made arguably makes it (cost oil) subject to potential abuse and manipulation by the IOCs. The IOCs, however, consider PSC arrangements more preferable, since they give them ultimate control of their share of crude oil as well as enable them to enjoy the largesse associated with increases in the world oil market. The advantage of PSCs from IOCs perspective is well articulated:

*Production-sharing agreements have been popular with the oil companies. The companies control their own share of the crude oil and, barring an election by the state oil company to take its share in kind, they can control the destination of the state oil company’s share. Moreover, no tax is payable by the company. Finally, and most importantly, companies have been able, on their share of the crude oil, to enjoy the whole of the price increases in the world market.*

Although the Federal Government of Nigeria in theory claims to control the management and operations of the IOCs under PSC arrangement, such a stance is, arguably, symbolic since *de facto* control of day to day running of petroleum operations still vests with IOCs. A grim picture of the dismal regime of PSC was illustrated by the *Report of the Tribunal of Inquiry into Crude Oil Sales* set up to investigate the disappearance of 2.8 billion Naira from the NNPC account. The tribunal noted, inter alia, that the PSC ‘has no benefits whatsoever to the NNPC’ and that the NNPC should ‘therefore ill-afford to continue this contract a day longer’.

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464 Ibid.
The current PSC arrangement cannot, therefore, be said to realise the philosophical expectation (ie to wrestle control from the IOCs and attract greater capital from petroleum operations) behind its adoption.

4.3.3 Service Contract

The earliest service contract is typified by the Venezuelan model in the sixties as well as the service contract employed in Iran and Iraq during the same period. The principal features of service contracts are well captured in the following words:

The national oil company is by law the sole titular holder of the area under agreement. All petroleum deposits and oil and/or gas produced are the property of the national oil company at the well head. The foreign company, either directly or through a subsidiary, acts as general contractor for the national oil company, and as such carries out, in the name and on behalf of the latter, all operations necessary for the exploration and development of oil deposits. Thus, the contractor is not a concession holder or partner, but merely a hired agent.\(^\text{465}\)

The relevance of service contracts is underscored by the host government’s need to hire or purchase the services of the IOCs. Such services could be financial (funding of the petroleum operations); technical (technology of the IOCs); and commercial (marketing of the products) services.\(^\text{466}\) The ultimate ownership of the oil and equipment for its production, however, remains with the host government or its national oil company.

In Nigeria, the only service contract in operation is between Agip Energy and Natural Resources (AENR) and NNPC. Service contracts leverage other contractual models particularly the PSC, since the contractor has no right to oil except the right to be repaid for the expenditure of operations if commercial quantities are discovered. Moreover, the flexible duration of service contracts more than other contractual models enable the host government

\(^{466}\) Ibid., at 170.
to terminate the contract when and where necessary.\textsuperscript{467} Service contract does not appear to be unique to large scale petroleum operations unlike the joint venture and PSC above.

4.3.4 Analysis of the Performance of the Petroleum Contractual Models

The above petroleum contractual models are the frameworks through which Nigeria fosters inflow of capital to the economy. However, these contractual frameworks still suffer significant constraints as indicated above. It is argued that government could ameliorate the situation by adopting a pragmatic approach to investment. One such approach is the use of a special investment vehicle (SIV) – jointly incorporated (with IOC) company - charged with overall petroleum operations. Such a legal vehicle would have the power to secure external financing for petroleum operations. This approach would undoubtedly reduce the current cash call burden on the NNPC and the associated bickering attendant on it particularly in the case of joint venture arrangement.\textsuperscript{468} The day to day administration of the entity would be at the hand of a management constituted by both the representatives of foreign investors and Nigeria government, to ensure transparency of operations. Since such an investment vehicle constitutes an incorporated entity it enjoys all the rights and privileges of a legal personality. Additionally, since such a SIV constitutes a joint investment enterprise, it undoubtedly accords with the rational premise of global distributive justice that advocates equality in international economic relation.

Furthermore, the text of the fiscal regimes that underpin the operation of any re-conceptualised contractual model would have to redress existing fiscal imbalance that

\textsuperscript{467} For an outline of the merits of the service contract from Nigerian perspective, see NIPC, 'Market Regulator and Service Contract'.

\textsuperscript{468} The previous version of Petroleum Industry Bill (PIB) 2008 attempted to introduce Incorporated Joint Venture (IJV) to replace existing joint arrangement for petroleum exploration and production, however, such a provision does not appear to be a significant part of the current PIB 2012 before the National Assembly (unless amendment follows since it is still stalled at the time of conclusion of this research). See sections 246-248 PIB 2008.
undermines government share of petroleum revenue accruable. Although the current PIB fiscal changes evidenced in new hydrocarbons tax as well as companies income tax\(^{469}\) (applicable to both joint venture and PSC operations) appear to tilt in that direction, such a step ought to be supplemented by other fiscal regimes, given the chaotic enforcement of tax regimes in Nigeria. One significant way of rectifying such an imbalance would be through the institution of a petroleum price cap\(^ {470}\) (in respect of world market petroleum prices) beyond which the difference goes to the host country. However, this approach does not take away the right of IOCs to recover the cost of petroleum operations (cost oil) prior to profit.\(^ {471}\)

The price cap mechanism ensures that once IOC recovers the expenditure of petroleum operations, the world market oil price of any quantity of crude oil allocated as profit (profit oil) would not exceed a predetermined price. The difference in the prices of crude oil beyond that predetermined limit should arguably be remitted to government. This approach would, no doubt, increase government share of the dividend of the country’s wealth. Although IOC may contest such a cap,\(^ {472}\) it is difficult to postulate that such an arrangement prejudices the interest of investor (IOC) given that world market oil price is unpredictable. In other words, IOC could not have projected with certainty the accrual of such an amount. Imprecise or uncertain expectation that is yet to crystallise into a right cannot be a subject of enforcement.

However, in accordance with the tenet of global distributive justice, where the price of the oil fell below a predetermined rate thereby prejudicing the revenue projection and consequently affecting the activities of the IOCs, it would be expected that the federal

\(^{469}\) See sections 299, 253 of PIB.

\(^{470}\) Sometimes called additional profit tax.

\(^{471}\) Note that PIB 2008 attempts to introduce a cap to cost oil recovery to 80% in contrast to existing 100% cost oil recovery under PSC 1993 regime. Note also that the PIB 2008 tends to replace the existing depth-determined royalty regime with progressive royalty regime defined by volume of petroleum production and consequentprice. However persistent amendment of the PIB has tended to obscure its status.

government of Nigeria would cushion the effect of such a scenario by rescheduling certain remittances of the IOCs such as taxes and royalties by carrying it over to next tax year, or even cancelling outrightly some of the financial remittances to cushion the effects of such price fall in the world market, on the IOCs.

The above arrangement would no doubt advance government drive for greater share of oil revenue while simultaneously not undermining the protection of investors. Arguably, such an arrangement does no violence to the tenet of theoretical premise of distributive justice recognised in contemporary literature to include not only a redistribution of world resources but also the re-conceptualisation of the rules of international economic institutions to reflect effective balance of relation between seeming unequal parties. In other words, a restructuring of the preceding petroleum contractual terms will lessen the current disadvantaged position of the Nigeria thereby bringing to par the country’s entitlement to petroleum revenue vis a vis IOCs.

4.4 Status of the Petroleum Contractual Approaches

4.4.1 Governing Law

There continues to be divergent views regarding the legal status of foregoing contractual approaches under international law. There would be little or no difficulty where the contract incorporates expressly the governing law. Where, however, there is lack of such clarity, the situation becomes complex. Article 42 of ICSID enjoins the application of host state law (including its conflict of law principles) supplemented by international law in absence of a choice of law clause. But this is only possible if the parties adopted the facility of ICSID as a dispute settlement framework, and not otherwise.
Under the traditional law of state responsibility, contracts between a sovereign state and a private entity were governed by national law. The rationale for this position is anchored on the right of eminent domain well-recognised in most legal jurisdictions. However, the validity of the foregoing position under contemporary international law appears to be in doubt.

Two diametrically opposed views seem to underpin this area of law. One view holds that state contracts are automatically governed by international law. This position is, by and large, predicated on the fact that international law cannot be contracted out. By contrast, other authors maintain that state contracts are not regulated by international law, since international law lacks a systematised and well-developed coherent body of international contract rules. This view appears to be textured to consideration of the host state perspective.

The foregoing dichotomy might not be unconnected with the age-long polarisation between capital importing countries and capital exporting countries pertaining to the breadth...
of protection enjoyed by foreign investors vis-à-vis the host state.\textsuperscript{478} One issue remains pretty unassailable though: state contracts are, first and foremost, contracts - i.e. voluntary private orderings between the relevant parties.\textsuperscript{479} Thus, the party autonomy to contract,\textsuperscript{480} well recognised in contract law imbues the parties with the right to choose the applicable law to govern their contract. The implication is that where the parties choose national law as the applicable law, the tribunal ought to give effect to such a choice consequent on autonomy of parties to contract, so along as public policy dimension is unaffected;\textsuperscript{481} and interest of third parties not compromised.\textsuperscript{482} It is not for the tribunal to substitute national law with international law.\textsuperscript{483} Moreover, where the parties omit the choice of law, the governing law should be the one with which the contract is most closely related with, which in most cases is the law of the host state, while international law plays only a supplemental role. However, the foregoing might be dependent on the dynamics underpinning contemporary position of international law at the point of dispute. Thus, in the case of \textit{Trendtex Trading Corporation v Central Bank of Nigeria},\textsuperscript{484} Lord Denning observed, inter alia, the dynamic nature inherent in

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\textsuperscript{479} On different trajectories of private ordering, see, Christopher R. Drahozal, 'Private Ordering and International Commercial Arbitration', ibid., 1032-33.
\textsuperscript{482} For insightful discussion on the implication of party autonomy on the third party interest, see, Stavros Brekoulakis, 'The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room', ibid., 1165-67.
\textsuperscript{483} On procedural constraint to party autonomy, see George A. Bermann, 'Ascertaining the Parties' Intentions in Arbitral Design', ibid., 1014-15. Note that such procedural constraint might invariably create uncertainty and unpredictability in arbitral relations. See Lawrence W. Newman, 'Agreements to Arbitrate and the Predictability of Procedures', ibid., 1323-25.
\textsuperscript{484} \textit{Trendtex Trading Corporation v CBN [1975 T. No 3663, [1977] QB 529, Court of Appeal at 16-26.}
\end{flushright}
international law, noting that courts ought to reflect such changes in their judgment as it unfolds, without waiting for acknowledging parliamentary ratification.

4.4.2 Pacta Sunt Servanda

A related controversial issue to the above status of contractual approaches under international law is the capacity of the host state to amend, modify or totally abrogate these state contracts, which might have been entered into with foreign investors. This issue borders on the question of the doctrine of pacta sunt servanda or stabilisation clauses.\textsuperscript{485} International law apparently recognises the sovereign power of the state to constrict its power for the purpose of attracting investment.\textsuperscript{486} Whether ‘freezing clauses’ (stabilisation clauses that ensure the application of the law in force at the conclusion of the contract, but freeze application of subsequent legislation) or ‘consistency clauses’ (which stipulate the application of only the host state legislation consistent with the investment contract),\textsuperscript{487} stabilisation clauses commit the host state not to embark on legislative and/or executive acts that may abrogate or modify the terms agreed on the contract. Since stabilisation clauses amount to a limitation of the sovereignty of host states, their validity rests on the specificity of the particular acts of states to be prohibited, duration of such prohibition, and the particular subjects of that rule.\textsuperscript{488}


\textsuperscript{487} The third strand of stabilisation clause is called economic equilibrium clause, which seeks to stabilise the economic equilibrium underpinning the contract (or pay compensation) even if regulatory changes or renegotiation is allowed. See Lorenzo Cotula, ‘Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilisation Clauses’, \textit{Journal of World Energy Law and Business}, 1 (2008), 160-62; Margarita T B Coale, ‘Stabilisation Clauses in International Petroleum Transactions’, \textit{Denver Journal of International Law and Policy}, 30 (2001-2002), 223 (classifying the types of stabilisation clauses into intangibility clauses and stabilisation clause stricto sensu as well as chronicling various arbitral cases in which stabilisation clauses were in issue).

\textsuperscript{488} In \textit{Aminoil Award}, the tribunal ruled that expropriation was not particularly precluded in stabilisation clauses.
Whether or not the host state is imbued with the power to amend, modify or abrogate the terms of the investment contract remains a moot point. It has been argued that a breach of stabilisation clauses is unlawful under international law. By contrast, the contrary view holds that a breach of such clauses is not unlawful since the relevant state is exercising its sovereign powers. The latter position appears to conform to the prevailing view that where a state action is motivated by public interest, non-discriminatory, conforms to due process, such a state action is lawful.489

The literal fallout of the latter view is that the incorporation of stabilisation clauses in state contracts cannot diminish or frustrate the sovereignty of states to legislate for the overriding public interest.490 Words as a vehicle of thought are by their nature sometimes imprecise; consequently no contract can cover every foreseeable situation. As illustrated by economics theorists, asymmetrical information constrains complete and precise contracting.491 Even where symmetrical information prevails, bounded rationality constrains optimisation of information for completeness of contracting.492

Indeed, in extreme circumstances stabilisation clauses in a state contract could even be overridden by public interest requirements, particularly the need for sustainable

489 The difference between lawful and unlawful breaches of stabilisation clauses lies with the quantum of compensation. National investment laws may provide for stabilisation clauses to attract foreign investment in contradistinction to a negotiated stabilisation clause with foreign investors. For perspectives on this, see A F M Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts: A Comparative Perspective', Journal of World Investment and Trade, 8 (2007), 121-57.
environmental practices. The foreign investor is only entitled to monetary compensation in cases of breach of the stabilisation clause, if applicable.

Increasingly, adaptation clauses in the form of renegotiation clauses have become the prevailing instrument through which the parties introduce flexibility in exceptional circumstances, requiring either total abrogation or modification of the contract terms. The merit of the renegotiation lies in the ‘legislative space’ it offers to the host country in the event of exceptional circumstances unforeseen by the parties. But it could also be invoked by the foreign investor.

Beyond the discussion of the preceding, another mode of importing capital into Nigeria is through international portfolio investment both debt and equity instruments. This forms the focus of next discussion.

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494 *AGIP Company v People’s Republic of the Congo, Award, 30 November 1979* (1982) 21 ILM 726; *Libyan American Oil Company (Liamco) v The Government of the Libyan Arab Republic* (12 April 1977) 62 ILR 140. See on the contrary the *Texaco case* where the arbitrator ruled that *restitutio in integrum* is the appropriate remedy for breach of stabilisation clause. On the uncertainties concerning relief in the breach of stabilisation clause see Piero Bernardini, ‘Stabilisation and Adaptation in Oil and Gas Investments’, *Journal of World Energy Law and Business*, 1 (2008), 99 - 100.

4.5. Equity Investment

Aside from attracting foreign capital through the petroleum contractual agreements, the deregulation of equity structure was meant to induce further inflow of foreign capital into Nigeria.\textsuperscript{496} Liberalisation of equity market has the inherent feature of allowing foreign investors to access the domestic capital market and by corollary, domestic investors to ‘transact in foreign equity markets’.\textsuperscript{497} Effective liberalisation fosters market integration with the attendant multiplying effect of stimulating not only the financial sector growth but also the overall economy.\textsuperscript{498} Indeed, such liberalisation reduces the cost of capital as well as engenders better mobilisation of capital for local industries. It is probably in line with the foregoing that NIPC Act completely liberalised Nigeria equity market thereby internationalising the Nigeria capital market.\textsuperscript{499}

Section 21 NIPC Act provides that ‘a foreign investor may buy the shares of any Nigeria enterprise in any convertible foreign currency;’ but such purchase has to be completed through the Nigeria Stock exchange. Consequently, a foreign investor can now own 100% equity interest in any enterprise in Nigeria in contradistinction to the past regime characterised by 60% - 40% equity holdings in favour of Nigerians.\textsuperscript{500} One significant thing

\begin{itemize}
\item See Annex II on the checklist of steps for establishing new companies in Nigeria with foreign shareholding.
\item See section 21 NIPC Act 1995. NIPC Act repealed Nigerian Enterprises Promotion Act 1972 (as amended in 1977 and 1989 respectively) that restricted ownership of shares by foreign investors to 60%-40% favouring Nigerians. The internationalisation of the Nigerian capital markets came on the heels of the abrogation of Exchange Control Act 1962 that inhibited foreign participation in capital markets. Foreigners can now invest in Nigerian capital market not only as investors but also as operators. See Patterson Chukwuemeke Ekeocha, 'Modelling the Long Run Determinant of Foreign Portfolio Investment in an Emerging Market: Evidence from Nigeria', \textit{International Conference on Applied Economics} (2008), 290.
\item NIPC, 'Investment Incentives'. Note however that in the petroleum sector ownership is limited to current joint venture and production sharing contract arrangements. See O A Oyeranti \textit{et al}, 'China-Africa Investment Relations: A Case Study of Nigeria', \textit{Trade Policy Research and Training Programme} (2010), 14.
\end{itemize}
worth noting is that section 21 used word ‘shares’ in contrast to portfolio investment. The literal construction of the foregoing entails that purchase of debt instruments particularly bonds and subordinated debts by foreign investors is not governed by the section. Nonetheless, protection of investors in both equity and debt instruments is facilitated by Nigeria Securities and Exchange Commission (SEC).

4.5.1 Responsibilities of the SEC to Protect Investors

The Nigerian Securities and Exchange Commission (SEC) undertakes the overall supervisory and regulatory responsibilities for capital market operators and dealers in securities. The institutional functions and powers of the SEC are not limited to domestic investors only but apply with equal force to foreign portfolio investors. Such regulatory and supervisory duties are better appreciated when viewed from the philosophical premise of its institutional role of enforcing investor protection and fostering disclosure, thereby engendering transparency in the financial market - a role modelled after the US Securities and Exchange Commission.

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501 OECD defines portfolio investment as ‘international investment’ encompassing equity and debt instruments ‘but excluding any such instruments that are classified as direct investment or reserve assets.’ See OECD, ‘Glossary of Statistical Terms - Portfolio Investment’.


503 SEC is a body corporate with perpetual succession with power to sue and be sued. See section 1 of Investment and Securities Act 2007 (ISA).

504 For a comprehensive list of the functions and powers of SEC, see section 13 ISA 2007. Portfolio Investors are naturally risk-averse and would like to maximise the return on investment; a condition accentuated by the portfolio theory. Portfolio theory (both in economics and finance) postulates that investors desire to maximise the rate of return on investment and minimize risk potential. Modern portfolio theory was propounded by Harry Markowitz, see Harry Markowitz, ‘Portfolio Selection’, The Journal of Finance, 7 (1952), 77-79; Harry M Markowitz, ‘Foundations of Portfolio Theory’, ibid.46 (1991), 469-76.

Although the harmonisation of the EU financial services did not result in practical emergence of SEC, similar security regulating institutions particularly the Committee of European Securities Regulators (CESR) and European Securities Committee (EMC) were set up to strengthen the framework of mandatory disclosure regimes, in order to curb potential instances of market abuse (insider dealing and market manipulation), and protect investors.

In the UK, the Financial Services Authority (FSA) performs similar roles akin to SEC. Note only is it responsible for listing of securities admitted to trading in London Stock Exchange, but also regulates and monitors compliance with disclosure rules as well as Market Abuse Directive.

Though there is a case for a self-regulation indicative of market driven forces in contrast to a government-inspired regulatory body like SEC (or a plethora of approaches involving both), the question of disclosure has never been discounted. In fact, mandatory disclosure engenders better pricing of securities and lessens the tendency to insider dealing and market manipulation that may negatively affect investors. In the context of Nigeria, such a disclosure regime is governed by the provision of Investment and Securities Act (ISA).

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508 There is also International Organization of Securities Commissions (IOSCO) coordinating international security regulation.
509 See sections 118, 119, 397 of the Financial Services and Market Act (FSMA) 2000. Note that FSMA is being amended by Financial Services Bill (which might replace FSA with Prudential Regulation Authority and Financial Conduct Authority).
4.5.2 Disclosure Regime

Although ISA incorporates extensive disclosure provisions to avert market abuse with the consequential effect of protecting investors, such provisions are anything but effective in stemming the tide of market abuse. A brief review of the provisions is necessary to underscore the foregoing. Section 73 of ISA stipulates that,

... every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, shall state the matters specified in part I of the third Schedule to this Act and set out the reports specified in part II of that Schedule and parts I and II shall have effect subject to the provisions contained in that Schedule.512

Part I of the Third Schedule lists out the constituents of prospectus to include, inter alia, the number of management or deferred shares and the extent of the interest of the holders in the property and profits of the company; the number of shares allotted to the director as stipulated by the company articles; and the names, descriptions and addresses of the directors or proposed directors. The prospectus must provide further for -

(i) The purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue,

(ii) Expenses and any commission payable by the company to any person in consideration for an agreement to subscribe for, or procure subscriptions for any share of the company.


Property acquired or to be acquired, contracts entered into with the company and the right to vote in the meetings must be embodied in the prospectus. The auditors and accountants reports must disclose the asset and liabilities as well as the profits and losses of the company.

In the UK, similar disclosure obligation obtains to protect investors. Section 178(1) and 190(1) of FSMA obliges an investor that intends to acquire, increase, or cease to control, reduce control of a UK authorised firm (ie shareholding interests or voting power) to notify FSA. Failure to disclose constitutes an offence under section 191 of FSMA.

The overall philosophy of the foregoing mandatory disclosure regime is arguably to equip potential investors with adequate information on the financial health of a company issuing shares or whose shares are traded in the stock exchange. Such information engenders transparent dealing and enhances informed investment decisions. Besides, disclosure of management or directors’ interest in the traded shares ensures that management (insiders) do not take advantage of the inside information of the company to either reap unwarranted gains or avoid inevitable losses in the financial market. Thus, effective enforcement of market abuse regimes (insider dealing and market manipulation) ensures a level playing field in the financial markets among various players (both the insiders and outsiders).

Despite stringent disclosure regimes to protect investors, failure of institutional oversight still lingers on, given widespread insider dealing and market manipulation. For instance, the downward spiral of market capitalisation from N12.6 trillion in March 2008 to N3.99 trillion in February 2009 in Nigeria equity market was attributed to both abuses

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513 For details of the contents of prospectus see the Third Schedule of ISA.
514 See Third Schedule, Part II.
515 Such shareholding interest should be up to 10% or more. See generally Part XII, section 178 – 192 of FSMA.
perpetrated in the capital market and failure of institutional oversight. In the same period, a significant number of foreign equity investors dumped their shareholdings interest, triggering near total collapse of the Nigeria equity market. Moreover, Nigerian capital market continues to be dogged by problems of illiquidity, double taxation, macro-economic instability, and the small size of the market, which undermine investors’ confidence (particularly foreign equity investors). Furthermore, in their report on the Nigeria SEC, the US SEC and Accenture indicted poor human capital as undermining the capacity of Nigeria SEC to deliver on its strategic responsibility of protecting investor as a market regulator.

Both the firm level and country level characteristics constitute important determinants of international portfolio investments. Better institutional and regulatory frameworks constitute effective drivers to portfolio investment. Strong investor protection, effective corporate governance, and institutionalised disclosure regimes have, for instance, been found to be positively correlated with greater capital inflows.

However, excessive capital inflow also has inherent pitfalls. It may for instance trigger inflation in the host country. Besides, such capital inflows are invariably sensitive to


518 J A Babalola and M A Adegbite, 'The Performance of the Nigerian Capital Market since Deregulation 1986', CBN Economic and Financial Review 39 (2001), 8-12. Note however that the illiquidity problem can be tackled by increasing the stock of listed instruments on the exchange as well as shoring up the capital base of market makers (securities dealers). This could be facilitated by the SEC and the Central Bank of Nigeria. See SEC, 'Nigeria’s Capital Market: Making World-Class Potential a Reality', 56-58. Equally, double taxation could be ameliorated through a conclusion of double taxation treaties with the relevant countries of international portfolio investor in Nigerian stock exchange.


domestic macro-economic shocks as well as financial crises. Unfavourable fiscal and monetary policies of a host country like Nigeria could trigger rapid capital flight which may have a destabilising effect on the domestic economy. Likewise, better macro-economic policy in the home country of the investor as well as in other capital markets may lead to capital flight to these destinations. Furthermore, international investors trading may have destabilising effects on the market if they engage in the habit of buying large blocks of shares at a time, thereby inordinately driving up the prices, and then suddenly dump those blocks of shares thereby causing potential crashes in the markets, except where the absorptive capacities of local investors are high.\textsuperscript{521}

In the case of Nigeria, the capital flight from N12.6 trillion in March 2008 to N3.99 trillion in February 2009 was attributed to market abuses partly caused by poor disclosure.\textsuperscript{522} Indeed, SEC failed in its institutional oversight of implementing effective disclosure. Although there is investor protection fund to compensate injured investors, it does not account for capital flight.

4.5.3 Compensation of Investor

In contemplation of potential abuses in Nigeria capital market and the need to protect investors, Investment and Securities Act mandates the institution of investor protection fund by securities exchange or capital trade point to compensate for losses that might be suffered by investors.\textsuperscript{523} Losses covered extend only to those occasioned by ‘insolvency, bankruptcy or negligence of a dealing member firm of a securities exchange or capital trade point’; and

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\item \textsuperscript{521} Stepanyan, ‘Financial Liberalization and Foreign Institutional Investors: Literature Review’, 33-34.
\item \textsuperscript{522} This period coincided with the global financial crisis in addition to occasional volatility that underscores international portfolio flow. see UNCTAD, ‘The Growth of Domestic Capital Markets, Particularly in Developing Countries, and Its Relationship with Foreign Portfolio Investment’, \textit{Commission on Investment, Technology and Related Financial Issues TD/B/COM.2/EM.4/2} (Geneva: United Nations, 1998) at 3.
\item \textsuperscript{523} See sections 197, 221 ISA. For the sources of funding constituting the investor protection fund, see section 202 of ISA.
\end{itemize}
\end{footnotesize}
‘defalcation committed by a dealing member firm’ or its agents concerning securities, money or any property of investor in respect thereof. The investor protection fund is to be kept in a distinct account administered by a board of trustees established for that purpose.

Similar compensation regimes underpin other jurisdictions. For instance, the UK financial services compensation scheme instituted under the Financial Services and Markets Act 2000 offers compensation to individuals who suffer losses owing to bankruptcy or financial default of their firms in cases involving, inter alia, investment.

The institution of an investor protection fund is predicated on, inter alia, the necessity to promote investors’ confidence and enhance overall market development. Compensation can equally be predicated on the doctrine of equity and fairness anchored on distributive justice since investors incurred losses. However, one sticking point against the foregoing objective is the discretion of the Board of Trustees to invest the investor protection fund in accordance with the Trustee Investment Act in the immediacy, where the fund lies idle. If the Board decides to embark on speculative investment, for instance, it could potentially entail losses. The Board might argue in accordance with trustees’ rules of investment that such an investment qualifies under the prudent rule regime mandating investment of trustees’ asset in accordance with the judgement of a prudent person managing its own investment. Thus, it is considered that leaving the fund in a secure account as a standby for immediate compensation of the investors who incur losses attributable to their firms is preferable. Alternatively, it could be statutorily stipulated that the Board invest such fund only in safe assets in contrast to speculative assets particularly government bonds.

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524 See sections 198 and 204 of ISA.
526 See section 211 of ISA.
Although the foregoing compensatory regime is laudable, compensation *simpliciter* does not engender an efficient and buoyant operation of the market unless it is bolstered with an effective disclosure regime coupled with the necessity for institutional overhaul of SEC.

4.5.4 Strengthening Effective Disclosure

Although there are elaborate mandatory disclosure rules meant to checkmate incidences of market abuses in order to protect investors, the current capital flight on the exchange demands a reassessment of both the disclosure rules and institutional supervisory and regulatory philosophy of SEC. Evidently, the regime of periodic and continuing disclosure obligations ought to be strengthened as obtained in advanced jurisdictions. A periodic disclosure regime should embody the obligation of the issuers of securities to make public quarterly and half-yearly reports of assets and liabilities as well as the profit and loss account of companies in addition to the existing annual returns. This should be collated electronically and accessible outside the country particularly by foreign equity investors.

However, effective disclosure is only possible if SEC live up to its responsibility of enforcement of infraction. In addition to strengthening the framework of disclosure, the SEC needs supervisory overhaul. The SEC needs to strengthen its proactive disposition in tracking and penalising offenders. In this perspective the role of ‘Investigation and Enforcement’ of SEC unit becomes relevant. This would involve stepping up the power of information

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527 See Sections 67-104 ISA and Part XI - Part XII CAMA.
528 For a blueprint of the recommendations to improve SEC see, SEC, ‘Nigeria's Capital Market: Making World-Class Potential a Reality’, 54-84. Effort to improve corporate governance practices as a backstop to better investor protection has also been made by the SEC. See SEC, ‘Code of Corporate Governance for Public Companies’, (2011).
gathering and investigation in a similar fashion to FSA. Undoubtedly, enhanced SEC supervisory oversight and increased disclosure would not only engender greater capital inflow but also significantly shield Nigeria from international regulatory competition among financial markets. Not the least is the necessity for greater funding of SEC to enhance its enforcement capacity for abuses in the capital market.

Nevertheless, the responsibility of SEC is somewhat constrained in managing the manner investors process the disclosed information given the bounded rationality of investors and tendency to herding. Thus, investors are not always rational economic players. Nevertheless, when complaints of infractions are promptly dealt with and perpetrators adequately punished investors would at least be imbued with the requisite confidence to invest in the first place, knowing they are adequately protected.

4.6 Misalignment

4.6.1 Political Strife

In addition to aforementioned dynamics of importation of capital through equity investment, political risk constitutes another factor that shapes capital inflow to Nigeria. Political risk factors constitute risk arising from real or potential conflicts and unstable policies that have profound effect on the outcome of inflow of capital to a particular country. Political risks constitute a wider dimension of institutional problem by virtue of its emanation from a political institution. The political stability along with the policy disposition of a political institution has significant implications for the overall investment profile. Literature on political risks continues to generate mixed conclusions. Although the existence of democratic

530 See generally Part XI of FSMA 2000.
ideals or authoritarian policy generally has a mixed outcome on the inflow of capital\textsuperscript{534} (since foreign investors sometimes exploit high risk areas with weak legal and political institutions), higher political risks have been generally associated with low inflow of capital to a given destination.\textsuperscript{535} A graphic illustration of political risk components from the International Country Risk Guide (ICRG) provided by Political Risk Services would be illustrative,\textsuperscript{536}

<table>
<thead>
<tr>
<th>Sequence</th>
<th>Component</th>
<th>Points (max.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Government Stability</td>
<td>12</td>
</tr>
<tr>
<td>B</td>
<td>Socioeconomic Conditions</td>
<td>12</td>
</tr>
<tr>
<td>C</td>
<td>Investment Profile</td>
<td>12</td>
</tr>
<tr>
<td>D</td>
<td>Internal Conflict</td>
<td>12</td>
</tr>
<tr>
<td>E</td>
<td>External Conflict</td>
<td>12</td>
</tr>
<tr>
<td>F</td>
<td>Corruption</td>
<td>6</td>
</tr>
<tr>
<td>G</td>
<td>Military in Politics</td>
<td>6</td>
</tr>
<tr>
<td>H</td>
<td>Religious Tensions</td>
<td>6</td>
</tr>
<tr>
<td>I</td>
<td>Law and Order</td>
<td>6</td>
</tr>
<tr>
<td>J</td>
<td>Ethnic Tensions</td>
<td>6</td>
</tr>
<tr>
<td>K</td>
<td>Democratic Accountability</td>
<td>6</td>
</tr>
<tr>
<td>L</td>
<td>Bureaucracy Quality</td>
<td>4</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

\textbf{Source: ICRG website}

The above political risk components comprise the totality of risks that affect capital destination aside from financial and economic risks. As illustrated above, it includes the stability rating, level of social unrest, intra and extra conflict and/or tensions, and institutional


transparency alongside accountability. The complexity of Nigeria political risk ratio is underscored by its rating among the ten worst performers.\footnote{537}{For a comprehensive list of top best and worst performers see, Political Risk Services, ‘Ten Best and Worst Countries’, (2012).}

Although the Multilateral Investment Guarantee Agency (MIGA) provides political risks insurance to investor and lenders, the risks covered is, inter alia, limited to currency issues, expropriation, unrest, and breach of contract\footnote{538}{Multilateral Investment Guarantee Agency, ‘Investment Guarantees: Guarantees Overview’.} in contrast to entire foregoing political risks component. Worst still, private insurers are seemingly averse to undertaking insurance in this aspect of investment potentially due to uncertainties which may undermine profit.\footnote{539}{Elizabeth A. Kessler, ‘Political Risk Insurance and the Overseas Private Investment Corporation: What Happened to the Private Sector?’, New York Law School Journal of International and Comparative Law 13 (1992), 227.}

Countries like the US through its Overseas Private Investment Corporation (OPIC) might significantly insure commensurate risks as that covered by MIGA particularly political violence – war, civil unrest, insurrection; expropriation; currency incontrovertibility; and special oil and gas insurance;\footnote{540}{Pablo M. Zylberglait, ‘OPIC’s Investment Insurance: The Platypus of Governmental Programs and Its Jurisprudence’, Law and Policy in International Business, 25 (1993 - 1994), 362 - 63.} however, the scope covered remains constrained. This exclusivity besetting the scope of risks covered together with the stringent standards constituting the condition precedent for granting investment insurance approval, arguably, makes the inflow of investment unpredicatable to political risks destinations.

In the case of Nigeria, there is a perceptible impact of these components of political risks affecting the investment profile. There are prevalent social unrest, policy instability and lack of institutional transparency, among others in Nigeria. No wonder the country is rated among the ten worst performers in the political risk ratio.\footnote{541}{Political Risk Services, ‘Ten Best and Worst Countries’.} As noted in NIPC Annual Report, Some of the major constraints to attracting investment in Nigeria include inconsistency in government policies ... unfriendly investment environment ... corruption, drug trafficking, insecurity, financial and economic crimes as well as inadequate and uncompetitive incentives ... The cost of doing business remained (sic)
relatively high in the country. This is a summation of the weakening local currency, high interest rates and inflation, perennial insecurity of life and property, poor infrastructure, high tariffs to mention a few.\textsuperscript{542} (Punctuation omitted).

Although the National Economic Empowerment and Development Strategy (NEEDS) was inaugurated primarily to ensure, inter alia, the restoration of investor confidence, implementation of a competitive package of incentives, thereby significantly reducing the cost of doing business in Nigeria as well as creating an enabling environment for high returns on investment, not much success has been recorded. A comparative indicator from World Bank Doing Business 2013 underpins this deteriorating state of affairs.\textsuperscript{543}

\begin{center}
\includegraphics[width=\textwidth]{chart.png}
\end{center}

Source: 2013 World Bank Doing Business Database

The figure indicates that Nigeria ranks 131 with comparator economies on the ease of doing business. Arguably, this position does not seem to paint a rosy picture of a favourable business climate to justify the workability of existing policies.

The cumulative effects of the above constitute a formidable impediment to inflow of capital to Nigeria. Even though stabilisation clauses, ICSID jurisdiction, investment insurance, among others, have been categorised as potential panacea to political risks, such position is investor-disposed and as such obscures the host state perspective. Indeed, containing issues implicated by political risks component is formidable. For instance, the intractable issues of ethnic and religious restiveness in Nigeria might be difficult to manage. In fact, such restiveness would seemingly be better managed by credible socio-economic policies and certain affirmative action plans which are not immediately captured by investment policies. Although political risk factors may seem insurmountable, a significant proportion of its constituents can be managed by shoring up social capital among the political class. Existence and manifestation of such informal norms could engender cohesiveness and team spirit among the political class, filtering into credible and more transparent policies. This can, in the long run, positively impact the political image, thereby improving the standing of the country in the International Country Risk Guide which filters into more capital inflow into the country.

4.6.2 Misalignment of Fiscal Regimes

Aside from the political strife, considerate fiscal incentives constitute the hallmark of any country’s intent on attracting investment.\(^ {545}\) While tax represents a significant source of revenue for any government, excessive tax burden could constitute an effective barrier to investment.\(^ {546}\) To this end, the Nigeria government has put in place significant tax incentives to spur investment both within and outside the country. In the first place, certain companies are granted pioneer status (ie tax exemptions granted to eligible companies) during their formative years to enable them make appreciable level of profits.\(^ {547}\) Equally, companies engaged in research and development (R&D) enjoys significant tax exemptions at the rate of 120% so long as the R&D is undertaken in Nigeria; and 140% if R&D is on local raw material.

In the petroleum sector, the petroleum profit tax (governed by Petroleum Profit Tax Act of 1959, as amended) payable by companies involved in petroleum operations equally enjoys certain tax exemptions.\(^ {548}\) Although, by and large, all such companies are subject to 85% tax on their income, such percentage is reduced to 65.75% in the first five years of the companies’ inception. In addition, tax break is lowered further to 50% if such companies operate under a production sharing contract. Furthermore, additional tax concession is granted to oil companies in the form of capital allowance and petroleum investment

\(^{545}\) Nigeria is governed by a number of tax regimes: the Federal government is responsible for collection of company income tax; personal income tax; value added tax; educational tax; withholding tax; capital gain tax; stamp duties and petroleum profit tax. The state government and local government collect other levies and taxes outside the preceding ones. See NIPC, 'Taxation and Fiscal Regulations in Nigeria'.


\(^{547}\) The prerequisite for the grant of pioneer status is the evidence of capital expenditure of not below five million Naira, for 100% foreign owned companies and joint venture companies; and not less than one hundred and fifty thousand Naira for indigenous companies. Pioneer status is granted to companies cutting across various sectors of the economy not limited to the petroleum sector. Currently, sixty nine companies qualified under this arrangement. See NIPC, 'Investment Incentives'.

\(^{548}\) Note that under the current draft petroleum industry bill, petroleum profit tax has been split into corporate income tax and hydrocarbon resource tax. See Omowumi O Iledare, 'Evaluating the Impact of Fiscal Provisions in the Draft Petroleum Industry Bill on Offshore E&P Economics and Take Statistics in Nigeria', (2010), 4.
allowance. The former covers expenses of the company on capital assets particularly equipment for operations, buildings, drilling costs, among others, called qualifying assets. The latter covers expenditures on new investments in petroleum equipment for petroleum operations.

Nigeria has equally concluded a number of double taxation treaties with some capital exporting countries aimed at relieving the investors of the strain of double taxation by both the home and host country. The preceding arrangement ensures that foreign companies operating in Nigeria and therefore taxed could not be similarly taxed by their home countries and vice versa. The tenor of the treaty is such that ‘tax payable in Nigeria on profits of a Nigerian company being remitted into the country is reduced by the amount of foreign tax paid abroad.

Note that the nature of this fiscal regime affects the repatriation of capital in the sense of whether such funds are taxed or tax-free. The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act No 17 of 1995 was part of the liberalisation regimes in the area of repatriation of capital. Thus, the graduation from the Dutch Auction System (DAS) and inter-bank market to Wholesale Dutch Auction System (WDAS) was meant to liberalise foreign exchange further to protect foreign investors. Although the utilitarian basis of the foregoing has been undermined by incessant politicising of the implementation of the policy, it is not expected that foreign investor are prejudiced to a significant extent.

Thus, it goes without saying that Nigeria investment regimes grant tax concessions to investors. The essence is to make Nigeria an investment haven. Nonetheless, further constraints remain. Currently, Nigeria is ranked 155 out of 185 economies of the world on the

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Capital allowance granted for any given year is 20% of qualifying assets for the initial four years, and 19% for the fifth year. Note that capital allowance for any accounting period cannot be less than 15% of the tax. Nigeria has signed double taxation treaties with the UK, Netherlands, France, Canada, Belgium, among others with negotiation on-going for other countries. See NIPC, 'Investment Incentives'.

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The unenviable position of the country in ranking pertaining to payment of taxes with comparator economies are indicated hereunder viz:

Source: 2013 World Bank Doing Business Database

Accordingly, companies make an average of 35 tax payments a year, spend 938 hours a year filing, preparing and paying taxes. The implication is that not only are there a significant number of taxes payable by investors but also the procedure of payment is cumbersome.


Besides, multiplicity of tax regimes continues to symbolise Nigeria tax law with taxes fragmented into the federal, state, and local government with occasional overlaps of authority among these three tiers of government. Indeed, any reasonable incentives to investors arguably ought to reflect a considerate tax policy and procedure in accordance with best international practice. One sure way of doing that is to streamline the tax laws to eliminate potential overlaps of authority among the three tiers of government. Equally the multiplicity of taxes could be consolidated to reduce the fragmentation characterising the present tax regimes. Apart from the capacity of the foregoing to tone down the fiscal challenges faced by foreign investors, it equally accords with the doctrine of global distributive justice since investors are not disproportionately treated with harsh fiscal regimes.

4.7 Conclusion

Though progress has been made in reducing barriers to capital importation, a number of constraints remain. Certainly, institutional problems have emerged as the most potent determinative outcome. These institutional problems, which derive theoretical correlation from the NIE theory, are perceptible in human capital and social capital conundrum. Inefficient human capital affects implementation of investment regulation in many significant respects. For instance, it undermines investor confidence ie when there is poor service delivery. Secondly, it damages the Nigeria investment profile – when investors become disenchanted and therefore avoid investing in Nigeria, owing to poor service delivery. The consequence of these is the obstruction of capital inflow. As noted by the World Bank, the effectiveness of the institutional sector (such as the civil service) is dependent on functional efficiency (result-oriented); and not necessarily complying with best practice.553

The textual premise of this poor qualitative human capital is partly traceable to section 14 of 1999 Constitution which justifies employment based on origin rather than merit. This filters into poor implementation outcome. It is contended that the section be scrapped, and in its stead should rein a merit-driven human capital. Additionally, there should be an emphasis on capacity building, shoring up of social capital, and outsourcing of recruitment to an independent and impartial agency to forestall any malpractice that might affect eventual workforce. In similar vein, the improvement in human capital ought to go hand in hand with the development of social capital to improve investment service delivery. Although the precepts of social capital might not have been codified by extant legislations (and therefore not legally enforceable) its accretion over time can engender functional efficiency and qualitative outcomes.

In respect of petroleum contractual frameworks adopted in the petroleum sector, particularly joint venture and PSC, the current arrangements do not seem to serve the interest of the country vis a vis the IOCs. It can be argued that the government can ameliorate the situation by adopting a pragmatic approach to investment. One such approach is the use of a special investment vehicle (SIV) - jointly incorporated company with IOC - charged with overall petroleum operations. Such a legal vehicle will have the power to secure external financing for petroleum operations. This approach would undoubtedly reduce the current cash call burden on NNPC and the associated bickering attendant on it, particularly in the case of joint ventures arrangement. The day to day administration of the entity would be at the hand of management constituted by both representatives of foreign investors and the Nigeria government to ensure transparency of operations.

In the same vein, the text of the fiscal regimes that underpin the operation of the any petroleum contractual model ought to be re-conceptualised and has to redress existing fiscal imbalance undermining government share of petroleum revenue accruable. It cannot be
argued that the doctrine of *pacta sunt servanda* operates to freeze legislative discretion of the host state. As illustrated by economics theorists, asymmetrical information constrains complete and precise contracting.\(^554\) Even where symmetrical information prevails bounded rationality constrains optimisation of information for completeness of contracting.\(^555\) Although the current PIB fiscal changes evidenced in new hydrocarbons tax as well as companies income tax\(^556\) (applicable to both joint venture and PSC operations) appear to tilt in that direction, such a step ought to be supplemented by other fiscal regimes, given the chaotic enforcement of tax regimes in Nigeria. One significant way of rectifying such an imbalance would be through the institution of a petroleum price cap (in respect of world market petroleum prices) beyond which the difference goes to the host country. This approach does however not take away the right of IOC to recover the cost of petroleum operation (cost oil) prior to profit. The arrangement equally accords with the rational premise of global distributive justice that advocates equality and equity in international economic relations. Although IOC may contest such a cap,\(^557\) it is difficult to postulate that such an arrangement prejudices the interest of investor (IOC) giving that world market oil price is unpredictable. In other words, IOC could not have projected with certainty the accrual of such an amount.

However, in accordance with the tenet of global distributive justice, where the price of the oil fell below a predetermined rate thereby prejudicing the revenue projection and consequently affecting the activities of the IOCs, it would be expected that the federal government of Nigeria would cushion the effect of such a scenario by rescheduling certain remittances of the IOCs such as taxes and royalties by carrying it over to next tax year, or

\(^{555}\) Mallard, *Modelling Cognitively Bounded Rationality: An Evaluative Taxonomy*, at 674-78.
\(^{556}\) See sections 299, 253 of PIB.
even cancelling outrightly some of the financial remittances to cushion the effects of such price fall in the world market, on the IOCs.

Furthermore, the massive and unprecedented capital flight from the Nigeria capital market particularly from international portfolio investors is largely attributable to institutional lapses in the SEC. The preceding translates into ineffectual enforcement of disclosure and infractions. Although bounded rationality and herding of investors might undermine optimisation of such disclosed information, SEC, in a similar fashion to FSA, can still strengthen institutional proactiveness with an emphasis on early warning of market abuse with a view to tracking and tackling same. This entails stepping up the power of information gathering and investigation, leaving the processing of the information to investors. In this respect, greater funding and capacity building of the SEC is recommended for greater functional effectiveness and institutional efficiency. Not only would such a situation restore plummeting investors’ confidence in the capital market, but it would also engender greater capital flow to the economy from international portfolio investors.

Aside from the preceding, though the hydra-headed political strife would be difficult to manage, pragmatic socio-economic programmes can at least tone down youth restiveness (note that Petroleum Host Community Fund discussed in chapter six infra appears to lean towards that; however it is geographically limited).

Additionally, fiscal regimes in Nigeria constitute another issue that impedes capital inflow. Currently, Nigeria is ranked 155 out of 185 economies of the world on the burdens of paying taxes by investors. Accordingly, companies make an average of 35 tax payments a year, spend 938 hours a year filing, preparing and paying taxes. The implication is that not only are there significant number of taxes payable by investors but also the procedure of

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558 See section 116 of PIB.
payment is cumbersome. Certainly, any reasonable incentives to investors arguably ought to reflect a considerate tax policy and procedure in accordance with best international practice. One sure way of doing that is to streamline the tax laws, to eliminate potential overlaps of authority among the three tiers of government; and the conclusion of double taxation treaties to lessen the strain of double taxation on investors in Nigeria.

Undeniably, institutional factors affect the manner of execution and implementation of, (i) petroleum contractual agreements; (ii) portfolio investor protection; (iii) the political dynamics that affect Nigeria’s investment profile; and (iv) fiscal regimes, since each of the preceding is embedded within an institution, managed by human workforce, invariably, suffering deficit in social capital.

Aside from these constraints to importation of capital, the procedural framework for the settlement of any dispute that might arise from the foregoing substantive rules similarly affects investment regulation and capital inflow to Nigeria. In the following Chapter 5, this procedural process for the settlement of investment disputes (through ICSID platform) between the capital exporting countries and developing countries host states (like Nigeria) will be the topic of discussion, in order to unravel the disequilibrium therein and reflect on reform options.
Chapter 5
Settlement of Investment Disputes

5.1 Introduction

In addition to the substantive rules analysed in the previous chapters, the procedural framework for the settlement of investment disputes is another mechanism embodied in IIAs. The philosophical premise for setting up the International Centre for the Settlement of Investment Disputes (ICSID) between the Contracting States and the Nationals of other Contracting States was to foster international economic cooperation for mutual benefits, balancing the interest of capital importing countries and capital exporting countries. Nevertheless, ICSID has lately being bedevilled by legitimacy crisis. The ICSID seems to have broken down, in need of repair. Although a number of suggestions have been put forward to correct the anomaly, including lately proportionality doctrine and/or margin of appreciation doctrine, none has succeeded in embedding an equitable balance. It is the contention of this chapter that the regime of remission doctrine whereby the ICSID tribunals would be obliged to remit compelling regulatory issues to the host state institutional competence should hold sway. The implication of the remission doctrine would be to accommodate certain discretionary policy space for the developing countries like Nigeria, without at the same time undermining investment protection.

The chapter is divided into three main sections, each with sub-sections. The first section focuses on three issues: legitimacy challenges in investor-state dispute settlement;

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562 UNCTAD, 'Reform of Investor - State Dispute Settlement: In Search of a Roadmap', at 1.
564 See Mathews, 'Proportionality Balancing and Global Constitutionalism', 72-75.
exhaustion of local remedies rule; and the settlement of investment disputes through the platform of ICSID. Section two then examines the wider issue of ICSID legitimacy crisis in the context of the existing reform options particularly the proportionality principle and margin of appreciation doctrine, and postulates for the embedding of a remission doctrine to ameliorate the current legitimacy challenges. The third section concludes.

5.2 Settlement of Investment Disputes

5.2.1 Legitimacy Challenges in Investor-State Disputes
Foreign investors and host states are generally at liberty to choose any framework for the settlement of investment disputes between them. However, in a significant number of cases the forum adopted is the ICSID framework. With the absence of an overarching multilateral investment treaty regulating international investment, BITs have become the prevailing legal framework for investment protection, embodying investor-state arbitration, almost always through the platform of the ICSID. The inconsistencies bedevilling ICSID decisions as well as the tribunals tendency to pay little or no consideration to the interest of the host state particularly the regulatory issues is disquieting to any well-meaning observer. As noted by UNCTAD, the concerns that underscore the current investor-state dispute settlement (ISDS) include, inter alia, ‘deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions’; and ‘questions about the

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566 See Stevens, Bilateral Investment Treaties at 49-50.
568 A clear example of little or no consideration of the regulatory interest of the host state by ICSID tribunals is the Argentinian experience. For a chronicle of these cases and its analysis, see, William W. Burke-White, ‘The Argentinian Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System’, (2008), 199; Kate M Supnik, ‘Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law’, Duke Law Journal, 59 (2009-2010), 346-47 (arguing that ICSID Convention should be amended to reflect the regulatory rights of host states vis a vis the protection of investor).
independence and impartiality of arbitrators.\textsuperscript{569} A remark to this effect was equally made by the President of Bolivia who approximated the legitimacy crisis that underlines ICSID in the following words: ‘developing countries … never win cases. The transnationals always win’.\textsuperscript{570} (Punctuation omitted). Although the preceding assertion might not be 100% accurate, it certainly indicates, to a significant extent, the diminution of confidence in the ICSID. Similarly, the denunciation of the investor-state arbitration by Bolivia and Ecuador further highlights the height of frustration that underlines the ICSID legitimacy crisis.\textsuperscript{571} Unlike the NAFTA tribunals that have shown deference to host state regulatory measures,\textsuperscript{572} the jurisprudence of the ICSID has being controversial.\textsuperscript{573} However, the current ICSID framework has been defended since the tribunals ‘place the litigants on the same plane’.\textsuperscript{574} To assume that the current system disfavours the host states in favour of the foreign investor ‘is to make assumptions that do not necessarily comport with the facts’.\textsuperscript{575}

The philosophical premise behind the institution of the ICSID can be gleaned from the preamble to the Convention. It provides as the basis the necessity to foster economic development among the contracting parties, and the need to have an institutionalised framework for settlement of investment disputes that might arise thereto.\textsuperscript{576} Though couched in generic form, such a necessity for promotion of economic development could be said to connote economic development of capital importing countries, since significant volumes of

\textsuperscript{569} UNCTAD, 'Reform of Investor - State Dispute Settlement: In Search of a Roadmap', at 1; OECD, 'Improving the System of Investor - State Dispute Settlement', at 3.

\textsuperscript{570} Quoted in Franck, 'Development and Outcomes of Investment Treaty Arbitration', 436.


\textsuperscript{573} See SGS v Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, January 29, 2004, para. 116, at 44, where the tribunal ruled that in the event of uncertainties in the construction of investment treaties it would be resolved in favour of a foreign investor.

\textsuperscript{574} Schwebel, 'The Overwhelming Merits of Bilateral Investment Treaties', 268.

\textsuperscript{575} Ibid.

investment flow from the capital exporting countries to capital importing countries. The necessary inference form the preceding is that capital importing countries almost always bear the brunt of any potential unfavourable awards originating from the ICSID tribunals decisions, since they constitute the host states of investment. Although the preamble does not seem to constitute an operative part of the rules, it nevertheless offers a significant insight into the philosophical justification for the promulgation of rules. In the context of Nigeria, accession to the jurisdiction of the tribunal is reflected in the NIPC Act and BITs concluded by the country which adopted in most part the facility of the ICSID framework.  

5.2.2 Localised Settlement of Investment Disputes

Two categories of disputes are envisaged by investment agreements concluded by Nigeria: (i) dispute relating to the interpretation and application of the BITs; and (ii) the disputes between a Contracting party and national of the other Contracting party. While the former is usually settled through diplomatic exchanges by contracting state parties, failure of which arbitration is resorted to in a manner agreed by the parties; the latter is settled through the framework of ICSID. Although both are relevant to investment, the former hardly arises in practice. The latter no doubt appears more pertinent to this discourse and therefore forms the focus of enquiry.

Both BITs concluded by Nigeria and section 27 NIPC Act provide for the facility of ICSID in cases of investment disputes. While a significant number of BITs concluded by

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577 Section 27 NIPC Act.
578 See article 8-9 Nig-UK BIT; article 9 and 12 Nig-Netherlands BiT; article 10-11 Nig-Germany BiT; article 11-12 Nig-Spain BIT in UNCTAD, ‘Bilateral Investment Treaties, Country-Specific Lists of BITs’.
579 It is noteworthy that legal disputes envisaged must relate to investment as contemplated by article 25 of the ICSID Convention. Article 25 ICSID Convention stipulates that jurisdiction of ICSID is invoked only where the disputes relate to investment. See also Oladiran Ajayi and Patricia Rosario, 'Investments in Sub Saharan Africa: The Role of International Arbitration in Dispute Settlement', (2009), 4.
Nigeria require the exhaustion of local remedies, NIPC Act stipulates attempt at mutual discussion as a precondition to ICSID. Strictly speaking, it could be argued that NIPC Act does not mandate the investor to adhere to other procedural administrative and court dispute settlement system once mutual discussion fails. Nonetheless, this is not the case with BITs concluded by Nigeria that requires exhaustion of local remedies (which in this case includes court hierarchy). NIPC Act however appears to subordinate dispute settlement provision to the operation of BITs when it invokes the authority of BITs as a guide for investment dispute settlement. The implication is that except a BIT concluded with an investor is devoid of a requirement of local remedies, an investor is invariably subject to the national judicial system on failure of mutual discussion stipulated in NIPC Act, since exhaustion of local remedies option (embodied in significant number of BITs concluded by Nigeria) is incorporated by reference in section 27 NIPC Act.

However, the implication of non-compliance with this local remedies rule to the institution of ICSID arbitration is uncertain. Some tribunals appear to hold the view that compliance with the local remedies requirement is merely a procedural issue and does not constitute a precondition to ICSID jurisdiction. Conversely, others were of the opinion that such compliance constitutes a precondition for the institution of arbitration. It has been argued that such a precondition to arbitration could be disregarded in circumstances of potential futility of embarking on such an exercise. This argument becomes tenable only if

Note that the host state may institute a mechanism to stem the eruption of dispute, and if already erupted, the escalation of such a dispute (as a bolster to local remedies rule) prior to utilising ICSID framework. See UNCTAD, 'Best Practices in Investment for Development: Case Study in FDI - How to Prevent and Manage Investor-State Disputes - Lessons from Peru', (2011) at 41-54.


Enron Corp. and Ponderosa Assets, L.P. v Argentina, Decision on Jurisdiction, Jan, 14, 2004 at para. 88;

Mummery, 'The Content of the Duty to Exhaust Local Judicial Remedies', 401 (noting that local remedies 'have been exhausted if the cost involved in proceeding further considerably outweighs the possibility of any satisfaction resulting'. On the necessity for the state to reassess their stand regarding such a circumvention of local remedies rule by investors, see Mavluda Sattorova, 'Denial of Justice Disguised? Investment Arbitration

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the host state decides to waive its right particularly in failing to raise preliminary objection to the jurisdiction of the ICSID. In that case, the host state becomes debarred from contesting the jurisdiction of ICSID prior to exhaustion of local remedies but not otherwise.

To trigger ICSID jurisdiction (on crystallisation of an investment dispute), an aggrieved party must invoke the existing framework of any applicable BIT or multilateral agreement, or any other mechanism agreed by the parties for the settlement of investment disputes, where the platform of mutual discussion fails. The implication is that an investor is entitled to invoke the jurisdiction of ICSID even where there is no separate agreement between the investor and the host state as long as the home country of the investor has concluded a BIT with the host country which accepts a resort to ICSID facility.

Once jurisdiction is invoked by the investor, the host state cannot wish away such a move in order to frustrate the potential outcome. Where the state defaults to present its case beyond the normal grace period, the tribunal shall examine its jurisdiction and competence to handle the matter, if satisfied, decide whether the submissions made by the complainant is well-founded in law and in fact, and proceed to award.

The moment ICSID is seised of a matter, an investor is precluded from espousal of its cause by the home country or recourse to diplomatic settlement unless the tribunal lacks the jurisdiction to entertain the dispute and/or the eventual award is disregarded by the award debtor (Contracting host state).

Each contracting party intending to institute proceeding shall address a request in writing to that effect to the Secretary-General indicating the transaction in disputes, parties’ identity, and the consent to arbitration or conciliation in accordance with ICSID rule of

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584 See Article 45 ICSID Convention and Rule 42 of ICSID Rules.

585 See Article 27 ICSID Convention. In that case, the dispute graduates to dispute between the two Contracting states parties.
procedure. The Secretary-General is bound to register the dispute unless it falls outside the jurisdiction of the tribunal in which case he notifies the parties of his refusal.\textsuperscript{586} Once the request passes the registration stage, the constitution of the ICSID tribunal is triggered.\textsuperscript{587} However, the host state retains the discretion, as a prerequisite to ICSID jurisdiction, for the investors’ exhaustion of local remedies.\textsuperscript{588}

Since local remedies entail exhaustion of national judicial hierarchy as well as other administrative mechanisms for national dispute settlement, it would appear to violate the rationale underpinning the resort to ICSID arbitration.\textsuperscript{589} It is highly unlikely that investors will be favourably disposed to exhaustion of the local remedies requirement given the procedural burdens involved, and the further possibility of resorting to ICSID assuming the investor is not satisfied with the judgment of the apex court.\textsuperscript{590} Similarly, such a requirement has uneasy cohabitation with the operation of the ‘fork in the road’ clause that might have been incorporated in the applicable BITs.\textsuperscript{591} The substance of the clause is that investors have irreversible option of choosing either the adjudicatory framework of national courts or international arbitration. A resort to one precludes the other particularly where the ‘same dispute between the same parties’ was submitted to national dispute settlement framework and subsequently international arbitration.\textsuperscript{592}

However, a BIT could also provide that a resort to one does not preclude the other. For instance, the Nig-Finland BIT stipulates that resorting to local remedies does not

\textsuperscript{586} See article 28 and 36 ICSID Convention. A party is entitled to choose between arbitration and conciliation. However the research will concentrate on arbitration proceedings which are more prevalent.
\textsuperscript{587} See article 37 ICSID Convention.
\textsuperscript{588} See article 26 ICSID Convention. See also UNCTAD, 'Bilateral Investment Treaties, Country-Specific Lists of BITs'.
\textsuperscript{589} See article 26 ICSID Convention.
\textsuperscript{592} Schreuer, 'Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road', 247-48.
constitute a bar to also choosing international arbitration, provided that a party withdraws midstream before the judgment in national court. This kind of stipulation has significant implication to the operation of *res judicata* in international context. In other words, what is the relationship between the judgments conclusively dealt with by the national courts with the initiation of new proceeding by the same parties on the same issue before international arbitration? Will the parties be bound by *res judicata* thereby barring the aggrieved party from proceeding to ICSID after the exhaustion of local remedies?

The answer to the above may be found in the contemporary position of customary international law which leans in favour of exhaustion of local remedies but the consequent national court decision does not acquire the status of *res judicata*. The aggrieved party is therefore entitled to have a second bite at the international settlement forum despite apparent conclusive and final decision of the national judicial hierarchy.

A further issue requiring clarification is the provision of three (and six) month’s deadline for exhaustion of local remedies stipulated by a significant number of BITs concluded by Nigeria. The conceptual question that arises regarding the local remedies deadline *vis a vis* a resort to ICSID is the implication of an inconclusive resolution of the dispute within three months. It could be argued that an investor is free to pursue the framework of ICSID on expiration of the stipulated period (whether three or six months) irrespective of the stage in the proceeding. This seemingly underlines the argument that the

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593 See article 9 Nig-Finland BIT. Under article 1121 Chapter Eleven NAFTA, it is a condition precedent to bringing action to NAFTA tribunal that the investor waives his right to initiate proceedings under national dispute settlement platform except proceedings for declaratory, injunctive or other extraordinary reliefs unconnected with damages. But the investor may bring NAFTA claim if unsuccessful from national court of the Contracting parties. See William Dodge, 'National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata under Chapter Eleven of NAFTA', *Hastings International & Comparative Law Review*, 23 (1999-2000), 371.
594 See *Interhandel Case (Switz v US)*, 1959 I.C.J. 5, 27 (21 March) (noting, inter alia, that the exhaustion of local remedies is a well-established principle of customary international law).
595 *Amco v Indonesia, Decision on the Application for Annulment, May 16, 1986.*
596 See article 8 Nig-UK BIT; article 11 Nig-Germany BIT; article 9 Nig-Finland BIT; Article 12 Nig-Spain BIT.
local remedies deadline is merely a formality since it is inconceivable to resolve courts cases including appeals within three months.⁵⁹⁷

Even where the national courts have a reputation for expediting proceeding, an investor not well-disposed to local remedy rule can still employ delay tactics exhausting the deadline before any meaningful progress in the proceeding, thereby frustrating the local remedies rule. Local remedies deadline would appear more suitable to administrative remedies (not subject to judicial appeals) rather than court proceedings *simpliciter*. Indeed, any meaningful application of the local remedies rule should be informed by a reasonable period (preferably eighteen months to twenty four months) given to national courts to resolve the dispute. A three or six month’s period obviously does not constitute a reasonable period.

### 5.2.3 Investment and Security Tribunal (IST)

A foreign investor caught up in the web of local remedies requirement must utilise any dispute settlement mechanism provided for such local remedies. In the case of a dispute arising from portfolio investment in Nigeria, section 274 of ISA provides for exclusive jurisdiction of Investment and Securities Tribunal (IST) to hear and determine any question of law or dispute relating to investment.⁵⁹⁸ The ISA Tribunal shall, ‘to the exclusion of any other court or body in Nigeria,’ hear and determine investment disputes consisting, inter alia, dispute between capital market operators; capital market operators and their clients; investor and securities exchange or clearing and settlement agency; capital market operators and a self-regulatory organisation; SEC and the self-regulatory organisation; SEC and capital market operators; SEC and investors; SEC and issuer of securities.⁵⁹⁹

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⁵⁹⁸ See sections 274 and 284 of ISA.
⁵⁹⁹ See sections 284 and 294 of ISA.
Thus, IST has the jurisdiction pertaining to portfolio investment in circumstances where local remedies apply. Nevertheless, one obstacle that may militate against the IST jurisdiction (particularly where exhaustion of local remedies apply) is the potential jurisdictional conflict between IST and Federal High Court (FHC). Section 251(1) (d) of 1999 Constitution vests exclusive jurisdiction on the Federal High Court in matters relating to, inter alia, ‘banking, banks, other financial institutions including any action between one bank and another…’ (Emphasis Added). Although the forgoing jurisdiction seemingly falls outside the matters statutorily covered by section 284(1) ISA (the section granting exclusive competence to IST), the definition of ‘other financial institution’ by Banks and Other Financial Institution Act (BOFIA), Cap B3, Vol. 2 LFN 2004, covers similar matters within the exclusive competence of the IST. The interpretation section of BOFIA defines ‘other financial institution’ as,

... any individual, body, association or group of persons; whether corporate or unincorporated, other than banks licensed under this Act, which carries on the business of a discount house, finance company and money brokerage and whose principal object include factoring, project financing, equipment leasing, debt administration, fund management, private ledger services, investment management, local purchases order financing, export financing, project consultancy, financial consultancy, pension fund management and such other business as the bank may, from time to time, designate.

These issues covered by the definition of ‘other financial institution’ which the Federal High Court has exclusive jurisdiction under section 251 (1) (d) of 1999 Constitution is coterminous with the jurisdiction of the IST under section 284(1) of ISA. Thus, jurisdictional conflict exists between IST and Federal High Court. However, since the constitution is the supreme law of the land,600 any law inconsistent with it would be void to the extent of its inconsistency.

600 See section 1 of 1999 constitution.
Consequently, the jurisdiction of the IST vis-à-vis the Federal High Court would arguably be void to the extent of its inconsistency.\textsuperscript{601}

However, one interesting dimension to the foregoing is that an aggrieved investor or capital market operator could decidedly ignore the jurisdiction of the Federal High Court and consequently seek redress under IST obtaining supposedly untainted relief unless and until the lost party challenges the jurisdiction of the tribunal. It is unclear however whether the right to challenge such coterminous jurisdiction arises in the course of determination of the substantive issues only or continues to operate even after a decision is made. It could be argued that where the lost party acquiesces to the jurisdiction of the IST leading to a decision being made on the issue, such a party is thereby estopped from seeking a re-determination of the same issue in the Federal High Court. Nonetheless, such a party is not barred from appealing the decision of IST to the appellate court.\textsuperscript{602}

Arguably, the inconsistency in jurisdiction between IST and the Federal High Court could be settled if the jurisdiction of both is clearly spelt out allocating each one with a clearly defined role. Such a delineation of the jurisdiction would no doubt lessen the strains investors might experience particularly where, eventually, they would have to proceed to ICSID if unsatisfied with the final decision.

Having dealt with the local remedies rule that operate within national institutional context, the next section then moves into dispute settlement through ICSID context proper, which operates in international context. The analysis would start from the constitution of ad hoc ICSID arbitrators, before focusing on the balancing of conflicting interest of the contracting parties through a remission doctrine.


\textsuperscript{602} See sections 295 and 297 of ISA entitling the aggrieved party to appeal to court of appeal and further to Supreme Court.
5.2.4 Ad Hoc Constitution of ICSID Arbitrators

ICSID jurisdiction is triggered after the constitution of ad hoc arbitrators. The mode of appointment of ICSID seems to cast doubt on the independence and impartiality of the constituted arbitrators and their predisposition to engender effective balance of interests of both parties – the host state and the investor. Although the disputing Contracting parties have input in the appointment of arbitrators the final discretion on who to appoint as the president of the tribunal resides with the Chairman in the event of a disagreement between the parties. The Chairman (ie Chairman of ICSID Administrative Council) is normally the President of the World Bank, a position under the exclusive appointment of the US sanctioned by the Board of Directors of the Bank whose approximate 60% of its voting powers are exercised by Executive Directors of the major capital exporting countries. The power of a US nominee in the person of the President of the World Bank to appoint arbitrators does not stricto sensu raise imputation of bias or impartiality in favour of capital exporting countries but does not equally eliminate such a possibility entirely. As noted, ‘given its nomination arrangements, its weighted voting [regarding capital exporting countries], and its governance structure, it is difficult for an informed outsider to conclude with confidence that ICSID will be free of improper bias in favour of capital exporting countries.’ Paulsson acknowledges that historically investor-state arbitral tribunals exhibited bias against developing countries. Sornarajah argues that this historic prejudice

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603 See article 37-40 ICSID Convention.
604 See article 5 ICSID Convention. Except for the current Korean-born President (with the US citizenship), previous Presidents of the Bank in its 60 year history were US appointed nationals.
606 Ibid., at 26-27.
continues till date in investor-state arbitration. 608 In other words, the reality of the appointment accentuates ideological preferences expressed in actions and nuances of the president.

Although each contracting party appoints an arbitrator who almost always vote in allegiance to the appointer, the chairman appoints the president of the tribunal who casts the deciding vote in arbitral award. The tendency for the president of the tribunal being motivated by other compelling meta-legal factors aside from the text of BITs before it cannot be discounted totally as being irrational or illogical. For one, socio-political research conducted to determine predictors of judicial outcomes indicate interplay of amalgam of factors shaping the adjudicative outcomes; thus attitudinal dispositions, institutional setting and strategic considerations all play their roles. 609

Thus, the action of the president of the tribunal is both enabled and constrained by both the institution (ie the World Bank through ICSID) that appointed him and the countries that wield significance influence in the institutions (ie capital exporting countries based on their weighted voting). 610 The president of the tribunal may equally be constrained to make certain preferences based on strategic considerations chiefly the protection of foreign investment and the need to secure the interest of influential property owners (capital exporters) over countervailing interest of the host state. As noted, ‘the choices which those in the legal realm must constantly make between differing or antagonistic interests, values, and

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610 Voting is based on number of shares held by the relevant countries. The countries with the highest volume of votes are the capital exporting countries; and currently constitute the US, Japan, Germany, France and the UK. See World Bank, 'Voting Powers'.
world views are unlikely to disadvantage dominant forces. Indeed, ICSID tribunals may not literally be accused of bias against capital importing countries but such imputation is not totally irrational. The preceding is even more trenchant given the astonishing revelation that international arbitration is controlled by a select ‘mafia’ or ‘club’. As illustrated in the case of *SGS v Republic of the Philippines*, in the event of conflict between the interest of a foreign investor and that of the host state, the interest of the former supersedes.

Apart from the appointment process, another potential flashpoint of bias is the ad hoc nature of the arbitrators’ tenure. Ad hoc constitution of arbitral tribunal does not prima facie raise suspicion of bias. However, in the case of ICSID arbitration characterised by investor-state dispute the tendency of arbitrators pandering to the interests of the investor cannot be ruled out. Foreign investors are the most frequent user of ICSID and therefore in a unique position to utilise such a frequency to familiarise with arbitrators. Till date, ICSID has concluded two hundred and sixty nine cases between foreign investors and the host states. In those concluded cases, only in eight cases, out of that record number were investment disputes initiated against capital exporting countries by foreign investors. In a similar vein, out of one hundred and sixty eight cases currently pending before the ICSID, only in six instances were investment disputes initiated against the capital exporting countries.

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613 See *SGS v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, para. 116 at 44.
615 The countries include: Iceland, New Zealand, Spain, the US (three instances), Czech Republic, and Federal Republic of Germany. See ibid.
remaining percentage was cases initiated against the capital importing countries by foreign investors. Similarly, the decisions of the tribunals in a significant number of cases tilt in favour of the foreign investor. It would not be out of place therefore for the prevalence of suspicion that the ICSID arbitrators would be favourably disposed to the most frequent user; after all they (arbitrators) are in the business of arbitration of which investors constitute the clientele.

Furthermore, arbitrators too are not discharging humanitarian duty. Indeed, their financial interest cannot be totally discounted. Arbitral duties are career-oriented with all the financial perks associated with it. They have incentive to stay in business, and continue to reap the pecuniary attachment. To this end, they tend to align more with the interest of the investors to maintain a potential chance of recall in any future investor-state disputes. However, the legitimacy of the present ICSID arbitral framework has been stoutly defended as being impartial and sufficiently independent. Indicators of such legitimacy and impartiality of the current framework are illustrated by the requirement that arbitrators must disclose any information that might cast doubt on their impartiality and independence. They are also required to disclose any potential conflict of interest that may affect the outcome of their decision. Their decisions are equally subject to challenge by either party as well as subject to public scrutiny; parties are imbued with power to appoint an arbitrator, among others.

However, as noted, these safeguards while relevant ought not to constitute substitutes for additional safeguards considered critical to enhanced legitimacy of the investment

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619 Ibid., at 491.
620 Ibid., at 491-92.
tribunal. Although the institution of an appellate ICSID could nominally ameliorate the situation, there is no guarantee that it would not fall prey to the same weakness bedevilling the current ad hoc system. Consequently, scholars have proffered various options for the solution, which would form the focus of analysis hereunder.

5.3 Balancing Conflicting Interests

5.3.1 Legitimacy Crisis vis a vis Overlapping Disciplines

According deference to host state interest together with the protection of investors has been the hallmark of the legitimacy crisis that underlines investor-state arbitration. Consequently, a number of propositions have been put forward to enhance the substantive legitimacy of the ICSID system. Justifying the external ramifications of the concept of reflexive law (called system rationality), it has been stated that,

... reflexive law shows elements of ‘‘system rationality’’ insofar as it facilitates integrative processes within a functionally differentiated society. What is important is that to facilitate integrative processes does not, for reflexive law, mean to prescribe authoritatively ways and means of social integration. It means to create the structural premises for a decentralized integration of society by supporting integrative mechanisms within autonomous social subsystems. (Citation omitted).

Applying the afore-mentioned socio-legal concept of reflexivity to investment arbitration entails that investment regime should be viewed as an autonomous norm-producing sub-

622 Note that under article 52(1) ICSID Convention, an annulment of an award is occasioned on the following grounds,
   (a) the tribunal was not properly constituted;
   (b) the tribunal has manifestly exceeded its powers;
   (c) there was corruption on the part of a member of the Tribunal;
   (d) there has been a serious departure from a fundamental rule of procedure; or
   (e) the award has failed to state the reasons on which it is based.
system ‘normatively closed but cognitively open’ \(^{624}\) - the concept of self-reference. The implication is that the legitimacy of the investment law is determined solely by the system internal processes and dynamics (ie investment law) independent of competing influences or related competences like the regulatory concerns of the host state. However, the system (investment arbitration) is willing to give a listening consideration to external influences (eg host state public interest, international human rights and international environmental treaties), \(^{625}\) but strictly on the terms dictated and defined solely by the investment rules. \(^{626}\) Put differently, the concept of legal reflexivity applied to the investment context would give predominance to investors’ rights over host state interest, even in face of potential regulatory clash and/or breach of other international obligations particularly human rights and international environmental treaties by the host state. This disquieting stance is illustrated in the case of *Compania del Desarrollo de Santa Elena, S.A. v Costa Rica*, \(^{627}\) pertaining the governmental intent on protecting the rainforest zone in consonance with biodiversity conservation. The tribunal held, inter alia, that the obligation arising from international environmental protection has no correlation with a breach of investment rules and compensation thereeto. According to the tribunal,

> [e]xpropriatory environmental measures - no matter how laudable and beneficial to society as a whole - are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains. \(^{628}\)

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\(^{627}\) *Compania del Desarrollo de Santa Elena, S.A. v Costa Rica, ICSID Case No. ARB/96/1, Final Award, February 17, 2000*.

\(^{628}\) *Compania del Desarrollo de Santa Elena, S.A. v Costa Rica, ICSID Case No. ARB/96/1, Final Award of February 17, 2000, para. 72 at 193.*
The implication of this kind of stance is the elevation of private disputes over public concern (environmental regulation). The above arbitral disposition constitutes a serious dilemma to developing countries engaged in legitimate regulation. Indeed, hermetic isolation of international investment rules seems antithetical to the cause of a systematised international law as well as constitutes a significant challenge to states compliance to international obligations. No doubt a common ground that would acknowledge and balance the contending interest of both capital exporting countries and capital importing countries ought to be struck.

5.3.2 Margin of Appreciation and Proportionality

Developing a coherent and consistent standard for adjudging the impugned regulatory actions of the host state vis a vis the rights of foreign investors remains arbitral tribunals dilemma. Consequently, various strands of argument have been deployed to contain the interest of both parties. Issuance of interpretative declaration by the state at the time of conclusion of the treaties and/or protocol post-treaties has been suggested to elucidate the state intention; and to act as an authoritative guidance to arbitral tribunal thereby safeguarding state interest. Likewise, the sole effect approach has been applied at one time; and the purpose and effect

629 Annika Wythes, 'Investor - State Arbitrations: Can the 'Fair and Equitable Treatment' Clause Consider International Human Rights Obligations?', *Leiden Journal of International Law*, 23(1) (2010), 241 (where similar dilemma was faced by South Africa affirmative legislation aimed at rectifying historical employment injustice and consequential action for breach of investment treaties).


633 See Dolzer, 'Indirect Expropriations: New Developments?', 79.
approach applied at the other time, by the tribunal. None of the existing doctrines has been able to settle the conflicting interest.\textsuperscript{634}

The doctrine of granting the host state ‘margins of appreciation’ - a principle developed by the European Court of Human Rights (ECHR) in deciding human rights cases - in deciding regulatory actions vis a vis the investors’ interest could be pertinent in this circumstance.\textsuperscript{635} The normative premise of the doctrine postulates that the ECHR would accord appreciation to certain actions of member states which nominally breaches individual’s human rights, but legitimately justifiable in the interest of, inter alia, public policy, public morals, national security; and that the ECHR would desist from embarking on judicial review thereto, leaving it to the domain of member states institutional competence.\textsuperscript{636}

Put differently, the doctrine grants a measure of discretion to national authorities on critical national issues because of the unique familiarity of the national authorities to deal with such issues, compared to the ECHR. The doctrine recognises that ECHR is in a subsidiary position in relation to national authorities (executive, legislative and judicial); and that the national authorities are better positioned to make a determination on such critical national issues owing to ‘“their direct and continuous contact with the vital forces of their country.”’\textsuperscript{637} The concept derives its strength from being flexible and fluid; its application in practice leading to varying outcomes depending on the facts of the case and the circumstances. The breadth of the margin of appreciation however widens significantly in circumstances of absence of common conception and/or interpretation of the rights by

\textsuperscript{634} Reisman, 'The Breakdown of the Control Mechanism in Icsid Arbitration', 740.
\textsuperscript{635} On the argument for reliance on treaty interpretation in article 31-32 VCLT and against specialised rule of interpretation tailored to investment arbitration, see Micheal Waibel, 'International Investment Law and Treaty Interpretation', (2011), 29-30.
\textsuperscript{637} William W. Burke-White and Andreas Von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations', Yale Journal of International Law, 35 (2010), 305, 33-44 (noting the relevance of margin of appreciation to domestic public policies but failing to apply it to compensation outcome).
member states but narrow down markedly where a higher degree of certainty and consensus exist among member states respecting the right being contested.638

However the emerging jurisprudence in the field of investor-state arbitration appears to be the proportionality doctrine, a concept borrowed from German administrative law.639 As elucidated by ECHR,

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\text{[n]ot only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim ‘‘in the public interest’’ but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised} \ldots
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Although the proportionality principle appears to have a normative convergence with margin of appreciation doctrine641 each is theoretically separate. Proportionality doctrine as discussed here differs markedly from the international law proportionality measures in response to a state wrongful act as articulated by article 51 of International Law Commission’s Article on State Responsibility.642 While the former evolved from German domestic law but increasingly being transposed into international context, the latter is embedded on the countermeasures a state may take in response to an internationally wrongful act.

Proportionality doctrine, as argued, could mediate the conflicting interests of both the host state and the interest of foreign investor643 from the perspective of the suitability (means-end analysis - determining suitability of the impugned action of the host state among a host of

638 AB&C v Ireland, Application No. 25579/05 September 16, 2010.
641 Note that proportionality principle is applied by ECHR in similar fashion to doctrine of margin of appreciation to balance the member states interests and that of individual rights. See Yutaka Arai-Takahashi, ‘The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR’, (2002), 14.
642 Crawford, The International Law Commission’s Articles on State Responsibility, Introduction, Text and Commentaries at 294-301.
alternatives available to host state), necessity (determining if the impugned action infringes on investors right more than is necessary for the host state to achieve its governance objective) and the proportionality of the actions of the host state vis a vis the investor. The doctrinal operation of proportionality mirrors a four-way progression: first, the ‘legitimacy’ stage where the adjudicator confirms (or otherwise) the constitutional competence of the government to take the purported action. Second, the ‘suitability’ stage, at this stage the adjudicator determines if ‘the means adopted by the government are rationally related’ to the declared objectives. Third, the ‘necessity’ stage, equivalent to restrictive means test. Lastly, a ‘proportionality’ test, in this last instance the benefits of the act are weighed against the cost of the alleged breach of the right. Proportionality involves balancing of conflicting interests. In the context of investor-state arbitration -

a move toward balancing would entail both the recognition of an investor’s property rights and a ‘public interest’ defense available to the State. In effect, the parties acknowledge that measures taken by the defendant State have infringed the investor’s rights, but that hindrance may nonetheless be mitigated or justified to the extent that the measures taken were not arbitral, and were meant to serve a proper public good arbitrators using the proportionality framework will deploy means-end testing to evaluate the impacts of State’s measures on the investment; they will weigh the investor’s rights against the public interest being pleaded; and their conclusions will bear upon their dispositive ruling and remedies.

However, arbitral application of the proportionality principle in practice has sometimes resulted in mixed outcomes; tending to defer to investors’ interest rather than fostering the so called balancing it purports to espouse. Although it has been argued that the foregoing can

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645 For a discussion of the four test termed new constitutionalism, see Mathews, 'Proportionality Balancing and Global Constitutionalism', 75-76.
646 Ibid.
648 See Tecmed, S.A. v United Mexican States, ICSID Case No. ARB (AF)/00/2, Award of May 29, 2003, at 47 – 60, particularly para 122 and 151, where despite consideration of proportionality doctrine the tribunal still found for the investor claimant; Continental Casualty Company v. Argentina Republic, ICSID Case No. ARB/03/9, Decision on Annulment, September 16, 2011, at 41 – 54, 110 – 113, para. 137and 285, where the
be ameliorated by introduction of the test of reasonableness in proportionality analysis, such step will arguably not completely resolve the inherent public-private law difficulty in investor-state arbitration. The fact that proportionality test is widely accepted in ECJ analytical jurisprudence is no sufficient succour either; other comity of nations equally ought to accept its application.

Moreover, ICSID arbitrators unlike the national judicial authority are not embedded within national institutional context to enable them better appraise the legitimacy, suitability, necessity, and the proportionality of the impugned host state actions vis a vis the investor. The end result of proportionality application in ICSID context is potentially compensation award heavily skewed to favour investors.

Even though the margin of appreciation doctrine and proportionality doctrine offer significant insights on how to manage regulatory conflict between foreign investors and the host states, they do not seem to be well-suited for wholesale transposition in ICSID context, as their limitations reveal above, moreso given that they are not ideologically-neutral. In other words, a neutral balancing doctrine should be sought. In this respect, it is contended that a remission doctrine should hold sway. Mapping out the principles and application in practice of this remission doctrine constitutes the subject of discussion below.

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650 For a critique of the ICSID and its effect on the host state, see Leon Trakman, 'The ICSID under Siege', University of New South Wales Faculty of Law of Research Series (2012), 1-16.
5.3.3 Remission Doctrine

Although both the proportionality doctrine and margin of appreciation principle have become embedded in ECHR jurisprudence it is argued here that the substantive legitimacy of the ICSID would be significantly enhanced if an independent and self-standing balancing doctrine is adopted. In this context the remission doctrine is postulated. Remission doctrine simply means that ICSID should remit any compelling regulatory issues to host state institutional competence, in similar fashion as ECHR, rather than adjudicating it. It is uncertain at this stage to make an authoritative statement on whether a remission doctrine would be accepted or not by investors’ community, or even the host states. Nonetheless, since remission doctrine smacks of local remedy option, it would be necessary to point out, at the outset, that it would not deprive ICSID of total jurisdiction. In other words, remission doctrine would apply only in compelling regulatory cases in similar fashion as ECHR jurisprudence, while ICSID continues with non compelling issues. There are certain justifications for the adoption of such an independent and impartial balancing tool. First and foremost, remission doctrine is value-neutral unlike both the proportionality and margin of appreciation doctrines that are products of EU jurisprudential heritage. Thus, a wholesale application of both concepts would hardly go down well in other climes. Wholesale adoption of both concepts therefore seems to perpetuate the interest of capital exporting countries to the detriment of developing countries like Nigeria.\(^{651}\)

Moreover, the remission doctrine advocated herein is justified by the theory of global distributive justice that underpins this research. Global distributive justice as already noted advocates the re-conception of rights-duties matrix that underscores international economic relations to reflect a level playing field - fairness and equality. This lends credence to the

foregoing argument for the institution of the concept of remission doctrine to underpin fairness in investor-state relation.\textsuperscript{652}

Certainly, a middle ground doctrine that does not pander to either side is justifiable. Indeed, any deference to host state regulatory interest would be better served by the adoption of the concept of a remission doctrine. However, the remission doctrine canvassed here ought not to operate in hermetic isolation of certain proven principles distillable from both concepts. In fact, it will not only draw from the emergent principles that underpin both concepts but also, by and large, have normative convergence with them, where necessary. Specifically, the remission doctrine might consider the four-way-test of proportionality doctrine in cases where the ICSID retains jurisdiction (assuming the case is not remitted to the host state). Similarly, it would equally draw corollaries from the margin of appreciation doctrine to remit compelling cases deferring to institutional competence of the host state.

The conundrum however remains the normative boundaries for the application of remission doctrine. Under ECHR jurisprudence the breadth of operation of margin of appreciation is not clearly delineated. The application of margin of appreciation principle simply widens significantly in circumstances of absence of common conception and/or interpretation of the rights by member states, but narrow down markedly where a higher degree of certainty and consensus exist among member states respecting the right being contested.\textsuperscript{653} The preceding uncertainty might have led to criticism of the doctrine as being vague and too flexible.\textsuperscript{654} The breadth of remission doctrine canvassed here would however cover compelling regulatory cases coterminous with police powers of the state. These include governmental regulation for public policy, public morals, public health, environment, taxation, and forfeiture for penalties. In these foregoing regulatory spheres, ICSID would be

\textsuperscript{652} See Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration', 740.
\textsuperscript{653} AB&C v Ireland, Application No. 25579/05 September 16, 2010.
mandated to abdicate jurisdiction and remit it back to the national institutional competence of the host state. ICSID is in a subsidiary position in contrast to the host state to adjudicate in these spheres; national institutional hierarchy being better situated to handle the matter given there continuous interaction with vital national forces requiring regulation. Indeed, where compelling public policy issues are implicated leading to attenuation of protection of relevant investment, the doctrine ought to be relied upon as a relevant justification to exonerate the host state vis à vis the investor.

Aside from the above, remitting these regulatory spheres to national institutional competence can also be predicated on further premises. Under Article 1 of Protocol I of European Convention of Human Rights (the Convention) member states are justified to initiate regulation that is tantamount to regulatory expropriation of investment without compensation as long as public policy or general interest dimension is satisfied. Similarly, emergent jurisprudence in the construction of the US Fifth Amendment indicates that compensation is refused using tripod determinants: (a) parcel-as-a-Whole doctrine – mere diminution in economic value of investment is not compensable. (b) Reasonable investment principle – embarking on investment in an unreasonable manner does not warrant compensation if the investment is subsequently caught up with governmental regulation. (c) Ripeness doctrine – inchoate regulatory action is devoid of compensation to the affected investor.

Indeed, the tenor of both Article 1 Protocol I of the Convention and the emergent jurisprudence of the US Fifth Amendment indicates that public policy or general interest dimension are not only adjudicated upon by national institutional competence but also devoid of compensation. Undoubtedly, the normative premise of the proposed remission doctrine coalesced with and is further legitimised by the emergent practices of the two major capital exporting countries above. It is envisaged that the current universe of IIAs ought to be
radically reconceptualised to acknowledge the emerging proposition. Having discussed the theoretical aspect of the remission doctrine, the practical aspect concerning compensation now forms the focus of enquiry.

### 5.3.4 Compensation Outcome for Exercise of Remission Doctrine

A question might arise on the applicable compensation standard on exercise of remission doctrine. Thus, the applicable compensation can be conceptualised from different angles depending on the applicability or otherwise of the remission doctrine in a particular context. In the main, where a particular controverted host state action falls within the sphere of remission doctrine, the tribunal should do no more than abdicate jurisdiction citing institutional competence of the host state. As a consequence, the tribunal should arguably remit the matter to national institutional competence in similar fashion as the ECHR does in deciding human rights cases. The implication is that the foreign investor ought to avail itself of the opportunity provided by a domestic procedural institutional dispute settlement framework in a similar fashion to the domestic investors. Where the national dispute settlement frameworks compensate for the alleged state action, the investor would be entitled to compensation otherwise no compensation.

Conversely, where the action of the host state demands arbitral scrutiny and therefore falls outside the remission doctrine arbitral tribunal should assume full jurisdiction and probably proceed to determination of the compensation standard applicable. The severity or otherwise of the alleged host state action determines whether fair market value or net book value compensation principle applies.
Furthermore, where Nigeria government compulsorily acquires interest in a foreign enterprise, an investor may be entitled to prompt, fair and adequate compensation depending on whether the government is exercising police powers under international law or not. If compelling regulatory issues are implicated under police powers, a foreign investor might not be entitled to compensation, under the proposed remission doctrine. As illustrated in Burlington Resources Inc. v Republic of Ecuador, under international law, bona fide and legitimate exercise of regulatory measures by a state are non-compensable.

A significant number of BITs concluded by Nigeria prohibits indirect expropriation otherwise called regulatory expropriation. This might indicate that any potential exercise of remission doctrine on regulatory grounds would obviously conflict with the substantive obligation to eschew indirect expropriation under BITs. Thus, a radical reconceptualisation of the regimes of IIAs is what is needed to embed this balancing doctrine. And the preceding should embed in MTFI (postulated in Chapter 3) for general applicability.

5.4 Conclusion

The framework for settlement of investment dispute through the platform of ICSID was meant to foster mutual economic cooperation between the investor and host states. However, the system has arguably broken down and is in need of repair. Fixing the problem would require concerted efforts not only at the procedural level but also in the re-conception of substantive rules as argued in Chapter 3. In the first place, the local remedies rule may appear to cater for the interest of the host state like Nigeria, but it is no more than a mere formality,

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656 Section 44(2)(f) 1999 Constitution stipulates, inter alia, that ‘nothing in the subsection 1 of this section shall be construed as affecting any general law’ that provides for ‘the taking of possession of property that is in a dangerous state or is injurious to health of human beings, plants or animals.’
657 Burlington Resources Inc. v Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability December 14, 2012, para.154 at 58.
given that an investor can abandon (or alternatively employ delay tactics thereby frustrating its operation) the remedy midstream on expiration of the stipulated deadline.

Similarly, the appointment of arbitrators and their mode of operation cannot, strictly speaking, be said to be anti-capital importing countries, nevertheless such a possibility cannot be simply dismissed as irrational. According to Paulsson, investor-state arbitral tribunals historically exhibited bias against developing countries. And this historic prejudice, Sornarajah argues, continues till date in investor-state arbitration.

Although the institution of an appellate ICSID could appear to ameliorate the situation, it could still fall prey to the same weakness bedevilling the current ad hoc system. Consequently, scholars have proffered various propositions for the solution. While some argue for the proportionality doctrine, others suggest the margin of appreciation doctrine. The doctrinal operation of proportionality mirrors four-way progression. First, the ‘legitimacy’ stage where the adjudicator confirms (or otherwise) the constitutional competence of the government to take the purported action. Second, the ‘suitability’ stage, at this stage, the adjudicator determines if ‘the means adopted by the government are rationally related’ to the declared objectives. Third, the ‘necessity’ stage, equivalent to restrictive means test; and lastly, the ‘proportionality test’, in this last instance, the benefit of the act is weighed against the cost of the alleged breach of the right.

Although the mechanics of theoretical operation of proportionality doctrine seemingly balances the mutual interest of both parties, in practice its application almost always inclines in favour of the foreign investor. Similarly, the theoretical tool of margin of appreciation might be a convenient tool for mediating conflicting interest, but it is postulated that

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659 Sornarajah, 'Power and Justice in Foreign Investment Arbitration', 103.
660 Mathews, 'Proportionality Balancing and Global Constitutionalism', 75-76.
661 See Tecmed, S.A. v United Mexican States, ICSID Case No. ARB (AF)/00/2, Award of May 29, 2003, at 47 – 60, particularly para 122 and 151.
remission doctrine should hold sway. Although remission doctrine shares theoretical similarity with the margin of appreciation, the former is more appropriate than the latter given that the former is ideologically-neutral; and therefore likely to be more acceptable to contracting parties.

Furthermore, the application of remission doctrine is rationally justified by the theory of global distributive justice that underpins this research. In other words, the remission doctrine argues for equality and fairness in investor-state relation: two concepts captured by the spirit of global distributive justice. Both the remission doctrine advocated herein and the balancing of rights-duties of investor postulated in chapter three above should embed in any prospective MTFI (proposed in chapter three above) to ensure wider applicability and enforceability.

Having stated the need to reconceptualise the unbalanced substantive terms (ie Chapter 3) and procedural term (ie in this Chapter 5) of IIAs to embed equity and a level playing field in international economic relations, the Chapter 6 hereunder contends further that the regimes of performance requirement and responsible investment should be strengthened as a justification for investment protection as well as the corresponding economic gains of foreign firms based on the rationalisation of the internalisation and eclectic theories of foreign investment. The analysis of the Chapter 6 forms the focus of next discussion.
Chapter 6
Performance Requirement and Responsible Investment

6.1 Introduction

This chapter explores two topical issues: performance requirement and responsible investment in the petroleum sector. Performance requirement as underpinned by the Local Content Act represents a significant breakthrough in government drive to create linkages between IOCs investment in the petroleum sector and other sectors of the Nigeria economy. Nonetheless, the successful outcome or otherwise would greatly depend on two vital factors. First, the defensibility of the aspect of the provision - particularly the obligation on the part of IOCs to source for raw materials exclusively from indigenous suppliers – before the international tribunal. Second, the institutional efficacy of the establishment charged with implementation thereto - Nigerian Content Monitoring Board (NCMB).

The second part pertains to responsible foreign investment in the petroleum sector – in the form of CSR practices – underscored by sustainable social and environmental investment. It would be argued that the existing practices of the three main IOCs in Niger-delta – Shell, Chevron, and ExxonMobil - remain grossly inadequate. Similarly, other potential modes of reinforcing responsible investment particularly shareholders and stakeholders activism as well as voluntary reporting lack coercive apparatus, thereby rendering its efficacy nugatory. Although the current PIB before the National Assembly intends to embed a coercive responsible investment paradigm, effective outcomes may be diminished by institutional lethargy. The chapter argues for increased emphasis on institutional efficiency. Not only are the regimes of performance requirement and responsible investment justifiable on the ground of global distributive justice as a backstop for the host
state investment protection but also on the premise of internalisation theory and eclectic theory of foreign investment, that robustly indicate that firms invest oversea purely for profit motives.

The chapter is divided into two main sections each with sub-sections. The first section explores the trajectories of performance requirement through the prism of the Local Content Act as well as the useful lessons to be garnered from other emerging economies that previously applied such policies. The second section evaluates responsible foreign investment in the petroleum sector including the potential implications of the current PIB that is poised to embed a coercive regime.

6.2 Performance Requirement

Performance requirement constitutes certain categories of host country operational measures required of a foreign company to align the investment in such a way as to benefit the economy of the host country. Depending on the requirement of the relevant economy, such host country operational measures may include, inter alia, the requirement of local content in the utilisation of raw materials and services, export performance, import restriction, equity participation, technology transfer, and employment of nationals. Whether it constitutes a condition for admission of investment (mandatory); or applies post-investment as a precondition for the enjoyment of certain investment incentives (voluntary) depends on the requirement of the relevant economy.

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663 Dunning, 'The Eclectic Paradigm as Envelope for Economic and Business Theories of MNE Activity', 163-64.
664 See Article 1106(1-3) of the NAFTA prohibiting the application of certain performance requirements from host countries signatories. See also UNCTAD, 'Key Terms and Concepts in IIAs: A Glossary', at 131-33. On broad contours of extant performance requirement and what future multilateral agreement might possibly cover, see OECD, 'Performance Requirements (Note by the Chairman)', Negotiating Group on the Multilateral Agreement on Investment (MAI) (OECD, 1996) at 2-4; OECD, 'Article on Performance Requirements: Results of the Informal Discussion on Special Topics - Performance Requirements and Monopolies/State Enterprises/Concessions on 21-22 April 1997', Negotiating Group on the Multilateral Agreement on Investment (MAI) (OECD, 1997), 1-14.
Although performance requirement is, by and large, an investment policy tool of most developing countries, developed countries nonetheless still embark on similar measures, stricto sensu, not called performance requirements, but tantamount to them.\textsuperscript{665} Performance requirements are premised on the ground of creating linkages between foreign investment and the economy of the host country.\textsuperscript{666} Whether this is empirically ascertaintable remains a moot point. Nonetheless, the relevance of these linkages in ‘leapfrogging’ the economic development of the host states has been acknowledged by UNCTAD publications.\textsuperscript{667}

Linkages of this nature could either be vertical or horizontal or both.\textsuperscript{668} The relevance of vertical linkages is hinged on its capacity to provide skill training and/or transfer of technology (from foreign affiliates) to local firms that supply goods (raw materials) and services to them. Horizontal linkages, on the other hand, involve collaboration between foreign firms and local firms in an identical industry - in the area of research and development. The prime objective of these linkages is to facilitate the overall economic development of the host state.

It is probably in the light of the above objective that Nigeria enacted the Oil and Gas Industry Content Development Act of 2010 (the Local Content Act). Local Content is defined as,

\textsuperscript{665} Measures employed by both the US and EU particularly the requirement of rules of origin, voluntary export restraints, among others, arguably constitute equivalent to performance requirements. See the illustrative list of such measures in UNCTAD, ‘Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries’ (New York: United Nations, 2003) at 11-13. See also ADF Group Inc. v United States, ICISD Case No. ARB (AF)/00/1, Award of January 09, 2003, 195; 18 ICSID Review – FILJ (2003).

\textsuperscript{666} However, it has been postulated that government attempts to influence the location or how investment should operate, ‘except to correct negative externalities’ particularly pollution, could lead to ‘misallocation of resources’ as well as distortion in international trade and investment. See UNCTAD, ‘Host Country Operational Measures’, UNCTAD Series on issues in international Investment agreements (New York: United Nations, 2001) at 6.


\textsuperscript{668} Ibid., at 52-54.
The quantum of composite value added to or created in the Nigeria economy by a systematic development of capacity and capabilities through the deliberate utilization of Nigerian human, material resources and services in the Nigerian oil and gas industry.\textsuperscript{669}

The Local Content Act is intended to effectuate the indigenous capacity utilisation, by mandating foreign companies to use indigenous companies ‘in the procurement of goods and services.’\textsuperscript{670} It emphasises local input, use of local raw material, enhancement of local technical capacity and achievement of cross-sectoral linkages in Nigeria economy.\textsuperscript{671} It is envisaged that it would stimulate the growth of indigenous companies, and by implication, enhance employment opportunities, which would cascade down to the overall economy. It is essentially directed at international oil companies operating in the oil and gas sector. The essence is to create linkages between the operations of the international oil companies with the rest of the economy thereby fostering economic growth.

The contours of the Local Content Act 2010 seemed to have followed (at least in part) Regulation 26 of the Petroleum (Drilling & Production) Regulation made pursuant to section 9 of the Petroleum Act of 2004.\textsuperscript{672} The substance of the Regulation is that a licensee of oil prospecting licence and a lessee of an oil mining lease are obliged to submit an employment plan detailing how Nigerians are to be employed within twelve months of the grant of a licence and/or the grant of a lease.

The renewed drive to create linkages between the operation of international oil companies and the Nigerian economy gathered momentum with the election of Olusegun Obasanjo in 1999. The Obasanjo administration set up a committee in October 2001 to review

\textsuperscript{669} See section 106 of the interpretation section of the Local Content Act.


the quantum of local content used by the IOCs operating in Nigeria. Consequently, the administration acknowledged the need for a compulsory requirement of local source of goods and services from IOCs (at least not less than 30 percent ratio). The follow-up action was embarked upon by the government, including a bill sponsored to that effect. The flagship of Nigeria oil relation – the Nigeria National Oil Corporation (NNPC) equally established the Nigeria Content Policy; with a follow up of establishment of the Nigerian Content Division which compels the compliance of the IOCs with the foregoing objectives. However, it was not until on April 22, 2010 that the local content policy acquired the legal validity through the assent of the president.

The Local Content Act is ambitious and far reaching in its stride to link foreign investment in the oil and gas sector with the overall economic development imperatives of the country. It takes precedence over all other legislation pertaining to Nigeria content concerning all ‘operations or transactions carried out’ with regard to the oil and gas sector in Nigeria. A hortatory call is made to all regulatory authorities, operators, contractors, subcontractors, alliance partners and other entities in the execution of projects in the oil and gas industry to consider the Local Content Act as an integral part of their management philosophy, particularly in sourcing raw materials and services; employment of nationals; and technology transfer. These are discussed in greater details below.

6.2.1 Local Raw Materials and Services

Any foreign investor operating in Nigeria must have to make use of the local raw materials and services. To this end, such an investor must submit Nigeria Content Plan (the Plan) demonstrating intention to comply with the provision of the Local Content Act when bidding

674 Section 1 of the Local Content Act.
675 Section 2 of the Local Content Act.
for any licence, permit or interest, and before embarking on any project in the Nigeria oil and gas industry.\textsuperscript{676} The Plan should demonstrate that priority is given to services provided in Nigeria and goods manufactured in Nigeria.\textsuperscript{677} In other words, the Plan that is submitted to the Board by any operator or alliance partner should indicate how ‘locally manufactured goods’ are to be used if ‘such goods meet the specification of the industry.’\textsuperscript{678} Also, all welding and fabrication activities by the foreign investor must be carried out in Nigeria.\textsuperscript{679} The essence of these provisions is to spur the growth of indigenous companies and fast track the overall economic development. However, the spirit of the above provisions could easily be thwarted by foreign companies hiding under the guise of non-availability of relevant goods and services in Nigeria. For instance, some IOCs may refuse to optimise locally fabricated materials on the ground of failure to satisfy quality control test in order to justify importation of equivalents.

IOCs working through the Nigerian subsidiaries must demonstrate that fifty percent of the equipment used for the execution of a project is ‘owned by the Nigerian subsidiaries.’\textsuperscript{680} This provision is however illusory since Nigeria is not known to produce hi-tech equipment. However, its merit lies in the fact that the subsidiaries of foreign investors are now legally obliged to utilise certain percentage of indigenous equipment as long as such equipment exists in Nigeria. Similar requirement underpins employment of nationals.

\subsection*{6.2.2 Employment of Nigerian workforce}

The Local Content Act equally made provision for the employment of Nigerians. It provides that Nigerians should be given first consideration in training and employment programme to

\begin{footnotesize}
\textsuperscript{676} See section 7.
\textsuperscript{677} Section 10(1) [a]; section 12.
\textsuperscript{678} Section 13.
\textsuperscript{679} Section 53.
\textsuperscript{680} Section 41(2).
\end{footnotesize}
which the Plan incorporated in bidding process relates.\textsuperscript{681} The operator or promoter of the project (investment) must indicate the employment and training plan which must be included in the Plan as well as report quarterly on employment and training activities and the identities of personnel involved within the relevant period.\textsuperscript{682} Where there is existence of skill deficit among Nigerians, the investor shall make reasonable effort to provide Nigerians with the requisite training, and submit a blueprint of the mode of doing so to be included in the Plan. In such cases where there are no qualified Nigerians, the investor shall submit succession plans which become activated after four years making the positions ‘Nigerianised.’ Foreign companies are however allowed five percent of expatriates in management positions.\textsuperscript{683} All projects in the oil and gas sector executed by a foreign investor in excess of $100 million (USD) must contain a ‘Labour Clause,’ which ensures that only Nigerian nationals are employed in the junior and intermediate cadres.\textsuperscript{684}

The implication of the foregoing would be the enhancement of the employment potential of Nigeria labour force and the improvement of their technical capacity. Such transfer of skills may in the long run ensure that Nigerians make productive input in the oil and gas sector under limited foreign influence. However, one potential problem that may bedevil the above provisions is poor enforcement or abuse of the provision. The Federal government or any of its subdivisions might try to exert undue pressure on the hiring policy of IOCs adhering to the regulations. For instance, they may tend to sacrifice merit for federal character obviating the IOCs power to hire the best brains. The possibility of this scenario would no doubt constitute a significant drawback to capacity building which underpins the Local Content Act employment philosophy. It is considered that IOCs should be allowed wide latitude in their hiring policy in compliance with the Local Content Act.

\textsuperscript{681} Section 10(1) (b); section 28.
\textsuperscript{682} Section 29.
\textsuperscript{683} Section 32 and section 33.
\textsuperscript{684} Section 34 and 35.
6.2.3 Technology Transfer

Following on the heels of imparting skills to Nigerians through employment, there is an obligation on the part of the investor to ensure an effective technology transfer.\textsuperscript{685} Although there are generally three international modes of technology transfer - the market based development approach; the intra-regional development approach; and the regulatory approach,\textsuperscript{686} only the latter is relevant or rather captures aptly the intendment of the Local Content Act. Apart from the consistent deployment of regulatory approach in a number of United Nations instruments to foster technology transfer to developing countries,\textsuperscript{687} its utility as underpinned by Local Content Act would lead to two potential outcomes if effectively implemented. First, it would help in introducing innovation in the existing technologies. Secondly, it would restrict entry of harmful technologies.

Thus, a foreign investor is obliged not only to submit a blueprint of technology transfer but also to carry out the project in such a way as to promote the transfer of technology.\textsuperscript{688} The relevance of this provision is bolstered by growing international consensus on the obligation of the multinational enterprises to transfer technology in the areas of operation.\textsuperscript{689} Not only are multinational enterprises enjoined to adhere to technology transfer obligation of the host country, they are equally obliged to make a positive and conscious effort to integrate the transfer of technology with the overall economic goal of the host

\textsuperscript{685} Transfer of technology is defined by the United Nations International Code of Conduct on the Transfer of Technology as the ‘systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service’ excluding transactions pertaining to ‘mere sales or mere lease of goods’. See UNCTAD, 'Draft International Code of Conduct on the Transfer of Technology', (1985).

\textsuperscript{686} For a discussion of the approaches, see UNCTAD, 'Transfer of Technology', UNCTAD Series on issues in international Investment agreements (New York: United Nations, 2001) at 44-46.

\textsuperscript{687} Ibid., at 49-51.

\textsuperscript{688} Section 43-46.

country. The Local Content Act, no doubt, enjoys certain complementarities with the emerging international consensus of obligation in this regard.

To forestall getting round the Act and ensure effective monitoring, the foreign operator must submit an annual report indicating that there is compliance with the technology transfer obligation. As part of fiscal incentive to encourage voluntary compliance, the Act provides tax incentives for companies that set up operation in Nigeria for the purpose of carrying out 'production, manufacturing or providing' goods and services otherwise imported in Nigeria.

Fiscal incentive of this nature in the form of tax reduction no doubt reduces the twin obstacles constituted by excessive tax regimes (it increases the cost of actual transfer to the host country, and reduction in subsequent return to the transferor). It is uncertain if IOCs would exploit the preceding tax reduction regime to facilitate transfer of technology. One usual generalisation about multinational corporations business characteristic however is their relative disinclination to transfer technology to the host country economy. Given this unpalatable posturing, it can be contended that IOCs may eventually rely on any foreseeable reason to circumvent the transfer. Firstly, IOCs may not be disposed to produce, manufacture, or provide good and services in Nigeria where the cost of such an exercise exceeds importation. Secondly, they may still embark on importation even if it is cheaper to produce or manufacture in Nigeria where the exporter constitutes a part of their global business

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691 Section 46 Local Content Act.
692 Sections 47-48, 52 Local Content Act.
694 See ibid., at 36. Fiscal Incentives particularly R&D incentives, export incentives and other tax related incentives are sometime used to accomplish technology transfer. Whether or not they lead to positive outcome depends on the nature of implementation and most importantly, the disposition of the transferor investor.
affiliation, or where the relevant IOC harbours an interest in protecting their patents or business secret.

However, the situation does not seem to be totally gridlocked. Indeed, one credible and potentially effective way of forestalling the preceding outcomes would be to strengthen the R&D paradigm. Already the Local Content Act mandates the IOCs to establish research and development centres in Nigeria for the purpose of carrying out research. Judicious implementation of the foregoing provision arguably constitutes the most realistic means of optimising technology transfer opportunities. This equally might reduce potential evasive tactics that may be adopted by the IOCs.

### 6.2.4 Nigeria Content Monitoring Board

The Nigeria Content Monitoring Board (NCMB) makes the procedures that guide, monitor, coordinate and implement the provisions of the Local Content Act. The bid with the highest Nigerian Content wins. The operators are expected to communicate the Local Content Plan to all their contractors and subcontractors and ensure compliance with the plan by them. To monitor compliance, an operator is required to submit Nigerian Content Performance Report within six months of every year covering the period of the year under review. The Board may conduct a public review for the purpose of ascertainment of the compliance of the plans with the provisions of the Local Content Act. Where the Board is satisfied that the Plan submitted by an operator satisfies the requirements of the Local Content Act, a Certificate of Authorisation would be issued to the operator. Breach of the provisions of the Local

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695 Sections 37-40.
696 Section 4.
697 Section 14.
698 Section 106 defines operators to include NNPC and its subsidiaries as well as joint ventures partners and any Nigerian or IOCs operating in Nigerian oil and gas sector under any contractual arrangements.
699 Section 8.
Content Act attracts a fine of five percent of the project sum for each project in which the offence is committed or cancellation of the project.\textsuperscript{700}

The Board may appear to have an unfettered discretion based on the foregoing provision. However, the ultimate power lies with the minister of petroleum who not only issues directives to the Board with regard to ‘application, administration and implementation’\textsuperscript{701} of the Local Content Act but also cause to be implemented (by the Board) any regulation with regard to any aspect of the Local Content Act.\textsuperscript{702}

Similarly, another potential danger to the realisation of the objectives of the Local Content Act is corruption which remains an aspect of the institutional problem in Nigeria. Corruption in this guise would be in the form of the attempt by the IOCs to lure the Board through gratification to lessen the strictures of implementation of the Act. Although there are in existence various international conventions prohibiting bribery of foreign officials under any guise in international business transactions,\textsuperscript{703} they have not, unfortunately, succeeded in stamping out corruption in the sphere of international petroleum operations in Nigeria. Similarly, the existence of anti-corruption agencies particularly the EFCC and Independent Corrupt Practices Commission (ICPC) has not stamped out institutional corruption in Nigeria. Nevertheless, one suggested way of curtailing the destabilising effect of corruption would be to ensure an effective remuneration regime for members of the Board. Although such a scenario may not entirely eliminate corruption among the Board members, it would at least lessen susceptibility.

\textsuperscript{700} Section 68.

\textsuperscript{701} Section 100.

\textsuperscript{702} Section 70(b).

Furthermore, the Local Content Act seemingly shifts significant burden of economic development aspirations of the country to IOCs. Though the creation of linkages between petroleum operations and the rest of the economy is germane for accelerated economic development, the primary responsibility for the economic development ought to rest squarely with the Nigeria government. Whether or not IOCs would adhere to the spirit of the legislation or challenge its validity before international forum would depend largely on the conformity or otherwise of the legislation to Nigeria international obligation.

6.2.5 International Dimension of Local Content Act

The Local Content Act appears to contravene the national treatment provision under article III of GATT 1994 and Article 2 of Trade Related Investment Measures (TRIMs). The substance of the foregoing provisions involves, inter alia, the prohibition of local content requirement and quantitative restriction. Such a contravention would normally occur where a particular IOC is forced to rely on indigenous suppliers in contrast to foreign suppliers domiciled in Nigeria. However, not all categories of performance requirements are covered by TRIMs. Strictly speaking, a state would not be in breach of performance requirements

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704 The Annex to TRIMs contains illustrative list of measures prohibited viz: 1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or

(b) that an enterprise purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.

2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:
as long as the categories imposed are outside TRIMs provision. A graphic illustration of host
country operational measures (HCOMs) either specifically prohibited at a multilateral level
or otherwise could be instructive.⁷⁰⁵

(a) the importation by an enterprise of products used in or related to its local production, generally or to
an amount related to the volume or value of local production that it exports;

(b) the importation by an enterprise of products used in or related to its local production by restricting
its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the
enterprise; or

(c) the exportation or sale for export by an enterprise of products, whether specified in terms of
particular products, in terms of volume or value of products, or in terms of a proportion of volume or
value of its local production.

⁷⁰⁵ WTO, 'Agreement on Trade-Related Investment Measures'.

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The red light section constitutes the prohibited part of the TRIMs. Strictly speaking, Nigeria would be in breach of its international obligation if any of the provisions of the local content

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<tr>
<th>Category</th>
<th>HCOM</th>
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<td>Local content requirements</td>
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<td>Trade-balancing requirements</td>
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<td>Foreign exchange restrictions related to foreign exchange inflows attributable to an enterprise</td>
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<td><strong>“Yellow light” HCOMs</strong></td>
<td>Requirements to establish a joint venture with domestic participation</td>
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<td>Requirements to locate headquarters for a specific region or the world market</td>
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<td>Export performance requirements</td>
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<td>Restrictions on sales of goods or services in the territory where they are produced or provided</td>
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<td>Requirements to supply goods produced or services provided to a specific region or the world market exclusively from a given territory</td>
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<td>Requirements to act as the exclusive supplier of goods produced or services provided</td>
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<td>Requirements to transfer technology, production processes or other proprietary knowledge</td>
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<td>Measures contrary to the principle of fair and equitable treatment</td>
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<td><strong>“Green light” HCOMs</strong></td>
<td>All other HCOMs</td>
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*Source:* UNCTAD.
contravenes the ‘red light HCOMs’. Same can hardly be said of the ‘yellow lights’ and ‘green lights’ HCOMs.

It must be noted however that performance requirement is not an investment policy peculiar to Nigeria *simpliciter*. A survey of investment policies of certain MENA countries (Middle East and North Africa) that have significant petroleum production indicates that performance requirements still persist in their foreign investment legislations. Egypt Investment Incentives and Guarantees Law 8 of 1997 and Labour Law of 1981 mandate a minimum local content requirement of 45 per cent from foreign affiliates; and impose an upper limit of foreign workforce not exceeding 10 per cent of the total workforce and 20 per cent of the payroll respectively. Similarly, the Saudi Arabian Labour and Workman Regulations of 1969 (as amended) require that Saudi nationals constitute 75 per cent of company’s workforce and 51 per cent of its payroll unless an exemption is granted by the Ministry of Labour and Social Affairs. In Syria, projects are sanctioned by a Higher Council of Investment composed of government functionaries. Such an authorisation is predicated on certain benchmarks such as the use of local content; employment of nationals; export performance (increasing export ratio) and import restriction; and technology transfer.

Indeed, various countries have at one time or another (just like Nigeria) implemented performance requirements in order to optimise the gains of foreign investment. Such requirements as the employment of Nigerians, technological transfer, and research and

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706 Section 10(1)(a) and section 12 Local Content Act 2010.
707 See however the argument to the effect that, 
"[c]ategorising these measures as yellow lights HCOMs should not suggest that they are not as legally binding as the red light HCOMs. Indeed both derive from instruments governed by international law, and which, among the parties, create binding legal obligations. The point of emphasis is that the red light HCOMs has, in terms of parties, a wider application."

In other words, yellow lights might not be prohibited at multilateral level but nonetheless discouraged at interregional and bilateral level. See UNCTAD, 'Host Country Operational Measures', at 2, 34-35. Arguably countries may still apply them if they do not constitute a specific breach of international obligation.
development in the Local Content Act (issues literally apprehended by the ‘yellow lights’ HCOMs) cannot be said to constitute an international breach.\textsuperscript{709}

\textbf{6.2.6 Comparative Effectiveness}

The implementation of performance requirements is one thing but its effectiveness constitutes another. A country-wide analysis of four emerging economies indicates mixed results, lending credence to the fact that the success or otherwise of the implementation of the performance requirements is country-specific. In Chile\textsuperscript{710} for instance, evidence indicates that the application of performance requirements fostered export capabilities of firms with a resultant spillover of foreign exchange. However, there was no perceptible improvement in the overall performance of local industries (automotive industry) resulting from the implementation of the local content regime. Increasingly however, Chile is gradually shifting emphasis to efficient performance of markets away from performance requirements regimes.

In India, evidence indicates that the implementation of performance requirements fostered positive externalities to the country, translating into diffusion of novel technologies thereby fostering ‘vertical linkages of domestic automotive components producers’\textsuperscript{711} with the major automobile manufacturers of the world.

The implementation of a performance requirement regime in Malaysia\textsuperscript{712} seemingly contributed to rapid industrialisation and overall growth of the economy as well as engendered a more equitable-based labour force and distribution of income. However, in the area of R&D, it does not appear that performance requirement fared well. As the Malaysian

\textsuperscript{709} To the extent that Nigeria is not a party to subsisting bilateral investment treaties and/or interregional trade agreements prohibiting the application of the yellow lights HCOMs.

\textsuperscript{710} UNCTAD, ‘Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries’, at 66-69.

\textsuperscript{711} Ibid., at 114.

\textsuperscript{712} Ibid., at 159-69.
economy continues to improve, the strictures underpinning the enforcement of performance requirement become relaxed to suit changing economic dynamics.

Performance requirements in South Africa\textsuperscript{713} indicate varied outcomes. Export and technology transfer performance fared well owing to synergy among existing industries. However, in the areas of employment of local labour force and R&D, it does not appear that significant improvement was achieved.

The overall picture painted by the foregoing indicates that performance requirements are context-specific. Arguably, successful outcomes may well depend on effective alignment of economic policies with industry strategic objectives. As noted, ‘… the optimization of investment through the creation of performance requirements’ involves ‘an intimate understanding of the industry structure and corporate strategies.’\textsuperscript{714} Excessively restrictive and unduly burdensome mandatory performance requirements could dampen industry morale thereby undermining the potential gains of such a policy. Conversely, the absence of an effective institutional monitoring agency that implements as well as oversees the conformity of the relevant affiliates with the overall goal of performance requirements could undermine the intended objectives.

Nigeria is in a strategic position to take a cue from the above-mentioned emerging economies that applied performance requirement at one time or the other. The institutional efficacy of the NCMB becomes critical in this regard. The success or otherwise of the Local Content Act depends largely on the effective implementation by the NCMB. A one-size-fits-all application of the rules would be counter-productive. Each situation should be analysed on its merits by the NCMB, focusing on the potential outcomes of a given implementation of a particular set of rules. Arguably, just like similar policy in Malaysia the NCMB should be

\textsuperscript{713} Ibid., at 213-16.
\textsuperscript{714} Ibid., at 216.
able to relax certain conditions where strict enforcement could be counter-productive; and/or undermine the competitiveness of the country in attracting FDI. Similarly, as illustrated by the Chilean experience, a gradual phase out of performance requirements is recommended where both macro-economic and micro-economic factors indicate favourable economic climate rendering such performance requirements nugatory.

Performance requirement is justified on the ground of balancing of interest of both parties, given the evidence from internalisation theory and the eclectic theory of foreign investment which indicate that firms benefit in substantial economic sense in their foreign operations. Consequently, it is only fair and equitable that the host state too benefit through the regimes of performance requirement (and responsible investment – discussed below). Such balancing of economic interest of the host state and foreign investor is equally justified by the emergent principle of global distributive justice. As noted,715 addressing international inequality through distributive justice requires not just a redistribution of world resources but more importantly, the re-conception of power and responsibility matrix of international actors, particularly multinational investors.

The obligation to incorporate Corporate Social Responsibility (CSR) and/or responsible investment does not however appear to feature in the performance requirement benchmarks. Nonetheless, IOCs are expected not only to engage in performance requirements but also to recognise and respect the interest of stakeholders particularly in the areas of operation through responsible investment and/or CSR.

6.3 Responsible Investment

Despite the absence of a general definition of responsible investment, its various contours remain pretty much understandable. Thus, it can be viewed in various modes such as the concept of corporate social responsibility (CSR); sustainable development;\(^{716}\) or better still legitimacy licence.\(^ {717}\) It is further evaluated from the angle of regulating the agent of foreign investment – multinational corporation. In this vein, it is viewed from the standpoint of coercive regulation versus voluntary regulation;\(^ {718}\) the host state model of regulation versus home state model of regulation;\(^ {719}\) unilateral regulation versus multilateral regulation.\(^ {720}\) It could also be analysed from the prism of communitarian and contractarian perspectives;\(^ {721}\) or even shareholder-stakeholder debate.\(^ {722}\) The diversity of these perspectives can be illustrated using radial cycle hereunder,

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\(^{716}\) One widely accepted definition of sustainable development enunciated by World Commission on Environment and Development (Brundtland Report), defines it as ‘a development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.’ See International Institute for Sustainable Development, ‘What Is Sustainable Development? Environmental, Economic and Social Well-Being for Today and Tomorrow’, at 3.


Despite the divergences in word characterisation, the normative content of all remains the same: responsible investment practices vis a vis outside constituencies. For instance, the words ‘communitarians’ and ‘stakeholders’ loosely denote outside constituencies affected in one way or another by the corporation operating in the sphere of their surroundings. The focal point of this discourse remains however the responsible foreign investment conduct/stakeholders’ concern - the manifestation of corporation outward concern to such stakeholders being invariably labelled the concept of CSR.\textsuperscript{723}

\textsuperscript{723} Note that CSR and responsible investment are used interchangeably in this discourse. Note also the effort by the UN in embedding responsible investment. See PRI, 'The Principles of Responsible Investment', \textit{An Investor Initiative in Partnership with UNEP Finance Initiative and the UN Global Compact}. Responsible investment forms one of the hallmarks of CSR normative paradigm. For the progressive link between the two see Russell Sparkes and Christopher J Cowton, 'The Maturing of Socially Responsible Investment: A Review of the Developing Link with Corporate Social Responsibility', \textit{Journal of Business Ethics}, 52 (2004), 55.
6.4 Definitional Construct

CSR does not seem to have a universally accepted definition.\(^\text{724}\) However, the evolutional and well-articulated definitional construct of CSR provides a useful guidance.\(^\text{725}\) CSR is characteristically viewed as mirroring a broad range of activities companies are expected to undertake. The diversity of perspectives underpinning CSR is not unconnected with various theories that underscore its conceptualisation particularly the institutional theory, agency theory, resource-based theory of the firm, stewardship theory, the theory of firm, and stakeholder theory.\(^\text{726}\) As noted, the ‘prescribed approaches to CSR’ sometimes ‘seem perplexing to theorists and completely elude practitioners’.\(^\text{727}\) This preceding ‘state of affairs probably impedes a full understanding among managers of what CSR should comprise’ and further hinders ‘theoretical development of CSR’.\(^\text{728}\)

Nevertheless, social responsibility of business entails, inter alia, responsible investment, respect for human rights of the host communities, and actions consistent with good corporate citizen in the host communities;\(^\text{729}\) not least is the maintenance of a harmonious industrial relation.\(^\text{730}\) It could also be viewed as encompassing economic, legal, ethical, and discretionary responsibilities (particularly voluntary activities such as philanthropy).\(^\text{731}\) However, the preceding classification of CSR seems illusory. The central objective of every business is to make profit (economic); economic responsibility therefore


\(^{727}\) Ibid., at 1.

\(^{728}\) Ibid.


seems to fall outside CSR construct. Legal responsibility constitutes a mandatory minimum standard necessary for continued existence of a legally chartered company while voluntary activities particularly philanthropy is external to company activities; both therefore seemingly fall outside CSR construct.  

Social responsibility therefore ‘rests centrally on firm’s operational behaviour and its impacts on the surrounding’ communities. In other words, it entails a ‘balanced approach for organization to address economic, social and environmental issues in a way that aims to benefit people, communities and to society’. In this perspective, it encompasses issues such as human rights, unfair business practices particularly bribery and corruption, anti-competitive practices, environmental development, social and community development.

CSR equally entails activities (which set out the companies as a good corporate citizen) beyond the mandates of the law particularly in developing countries where statutory devices may be underdeveloped or even non-existent in the particular area of companies conduct. In fact, the significance of CSR construct is dependent not only on the managerial perspectives of CSR but also the prevailing institutional and political environment. In other words, a consolidative conception of CSR is not thematically limited to moral, strategic,

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733 Ibid., at 3.
735 Ibid.
organisational aspects and implications alone but extends with equal force to cultural
dimension.\textsuperscript{739}

In the context of the relevance of CSR to Nigeria, it can be mirrored in various modes
and shades such as environmentally sustainable investment; respect for the right of the host
communities; and good corporate citizenship both in pre-investment (proactive policy of
preventing negative externalities) and post investment (corrective policy) cum partnering
with the government (federal, state and/or local) in developmental projects – social
investment. The analysis of the contour of CSR construct in Nigeria would therefore follow
this latter exposition – generally regarded as responsible investment conduct (responsible
foreign investment) in this discourse.

6.5 Global Convergence

Scholars in the field of economics (including management theorists), law, and political
philosophy\textsuperscript{740} have argued for ages on the proper contours of the corporation role vis a vis the
external constituencies.\textsuperscript{741} Neo-classical proponent of shareholder-centric corporation argued
that the only social responsibility of corporation is to engage its resources for profit motive to
maximise shareholders wealth.\textsuperscript{742} Indeed, multi-stakeholders approach to investment in the
sense of corporation accounting for the interest of stakeholders including the community of

\textsuperscript{739} Adam Lindgreen \textit{et al}, 'Organisational Stages and Cultural Phases: A Critical Review and a Consolidative
Model of Corporate Social Responsibility Development', \textit{International Journal of Management Reviews}, 12(1)
(2010), 20.


\textsuperscript{741} See A.A. Berle, 'For Whom Corporate Managers Are Trustees: Note', \textit{Harvard Law Review},
45/8 (1931-1932), 1367; E.M. Dodd, 'For Whom Are Corporate Managers Trustees?', ibid. (1932), 1145-63. The competing
theories of corporation (artificial entity theory and natural entity theory) evolutionally define corporation

\textsuperscript{742} Milton Friedman, 'The Social Responsibility of Business is to Increase Its Profit', \textit{New York Time Magazine},
1970 at 32.
operations is disregarded. In their influential article, *The End of History for Corporate Law*, Hansmann and Kraakman in arguing for shareholders primacy state that other constituencies such as the community where the corporation operates, creditors, employees, customers, suppliers, environments, can only be part of the corporate governance equation if they are party to express and unambiguous private orderings (contract) with the corporation. Failing that, they can only lay claim to protections of other bodies of law (like environmental law, human rights law, tort, among others), otherwise their interests are not to be the concern of corporate policies.

Conversely, progressives argue that in the context of increasing globalisation, the arguments that corporation exists purely to maximise shareholders’ wealth is illusory, in the face of environmental and human rights challenges created by the activities of the corporations’ consequent upon globalisation. In other words, the existence of corporation is a by-product of team production involving the input of the communities hosting the corporation, the employees, and other constituents outside shareholders.

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In the UK, section 172 Company Act 2006 mandates the directors of companies to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so, inter alia, have regard to outside constituencies interests particularly the impacts of the company operations on the host community and environment as well as maintain high standard of business conduct. The UK company law reform of 2006 encapsulated in the ‘enlightened shareholder value’ has been hailed as the harbinger of the emerging CSR trends, even though the traditionalists continue to maintain that the traditional common law shareholders primacy remains ‘reiterated in the section’. Indeed, for the first time the traditional common law shareholders primacy is qualified with enlightened shareholders value, entailing directors must take account of the interest of stakeholders in promoting the interest of the shareholders. Similarly, the OECD Principles of Corporate Governance embody similar obligation on the management to pay attention to stakeholders’ interests in the context of not engaging in unethical and illegal investment practices. Theoretically, the stakeholders’ case in the context of responsible investment can equally be justified by emergent global distributive justice that emphasises a level playing


749 CSR has become a global phenomenon with countries adapting their laws to incorporate CSR consideration. See Celine Louche and Steven Lydenberg, 'Socially Responsible Investment: Differences between Europe and United States', (2006), 6-8.

750 The business review under section 417(1-2) is meant to compel all companies other than small companies to acknowledge and respond to the interest of the stakeholders affected by their operations. See Brendan Hanigan, Company Law (3rd edn.; Oxford: Oxford University Press, 2012) at 198.


752 Note that the same section 172 UK Company Act 2006 has been severely criticised for not being far reaching enough to take into account the stakeholders interest, since the section subordinates the stakeholders’ interest to maximisation of shareholders value. Moreover, stakeholders are not entitled to direct action to enforce their interest except where they double as shareholders, further undermining the utility of the section. See Andrew Keay and Joan Loughrey, 'Derivative Proceedings in a Brave New World for Company Management and Shareholders', Journal of Business Law, 2 (2010), 2-11; Adefolanke Adeyeye, 'The Limitations of Corporate Governance in the CSR Agenda', Company Lawyer, 31(4) (2010), 4-5.

field in international economic relations. Consequently, corporations ought to take into account stakeholders’ interest in their foreign investment, if anything, through the instrumentality of CSR.

6.6 CSR Patterns by Multinationals in Niger-Delta

The failure of CSR arising from multinational oil companies’ investment in the Niger-Delta region has been, invariably, attributed to inadequate CSR packages. However, given the enormity of Niger-Delta developmental needs, multinational oil companies alone cannot cater for every perceptible developmental challenge afflicting the region. Nonetheless, they can make credible efforts in partnering with the government in certain developmental projects to offset the negative impacts of foreign investment, more so when they equally have economic interest in petroleum operation.

CSR practices that bear directly on foreign investment may involve such responsibilities as the provision of pipe borne water (due to the pollution of rivers traditionally relied on for sustenance); community health care delivery (giving the effect of air pollution); road construction, electricity as well as the grant of scholarship to indigent but brilliant students. Although the federal government has set up such facilitative institutions as the Oil Mineral Producing Area Development Commission (OMPDAEC) 1993; Niger Delta Development Commission (NDDC) 2000; and the Ministry of Niger Delta (created in 2008) to facilitate community development, they have not been able to comprehensively address the

754 Nardin, Law, Morality, and the Relations of States at 268.
myriad developmental challenges emanating from foreign investment. Even though significant milestones have been recorded by these institutions, further constraints remain.\textsuperscript{757} It is noteworthy that for CSR to be better harnessed in the Delta region, it has to be implemented in such an equitable way as not to engender community disharmony. For instance, a discriminatory implementation where one community is arbitrarily chosen for development over another could stoke the flame of violence.\textsuperscript{758} It would be necessary to examine the CSR practices of these IOCs as obtained from their published reports to unravel potential areas of lapses. Despite the existence of a number of oil companies involved in petroleum operations in Nigeria, the analysis would only concentrate on the practices of the Royal Dutch Shell (Shell), Chevron, and ExxonMobil, owing to the breadth of their investment which significantly outweighs other IOCs.\textsuperscript{759}

6.6.1 Shell Petroleum Development Company of Nigeria (SPDC)

The Royal Dutch Shell otherwise known as Shell claims to be the first global company to establish General Business Principles that guide all Shell companies. These eight Principles, drafted in 1976 - literally replicated in the definition of sustainable development enunciated by the Brundtland Report - are committed ‘to contribute to sustainable development’, thereby ‘balancing short and long-term interests and integrating economic, environmental and social considerations’ into corporate decision.\textsuperscript{760} In other words, Shell General Business Principles are guided by both economic consideration and reflection of good corporate citizenship in operational areas.


\textsuperscript{759} For the list of IOCs operating in Nigeria, see Annex VII.

In Nigeria, the Shell (called Shell Development Company of Nigeria) claims to have spent about nine billion Naira on community development in 2010. According to the Shell Managing Director, the amount represents

... the biggest corporate social responsibility portfolios operated by a private company in Sub-Saharan Africa, and it shows that we care for the well-being of the communities in which we do business.\(^{761}\)

The Shell LiveWire Nigeria Programme set up in 2003 allegedly engages in youth enterprise development. The programme provides entrepreneurial training, business skills development, and initial capital to start up and ‘expand youth-owned businesses’.\(^{762}\) According to Shell, the programme has trained not less than ‘3,208 Niger-Delta youths in enterprise development and management’.\(^{763}\) In addition to LiveWire Programme, Shell equally claims to have reflected traces of CSR in advancing the cause of education. Scholarship is said to have been granted to 2,730 secondary school students and 750 undergraduate students of the universities.\(^{764}\) Shell in partnership with the state government claims equally to facilitate access to improved and better health care delivery. About 275,000 people are said to have benefitted from such programme.\(^{765}\)

However, the programme does not claim to have eliminated youth restiveness that bedevils the region. Moreover, as noted by Friends of the Earth (FOE), Shell ‘bears significant responsibility for the oil pollution’ being the main oil producer in Nigeria. The same FOE cited a UN report stating that Shell failed to clean up oil spills, or did so insufficiently, and that the company’s operational approaches breach Nigeria environmental legislation.\(^{766}\) Indeed, significant oil spills have been witnessed in Nigeria – largely caused by

\(^{761}\) Shell, ‘SPDC Spent N9 Billion on Community Development in Niger Delta in 2010’. Shell also holds the most significant interest in petroleum operation in Nigeria.

\(^{762}\) Shell, ‘Improving Lives in the Niger Delta’.

\(^{763}\) Ibid.

\(^{764}\) Ibid.

\(^{765}\) Ibid.

\(^{766}\) Friends of the Earth, ‘Breakthrough Ruling in the Hague on Shell’s Nigeria Subsidiary’.
Shell - far outstripping anything close to BP oil spills in the Gulf of Mexico.\textsuperscript{767} In other words, despite Shell’s claims to responsible investment practices, its conduct significantly falls below expectation. The situation is exacerbated by the fact that the IOCs usually mount the defence of ‘third parties action’ to exonerate themselves from any liability arising from negative spillovers of foreign investment. The case of the \textit{Friends of the Earth (FOE) v Shell}, decided by the Netherlands court on 30\textsuperscript{th} January, 2013 is illustrative. The case, concerning damage caused by oil spills in Ikot Ada Udo, Oruma, and Goi, was brought by FOE Netherlands and four Nigeria farmers in 2008 against Shell Petroleum Development Company of Nigeria and the Royal Dutch Shell – the parent company. The plaintiffs claimed that Shell should clean up oil pollution emanating from their operations, compensate the farmers for the damages caused and improve the maintenance of pipelines in the future. The District court of Hague (the Netherlands) ruled that sabotage caused the alleged oil spills at Oruma and Goi which was the subject of litigation (though the defendant was held liable in respect of Ikot Ada Udo) consequently exonerating Shell from liability.\textsuperscript{768}

Although one cannot totally remove economic sabotage of third parties, it would nonetheless amount to exaggeration to attribute every spill to third parties causes in absence of credible evidence. Indeed, mere existence of oil spills \textit{simpliciter} without credible and incontrovertible evidence pointing irresistibly to action of third party sabotage is not conclusive of third parties liability.

The case equally highlights the difficulty involved in suing the parent companies of oil companies operating in Nigeria even where interlocking directorship or governance is evident.\textsuperscript{769} For instance, while the Nigeria subsidiary was held liable (in respect of Ikot Ada Udo) the parent company was exonerated for lack of evidence establishing that the

\textsuperscript{767} ibid.
\textsuperscript{768} Shell, 'Dutch Court Dismisses Foe Claims on Oil Spills', (30 January, 2013).
\textsuperscript{769} Environmental News Service, 'Dutch Court Finds Shell Liable for Nigeria Oil Damages', (Hague, 2013).
governance of the Nigeria subsidiary emanates from the parent company. Although there was evidence indicating that the parent company owns 100% shares of the Nigeria subsidiary and that the total profits made by the latter are normally remitted to the former, such evidence was not conclusive, according to the court, in absence of proof of the parent – subsidiary governance links. Such prove could only be possible under Netherlands law where the plaintiffs have access to the parent company documents (discovery of documents), which the court declined to grant in the circumstance. Thus, it is safe to theorise that had the court allowed the plaintiffs access to the parent company documents such interlocking governance from the parent to the subsidiary in Nigeria would have been established, necessitating the corresponding liability of the parent company for the pollution caused by the subsidiary in Nigeria.

6.6.2 Chevron

Chevron Business Conduct and Ethics Code equally claim socially responsible and ethical business practices as the guiding business principles in their places of investment. In this respect, Chevron seemingly observes environmentally-friendly investment as well as social investment in the community of their operation. Chevron’s claim to stakeholders’ recognition is reflected in Global Memorandum of Understanding (GMOU).

In Nigeria, Chevron through its Niger Delta Partnership Initiative (NDPI) signed a Memorandum of Understanding (MOU) with the United States Agency for International Development (USAID) to foster socio-economic development of the Niger Delta region. About 200 projects are said to have been executed in 425 communities affecting over


771 Chevron, 'Chevron and USAID Partner to Improve Living Standards in the Niger Delta through $50 Million Alliance'. Partnership Initiatives in the Niger Delta (PIND) in addition to Niger Delta Partnership Initiative (NDPI) coordinates development initiatives in the delta region.
850,000 inhabitants, through these development initiatives. Impressive as the data may indicate, these programmes are patchy and at best driven by anything but altruistic disposition. Indeed, if anything, it is motivated by economic imperatives – attempt to temporarily assuage the restive communities in order to continue oil exploration - some sort of conflict management tool. The objective behind such socio-economic initiatives in Niger Delta is no more than to foster peace and stability in ‘areas where Chevron operates’. After extensive empirical analysis of Chevron CSR performance, it was stated that,

\[\text{evidently, Chevron Nigeria Limited’s claim about various community development effort embarked upon as part of the company’s Corporate Social responsibility is undeniable, the findings however show the need for Chevron Nigeria Limited to carry out a re-appraisal of her community development efforts in the host communities in order to ensure that only projects that are directly relevant to the needs of the host communities are embarked upon as part of the company’s CSR effort. It could be necessary also for Chevron to adopt a bottom-up approach in its community development drives. This will ensures proper investigation into the relevant needs of the community, build local capacity, enhance confidence, build social capital and stimulate growth of the local economy.}\]

6.6.3 ExxonMobil

Other oil companies that have fairly significant investment in petroleum operations particularly ExxonMobil equally lay claim to the recognition of stakeholders interest. Such social investment involves recognising and addressing the interest of the community where the company operates. In the area of training and development, ExxonMobil Nigeria claims to have established training centre in Eket to impart skills to the local workforce.

About 500 employees of the company specialised in mechanical and electrical engineering

772 Note that aside from altruism, the motive for CSR can also be strategic and defensive. See Swaen, ‘Coroproate Social Responsibility’, 3.
773 Chevron, 'Nigeria in the Community'. See also Chevron, 'Transforming Investment in Nigeria', where the former country director of USAID in Nigeria echoed the same ‘peace and stability motive’ as the rationale behind socio economic initiatives in delta region in contrast to altruistic disposition.
775 ExxonMobil, 'Civic and Community'.

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are said to be graduates of the centre. In the area of supplier development, the company claims to be involved in indigenous capacity building and utilisation. This was illustrated in 2000 metric tons of specialised steel pipeline installed in Edop-Idoho field offshore said to have been the first locally manufactured pipelines used by the company in Nigeria.

Even though these companies are making efforts to engage in social investment in the petroleum sector, they are by no means comprehensive, given vast unsustainable investment practices dotting Niger-Delta. According to UN report,

*at least twice as much oil has been leaked in Nigeria as in the BP oil disaster in the Gulf of Mexico. Unlike Deepwater Horizon, the Nigeria disaster has been a silent one, with disastrous consequences for people, wildlife, nature and the environment.*

Indeed, what is expected of the IOCs is the conduct of their investment in a responsible and ethical way. In other words, corrective measures through the instrumentality of CSR should not be the guiding principle of their foreign investment. Instead, proactive measures to prevent the occurrence of such negative spillovers in the first place should be the guiding philosophy. IOCs should adopt and reflect international best practices employed in advanced economies in their petroleum operation in Niger-Delta. It is not enough to claim compliance with such international best practice on papers alone. Emphasis should be to reflect such best practice in the field of operation. A typical example of such relevant international best practice is the standards set by the Global Oil and Gas Industry Association for Environmental and Social Issues (IPIECA).

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777 Friends of the Earth, 'Breakthrough Ruling in the Hague on Shell's Nigeria Subsidiary'.
778 International best practice is equally reflected Global Reporting Initiative (GRI) and Oil and Gas Industry Guidance on Sustainability Reporting, 2nd ed. 2010 as well as in the guidelines of American Petroleum Institute (API). However, IPIECA remains the overarching global standard-setter.
IPIECA provides standards for oil and gas companies’ optimal environmental and social performance. The scope of issues covered by the standard includes, inter alia, biodiversity; climate change; healthcare delivery; oil spill control; CSR; and water purity.\(^{779}\)

Since there is a lack of harmonised international methodology for assessing social performance of corporations, the legitimacy of the IOCs claims from the communities’ perspectives remains difficult to measure, at least, for the foreseeable future.\(^{780}\) However, the current PIB attempt to compel IOCs to adopt responsible investment practices that emphasise both preventive and corrective measures while engaging in petroleum operation is seemingly indicative of an encouraging paradigm shift.

### 6.6.4 Petroleum Host Community Fund (PHC Fund)

As part of the stride to embed responsible investment in the petroleum sector, the current PIB stipulates the setting up of Petroleum Host Community Fund.\(^{781}\) Every upstream oil company\(^{782}\) is mandated to make a monthly remittance of ten percent of their net profit - calculated to mean ‘adjusted profit less royalty, allowable deductions and allowances,’ less hydrocarbon tax, and less Companies Income Tax - to the PHC Fund for the execution of its intended objectives.\(^{783}\) The rationale behind such a PHC Fund is premised on the expediting the overall socio-economic development of the oil producing communities.\(^{784}\)

The establishment of the PHC Fund has a significant implication for the cause of responsible investment. Apart from its tendency to foster responsible foreign investment paradigm, such a ten percent monthly remittance would act as a clawback scheme to make oil

\(^{779}\) IPIECA, ‘About Us’.


\(^{781}\) See section 116 of PIB.

\(^{782}\) Upstream sector includes oil and gas exploration and production in contrast to downstream sector that involves the final distribution and retail services.

\(^{783}\) Section 118 (1) (2) of PIB.

\(^{784}\) Section 117 of PIB.
companies financially responsible for unsustainable foreign investment practices in the petroleum sector. Prudent management and disbursement of the remittances would undoubtedly translate into upliftment of standard of living of the oil producing communities. However, the advantage of the PHC Fund should not be viewed strictly through the lens of oil producing communities. The oil companies equally stand to gain in the long run if the cumulative effect of the prudent management of the PHC Fund eventually fosters the elusive peace in Niger-delta. There is no gainsaying that the Niger-delta has been blighted by restiveness disrupting oil production to the dismay of oil companies. Certainly, where the benefits accruing from the PHC Fund succeed in embedding peace and security in the region, it would have a dramatic effect on enhancing social licence to operate hitherto lacking among oil companies. For the preceding to materialise however, the IOCs must strategically manage the way CSR policies are communicated to the communities\textsuperscript{785} to promote understanding and acceptance.

Furthermore, the PIB contains an additional incentive to oil companies mediating any unpalatable burden of remittances to PHC Fund. Thus, where an act of sabotage, vandalism, or other civil unrest occurs causing damage to any petroleum facility within the host communities, the cost of repair of such facilities shall not be borne by oil companies if such damage is not attributable to them.\textsuperscript{786} Such a consequential damage would be paid from the PHC Fund providing there is evidence of the host communities’ complicity.

The import of the foregoing provision is crystal-clear: if any member of the host community instigates sabotage of petroleum facilities, the PHC Fund ostensibly meant for the development of their community would be diverted for the repair of the damaged petroleum facilities instead. The traditional responsibility of the oil companies to undertake repairs of


\textsuperscript{786} Section 118 (5) of PIB. Note that by virtue of section 118(6) the Minister subject to section 8 has the responsibility to make regulations for the entitlement, governance and management of PHC Fund.
damaged petroleum facilities in the course of their operations needs no over-flogging here. It is however unclear who undertakes the funding of repairs of damaged petroleum facilities if the perpetrator involves a neutral third party external to the particular host community. The PIB is silent in this regard. It can be postulated that the oil companies remains invariably responsible to undertake restoration of the relevant petroleum facilities. If anything, it constitutes part of the operational hazards.

Although PHC Fund constitutes a laudable innovation, the problem lies in the implementation. Undoubtedly, similar obligation for remittances prevailed in the past under Oil Mineral Producing Areas Development Commission (OMPADEC) and Niger Delta Development Commission (NDDC) regimes but poor and/or corrupt implementation bedevilled such exercise, reinforcing the argument of this thesis that institutional problems (exemplified in inept implementation) underpin Nigeria investment legislation.

The PIB is equally silent on the modalities for the allocation and execution of the PHC Fund. The consequential lack of clarity may turn out to constitute a hotbed for potential bickering among the contending communities concerned. Although the PIB empowers the Minister to make regulations respecting ‘entitlement, governance and management structure’ of the PHC Fund, such generalisation by no means constitutes clear-cut parameters of the percentage share of potential beneficiaries. In fact, it would not even amount to exaggeration to hypothesise that the Minister potentially stands the danger of being accused of favouritism in the course of deciding on the ‘entitlement, governance and management structure’ of the PHC Fund. Arguably, a formula for calculating the percentage entitlement of beneficial communities should have been set at least by the PIB, even if couched in general terms.

787 Section 118 (6) of PIB.
Another curious feature of the PHC Fund is the perceptible stipulation of the financiers: upstream petroleum producing companies. There are remarkable absences of the midstream (involving refining, engineering, among others) and downstream sectors from the remittance obligation – areas dominated by indigenous petroleum operators. The fact that the upstream sector is dominated by IOCs seems to provide the justificatory premise that PIB is arguably targeted at IOCs.\textsuperscript{788} It is considered that the PIB should have instituted a proportional remittance regime from both the midstream and downstream petroleum operations since their operations can equally have detrimental effects on the communities in similar fashion to the upstream sector. Arguably at the very least, two – three percentage remittance regimes on midstream and downstream net profit would have sufficed, to give semblance of fairness among the competing petroleum operators.

Similarly, eyebrows may be raised by the IOC - as an attempt to emasculate them financially - if payment to PHC Fund is mandated of them (after discharge of chargeable tax, royalties, and other incidental remittances) without corresponding contribution from the government. The foregoing position is bolstered by the discriminatory nature of the PHC Fund regime that imposes obligation on upstream petroleum operators only. However, it can also be argued, on the corollary, that the present PHC Fund regime seemingly bears the imprint of subsistence rights of the petroleum host communities which draw necessary corollaries with the right based version of emergent global distributive justice.\textsuperscript{789} Given the mammoth tentacles of IOCs vis a vis the petroleum host communities, only a coercive financial arrangement of this nature would ‘bring assistance to those confronted by forces

\textsuperscript{788} Although indigenous oil companies are at liberty to engage in upstream operations, they are invariably inhibited from doing so due to technological constraints leaving them with no option but to partner with IOCs under sole risks arrangement. See Nigerian National Petroleum Corporation, 'Oil Production'.

that they themselves cannot handle’. The case is not mediated by libertarians claim that any redistributive legal rule is tantamount to outright theft. Indeed, the ‘right to life, if it exists at all, is a right to subsistence ….’ Subsistence right no doubt forms the touchstone for the existence and consequential enjoyment of other rights.

Apart from the foregoing, there are other modes worth exploring to foster credible responsible investment in the petroleum sector. Analysis of these modes and the inherent implications would form the focus of next section.

6.7 Modes of Embedding Responsible Investment

Various modes have been postulated at one time or another to make multinationals indulge in responsible investment practices and/or at least tackle the collateral effect of foreign investment (post investment phase). Analysis of these modes would demonstrate the strengths and weaknesses of each. As noted, the question is not whether to constrain corporations’ obsession with profit maximisation but rather how to constrain them (emphasis added): internal constraint (shareholder activism or other mechanism evolved by corporate law) or external constraints (markets, stakeholders, and regulation).

6.7.1 Shareholders Activism

Shareholder activism involves the use of ownership power by institutional investors and/or individual shareholders to influence corporate policy and practice. Agency theory
postulates the existence of agency problem in corporation that creates divergence of interests between corporate managers and shareholders triggering shareholder activism. Corporate governance attempts to ameliorate this agency problem in various ways viz: (i) instituting independent board of directors to monitor management compliance with company philosophy; (ii) existence of institutional investors that watch over the activities of the management; and (iii) strong market for corporate control.

While shareholders activism appears to be a novel phenomenon in emerging markets, it has become a cardinal feature of corporate culture in advanced economies. Shareholders activism in the US dated as far back as 1900 when financial institutions particularly insurance companies, mutual fund, banks, among others, were involved in corporate governance prior to Glass-Steagall Act that proscribed direct acquisition of equities by US banks. There were also traces of such activism reflected in the practice of certain religious organisations that employ a social screen of investment. Such organisations forbade their members from investing in so-called sin stocks – gambling, tobacco, alcohol etc. However, the current tide of shareholders activism is credited to 1946 Securities and Exchange Act Rule 14a-8 that mandated corporate management to admit shareholders resolution into proxy statement. In the 1960s and 1970s, shareholders activism was employed to pressure companies on civil rights and equal opportunities. Shareholders activism in the 1980s meandered into anti-takeover activism. Pressure from shareholders on social and environmental activism however gained momentum in the 1990s, attributable to increasing responsible investment awareness.

Despite the fact that shareholders activism are traditionally used in corporate governance issues to extract certain benchmarks from the management and/or board bearing

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on improved financial returns, its usage to extract social performance benchmark remains nascent. Such techniques as dialogues with the management; open letter to the board or management; questions and answer sessions at the annual general meeting; and shareholders proposal filed to the company, are normally used in such activism. However, nothing precludes similar shareholders activism in the context of socially and environmentally responsible foreign investment in the oil sector in Nigeria.

Such possibility can be accomplished in various ways. Firstly, shareholders may demand that IOCs comply with certain social performance benchmarks. Secondly, institutional investors (such as pension fund, mutual fund, insurance companies, among others) may also threaten to withdraw their investment unless IOCs follow certain social and environmental performance benchmarks. Equally, potential investors can screen securities for possible investment and demand that IOCs adhere to a certain tenet of responsible investment as a prerequisite to investing. The latter seems to be gaining momentum with institutional investors. Indeed, the international group of institutional investors under the auspices the United Nations launched the Principles of Responsible Investment in 2006 to highlight the significance of environmental, social and corporate governance (ESG) topics to investment.

The essence of the foregoing no doubt is to align investment objectives with broader societal interests.

It does not seem that shareholders activism forms a significant feature of Nigeria corporate culture. However, there exists Nigerian Association of Shareholders for

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797 A distinction acknowledged as financial activism and social activism respectively. See Ajai Gaur et al, 'Antecedents of Shareholder Activism in Target Firms: Evidence from a Multi-Country Study', Corporate Governance: an International Review, 18(4) (2010), 259.

798 Other ways of classifying it include: avoiding corporation with poor social performance benchmarks; supporting those with good benchmarks; comparing of various corporations benchmarks before investing; and engagement, see Celine Louche, 'Corporate Social Responsibility: The Investor's Perspective', Professionals’ Perspectives of Corporate Social Responsibility (2010), 222.

799 For scepticism underpinning institutional shareholders capability to foster improved corporate behaviour, see Stephen M. Bainbridge, 'Shareholder Activism and Institutional Investors', UCLA Law-Econ Research Paper No. 05-20 (2005), 12-18.

800 For an outline of the core ESG issues see, PRI, 'The Principles of Responsible Investment'.

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safeguarding the interest of investors. It is arguable if shareholders can rely on minority provisions to bring action for improved social and environmental performance of companies. Examination of sections 299-309 of CAMA pertaining to minority protection does not disclose anything caught by better social performance of companies. However, it seems action for relief can be maintained under section 311 of CAMA on the ground that the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to a member or members, in a total disregard of the interest of a member or members. In the past however, a significant number of actions and reliefs sought and maintained under this section relate to financial management of the company, unrelated with social performance benchmarks. The possibility of using such innovation as the reliance on minority provisions to achieve social performance outcomes remains a moot point, and an interesting issue for future court ruling.

The pertinent question likely to be asked is, to what extent would shareholders’ activism achieve the intended objective? Indeed, the outcomes of such activism would depend on amalgam of factors. As noted, the success or otherwise of shareholders activism depends on a number of factors chiefly, the shareholders’ power and influence; the firm’s culture and the degree of compliance to that by the shareholders demand; and the political milieu characterising the shareholders’ activities. No doubt divergence of opinions shapes this emerging discourse.

803 Such activism with Burlington (which later merged with Conoco-Philip) succeeded but was partly unsuccessful with Chevron. See Emily Mcateer and Simone Pulver, 'The Corporate Boomerang: Shareholder Transnational Advocacy Networks Targeting Oil Companies in the Ecuadorian Amazon', Massachusetts Institute of Technology Press (2009), 17-18.
Sceptics argue that the non-bindingness of shareholders resolution and other process constraints make shareholders activism an ineffective tool for improved social and environmental performance outcomes from corporations.\textsuperscript{805} The most such an activism can achieve, sceptics argue, is to engender awareness and sensitisation both within and outside the corporation, and consequently flag off debates on the corporation social and environmental performance.\textsuperscript{806} In other words, shareholders activism cannot engender systemic changes to corporations social and environmental performance; and where positive changes eventually filter out, it would be piecemeal, unlikely to be sustained in the long term.\textsuperscript{807} The foregoing scepticism does not however divest shareholders activism of total utility. In fact, it can still constitute a veritable tool for improved social and environmental performance outcomes from corporations.\textsuperscript{808} More so when it has been established that embedding CSR factors in investment decisions positively correlates to better investment returns, given the reputational leverage compared to other firms not embedding CSR matters in investment decision.\textsuperscript{809}

Shareholders activism - institutional shareholders - in managing social performance of IOCs in Niger-Delta could provide the needed catalyst to curtail egregious investment practices. The situation is however more complicated than meets the eye. Significant shareholding interests of these corporations which include, inter alia, Shell, Chevron, and


\textsuperscript{806} O’rourke, ‘A New Politics of Engagement: Shareholder Activism for Corporate Social Responsibility’, 236.


ExxonMobil are concentrated in the advanced countries in contrast to their core areas of operations.\textsuperscript{810} Thus, it is doubtful that these shareholders would be altruistic enough to insist on strict adherence to social and environmental benchmarks by these corporations – owing to bounded empathy\textsuperscript{811} (ie they are not implicated directly by the issues therefore their empathy is limited). The situation is compounded further by the intersection of shareholders financial interest with social performance benchmarks – the primary motive of shareholding interest being financial incentive. Moreover, to wriggle out a sound investment paradigm, these corporations may engage in such evasive and misleading arguments as strict social and environmental benchmarking is capital intensive, leading to a possible reduction of shareholders value (ie poor return on investment). These may constitute effective constraints on shareholders activism.

\textbf{6.7.2 Stakeholders Pressure}

Closely aligned to shareholders activism is stakeholders’ pressure on corporate management to reflect sound social and environmental foreign investment practice. The word ‘stakeholders’ presuppose a wide spectrum of groups. By and large, it entails both non-shareholders and shareholders since the latter have financial stakes in the company. However, in this discourse it refers to individuals or entities that do not have a shareholding interest in the company, and therefore do not constitute residual owners of the company, but are affected either directly or indirectly by the operation of corporations. In this perspective, it encompasses employees, creditors/contractors, and community hosting foreign investment, including the NGOs.

\footnote{\textsuperscript{810} There is no doubt that shares of IOCs subsidiaries listed in Nigeria stock exchange are amenable to local ownership. Nonetheless significant proportion of those shares has foreign ownership.}\textsuperscript{811} See, Lee, 'Corporate Law, Profit Maximization and the "Responsible Shareholder"', 17.
However, not all of them constitute formidable players in bringing about improved social performance outcomes. This is because not all stakeholders have power and legitimacy – essential attributes of effective stakeholders - to coerce or convince corporate management in order to bring about responsible investment outcomes. Such power becomes efficacious where a stakeholder can ‘gain access to a coercive, utilitarian, or normative means, to impose its will’ on corporate management. In default of such attributes of power and legitimacy, stakeholders are no more than, in metaphorical sense, ‘mosquitoes buzzing in the ears’ of managers: irksome but not dangerous’, cum ‘bothersome but not warranting more than passive management attention, if any at all.’

Stakeholders equally lack homogeneity of identity (unlike shareholders bound by residual ownership of the corporation), and commonality of interests. Consequently, they may suffer from competing or conflicting demands from the members. For instance, an employee who has concerns relating to social performance may fear dismissal, especially in a jurisdiction where union protection and employment laws are not strong. A creditor may be more interested in debt servicing in contrast to social performance benchmarks, since they do not constitute part owners of the company. Thus, lack of a harmonious and unified identity and interest may hamper corporate attention and recognition of stakeholders’ case for responsible foreign investment practices.

The role of NGOs and community groups as stakeholders becomes relevant in this regard. A coalition of both national and international NGOs can work in collaboration. Although NGOs lack the power to employ coercive means to bring about responsible

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813 This description was used to illustrate demanding stakeholders. However, the description fits all stakeholders as long as there is an absence of private ordering between the relevant stakeholder and the corporation, which legally mandate the management to incorporate social performance benchmarks. See ibid., at 875.

investment, they can engage in their usual tool of ‘whistle-blowing’ or ‘name and shame’ to bring attention to their cause. Amnesty International and Friends of the Earth have been particularly effective in the use of these approaches in the Niger-Delta. Similarly, there exist innumerable NGOs in Nigeria that can engage in collaborative efforts with international NGOs (or even work in stand-alone basis). For instance, Environmental Rights Action (national NGO) - committed to sustainable development in Niger-Delta - merged with Friends of the Earth for greater efficacy and improved outcomes in Niger-Delta.\textsuperscript{815}

There are many other national NGOs with a convergent interest in sustainable foreign investment in the petroleum sector in Nigeria particularly, Communicating for Change; Enterprise Development Services; Guidance Community Development Foundation; International Society for Social Justice and Good Governance; and Niger Delta Woman for Justice. Such groups can work in collaboration with international NGOs for an efficacious outcome. A similar collaboration was illustrated by Friends of Earth Nigeria and Friends of the Earth Netherlands in the case of \textit{Friends of the Earth v Shell Petroleum Development Company of Nigeria Ltd (SPDC)}, decided by the Netherlands court on 30\textsuperscript{th} January, 2013. Although not all the issues canvassed by the Friends of the Earth (FOE) were upheld by the court,\textsuperscript{816} this singular act of litigation to enforce sound foreign investment practice in Niger-Delta by the IOC highlights the potential implication of the NGOs inspired activism.

The disparate geographical location of Niger-Delta communities however might make them amenable to collective action problem,\textsuperscript{817} thereby undermining their cause for responsible foreign investment from IOCs. In the past, they (ie Niger-Deltans) have resorted

\textsuperscript{815} Friends of the Earth, ‘Environmental Rights Action/Friends of the Earth Nigeria’.

\textsuperscript{816} The court found Shell liable for failure to prevent oil pollution of farmlands at Ikot Ada Udo in Akwa Ibom State. The court however dismissed pollutions at Goi and Oruma as not attributable to Shell. See Friends of the Earth, ‘Breakthrough Ruling in the Hague on Shell’s Nigeria Subsidiary’.

to violence to drive home their agitation for responsible foreign investment, leading to fatalities and excessive militarisation of the community, not least the killing of the prominent Ogoni activists - Ken Saro-Wiwa and others. Youth restiveness equally sprang up (coupled with sporadic civil action and complaints) to pressure the IOCs to be more responsible in their foreign investment policies, but to no avail. This lack of successful outcomes of community-inspired responsible investment lends credence to the fact that the Niger-Delta community alone (as stakeholders) cannot, in itself, engender responsible foreign investment outcomes in the petroleum sector in Nigeria. An insight into the dimension of influence of various stakeholders would better underscore the argument of this discourse -

**Graphic Illustration of Stakeholders Influence**

<table>
<thead>
<tr>
<th>Stakeholders</th>
<th>Predominant Interest</th>
<th>Implications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employees</td>
<td>Job security (weak unionism in Nigeria)</td>
<td>General apathy</td>
</tr>
<tr>
<td>Creditors and contractors</td>
<td>Debt servicing</td>
<td>No significant interest</td>
</tr>
<tr>
<td>Niger-Delta community</td>
<td>Social and environmental performance</td>
<td>Collective action problem</td>
</tr>
<tr>
<td>NGOs</td>
<td>Social and environmental performance</td>
<td>Whistle-blowing; litigation; lack coercive apparatus</td>
</tr>
</tbody>
</table>

Source: author

The overall picture painted by this table indicates that no one stakeholder has significant influence to bring about transformative changes owing to inherent limitation. However, NGOs as illustrated by *FOE V Shell case* can make a difference.
6.7.3 Reporting Requirement

Publication of companies’ reports – quarterly, half-yearly and/or annually – is an aspect of disclosure regime required of the publicly quoted companies to keep the shareholders and stakeholders abreast of the companies’ performance.\footnote{Sections 415-418 UK Company Act 2006; see also sections 331 – 342 CAMA.} While disclosure regime features prominently in corporate governance issues in the context of financial performance of companies, efforts have been intensified to deploy a similar requirement in social and environmental reporting.\footnote{OECD, 'OECD Guidelines for Multinational Enterprises 2011 Edition', at 27-30.} Companies’ Report or disclosure could either be voluntary or mandatory. However as noted,\footnote{Adaeze Okoye, 'Novel Linkages for Development: Corporate Social Responsibility, Law and Governance: Exploring the Nigerian Petroleum Industry Bill', (2012), 465-66 (noting CSR could be either voluntary, mandatory or hybrid depending on the dynamics of societal perception).} the distinction between voluntary and mandatory nature in the definitional context of CSR is no longer tenable.

Voluntary disclosure (reporting) constitutes corporate-inspired and enforced business principles, code of conduct, or disclosure regime pertaining to social, environmental, and corporate governance issues. A significant number of corporations in the spotlight for unsustainable foreign investment practices adopt these guidelines (disclosure) to reflect their own version of responsible foreign investment practices, or to deflect attention. It comes under various guises – code of conduct, CSR report,\footnote{Chevron, '2011 Corporate Responsibility Report', (2011).} corporate citizen report,\footnote{Exxonmobil, '2011 Corporate Citizen Report'.} and sustainability report.\footnote{Shell, 'Sustainability Report'.} It constitutes the concept of self-regulation.

The rationale behind the foregoing voluntary reporting remains a subject of intense debate. It is invariably viewed as a ploy by corporations to evade external regulation by coercive authority. Industry lobbyists, on the other hand, view it as an embodiment of industry compliance with international best practices, requiring no further regulation externally. The Shell prides itself as a quintessence of international best practice. The
Sustainability Report 2011 embodies the company’s principal aim in business: to meet the global energy needs ‘in ways that are economically, environmentally and socially responsible.’

Elegant testimonial on commitment of this nature belies the truth characterising foreign investment practices in the Niger-Delta where Shell has time and again been accused of unsustainable investment practices. Shell conceded in its sustainability report that oil spills continue to linger in the delta regions particularly Ogoniland and Bonga field. The magnitude of the spillage is underpinned by the slow pace of remedial action from Shell. After assessment of the scale of IOC unsustainable foreign investment policies in the Niger-Delta, the United Nations Environment Programme (UNEP) concluded that,

[It]he environmental restoration of Ogoniland in Nigeria could prove to be the world’s most wide-ranging and long term oil clean-up exercise ever undertaken if contaminated drinking water, land, creeks and important ecosystems such as mangroves are to be brought back to full, productive health.

More than 200 locations were covered - by the UNEP Report - in over 4000 samples conducted, involving water and soil samples unravelling an unprecedented scale of ecological devastation and monumental health risk posed by these deplorable foreign investment practices.

While voluntary reporting initiative enjoys flexibility as well as derives justification from the right of the investing corporation to reflect its best practices in their own way and defend it, it suffers from significant inadequacies. In the first place, it lacks thorough and unbiased analytical dynamism. For instance, while Shell conceded knowledge of oil spillage, they scarcely faulted their operational procedures and/or accepted liability thereto. Secondly, it may be devoid of policy recommendation for punitive action against the company in the

824 Ibid.
825 Ibid., at 18.
827 Ibid.
event of future recurrence. Shell could not have recommended self-punishment in its Sustainability Report. Indeed, such voluntary initiatives suffer from conflict of interest syndrome, under-enforcement and/or inadequate sanctions. It equally lacks a robust assumption of the ecological and health consequences of such unsustainable foreign investment practices. Such an outcome arguably is a recipe for the death-knell of the company’s operation because of the potential backlash and image imbroglio.

In view of the inherent deficiencies of voluntary reporting, argument has been made for mandatory CSR reporting. Under the US Securities and Exchange Commission (SEC) Rule S-K, companies are required to disclose compliance with federal, state and local provisions pertaining to the environment. The US Sarbanes Oxley Act (otherwise known as the Public Company Reform and Investor Protection Act), 2002 requires significant reporting requirements for public-quoted companies to enhance transparency. Similarly, the EU Modernisation Directive 2003/51 appears to be tilting towards that direction. It mandates companies to publish non-financial report incorporated in annual and consolidated report, where necessary, for understanding of the company’s development, performance or position.

In the UK, companies intent on listing on the London Stock Exchange are obliged to publish in their annual report the companies’ performance pertaining to environmental, social and community matters. This requirement constitutes a transposition of the EU Modernisation Directive 2003/15. The UK Company Act 2006 requires that the content of the directors’ report for understanding of the development, performance or position of the company’s business incorporates, inter alia, information on the environmental matters – specifically, the impacts of the company’s operation on the environment; and social and

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community issues as well as the efficacy of the companies policies in respect of the afore-
mentioned issues.\textsuperscript{830}

Mandatory non-financial reporting (ie social and environmental performance reporting) does not appear to be a significant feature of Nigeria investment legislation particularly in the petroleum operation.\textsuperscript{831} Although mandatory non-financial reporting has been criticised for the fact that no one size fits all,\textsuperscript{832} its significance outweigh voluntary reporting. First and foremost, it enjoys completeness of information on the activities of the IOC (ie avoidance of non-disclosure of negative information) – there is no opportunity for cherry picking. Additionally, its relevance is predicated on coercive character. IOCs would be under pressure to file report at the risk of sanction for failure to do so. Apparently to underpin the significance of this coercive regime, the current PIB before the National Assembly embodies some innovations. Analysis of these innovations and their implication forms the subject of the next discussion.

\textbf{6.8 Implications of PIB Innovative Paradigm}

Following the shortcomings besetting the preceding modes, the current PIB provides significant innovations requiring the IOCs not only to conduct petroleum operation in a responsible manner that pay heed to social and environmental impacts but also to reflect social investment in the areas of operation.\textsuperscript{833} A graphic illustration of the significance of the PIB coercive regulation over other regulatory modes discussed above would be illustrative,

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{830} Section 417 (5) UK Company Act 2006.
  \item \textsuperscript{831} However, traces of CSR still exist within some legislation particularly sections 5-6 of Nigeria Extractive Industry Transparency Initiative (NEITI) Act 2007. See Bethel U Ihugba, 'Compulsory Regulation of CSR: A Case Study of Nigeria', \textit{Journal of Politics and Law}, 5 (2012), 68-81.
  \item \textsuperscript{832} UNEP, 'Carrots and Sticks - Promoting Transparency and Sustainability', at 8.
  \item \textsuperscript{833} The balancing challenges of the policy goal of development with the tenet of sustainable investment continue to bedevil emerging economies such as Nigeria. For highlights of these investment challenges, see UNCTAD, 'Investment Policy Framework for Sustainable Development', \textit{UNCTAD/DIAE/PCB/2012/5} (New York: United Nations, 2012) at 7-8.
\end{itemize}
\end{footnotesize}
The Dimension of their Influence

<table>
<thead>
<tr>
<th>Actors</th>
<th>Legitimacy</th>
<th>Strengths</th>
<th>Weaknesses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shareholders</td>
<td>Financial</td>
<td>They can use their financial commitment to leverage corporations</td>
<td>Shareholders resolutions are non-binding; thus, the management can</td>
</tr>
<tr>
<td>Activism</td>
<td>Interest</td>
<td>adherence to social and environmental benchmarks</td>
<td>afford to ignore their CSR disposition</td>
</tr>
<tr>
<td>Stakeholders</td>
<td>It may involve either financial or non-financial interest or both</td>
<td>Whistle-blowing particularly NGOs</td>
<td>Collective action problem</td>
</tr>
<tr>
<td>Voluntary Codes</td>
<td>Inspired by relevant company</td>
<td>Flexible</td>
<td>Non-binding</td>
</tr>
<tr>
<td>PIB (Legal Code)</td>
<td>Regulatory authority</td>
<td>coerciveness and sanction</td>
<td>Lack of flexibility</td>
</tr>
</tbody>
</table>

Source: author

Thus, while other regulatory modes might be relevant, only the last one through PIB would be more effective given its coercive nature and power of sanction in cases of breach. However, its success will largely depend on the institutional capacity and monitoring efficiency of the implementing establishment.

### 6.8.1 Institutional Capacity Building

To facilitate effective implementation of responsible foreign investment practices in the petroleum sector, the PIB proposes to establish two institutions - the Upstream Petroleum
Inspectorate (the Inspectorate) and Downstream Petroleum Regulatory Agency (Agency). The Inspectorate shall, among other objectives, have the responsibility to -

(a) promote the efficient, safe, effective and sustainable development of the upstream sector of the petroleum operations;

(b) promote the healthy, safe and efficient conduct of all upstream petroleum industry.834

Similarly, the Downstream Petroleum Regulatory Agency (Agency) proposed to be set up has, among other things, coterminous objectives (as the Inspectorate above) to

(a) promote the efficient, safe, effective and sustainable development of the downstream sector of the petroleum operations;

(b) promote the healthy, safe and efficient conduct of all downstream petroleum operations.835

Arguably, the foregoing objectives of both the Inspectorate and the Agency have significant implications for responsible foreign investment in Niger-Delta. First and foremost, the PIB does not specify the modus operandi for the promotion of sustainable foreign investment both in upstream and downstream sector leaving it to the widest discretion of both the Inspectorate and the Agency. Thus, it can be postulated that both the Inspectorate and the Agency are at liberty to avail themselves of whatever mode legitimate to fulfil their stipulated functions.

In the first place, they may for instance request mandatory quarterly, half-yearly, and/or annual reporting on sustainable foreign investment from the IOCs. This seems to be buttressed by the stipulated powers of both institutions. Specifically, both the Inspectorate and the Agency have the powers to request and obtain any information or any document pertaining to licensed activities in both the upstream petroleum sector and downstream petroleum sector respectively from the licensee, permit holder or lessee (ie the oil

834 Section 14(1) (a-b) PIB.
835 Section 44(a-b) PIB.
companies). Furthermore, both the Inspectorate and the Agency can authorise the lessee, licensee or permit holders to publish information pertaining to upstream petroleum and downstream petroleum operations respectively. Both powers exercisable by the two agencies – power to request and obtain information along with the power to authorise publication of information can rightly be construed - it is submitted - as imbuing both the Inspectorate and the Agency to demand publication of information indicating the degree of conformity with the precepts of sustainable foreign investment. Since the PIB does not specify the nature and breadth of the information to be requested and/or published, it can be validly argued that such information encompasses the whole spectrum of matters pertaining to upstream and downstream petroleum operations as long as it affects compliance with the PIB.

The PIB does not equally state at what stage the information becomes necessary, giving the impression that both the Inspectorate and the Agency have the discretion to request information both at pre-investment stage (ie blueprint of responsible investment plans - assuming there are new entrants to petroleum sector) and the post-investment stage – during the currency of the investment as long as such a request fosters compliance with the PIB. Adopting such two-pronged classifications is underscored by certain implication. While pre-investment would provide the sustainable investment benchmarks from the perspective of the IOCs (vetted probably by both the Inspectorate and the Agency), the post-investment reporting would constitute an accountability test – verifying the compliance of the IOCs with their pre-investment benchmarks.

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836 Section 16 (d) and section 46 (c) of PIB respectively.
837 Section 16 (e) (ii) and section 46 (d) (ii) PIB respectively.
838 See section 15 (1) (a-b) and section 45 (a-b) of PIB mandates the Inspectorate and Agency to administer and enforce policies, law and regulations pertaining to all aspects of upstream petroleum operations and downstream petroleum operations respectively together with the power to enforce compliance with the terms and conditions of all permits, licences and authorisations granted, respecting upstream sector and downstream sector respectively.
Aside from embarking upon the foregoing request for mandatory reporting, both the Inspectorate and the Agency can equally, as part of the implementation of their objectives, undertake site inspection to establish either the degree of compliance with the relevant section of the PIB or to ascertain the veracity of the reports submitted (if applicable). On-site inspection by the Inspectorate and the Agency respectively has significant advantages for the cause of responsible/sustainable petroleum investment in Niger-Delta. It constitutes the most veritable way for fact-finding mission. Real evidence of non-compliance can also be obtained bolstering the Inspectorate and the Agency cause respecting any potential future litigation on breach of relevant PIB sections. From the IOCs perspectives, such visits can similarly help foster understanding (ie between IOCs and both institutions) since they deal with persons they can see instead of compliance with the letters of the law alone. The IOCs can avail themselves of such site visits as well to offer on the spot explanation for any potential breach particularly if it is inevitable – such an opportunity can constitute the forerunner of further written exchanges in that respect thereby facilitating mutual understanding.

Although both the Inspectorate and the Agency are imbued with power to wield the big stick in the event of non-compliance – modify, suspend or revoke any licence issued to oil companies pursuant to PIB\(^\text{839}\) as it affects the upstream petroleum sector\(^\text{840}\) and the downstream petroleum operations\(^\text{841}\) - it is not expected that such an option would be explored except as a last resort. Arguably, only in cases of gross violation of the terms and conditions of licence, lease or permits granted would such modification, suspension or revocation be contemplated.

\(^{839}\text{Section 16 (a) and section 46 (a) of PIB.}\)
\(^{840}\text{See section 15 (1) (m) of PIB.}\)
\(^{841}\text{See section 45 (1) (w).}\)
In addition to the preceding oversight responsibilities, both the Inspectorate and the Agency have other responsibilities pertaining to the realisation of the goal of responsible foreign investment in the petroleum sector which constitute the subject of discussion shortly.

6.8.2 Responsibility for Health, Safety, and Environment

In addition to afore-mentioned duty to remit ten percent of the net profit for social investment under the PHC Fund, every oil company engaged in upstream and downstream petroleum activities requiring licence, lease or permit has corresponding obligation respecting health, safety and environment.842 Such companies must comply with all environmental, health and safety laws, regulations, guidelines or directives that may be issued by the Minister, Federal Ministry of Environment, the Agency or the Inspectorate, as the case may be.843 Similarly, such companies involved in upstream and downstream petroleum operations are obliged to conduct petroleum operations in accordance with internationally acceptable principles of sustainable development; which involves respect for the constitutional rights of the present and future generation to a healthy environment - echoing the Brundtland Report.844 This no doubt echoes the principles of emergent theory of global distributive justice anchored on commitment to environmental fairness; abstinence from subjecting people to injustice owing to their involuntary disadvantages as well as a commitment to respect people’s basic rights.

The responsibilities of both the Inspectorate and the Agency in this respect is to ensure compliance with environmental laws, regulations or directives as may be issued by the Ministry of Environment and other relevant agencies involved in petroleum operations. In the

842 See Part VII of PIB. PIB embodies additional responsibilities of the IOCs: duty to respect protected sites and objects – section 198 – 199; duty to ensure environmental quality management – section 200 (1-2); duty to decommission and dispose solid pollutants on conclusion of relevant petroleum activities.
843 Section 290 of PIB.
844 Section 291 of PIB. The couching of this provision seemingly conforms to the internationally accepted tenet of sustainable development embodied in the Brundtland Report. See also David Birch, ‘Social, Economic and Environmental Capital - Corporate Citizenship in a New Economy’, Alternative Law Journal, 27 (2002), 5-6.
course of enforcing compliance with the foregoing, both the Inspectorate and the Agency are empowered to make regulations and issue directives pertaining to the environmental aspect of petroleum operations, as the case may be.

Curiously enough, the PIB does not specify the functional relationship between the Inspectorate, the Agency, and the National Oil Spill Detection and Response Agency.\(^\text{845}\) Apparently their institutional function overlaps. Arguably the domain of activities of these institutions ought to be properly defined to avoid duplication as well as potential conflict. It remains to be seen how this will play out

In addition to corrective measures, the PIB seems to incorporate a preventive approach to responsible investment. Thus, any company requiring oil prospecting licence or oil mining lease or permit in the upstream and downstream petroleum operations shall embody a precautionary approach to investment. Additionally, it should endeavour to develop and use environmentally friendly technologies for petroleum operations.\(^\text{846}\)

The implication of the foregoing subsection is manifold. Firstly, the ‘precautionary approach’ to investment can be interpreted to mean taking precaution to avoid negative externalities of foreign investment - both at the inception and during the currency of the investment - particularly environmental damages (oil spills, pollution of farmland and fishing rivers). Secondly, the ‘use of environmentally friendly technologies’ can be construed as the deployment of up-to-date technology that eschews negative externalities emanating from petroleum operations. Such up-to-date environmentally friendly technologies would no doubt include the type that would not only extinguish or at least reduce gas flaring but also tone down other environmentally harmful petroleum operations of the oil companies.

\(^{845}\) See section 1 NOSDRA.
\(^{846}\) Section 292(a-b) of PIB.
Where the oil companies fail or are negligent in the execution of petroleum operations creating environmental damage, they are responsible for the restoration of the affected environment. In other words, the oil companies are expected as far as reasonably practicable to remediate the environment affected by petroleum exploration and production to its natural pre-existing state prior to petroleum operations as a result of which the environmental impact occurred.  

Strictly speaking, it can be argued that this stipulation entails that, in addition to dismantling the oil installations, the holder of petroleum exploration licence, petroleum prospecting licence or petroleum mining lease must clean up environmental impacts of the petroleum operations, restore natural vegetation, natural habitat, on the expiration of the licence or lease.

Although the foregoing constitutes a laudable milestone in curtailing the negative externalities of petroleum operations, the dilemma lies in default of compliance. The Inspectorate and the Agency in consultation with the Minister prescribe appropriate sanctions including payment of fines to the defaulting person or company. Lack of clear-cut parameters for sanctions as well as permutation of the fines regimes payable can undermine the efficacy of this provision. Oil companies for instance may prefer to violate this provision and suffer the weight of ‘sanctions, including payment of fines’ if the cost of compliance - restoration of the environment to its pre-existing natural state - outweighs non-compliance. As argued, a firm may find that it is advantageous to violate the law deliberately and pay the penalty if the gains from the breach or violation outweigh the social cost of compliance with the statute or contract.

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847 Section 293 (1) of PIB.
848 Section 298 of PIB.
It is contended however that the Inspectorate and the Agency in consultation with the Minister can forestall this outcome by ensuring at all times that the penalty for default is consistently equal to or surpasses the cost of rehabilitating the environment to its natural pre-existing state.

6.8.3 General Note

As noted by CSR theorists, the rational justification for CSR can premised on: (a) reducing the cost and risk of business operation; (b) strengthening reputation and legitimacy; (c) competitive advantage; (d) and the creation of win-win situations through synergy with societal interests. After all, it is not objectionable to make firms strategic goal part of broader ethics. Thus, the essence of responsible investment is beneficial not only to to petroleum producing communities but also the IOCs.

Furthermore, both performance requirements and responsible foreign investment can be justified on the grounds of emergent global distributive justice. Although there is hardly any existing application of global distributive justice to performance requirements and/or responsible foreign investment in the contemporary scholarship, its application still obtains nonetheless. Global distributive justice has been applied across a broad spectrum of international issues ranging from global economic equality, human rights, trade justice, among others. The domain of global distributive justice is therefore not restricted to the redistribution of world resources to redress economic inequality, but forays out to other aspects of inequality in international relations given its diffuse application in contemporary literature.

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852 Armstrong, 'Global Distributive Justice', 107-221.
Although PIB has made an effort to embed responsible investment in petroleum operation further constraints remain: it remains an inchoate bill which may or may not be passed into law. In a similar vein, the institutional problem bedevilling implementation of investment regulation continues to rear its unpalatable head and constitutes a significant factor pointed out in the Global Competitiveness Index – the efficiency of Nigeria institution occupying an unenviable position of 129th out of 148 economies ranked. The implication is that even if the PIB eventually becomes law, this recurring institutional problem may truncate effective implementation, thereby rendering nugatory the objective inherent in responsible foreign investment in the petroleum sector. Certainly, there is a need for an overall infrastructural upgrade, enthronement of competitive ethos, and investment in IT-driven mode of doing work in addition to the already pointed needs for enhanced capacity building and shoring up of social capital.

6.9 Conclusion

The regimes of performance requirement and responsible investment constitute a veritable framework for developing countries like Nigeria to benefit from foreign investment. The justifications for such framework cannot be over-emphasised. They constitute corresponding advantages to the host country given economic benefits of foreign investment to foreign firms based on the rationalisation of the internalisation and eclectic theories of foreign investment. This kind of balancing of interest of both parties no doubt is justified by the emergent principle of global distributive justice that advocates equality in international relations.

Performance requirements, as underscored by the Local Content Act, remain a legislative milestone in government strive to enhance indigenous capacity building and

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utilisation as well as creating linkages with the rest of the economy. Judicious implementation of the highpoints of the provisions, particularly the exclusive reliance on indigenous raw materials and services; employment of Nigeria workforce; and the technology transfer clause would no doubt provide a massive transformation of the cause of economic development. Similarly, Nigeria stands in a unique position to optimise the opportunities offered by other emerging economies particularly India and Malaysia that adopted such measures to hasten rapid industrialisation. Nonetheless, one factor that may undermine the optimal outcome of the foregoing remains the recurring institutional problem that blights implementation of investment regulations in Nigeria. Strengthening the institutional effectiveness of the Nigerian Content Monitoring Board (the implementation Board) becomes necessary in this regard to achieve an efficacious outcome.

Responsible investment in the form of environmental responsibility; respect for the right of host communities; and social investment constitutes another issue dealt with under this chapter. Evidence indicates that IOCs - Shell, Chevron, and ExxonMobil practices of responsible investment in the Niger-Delta remain few and far-between, at best patchy. Even other approaches such as shareholder activism; stakeholders’ pressure; and reporting obligation could be employed to foster better outcomes, their effects would be marginal. While shareholder activism is imbued with the advantage of using votes in company meetings to extract management concession for social performance benchmarks, its shortcoming lies in non-bindingness of the resolution. Although stakeholders can engage in whistle blowing to promote social performance, they sometimes suffer from collective action predicament. Voluntary reporting may thrive on its inherent flexibility but it is nonetheless devoid of coercive force. Though the current PIB intends to introduce coercive regulation of responsible investment in the petroleum sector, the success or otherwise of the agenda depends significantly on institutional efficacy of the implementing establishment. In other
words, legal re-alignment *simpliciter* is insufficient; the quality of institution (both the human capital and social capital) that administers the laws matter.\textsuperscript{854}

Thus, there is a compelling need for institutional re-orientation and qualitative human capital. This entails capacity building and emphasis on efficient outcomes. As noted by the World Bank, any ‘sustainable institutional change requires that thousands of paid agents change their behaviour’\textsuperscript{855} in significant ways. Indeed, this is no less than a clarion call to shore up the social capital ratio, hitherto lacking, needed for enhanced efficient service delivery.

In the next chapter which constitutes the last chapter, concluding remarks are synthesised and articulated. These conclusions provide a veritable blueprint of guidance to future policy makers, researchers, IOCs, multilateral institutions, and negotiators at international fora.

\textsuperscript{854} Feiwel (ed.), *Arrow and the Foundations of the Theory of Economic Policy* at 1-2.

\textsuperscript{855} World Bank, ‘‘Better Results from Public Sector Institutions’‘.
Chapter 7
Conclusion

7.1 Introduction

In conclusion, it is the contention of this research that liberalisation and dismantling of legal strictures does not *ipso facto* constitute the end in itself but only a means to an end in engendering increased capital inflows and other positive spill overs from foreign investment. Certainly, investment inflow is determined by both external and internal factors that ought to be taken into account and tackled. To this end, the following reform options, policy recommendations, and area for further research in future, are proffered.

7.2 Towards a More Equitable and Balanced Treaty Obligations

Developing countries like Nigeria liberalise their economy and loosen legal strictures to attract much needed foreign capital. They also conclude international investment treaties (IIAs) to underscore their readiness to protect investment which is expected to foster economic transformation. However, the substantive terms of these investment treaties epitomised by BITs are largely unbalanced and inequitable. Thus, there is a need for a re-conception of the regime of IIAs to redress the above, by providing for equal rights and duties of foreign investor and host state both in substantive and procedural terms of IIAs. Firstly, the broad-based and amorphous construction of the term ‘investment’ could clip the development imperative and policy discretion of the host state. It could lead to protection of virtually everything of economic value which is antithetical to economic philosophy of the host state. In this wise, the conditions laid down by *Salini Test*\(^856\) and reinforced in *Phoenix*...
Action, Ltd. v Czech Republic\textsuperscript{857} ought to be augmented and not undermined by the case like 
\textit{GEA Group v Ukraine}.\textsuperscript{858} Secondly, FET has been interpreted against the host state in such cases as, inter alia, a breach of the legitimate expectations of the investors;\textsuperscript{859} inconsistent governmental action bearing on the investment;\textsuperscript{860} arbitrary changes to regulatory framework;\textsuperscript{861} lack of stable legal climate for operation of investment;\textsuperscript{862} and transparency of legal rules.\textsuperscript{863} Consequently, it is argued that the interpretation of FET should be underpinned by a corresponding application of the doctrine of \textit{clausula rebus sic stantibus}, to create a balance of contending interests of both parties. Thirdly, ordinary contracts ought not to be conflated with treaties simply to ground the liability of host states.\textsuperscript{864} A treaty is an aspect of international law, while contract is governed by its own synthesised rules. Fourthly, justifiable regulatory expropriation ought not to be compensable in contrast to the position established in \textit{Santa Elena Case}. This is in line with the approach among emergent jurisprudence of major capital exporting countries. For instance, ECHR allows regulatory takings without compensation on grounds of, inter alia, public interest or ‘general interest or to secure the payment of taxes or other contributions or penalties’.\textsuperscript{865} These aforementioned reform options can be articulated in a multilateral treaty in the form of a multilateral treaty on

\textsuperscript{857} Phoenix Action, Ltd. v Czech Republic, ICSID Case No. ARB/06/5, Award of April 15, 2009, para. 96 at 38.
\textsuperscript{858} GEA Group v Ukraine, ICSID Case No. ARB/08/16, Award of March 31, 2011, para. 313 at 41.
\textsuperscript{859} Duke Energy & anor. v Ecuador, ICSID Case No. ARB/04/19, Award of August of 18, 2008, para. 340; Tecmed v United Mexican States, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003, para. 154.
\textsuperscript{860} MTD Equity Sdn. Bhd. & MTD Chile S.A. v Republic of Chile (ICSID Case No. ARB/01/7), Award of May 25, 2004, para. 164).
\textsuperscript{861} Tecmed, S.A. v United Mexican States (ICSID Case No. ARB (AF)/00/2), Award of May 29, 2003, para. 154.
\textsuperscript{862} Metaclad Corporation v United Mexican States (ICSID Case No. ARB (AF) 97/1), Award of August 30, 2000, para 99. Contrast with AES Summit Generation Ltd. v Hungary ICSID Case No. ARB/07/22, Award of September 23, 2010, para. 9.3.39, 9.3.30 & 9.3.34 at 61.
\textsuperscript{863} Schreuer, ‘Fair and Equitable Treatment in Arbitral Practice’, 373-74.
\textsuperscript{864} SGS Societe Generale de Surveillance SA v Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, January 29, 2004.
foreign investment (MTFI). Although previous efforts in this respect were unsuccessful, attempts could still be made once more to secure a multilateral investment treaty. Indeed, such a re-configuration of inequitable regimes is justified by the emergent principle of global distributive justice that postulates for the necessity of equality and a level playing field in international economic relation.

7.3 **Shoring up Human and Social Capital to Redress Institutional Lapses**

Apart from the re-conception of the terms of IIAs to embed balance as argued above, there is equally the need to shore up human and social capital to redress institutional lapses. Certainly, institutional problems have emerged as the most decisive factors of Nigeria investment regime. These institutional problems, which share theoretical corollary with the NIE theory, are perceptible in the human capital and social capital conundrum. In the case of poor human capital, it can be argued that its textual justification is partly traceable to section 14 of 1999 Constitution. This section perpetuates mediocrity by providing that employment should be based on geographical origin rather than merit. This filters into absorption of poor human capital with below par performance. It is contended that the section be scrapped; and replaced by a merit-driven human capital provision. Additionally, there should be emphasis on capacity building, shoring up of social capital, and outsourcing of recruitment to an independent and impartial agency to forestall any malpractice that might affect eventual workforce. These institutional problems affect all strata of investment implementation in Nigeria.

Moreover, the analysis of the prevailing petroleum contractual frameworks particularly joint venture and PSC indicates that the current arrangements do not serve the

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best interest of Nigeria vis a vis IOCs. In line with the doctrine of global distributive justice that advocates equity and fairness in international economic relation, these contractual frameworks ought to be reconceptualised to embed justice and equity among the parties. It can be argued that the government could ameliorate the current deterioration in the system by adopting a pragmatic approach to investment. One such approach is the use of a special investment vehicle (SIV) - jointly incorporated company with IOC - charged with overall petroleum operations. Such a legal vehicle would have the power to secure external financing for petroleum operations. This approach would undoubtedly reduce the current cash call burdens on the Nigeria National Petroleum Corporation (NNPC) and the associated bickering attendant on it, particularly in case of joint venture arrangements. The day to day administration of the entity would be at the hand of management constituted by both representatives of foreign investors and the Nigeria government to ensure transparency of operations.

In the same vein, the text of the fiscal regimes that underpin the operation of any re-conceptualised petroleum contractual model ought to redress existing fiscal imbalance undermining government share of petroleum revenue accruable. It cannot be argued that the doctrine of pacta sunt servanda operates to freeze legislative discretion of the host state. As illustrated by economics theorists, asymmetrical information constrains complete and precise contracting. Even where symmetrical information prevails, bounded rationality constrains optimisation of information for completeness of contracting. This provides the necessary justification for changes to the text and content of the current petroleum contractual models.

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868 Mallard, 'Modelling Cognitively Bounded Rationality: An Evaluative Taxonomy', 674-78.
Although the current PIB fiscal changes evidenced in new hydrocarbons tax as well as companies income tax\textsuperscript{869} (applicable to both joint venture and PSC operations) appear to tilt in that direction, such a step ought to be supplemented by other fiscal regimes, given the chaotic enforcement of tax regimes in Nigeria. One significant way of rectifying such an imbalance would be through the institution of petroleum price cap (in respect of world market petroleum prices) beyond which the difference goes to the host country. This approach does not however take away the right of IOC to recover the cost of petroleum operation (cost oil) prior to profit. The arrangement equally accords with the rational premise of global distributive justice that advocates equality and equity in international economic relations. Even though IOC may contest such a cap, it is difficult to postulate that such an arrangement prejudices the interest of investors (IOCs) giving that world market oil price is unpredictable. In other words, IOCs could not have projected with certainty the accrual of such an amount. Nevertheless, in accordance with the principle of global distributive justice, where the price of the oil fell below a predetermined rate thereby prejudicing the activities of the IOCs, it would be expected that the federal government of Nigeria would cushion the effect of such a scenario by rescheduling certain remittances of the IOCs such as taxes and royalties by carrying it over to next tax year, or even cancelling outrightly some of the financial remittances to cushion the effects of such price fall in the world market, on the IOCs.

Furthermore, the massive and unprecedented capital flight from the Nigeria capital markets particularly from international portfolio investors is largely attributable to institutional lapses in the SEC. The preceding translates into ineffectual enforcement of disclosure as well as infractions. Although bounded rationality and herding of investors might undermine optimiaation of such disclosed information, SEC, in a similar fashion to FSA, can still strengthen institutional proactiveness with emphasis on early warning of market abuse

\textsuperscript{869} See sections 299, 253 of PIB.
with a view to tracking and tackling same. This entails stepping up the power of information
gathering and investigation, leaving the processing of the information to investors. In this
respect, greater funding and capacity building of the SEC is recommended for greater
functional effectiveness and institutional efficiency. Not only would such a rule restore
plummeting investors’ confidence in the capital market, it would also engender greater
capital flow to the economy from international portfolio investors.

Additionally, fragmentation and cumbersome nature of fiscal regimes constitute
another issue. Currently, Nigeria is ranked 155 out of 185 economies of the world on the
burdens of paying taxes by investors.\footnote{Note that Nigeria was ranked 138 out of 183 economies of the world on the burdens of paying taxes by investors in Doing Business 2012. See World Bank, 'Doing Business 2012 - Economic Profile: Nigeria', at 70.} Accordingly, companies make an average of 35 tax payments a year, spend 938 hours a year filing, preparing and paying taxes.\footnote{World Bank, 'Doing Business 2012 - Economic Profile: Nigeria', at 70.} The implication is that not only are there a significant number of taxes payable by investors but also the procedure of payment is cumbersome. Indeed, any reasonable incentives to investors arguably ought to reflect considerate tax policy and procedure in accordance with international best practice. One sure way of doing that is to streamline the tax laws to eliminate potential overlaps of authority among the three tiers of government. Such a reduction of fiscal strictures equally accords with the doctrine of global distributive justice in the sense of ameliorating the harshness and inequity occasioned to foreign investors doing business in Nigeria. In the final analysis, the success of the foregoing myriad issues would depend on the functional efficiency of the implementing institution, necessitating urgent need for quality human and social capital.
7.4 Embedding Remission Doctrine to Redress Procedural Inequity

While the recommendations in section 7.2 and section 7.3 above would ameliorate unbalanced substantive terms of IIAs and institutional lapses respectively, procedural inequality requires a different solution. Certainly, the procedural framework for the settlement of investment disputes through the platform of ICSID continues to be bedevilled by legitimacy crisis. The system has broken down; and is in need of repair. Fixing the problem would require concerted efforts not only at the procedural level but also in the re-conception of substantive rules as argued in Chapter 3 above.

In the first place, the local remedies rule may appear to cater for the interest of developing countries host states like Nigeria, but it is no more than a mere formality, given that an investor can abandon (or alternatively employ delay tactics thereby frustrating its operation) the remedy midstream on expiration of the stipulated deadline. Similarly, the appointment of arbitrators might not, by and large, be skewed to favour capital exporting countries, but it does not equally eliminate the possibility of bias in their favour, given that ICSID is an arm of the World Bank, and its major shareholders are capital exporting countries. The institution of an appellate ICSID could nominally improve the situation, but it could fall prey to the same weakness bedevilling the current ad hoc system. Consequently, scholars have proffered various options for the solution.

While some angles for proportionality doctrine, others postulate for the margin of appreciation doctrine. The doctrinal operation of proportionality mirrors a four-way progression. First, the ‘legitimacy’ stage where the adjudicator confirms (or otherwise) the constitutional competence of the government to take the purported action. Second, the ‘suitability’ stage, at this stage the adjudicator determines if ‘the means adopted by the

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872 UNCTAD, 'Reform of Investor - State Dispute Settlement: In Search of a Roadmap'.
873 Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration', 740.
874 Note that the possibility of an appellate ICSID constitutes an interesting area of future research.
government are rationally related’ to the declared objectives. Third, the ‘necessity’ stage, equivalent to restrictive means test. Lastly, the ‘proportionality’ test, in this last instance the benefits of the act are weighed against the cost of the alleged breach of the right.  

Although the mechanics of the theoretical operation of proportionality doctrine seemingly balances the mutual interest of both parties, in practice its application almost always inclines in favour of the foreign investor.  

Similarly, the theoretical tool of margin of appreciation might appear to be a convenient tool for mediating conflicting interests, but it is postulated that remission doctrine should instead hold sway. Remission doctrine simply means that ICSID should remit any compelling regulatory issue to host state institutional competence, in similar fashion as ECHR, rather than adjudicating it. While remission doctrine might share theoretical similarity with the margin of appreciation doctrine, the former would be better than the latter given that it is value neutral. Therefore, remission doctrine would likely be more acceptable to the parties.

Furthermore, the application of remission doctrine is rationally justified by the theory of global distributive justice that underpins this research. The remission doctrine advocates deference to the host state interests as a countervailing factor to host duty to protect investment. In other words, the remission doctrine argues for equality and fairness in investor-state relation: two concepts captured by the spirit of global distributive justice. Both the remission doctrine advocated herein and the balanced obligations of the parties postulated in Chapter 3 above should embed in any future MTFI to ensure wider applicability and enforceability.

875 Mathews, ‘Proportionality Balancing and Global Constitutionalism’, 75-76.
876 See Tecmed, S.A. v United Mexican States, ICSID Case No. ARB (AF)/00/2), Award of May 29, 2003, at 47 – 60, particularly para 122 and 151, where despite consideration of proportionality doctrine the tribunal still found for the investor claimant; Continental Casualty Company v. Argentina Republic, ICSID Case No. ARB/03/9, Decision on Annulment, September 16, 2011, at 41 – 54, 110 – 113, particularly para. 137 and 285, where the tribunal still proceeded to issue an award against Argentina after consideration of the proportionality principles.
7.5 Strengthening Responsible Investment and Performance Requirements

In addition to the foregoing reform options, the regimes of performance requirement and responsible investment ought to be strengthened as a trade-off for investment protection. The justification for such obligations cannot be over-emphasised. They constitute corresponding advantages to the host country given the economic benefit of foreign investment to foreign firms, based on the rationalisation of the internalisation theory and eclectic theory of foreign investment. This kind of balancing of interest of both parties, no doubt, is justified by the emergent principle of global distributive justice that advocates equality in international relations.

Judicious implementation of the highpoints of the provisions the Local Content Act especially the exclusive reliance on indigenous raw materials and services; employment of Nigeria workforce clause as well as the technology transfer clause would no doubt provide massive transformation of the cause of economic development. Similarly, Nigeria stands in a unique position to optimise the opportunities offered by other emerging economies that adopted such measures to hasten rapid industrialisation. Arguably, just like similar policy in Malaysia, the Nigerian Content Monitoring Board (NCMB) should be able to relax certain conditions where strict enforcement could be counter-productive; and/or undermine the competitiveness of the country in attracting FDI. Similarly as illustrated by Chilean experience, a gradual phase out of performance requirements is recommended where both macro-economic and micro-economic factors indicate favourable economic climate rendering such performance requirements nugatory. Strengthening the institutional effectiveness of the NCMB (the implementation Board) becomes necessary in this regard to achieve efficacious outcome.
Apart from performance requirements, responsible investment forms one other requirement of the trade-off. Although there is no universally acceptable definition of responsible investment, it is used here to denote environmental responsibility; respect for the right of host communities; and social investment. Evidence indicates that IOCs - Shell, Chevron, and ExxonMobil, practices of responsible investment in the Niger-Delta remains few and far-between, at best patchy. Even other approaches such as shareholder activism; stakeholders’ pressure; and reporting obligation could be employed to foster better outcomes, their effects would be marginal. While shareholder activism has the advantage of using votes in company meetings to extract management concession for social performance benchmarks, its shortcoming lies in non-bindingness of the resolution. Although stakeholders can engage in whistle blowing to promote social performance, they sometimes suffer from collective action problem. Voluntary reporting may thrive on its inherent flexibility but it is nonetheless devoid of coercive force.

The current consolidated PIB intends to introduce coercive regulation of responsible investment in petroleum sector. However, the success or otherwise of the agenda may depend significantly on institutional efficacy of the implementing establishment. In other words, legal re-alignment simpliciter is insufficient; the quality of institution (both human capital and social capital) that administers the laws matters. Thus, there is a compelling need for institutional re-orientation and qualitative human capital. This entails capacity building and emphasis on efficient outcome. As noted by the World Bank, any ‘sustainable institutional change requires that thousands of paid agents change their behaviour’ in significant ways. Certainly, this is no less than a clarion call to shore up the social capital ratio, hitherto lacking,

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878 World Bank, ‘Better Results from Public Sector Institutions’, at 1.
needed for enhanced efficient service delivery. Empirical measurement of the ratio of social capital needed for efficient institutional outcome would be an interesting area of future research by scholars.

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APPENDIX

ANNEX I

PROCEDURE FOR INCORPORATING A BUSINESS ENTERPRISE BY A FOREIGN INVESTOR IN NIGERIA

THE LEGAL FRAMEWORK FOR INCORPORATING A BUSINESS IN NIGERIA

METHODS OF CONDUCTING BUSINESS

All business enterprises must be registered with the Corporate Affairs Commission. Business activities may be undertaken in Nigeria as a:

(i) Private Limited Liability Company;
(ii) Public Limited Liability Company (Plc);
(iii) Unlimited Liability Company;
(iv) Company Limited by Guarantee;
(v) Foreign Company (branch or subsidiary of foreign company);
(vi) Partnership/Firm;
(vii) Sole Proprietorship;
(viii) Incorporated trustees (religious, charitable, philanthropic or cultural);
(ix) Representative office in special cases.
THE COMPANIES AND ALLIED MATTERS ACT AND INCORPORATION PROCEDURES

The Companies and Allied Matters Act, 1990 (the Companies Act) is the principal law regulating the incorporation of businesses. The administration of the Companies Act is undertaken by the CORPORATE AFFAIRS COMMISSION (CAC), which undertakes the administration of the Companies Act.

Minimum Share Capital

The minimum authorised share capital is N10, 000 (Ten Thousand Naira) in the case of private companies or N500,000 (Five Hundred Thousand Naira) in the case of public companies with a minimum subscription of 25% of the authorised share capital respectively.

OPERATIONS OF FOREIGN COMPANIES IN NIGERIA

A non-Nigerian may invest and participate in the operation of any enterprise in Nigeria. However, a foreign company wishing to set up business operations in Nigeria should take all steps necessary to obtain local incorporation of the Nigerian branch or subsidiary as a separate entity in Nigeria for that purpose. Until so incorporated, the foreign company may not carry on business in Nigeria or exercise any of the powers of a registered company.

The foreign investor may incorporate a Nigerian branch or subsidiary by giving a power of attorney to a qualified solicitor in Nigeria for this purpose. The incorporation documents in this instance would disclose that the solicitor is merely acting as an “agent” of a “principal” whose name(s) should also appear in the document. The power of attorney should be
designed to lapse and the appointed solicitor ceases to function upon the conclusion of all registration formalities.

The locally incorporated branch or subsidiary company must then register with the Nigerian Investment Promotion Commission (NIPC) before commencing formal operations. The new company may also apply to NIPC for other investment approvals (e.g. expatriate quota) and other incentives.

**Exemption to the General Rule**

Where exemption from local incorporation is desired, a foreign company may apply in accordance with Section 56 of the Companies Act, to the National Council of Ministers for exemption from incorporating a local subsidiary if such foreign company belongs to one of the following categories:

(a) “foreign companies invited to Nigeria by or with the approval of the Federal Government of Nigeria to execute any specified individual project;

(b) foreign companies which are in Nigeria for the execution of a specific individual loan project on behalf of a donor country or international organisation;

(c) foreign government-owned companies engaged solely in export promotion activities; and

(d) engineering consultants and technical experts engaged on any individual specialist project under contract with any of the governments in the Federation or any of their agencies or with any other body or person, where such contract has been approved by the Federal Government.”
The application for exemption from disclosing certain details about the applicant is to be made to the Secretary to the Government of the Federation (SGF). If successful, the request of the applicant is granted upon such terms and conditions, as the National Council of Ministers may think fit.

**Representative Offices**

Foreign companies may set up representative offices in Nigeria. A representative office however, cannot engage in business or conclude contracts or open or negotiate any letters of credit. It can only serve as a promotional and liaison office, and its local operational expenses have to be floated by the foreign company. A representative office has to be registered with the CAC.
ANNEX II

CHECKLIST OF STEPS FOR ESTABLISHING NEW COMPANIES IN NIGERIA
WITH FOREIGN SHAREHOLDING

Stage A

i. Establish partners/shareholders and their respective percentage shareholdings in the proposed company;

ii. Establish name, initial authorised share capital and main objects of proposed company;

iii. EXCEPT in instances where the proposed company will be 100% owned by non-resident shareholders - Prepare Joint-Venture Agreement between prospective shareholders. The Joint Venture may specify; inter-alia, mode of subscription by parties, manner of Board Composition, mutually protective quorum for meetings, specific actions, which would necessitate shareholders approval by special or other resolutions;

iv. Prepare Memorandum and Articles of Association, incorporating the spirit and intents of the Joint-Venture Agreement;

v. Foreign Shareholder may grant a Power of Attorney to its Solicitors in Nigeria, enabling them to act as its Agents in executing incorporation and other statutory documents pending the registration with NIPC (i.e. formal legal status for foreign branch/subsidiary operations);

vi. Conduct a search as to the availability of the proposed company name and, if available, reserve the name with the CAC and obtain registration forms;

vii. Submission of stamped Memorandum and Article of Association together with registration forms for verification and assessment;

viii. Effect payment of stamp duties, CAC filing fees and process and conclude registration of the company as a legal entity.
Stage B

Prepare Deeds of Sub-Lease/Assignment, as may be appropriate, to reflect firm commitment on the part of the newly registered company, to acquire business premises for its proposed operations.

Stage C

Prepare and submit simultaneous applications to the NIPC (on prescribed NIPC Application Forms) for the following:

- Registration (Business Permit Certificate);
- Expatriate Quota (NIPC facilitates with Federal Ministry of Internal Affairs).

The application to the NIPC should be accompanied with the following documents:

- Original copy of the duly completed NIPC Form;
- Original copy of the treasury receipt for the purchase of NIPC Form;
- A copy of the Certificate of Incorporation of the applicant company (minimum share capital acceptable is 10million Naira);
- A copy of the Tax Clearance Certificate of the applicant company;
- A copy of Certificate of Capital Importation;
- Certified True Copies of CAC Form 02 & 07;
- A copy of the Memorandum and Articles of Association;
- A copy of treasury receipt as evidence of payment of stamp duties on the authorised share capital of the company as at date of application;
- A copy of the Joint-Venture Agreement - UNLESS 100% foreign ownership is applicable;
- A Copy of Feasibility Report and Project Implementation Programme of a company for its proposed business;
- A copy of Deed(s) of Sub-Lease/Agreement evidencing firm commitment to acquire requisite business premises for the company's operation;
- Copies of information brochure on foreign shareholder (if available) as testimony of international expertise and credibility of the foreign partner in the proposed line of business;

In case of application for Expatriate Quota Position, and in addition to the above
- Evidence of non-availability of expertise in the country;
- A copy of training programme or personnel policy of the company, incorporating management succession schedule for qualified Nigerians;
- Particulars of names, addresses, nationalities and occupations of the proposed directors of the company;
- Job title designations of expatriate quota positions required, and the academic and working experience required for the occupants of such positions;

Stage D
Application for Incentives: Aside from approving statutory incentives under its purview, the Commission negotiates additional specific incentives on behalf of companies.

i. Pioneer Status: under the Industrial Development (Income Tax Relief) Act 22 of 1971 certain manufacturing and service activities/products were prescribed Pioneers
Activities. This list has, however, been expanded in 1988 and 2004. This status ascribes 5 years tax holiday period on such approvals.

Basic Requirements
a. the company’s activity/product must be listed among the prescribed activities;
b. a minimum of 10million share capital for foreign or joint venture company and one million for local company
c. apply within the first year of commencement of operation

The application form should be accompanied with

- Original copy of the duly completed NIPC Form;
- Original copy of the treasury receipt for the purchase of NIPC Form;
- A copy of the Tax Clearance Certificate of the applicant company;
- A copy of the Memorandum and Articles of Association;
- Evidence of acquisition and installation of plant and machinery;
- Operational Licenses for applicable activity;
- A copy of the Joint-Venture Agreement - UNLESS 100% foreign ownership is applicable.

ii. Application for Technical Agreement

This is a form of technical co-operation agreement in which a party will agree to offer technical services to a company for the payment of a fee. Details and terms of such agreements are normally worked out between the parties involved but such agreements
should be registered with the National Office for Technological Acquisition and Promotion (NOTAP).

**PREScribed FEES BY NIPC**

<table>
<thead>
<tr>
<th>S/N</th>
<th>SERVICES</th>
<th>FEES</th>
</tr>
</thead>
<tbody>
<tr>
<td>i.</td>
<td>Procurement of Form</td>
<td>N25,000.00</td>
</tr>
<tr>
<td>ii.</td>
<td>Process fees</td>
<td>N25,000.00</td>
</tr>
<tr>
<td>iii.</td>
<td>Grant of Establishment Quota (per slot)</td>
<td>N10,000.00</td>
</tr>
<tr>
<td>iv.</td>
<td>Renewal of Quota position (per slot)</td>
<td>N1,000.00</td>
</tr>
<tr>
<td>v.</td>
<td>Additional Quota (per slot)</td>
<td>N2,000.00</td>
</tr>
<tr>
<td>vi.</td>
<td>Stay of Action</td>
<td>N5,000.00</td>
</tr>
<tr>
<td>vii.</td>
<td>Grant of Business Permit</td>
<td>N25,000.00</td>
</tr>
<tr>
<td>viii.</td>
<td>Amendment of Business Permit</td>
<td>N25,000.00</td>
</tr>
<tr>
<td>ix.</td>
<td>Re-grading of Quota (per slot)</td>
<td>N10,000.00</td>
</tr>
<tr>
<td>x.</td>
<td>Appeal Processing fee</td>
<td>N50,000.00</td>
</tr>
<tr>
<td>xi.</td>
<td>Restoration of Lapsed quota</td>
<td>N1,000.00</td>
</tr>
<tr>
<td>xii.</td>
<td>Upgrading of Quota to P.U.R (per slot)</td>
<td>$10,000.00</td>
</tr>
<tr>
<td>xiii.</td>
<td>Re-designation of P.U.R. (per slot)</td>
<td>$10,000.00</td>
</tr>
<tr>
<td>xiv.</td>
<td>De-tagging/Extension of Quota (per slot)</td>
<td>N10,000.00</td>
</tr>
<tr>
<td>xv.</td>
<td>Re-validation of lapsed Quota (per slot)</td>
<td>N10,000.00</td>
</tr>
<tr>
<td>xvi.</td>
<td>Penalty for late submission of renewal of private license</td>
<td>N150,000.00</td>
</tr>
<tr>
<td>xvii.</td>
<td>Application for Pioneer Status</td>
<td>N20,000.00</td>
</tr>
<tr>
<td>S/N</td>
<td>SERVICES</td>
<td>FEES</td>
</tr>
<tr>
<td>------</td>
<td>--------------------------------------------------------------------------</td>
<td>-----------------------------</td>
</tr>
<tr>
<td>xviii.</td>
<td>Collection of Approval letter and Certificate</td>
<td>N30,000.00</td>
</tr>
<tr>
<td>xix.</td>
<td>Application for extension of Pioneer Status</td>
<td>-</td>
</tr>
<tr>
<td>xx.</td>
<td>On Approval of Pioneer Status Extension</td>
<td>N50,000.00</td>
</tr>
<tr>
<td>xxi.</td>
<td>Processing Fees (Verification visits)</td>
<td>N50,000.00</td>
</tr>
</tbody>
</table>

**SOME PRESCRIBED FEES BY CORPORATE AFFAIRS COMMISSION (CAC)**

<table>
<thead>
<tr>
<th>S/N</th>
<th>SERVICES</th>
<th>FEES</th>
</tr>
</thead>
<tbody>
<tr>
<td>i.</td>
<td>Registration of public companies whose share capital does not exceed N1m</td>
<td>N20,000.00</td>
</tr>
<tr>
<td></td>
<td>Exceeds N1m</td>
<td>N30,000.00 for the first N1m and thereafter, N20,000.00 for every N1m of part thereof</td>
</tr>
<tr>
<td>ii.</td>
<td>Registration of private company whose share capital does not exceed N1m</td>
<td>N10,000.00</td>
</tr>
<tr>
<td></td>
<td>Exceeds N1m</td>
<td>N10,000.00 for the first N1m and N10,000.00 for every N1m of part thereof</td>
</tr>
<tr>
<td>iii.</td>
<td>Registration of company not having a share capital</td>
<td>N20,000.00</td>
</tr>
<tr>
<td>iv.</td>
<td>Filing of notice of exemption by foreign companies</td>
<td>N30,000.00</td>
</tr>
<tr>
<td>v.</td>
<td>Certified True Copy of:</td>
<td></td>
</tr>
<tr>
<td>----</td>
<td>------------------------</td>
<td></td>
</tr>
<tr>
<td>i.</td>
<td>Memorandum and Articles of Association</td>
<td>N3,000.00</td>
</tr>
<tr>
<td>ii.</td>
<td>Certificate of incorporation</td>
<td>N6,000.00</td>
</tr>
<tr>
<td>iii.</td>
<td>CO2, CO6 and CO7</td>
<td>N2,000.00 (each)</td>
</tr>
<tr>
<td>vi.</td>
<td>A set of Company Incorporation Form</td>
<td>N500.00</td>
</tr>
<tr>
<td>vii.</td>
<td>Same Day Incorporation (excluding filling fees)</td>
<td>N50,000.00</td>
</tr>
<tr>
<td>viii.</td>
<td>Filling of Annual Returns</td>
<td>N1,000.00</td>
</tr>
</tbody>
</table>
ANNEX III

IMMIGRATION PROCEDURE AND REQUIREMENTS

TYPES OF VISA/ENTRY PERMIT

The knowledge of the various types of visa/entry permit is of crucial importance both to the applicant and to the company or organisation sponsoring him/her. This is because in the Nigerian visa system, the type that is given is tied to the purpose for which the journey is intended and any variation of the visa with the purpose of journey will render such a visa inappropriate for entry, leading to either a refusal of landing or deportation, in the case of a foreigner already in the country.

There are three main types of visa, viz.

(1) Ordinary Visa
(2) Diplomatic Visa
(3) Gratis Courtesy Visa

The Ordinary Visa is further divided as follows:

(a) Transit
(b) Single journey
(c) Multiple journeys

ORDINARY VISA

Transit
This type of visa is issued to applicants who wish to pass through Nigeria to a further destination. It may be obtained at a Nigerian mission and is given for a period not exceeding seven (7) days without reference to the Comptroller-General of Immigration.

An applicant seeking this type of visa must be in possession of an express approval (visa or any form of permission) to enter a specified third country, as well as a confirmed ticket or sufficient funds to pay for any means of transportation appropriate to reach that country. A transit visa may also be given at the port of entry on the specific approval of the Comptroller-General of Immigration. A transit pass is normally issued whether in the former or latter case, and it takes the form of an endorsement by rubber stamp on the passport of the applicant, which shall contain particulars of the port of entry, the date of entry and the period the person is permitted to remain in Nigeria in transit.

**Single Journey Visa**

This is valid for a single entry into Nigeria and may be issued as:

- Short Visit Visa;
- STR Visa (Subject To Regularisation for Residence Work Permit);
- T.W.P (Temporary Work Permit)

**The Short Visit Visa**

This type of single journey visa is issued to applicants who require a single entry to Nigeria for the purpose of tourism, to see places of interest, or visit friends and/or relations resident in Nigeria. It is also issued to applicants who wish to visit Nigeria for business or meeting. This visa is also issued at a Nigerian mission abroad without reference to the Comptroller-General
of Immigration provided that, the applicant who fills Form (1MM 22), is in possession of a return air ticket to and from Nigeria or an onward ticket for a further destination, together with a visa or any other acceptable form of permission to enter that country. In case a passenger arrives at the port of entry without a return ticket or onward ticket to a further destination but is otherwise found to be admissible, he/she may be required to deposit the appropriate amount for the purchase of such ticket as may be necessary to enable him/her return to his/her country of domicile, or proceed to a further destination.

**STR Visa (Subject to Regularisation)**

This is the type of visa required by foreigners seeking to take up employment in Nigeria. Section 8, sub-section 1, of the Immigration Act provides that “no person, not being a citizen of Nigeria, may take up employment in Nigeria other than employment with the federal or state government without the consent of the Comptroller-General of Immigration”. Section 33 of the Act further provides that an application must be made to the Comptroller-General by the prospective employer, in writing, confirming that he/she has a vacancy on the expatriate quota and at the same time stating the position in which prospective employee is to be employed and confirming acceptance of immigration responsibility”.

The employer company applies to the Nigerian embassy or consular office in the country where such intending employee/applicant resides, requesting that he (and his accompanying spouse/ fiancée/children, if applicable) be granted STR Visa (subject to regularisation for residence work permit) when he arrives in Nigeria. In such application, the employer company undertakes to assume immigration and other responsibilities for the employee (and his accompanying spouse/ fiancée/children, if applicable) in Nigeria.
The STR Visa is issued at Nigerian mission without reference to the Comptroller-General of Immigration provided that the applicant presents specified documents. STR visa is normally given for 90 days without reference, during which an application must be made to the Comptroller-General of Immigration, to regularise the stay of the prospective employee, and the person may assume his employment only when such application is approved and a **RESIDENCE WORK PERMIT** granted.

### Registration of Aliens

Having undergone the various legal formalities for residency status, all foreigners are expected to register their presence at the immigration offices closest to their places of residence or occupation. It should be noted that for this purpose, all the state immigration offices are representatives of the Comptroller-General of Immigration and application for regulation should be made to them, which they would refer accordingly, for approval to issue the residence permit.

### Temporary Work Permit (T.W.P)

Companies and organisations wishing to engage the services of expatriates for short period assignments are required to apply direct to the Comptroller-General in Abuja for visa/entry permits for such expatriates. This is the temporary work permit visa and it is not issued without reference to the Comptroller-General of Immigration. If such applications are submitted at the Nigerian missions abroad, they must be referred to the Comptroller-General of Immigration for approval. The temporary assignments, which are eligible for such approval, include:

- erection/installation work;
- feasibility studies;
- repairs of machinery/equipment;
- auditing of accounts;
- research work, and such other assignments as may fall into this category.

The visa is normally approved by cablegram sent through NITEL offices in Nigeria to the Mission from where it would be issued. The cost of the transmission is borne by the company/organisation applying for the facility. The T.W.P Visa is given for a period not exceeding 3 months and may be extended for a further period, upon application to the Comptroller-General of Immigration who will determine the desirability of such an extension.

**Multiple Journey Visa**

This type of visa is normally issued without reference to the Comptroller- General of Immigration by the Nigerian missions abroad for a period not exceeding 12 months, and may be for a specified number of journeys within the period granted.

It is normally given mostly to non-resident directors of Nigerian based companies and other foreign businessmen and women for the purpose of attending meetings and for other frequent visits to pursue business arrangements, or make consultations regarding investment projects.

Both the single and multiple journey visas are also given in Nigeria to employees of companies/organisations whose stay have been duly regularised, in order to enable them return to their employment whenever they travel out either for business or holidays. This is called return or re-entry visa. Applications for this must be made personally by the employee.
in Nigeria and not from outside the country. The application must be supported by the employer confirming that the employee is returning to his job, and reaffirming acceptance of Immigration responsibility on behalf of the applicant, as well as showing proof of the continued availability of the expatriate quota position to be occupied.

**GRATIS COURTESY VISA**

This type of visa is normally issued to persons who do not qualify for diplomatic visa, but who are foreign government officials traveling on official business. It may be granted in cases where it is considered undesirable to accede to an application for a diplomatic visa, but where it is desirable on grounds of international courtesy to facilitate a journey.
# ANNEX IV

## Agencies at OSIC

<table>
<thead>
<tr>
<th>No.</th>
<th>Agency</th>
<th>Functions/Role</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>NIGERIAN INVESTMENT PROMOTION COMMISSION (NIPC)</td>
<td>Registration of Foreign Investments, Issuance of Business Permits, Complaint Management, Linkages with NIPC Departments, and other Government Agencies, Country-wide liaison with the 36 States on investment matters etc</td>
</tr>
<tr>
<td>2.</td>
<td>CORPORATE AFFAIRS COMMISSION</td>
<td>Name searches, Company Incorporation</td>
</tr>
<tr>
<td>3.</td>
<td>NIGERIA IMMIGRATION SERVICE</td>
<td>Expatriate Quota Positions, Regularization of Permanent Work Permits, other immigration facilities</td>
</tr>
<tr>
<td>5.</td>
<td>FEDERAL INLAND REVENUE SERVICE</td>
<td>Tax Registration, Payment of Stamp Duties, Issuance of Tax Clearance Certificates and issuance of Tax Forms</td>
</tr>
<tr>
<td>6.</td>
<td>NATIONAL OFFICE FOR TECH. ACQUISITION &amp; PROMOTION</td>
<td>Registration of contract agreements dealing with Transfer/Acquisition of Technology, Approvals/licenses for Technology Transfer, Patents and Franchises etc.</td>
</tr>
<tr>
<td>7.</td>
<td>NATIONAL AGENCY FOR FOOD &amp; DRUG ADMINISTRATION &amp; CONTROL</td>
<td>Registration of Regulated Products, Issuance of Export Certificates, Authorization to import of Unregistered Products</td>
</tr>
<tr>
<td>8.</td>
<td>STANDARDS ORGANIZATION OF NIGERIA</td>
<td>Facilitates all aspects of Standardization activities, approvals or permits for use of standards</td>
</tr>
<tr>
<td>9.</td>
<td>FEDL MINISTRY OF SOLID MINERALS DEVELOPMENT</td>
<td>Exploration Licenses, Mining leases and information and guidelines on investing in the solid minerals sector</td>
</tr>
<tr>
<td>10.</td>
<td>NATIONAL BUREAU OF STATISTICS</td>
<td>Statistical Data on the Nigerian Economy</td>
</tr>
<tr>
<td>11.</td>
<td>MINISTRY OF THE FEDERAL CAPITAL TERRITORY</td>
<td>Land Matters on investment projects and general information</td>
</tr>
<tr>
<td>12.</td>
<td>FEDERAL MINISTRY OF FINANCE</td>
<td>Administration of Industrial Incentives, Tariff Administration and general information and guidelines on fiscal policy</td>
</tr>
<tr>
<td>13.</td>
<td>CENTRAL BANK OF NIGERIA</td>
<td>Provision of Information and Technical Advice on the Nigerian, Banking and Financial System, guidelines on correspondent banking and funds transfer, including capital importation.</td>
</tr>
</tbody>
</table>

*Source: NIPC.*
ANNEX V

FREE TRADE/EXPORT PROCESSING ZONE SCHEME

INTRODUCTION

Export Processing or Free Trade Zones are clearly delineated and fenced industrial estates within a nation’s customs and trade regime. They are normally set up for manufacturing concerns producing mainly for the export market. The Nigerian concept is no different. Since 1989 when the foundations for the first Free Trade Zone (Calabar Free Trade Zone) was established, there have been the addition of five more with two been fully completed and operational.

In Nigeria, there are two types of free trade concept – the specialised and the general-purpose trade/export zone. For effective management of these zones, at the federal level, two bodies are in place – Nigerian Export Processing Zone Authority (NEPZA) for the general-purpose zones and Oil & Gas Free Zone Authority (OGFZA) for oil & gas zone.

INVESTMENT PROCEDURES WITHIN THE ZONES

The following are the entry procedures into the zones:

i. Obtain and complete prescribed forms from either NEPZA or OGFZA, as applicable

ii. Submit completed form with the following attachments:

• Project description
• Market survey
• Funding proposal
• Financial projection
• Environmental impact statement and control
iii. Upon approval of request, the following steps are thereafter taken:

- company’s registration with CAC;

iv. If outright purchase of factory building is desired

- 10% deposit of the selling price of the standard building is made within 3 months of approval
- payment of the balance 90%, 5 months after

v. Renting of factory building

- down payment of one year rent required not exceeding 3 months after signing the rental contract. Thereafter, rental charges shall be paid within the first quarter of every year.

vi. Leasing the standard factory

- Payment of 40% lease value on approval
- Payment of 30% at the end of the 5th year
- Payment of 30% balance at the end of the 10th year

vi. With condition(s) in (iii) fulfilled, the investor may proceed to carry out the following:

- Remittance of investment capital
- Importation and installation of machinery
- Commencement of production

**TYPES OF INDUSTRIES PERMISSIBLE IN NIGERIA EXPORT PROCESSING ZONES**

- Electrical and electronic products
- Textile products
- Wood products
• Leather products
• Plastics products
• Petroleum products
• Rubber products
• Cosmetics
• Garments
• Chemicals products
• Metal products
• Educational materials and equipment
• Communication equipment and materials
• Sports equipment and materials
• Machinery
• Handicraft
• Optical instruments and appliances
• Medical kits and instruments
• Biscuits and confectioneries
• Printed materials, office equipment and appliances
• Paper materials
• Food processing
• Pharmaceutical products
• Oil & gas activities

INCENTIVES
i. Exemption from payment of all federal, state and local taxes, levies, rates, and customs duties;

ii. Repatriation of foreign capital investment in EPZs at any time with capital appreciation on the investment;

iii. No import or export licence;

iv. Rent free land during construction of factory space;

v. Services such as warehousing, standard pre-built factories, transportation, sanitation, canteen, etc, are available within the zones;

vi. Unrestricted remittance of profits and dividend earned by investor in the zone;

vii. 100 percent foreign ownership of enterprises in the EPZ allowable;

viii. Sale of up to 25% of production permitted in the domestic market.

EXISTING ZONES AND STATUS

<table>
<thead>
<tr>
<th>Name</th>
<th>Location</th>
<th>Status</th>
<th>Mode</th>
<th>Management</th>
</tr>
</thead>
<tbody>
<tr>
<td>Calabar Free Trade Zone</td>
<td>Calabar, Cross River State</td>
<td>Completed (over 80% occupied)</td>
<td>General purpose</td>
<td>NEPZA</td>
</tr>
<tr>
<td>Onne Oil &amp; Gas Free Zone</td>
<td>Onne, Rivers State</td>
<td>Completed (Over 80% occupied)</td>
<td>Specialised</td>
<td>OGFZA</td>
</tr>
<tr>
<td>Kano Free Trade Zone</td>
<td>Kano, Kano State</td>
<td>Under construction</td>
<td>Non-oil export</td>
<td>NEPZA</td>
</tr>
<tr>
<td>Maigatari Free Trade Zone</td>
<td>Maigatari, Jigawa State</td>
<td>Under construction</td>
<td>Non-oil export</td>
<td>Jigawa State Govt.</td>
</tr>
<tr>
<td>Banki Free Trade Zone</td>
<td>Banki, Borno State</td>
<td>Under construction</td>
<td>Non-oil export</td>
<td>Borno State Govt.</td>
</tr>
<tr>
<td>Lekki Export Processing</td>
<td>Lekki, Lagos</td>
<td>Under construction</td>
<td>Non-oil export</td>
<td>Private initiative</td>
</tr>
<tr>
<td>Zone</td>
<td>State</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>------</td>
<td>-------</td>
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<td></td>
</tr>
</tbody>
</table>

331
Oil & Gas

Major Industry Policies

Production Sharing Contract (PSC)

In view of the burden of funding joint venture operations (cash calls) by the NNPC and the need to increase Nigeria's oil reserves from the present 20 billion barrels and also to develop other sectors of the economy begging for government attention, the federal government decided to introduce the Production Sharing Contract (PSC). This policy is designed to transfer exploration risks and funding of exploration and development efforts on new acreage to the interested oil companies.

The essence of PSC is that NNPC engages a competent contractor to carry out petroleum operations on NNPC's wholly held acreage. The contractor undertakes the initial exploration risks and recovers his costs if and when oil is discovered and extracted.

Under the PSC, the contractor has a right to only that fraction of the crude oil allocated to him under the cost oil (oil to recoup production cost) and equity oil (oil to guarantee return on investment). He can also dispose of the tax oil (oil to defray tax and royalty obligations) subject to NNPC's approval. The balance of the oil, if any (after cost, equity, and tax), is shared between the parties (profit oil).

The current direction in the petroleum operations in the country is the production sharing contract.

Examples below detail the number of blocks held by named operators operating PSC with NNPC.

(i) Statoil/BP (3 Blocks)
(ii) Ashland (2 Blocks)
(iii) Abacan (1 Block)
(iv) Esso Expt. (1 Block)
(v) Agip (1 Block)
(vi) Shell (5 Blocks)
(vii) Elf (2 Blocks)
(viii) Mobil (1 Block)
(ix) Chevron (7 Blocks)
(x) Conoco (1 Block)
(xi) Allied Energy (1 Block operated by Statoil)

Examples Of Some Specific Provisions Of A PSC Contract:

(a) The term of the contract is for 30 years (inclusive of 10 years exploration and 20 years OML period). However, the contract may be terminated if at the end of the 6th year (from the effective date of the contract) the agreed Work Programme has not been substantially executed, or either party gives a notice of not less than 90 days for termination of the contract (on grounds permitted by the contract terms). Termination of the contract will also take place if no petroleum is found in the contact area after 10 years from the effective date of the contract.

(b) Work Programme: The minimum work programme during the exploration period shall be as follows:
<table>
<thead>
<tr>
<th>Contract Years</th>
<th>Amount to be Expended</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) 1 - 3</td>
<td>$24 million</td>
</tr>
<tr>
<td>(ii) 4 - 6</td>
<td>$30 million</td>
</tr>
<tr>
<td>(iii) 7 - 10</td>
<td>$60 million</td>
</tr>
</tbody>
</table>

If during any period of the contract years, the contractor spends less than the required expenditure, an amount equal to such under-expenditure shall be carried forward and added to the amount to be expended in the following period of contract years.

(c) Management Committee must be established within 30 days from the effective date of the contract. The Committee is made up of 10 persons appointed by the parties on a 50/50 basis.

The NNPC appoints the Chairman of the Management Committee while the contractor appoints the Secretary who will be a non-member of the Committee.

(d) Recovery of Operating Costs and Crude Oil Allocation: The available crude oil from the contract area shall be allocated in accordance with the Accounting Procedure, the Allocation Procedure and other applicable provisions of the contract.

(e) Royalty: Royalty rates in offshore is graduated as follows:

<table>
<thead>
<tr>
<th>Area/Water Depth</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>In areas up to 200 meters water depth</td>
<td>16.67%</td>
</tr>
<tr>
<td>From 201 to 500 meters water depth</td>
<td>12%</td>
</tr>
<tr>
<td>From 501 to 800 meters water depth</td>
<td>8%</td>
</tr>
<tr>
<td>From 801 to 1000 meters water depth</td>
<td>4%</td>
</tr>
<tr>
<td>In areas in excess of 1,001 meters</td>
<td>0%</td>
</tr>
</tbody>
</table>
ANNEX VII

International Oil Companies In Nigeria

There are eighteen international oil companies operating in the country. Some of them are new entrants who have an interest in the deep offshore blocks in partnership with other operators. The oil majors account for about 99% of crude oil production in Nigeria. The international oil companies operating in Nigeria and when they established are:

Shell Petroleum Development Company Ltd       (1937)
Mobil Producing Nigeria Unlimited                     (1955)
Chevron Nigeria Ltd                                          (1961)
Texaco Overseas Nig. Petroleum Co. Unltd       (1961)
Elf Petroleum Nigeria Limited                             (1962)
Philip (1964); Pan Ocean Oil Corporation           (1972)
Bought over Ashland Oil Nigeria Limited            (1973)
Agip Energy & Natural Resources                    (1979)
Statoil/BP Alliance                                 (1992)
Esso Exploration & Production Nig. Ltd.            (1992)
Texaco Outer Shelf Nigeria Limited                  (1992)
Shell Nig. Exploration & Production Co.            (1992)
Total (Nig.) Exploration & Prod. Co. Ltd.          (1992)
Amoco Corporation                                   (1992)
Chevron Exploration & Production Co.               (1992)
Conoco                                                   (1992)
Abacan                                                   (1992)