The Impact of Foreign Investment on the Sovereignty of Developing Countries: An Appraisal of the China-Nigeria Bilateral Relations

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Declaration

I declare that the work in this Long Essay titled "The Impact of Foreign Investment on the Sovereignty of Developing Countries: An Appraisal of the China-Nigeria Bilateral Relations" has been carried out by me in the Faculty of Law, Lead City University, Ibadan. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this long essay was previously presented for another degree or diploma at this or any other institution.

Certification

This is to certify that this research work was conducted under my supervision by IBEKWE EMMANUEL CHIDI (LCU/PG/002738) and is being approved by the Faculty of Law, Lead City University, Ibadan, Nigeria.

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Prof. Kolapo Omidire **Date**

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(Dean)

Dedication

This research is dedicated to all who contributed to knowledge by making the realization of this body of work a possibility.

Acknowledgement

I would not have been able to attain this feet without the grace of the Almighty God who has brought me this far in my academic endeavor. To God alone, the ultimate glory is due.

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Even though, the above-mentioned institutions and people assisted in the process of this work, I alone stand responsible for the errors, if any, found in the work.

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Abstract

This research examines and critically analyses to what extent host states might use their sovereignty in a manner that may be counterproductive to the interests of foreign investors on their territory, and the extent to which international investment law can regulate transactions to the benefit of the parties. The research considers the extent to which different dispute resolution mechanisms can be used to rebalance the uneven investment relationship arising from the adverse effect of host state sovereignty. The breach of legal obligations may subject the host states to international judicial or quasi-judicial instruments and their enforcement which may ordinarily affect the traditional power of the state to control every activity within its territory. To this end, this research examines the legal obligations between the host state and foreign investors and the various types of foreign investments and the potential impact of such activities on the sovereignty of the host state. The objective underlying the research is to determine whether or not foreign investment and the circumstances surrounding the transactions relating thereto have the potential to lead developing sovereign states back into a form of neo-colonialism in the guises of international loans and infrastructure developments agreements. The study will conduct a review of the Nigerian economy, vis-à-vis the country's trade relations with China in terms of science, technology, and infrastructure loan to determine the extent to which the activities may adversely impact the country sovereignty. To do this, the methodology adopted in this research is doctrinal that is, library oriented research. This is by an analysis of Secondary sources of data and archival study which will involve the analysis of Primary and Secondary sources of research.

Keywords: International Investment, Foreign Direct Investment, Portfolio, Sovereignty, Globalization, China, Nigeria dispute resolution.

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List of Acronyms

Abbreviations	Meanings
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
BMD4	Benchmark Definition of Foreign Direct Investment
CFRN	Constitution of the Federal Republic of Nigeria
DMO	Debt Management Office
ECT	European Energy Charter Conference
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
IAEA	International Atomic Energy Agency
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ILO	International Labour Organisation
IMF	International Monetary Fund
LCRs	Local Content Requirements
LFTZ	Lekki Free Trade Zone
NAFTA	North American Free Trade Agreement

NIEO	New International Economic Order
NNPC	Nigerian National Petroleum Corporation
OAU	Organization of African Unity
OECD	Organization for Economic Co-operation and Development
PSC	Production Sharing Contracts
TFCNs	Treaties of Friendship, Commerce and Navigations
U.N	United Nations
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on Laws and Treaties
WTO	World Trade Organization

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Bipartisan Congressional Trade Priorities and Accountability Act, 2015

Convention of the International Labour Organisation

General Assembly Resolution in Permanent Sovereignty over Natural Resources, 1962

Hawaiian-American Treaty of Friendship, Commerce and Navigation (TFCN), 1849

Nigeria-China BIT, 2001 on the Reciprocal Promotion and Protection of Investment, 2021

United Nations General Assembly Resolution in Permanent Sovereignty Over Natural Resources 1962

United Nations New International Economic Order (NIEO), 2009

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Companies and Allied Matters Act, 2020

Constitution of the Federal Republic of Nigeria, (CFRN), 1999

Foreign Exchange (Monitoring and Miscellaneous) Provisions Act, CAP F34, LFN, 2004

National Office for Technology and Promotion (NOTAP) Act, CAP N62, LFN, 2004.

Nigerian Investment Promotion Commission Act CAP N117, Laws of the Federation of Nigeria (LFN), 2004

The Immigration Act, 2020.

CHAPTER ONE

1.1 Background to the Study

At the historic third Moscow conference held in Moscow in October, 1943,[1] the Governments of the United States of America, the United Kingdom, the Soviet Union, and China jointly declared that they recognized "the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security."[2] In furtherance of this, activities of nations were expanded to create an international organization which has the aim of maintaining international peace and preventing the outbreak of another catastrophe after the Second World War (1938-1945). These activities were seen in the establishment of the United Nations in San Francisco in 1945 and the *Charter of the United Nations* by its preamble presupposes that states are equal as well as human beings within and across nations in the international community. Thus, international law prohibits intervention in the affairs of a sovereign state[3] except in certain exceptional cases.

Meanwhile, the concept of state sovereignty does not denote that any state is an island onto itself, it does not picture a situation where a state is fully self-sufficient, the desire to advance trade and investment is one of the factors which have made inter-state

[1] The declarations at the conference are contained in Foreign Relations of the United States: Diplomatic Papers, 1943, General, Volume I, 740.0011 Moscow/340.

[2] H Kelsen, The Principle Of Sovereign Equality Of States As A Basis For International -Organization, (1994), Vol. 53, Yale Law Journal. Available At: <Http://Digitalcommons.Law.Yale.Edu/Ylj/Vol53/Iss2/1>. Last accessed, 28/2/2023.

[3] I Hurd, Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World. A Paper Presented at the Centre for International Policy Studies at the University of Ottawa and at the International Politics Seminar at Columbia University, 2011.

interaction inevitable. The idea is that citizens of a state may intend to pursue economic interests in other states, even states themselves may undertake investment in the territories of other states. Thus, there is an unavoidable legal relationship between an investor-state where the investor or the investment originates and a host-state where the investment is to be domiciled.

No doubt, states relate with one another within the international stage, this is to say that states depend on one another for certain needs, if this inter-state relations are not regulated, the world would degenerate into nothing but a thin space. The crux of the formation of all kinds of international arrangements and organizations has been driven by a desire to preserve the political independence of all existing states against external aggression and respect the territorial integrity of same.[4] Thus, nations and states have always interacted by way of technological exchange, business, trade, sporting activities, education an even the "unjust" industry of colonialism and slavery. By virtue of the fact that states cannot exist without interacting with other states, the issue of conflicts becomes a possibility in such relations.[5]

Taking a clue from the fact that nations are interdependent with one another, it will be stated that the sovereignty of a state may not remain intact in its absolute form since it is the desire of every state to protect its citizens and interests wherever they may be located around the world. Usually, states are classified based on economic growth, in this sense, some states are classified as "industrialized economies" and others classified as "developing economies." It is also important to note that most developing economies

[4] See for example, Article 10 of the *Covenant of the League of Nations, 1919.*
[5] N M Al-Adba, The Limitation of State Sovereignty in Hosting Foreign Investments and The Role of Investor-State Arbitration to Rebalance the Investment Relationship (Unpublished), a PhD Thesis Submitted to the University of Manchester, 2014 p. 20

around the world rely on foreign investment to achieve significant development.[6] The case of post-colonial Africa explains this instance, most African countries at early independence relied on investments from their former colonial masters, thereby, establishing neo-colonialism, for instance, the period between 1960 and 1972 had the Britain controlling most industries in Nigeria until the enactment of the *Enterprises Promotion Decree* No.4 of 1972 (the indigenization policy).[7] Meanwhile, it was not too long when the Nigerian government discovered that there was need to attract and encourage foreign investment and consequently, in 1995, the *National Investment Promotion Commission Act* was enacted.[8] This is to say that the desire to attract investment from foreign states is still seen as a way for developing economies to increase their productivity, the case of the Nigerian indigenization policy is a testament to the fact that the presence of international investment is one of the mainstays of developing economies.

Having established vide the Nigerian case that foreign investment is important to the development of states, it remains to be said that investments are of two principal categories namely Foreign Direct Investment (FDI) and Portfolio Investment.[9] In the case of Portfolio Investment, the host state of the investment may not have too much to worry about interference on its internal affairs since it is generally accepted that the investor

[6] Ibid.
[7] F C Onuegbua, I H Aniefiok, Indigenization of Nigeria's Economy: Appraising the Second and Third National Development Plans, 1970-1980, (2016), Vol. 2 (12), International Journal of Academic Studies, 507-524 at 509.
[8] CAP N117, Laws of the Federation of Nigeria, 2004.
[9] N M Al-Adba, The Limitation of State Sovereignty in Hosting Foreign Investments and The Role of Investor-State Arbitration to Rebalance the Investment Relationship (Unpublished), a PhD Thesis Submitted to the University of Manchester, 2014, p. 28

takes on any risk involved in the making of such a transaction[10] and it has little, if any physical manifestation on host state territory.[11] On the other hand, according to the report on trade and foreign direct investment published by the Secretariat of the World Trade Organization (WTO) in 1996,[12] Foreign Direct Investment (FDI) is a circumstance in which an investor who resides in its home nation and owns assets in another country (the host country) with the intention of managing the assets directly as an entity. As seen in the definition, the international legal implication of FDI is more problematic to a host state since the investment has a physical presence in the host state and there exists a more enlarged legal and commercial relationship between the host state and the investor, there are also more issues like nationalization and expropriation of business interests which the investor has to consider.

This study considers the issues arising from foreign investments between developed and developing economies and how same affects the sovereignty of the states involved, the standard example considered here is the business relationship between Nigeria and China which has been described as one of the largest bilateral relationships in Africa.[13] The bilateral relationship between Nigeria and China had existed since 1971 after Nigeria had earlier rejected a diplomatic relation proposed by china in 1964. Since then, the trade relationship between Nigeria and China has taken the shapes of Foreign Direct

[10] Ibid; Van Duzer, J A Simons & G Mayeda, Integrating Sustainable Development Into International Investment Agreements – A Guide for Developing Country Negotiator (Commonwealth Secretariat, 2013), 57

[11] Al-Adba, Op. cit, p. 29.

[12] Cited in L Hai-Qing, Relationship between Trade and Foreign Direct Investment and the Implications for the WTO (Unpublished) Thesis submitted in partial Fulfillment of the Masters of Law (LLM) to the University of Toronto, 2001, p. 42.

[13] A. D Oluwabiyi & M. M Duruji, The Implication of Nigeria-China Relations on the Actualization of Sustainable Food Security in Nigeria, (2021), Vol. 14 (1), Acta Universitatis Danubius Relationes Internationales, p. 52.

Investments by Chinese citizens in Nigeria, import of science and technological products and in recent times, infrastructural loan.

There are some possible reasons for this partnership in the year mentioned previously.[14] First, it was in 1971 that the Nigerian oil industry was nationalized. Nigeria joined the Organization of Petroleum Exporting Countries in accordance with the declaration of the organization and as a result, in 1977, the Nigerian National Petroleum Corporation (NNPC) (formerly known as the Nigerian National Oil Corporation) was established.[15] This portrayed the Nigerian oil industry as credible industry with regulation and supervision of fiscal policy that enables it express total control over this industry.

Secondly, in the quest for more resources to securitize their energy, China started offering "unconditional" development aid to African countries. Both countries perceived this as effort to strengthen a global South-South cooperation to enable both countries achieve their economic and development goals.[16] Additionally, in the same year (1971) Nigeria supported China's bid to represent East Asia at the United Nations (U.N.). Since then, China has become a major export destination for goods from the Nigerian market. In Nigeria, China's focus is on the oil and gas, manufacturing, transport, water and power sectors, however, their initial investment was limited in the agricultural sector, which is one of the potential sectors of the Nigerian economy which can expand the job market for this oil dependent economy.[17]

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[14] P. I Tom-Jack, The Evolving Geopolitical Relations of Nigeria and China: What is the impact of the Nigeria-China trade and direct investment on the Nigerian economy? (Unpublished) Research paper submitted to the School of International Development and Global Studies, The University of Ottawa, 2016 P. 9

[15] Recently privatized as the Nigeria National Petroleum Commission Limited.

[16] Tom-Jack, Op. Cit.

[17] Ibid.

According to the Nigerian Bureau of Statistics By 2022, Nigeria's borrowing from China increased by 89.94 per cent to hit $3.67bn, making it the nation's largest bilateral lender while Nigeria's exports to China in 2022 included, polyethylene, leather, sesamum seeds, cashew nuts, zinc ores and concentrates, lead ores and concentrates. On the other hand, imports from China include motorcycles, machines for reception of voice, electrical apparatus for line telephony, or line telegraphy, mackerel, parts of machinery for working on rubber or plastics, crude salt, compressed salt used in animal feeding, antibiotics, herbicides and has a value of N1.51tn in quarter 1 of 2022.[18]

Despite the perceived symbiotic relations that characterize this bilateralism, the complex dynamics underscoring the (somewhat unequal) relationship between Nigeria and China have made scholars to inquire, on the one hand, whether this interaction can be likened to a tale of two great powers or, on the other hand, whether it is a tale where Nigeria, one of many small third-world powers serves to sustain the interests and status of China, a great power.[19] For instance, it is perceived that there exist surge in Nigeria imports of Chinese goods relative to Nigeria exports to China, resulting in a trade deficit with China since Nigeria is yet to offer its industrial producers home-grown alternatives of the same quality at competitive prices.[20]

1.2 Statement of the Problem

An instance to consider is the fact that apart from Foreign Domestic Investment by citizens of the investor-state (China in this case) in the territories of the host states, there

[18] See the report of the Cable Newspaper, 7th June, 2022, available at www.thecable.ng/nbs-nigeria-recorded-n1-2-trillion-trade-surplus-in-q1-2022 last accessed, 12/11/2022.
[19] Ibid, P. 53.
[20] See M Oke, O Oshinfowokan & O Okonoda, Nigeria-China Trade Relations: Projections for National Growth and Development, (2019), Vol. 14 (11) International Journal of Business and Management, p. 78.

are also trade between nations, an example of this is the trade involvement between developed states and the developing ones. As would be expected, the availability of funds is a determinant factor in the obvious inequality in trade relations. Thus, from business partners, Nigeria has moved into the status of debtor-state in its relationship with China. The focus of this study is therefore, to analyze the probable implications of the imbalanced trade between Nigeria, representing the developing nations and China, being the super power. This is to reach a conclusion of whether the bilateral relations is capable of leading the developing state to a state of economic prosperity or whether it is merely mortgaging its sovereignty at its own prejudice.

It is also seen that the investment relationship between Nigeria and China includes unequal trade balance with China recording a positive trade index by exporting more goods into Nigeria while Nigeria's trade index is negative as Nigeria receives more imports from China, it is therefore, apt to say that the investment relationship between Nigeria and China is not that of two world powers but two business partners who have unequal bargaining rights.

1.3 Aim of the Study

The study aims to examine the impact of foreign investment between developing states and the developed states as to determine whether such relationships are in the interests of the sovereignty of developing nations or otherwise, this is achieved by conducting an examination of the bilateral investment relationship between Nigeria and China.

1.4 Research Objectives

The objectives of this study are *inter alia*,

i. To examine the challenges which are posed to the Nigerian sovereignty by Nigeria's trade involvement with china.

ii. To examine the relationship between the effective performance of host state and the improved level of foreign direct investment.

iii. To expose the various problems which discourage foreign investments from being sited in developing economies.

iv. To examine whether the trade agreements between Nigeria and China are in the interests of Nigeria.

1.5 Research Questions

i. What are the challenges posed by the China-Nigeria Bilateral trade relations to the Nigerian economic sovereignty?

ii. How could effective performance of host countries' duties to foreign investors attract foreign direct investment?

iii. What are the various problems which discourages foreign investments from being sited in developing economies?

iv. To what extent are the trade agreements between Nigeria and China in the interests of Nigeria?

1.6 Research Method and Methodology

The method adopted in this study the qualitative method, incorporating the analysis of secondary data and archival study which will involve the analysis of primary and secondary sources. The study is largely a library-oriented research. To some extent, the research also employs a comparative methodology of legal position on the subject matter in some developing countries other than Nigeria. The materials consulted for this study comprise:

a. Primary authorities which include international treaties, domestic laws of states and case laws, both in international and domestic law

b. Secondary authorities, which comprise relevant materials and opinions from authors as expressed in textbooks and journal articles on the area of law in context.

1.7 Scope of the Study

This study evaluates available international investment law and how it affects the right of state to regulate its internal affairs without external interference. The study further appraises the limitations of the state sovereignty as a signatory to the international treaties regulating international investment law.

Importantly, the study examines the business relationship between Nigeria and China and draws conclusion as to how the bilateral business relationship is capable of affecting the sovereignty of the Nigerian state, this is done to create an inductive conclusion on the business relationship between developed states and developing states.

1.8 Significance of the Study

The essence of this study is centered on emerging countries, which rely heavily on foreign investment to guarantee economic stability. The argument is that by locating a foreign enterprise in a state, the commerce becomes international, involving involvement across state borders and governments.

This study, therefore, constitutes a guide to policy makers in the process of determining the suitable status of investment within its territories. Further, this study contributes to the knowledge of investment law by analyzing investment policies and BIT models which is most suitable for developing states to adopt while retaining its sovereignty within the modern sense of the concept.

1.9 Limitation of the Study

One of the sources relied on in this study is reports of arbitral proceedings which are the most suitable means of resolving international investment disputes. However, some of these proceedings are conducted with confidentiality and as such, the researcher is limited to only the few arbitral proceedings which are reported.

Also, the study focuses on developing countries, it is therefore, impossible to analyze all developing states in a single study and on all the divisions of the study. Thus, the research is limited to conduct an inductive conclusion using the relationship between Nigeria and China.

1.10 Operational Definition of Terms

Territorial Sovereignty. As codified in the Montevideo Convention on the Rights and Duties of States "[t]he jurisdiction of states within the limits of national territory applies to all the inhabitants".[21]

Portfolio Investment. An 'investment in debt and equity securities that is intended only for financial gains and that does not signify a lasting interest in or control over an enterprise'.[22] Here the purchase of bonds, or debt securities, which have little if any physical manifestation on host state territory, may qualify as investments; but it is generally accepted that the investor takes on any risk involved in the making of such a transaction.[23]

Foreign Direct Investment. Foreign direct investment occurs when an investor who resides in his parent country and owns assets in another nation, the host country, with the intention of managing these assets.

Bilateralism. Bilateralism simply connotes interactions (whether economic, political or cultural,) occurring between two countries with sovereignty. This form of interaction is distinct from multilateral or unilateral subjects.[24] Often, economic/trade interest is the common denominator for countries entering into bilateral relations, although these interests might shift to other political and socio-cultural concerns over time. Nevertheless,

[21] See Article 9, Montevideo Convention, 1933.
[22] N.M Al-Adba, The Limitation of State Sovereignty in Hosting Foreign Investments and The Role of Investor-State Arbitration to Rebalance the Investment Relationship (Unpublished), a PhD Thesis Submitted to the University of Manchester, 2014 P. 28
[23] Ibid; Van Duzer, J.A, Simons P & Mayeda G, Integrating Sustainable Development Into International Investment Agreements – A Guide for Developing Country Negotiator (Commonwealth Secretariat), 2013, 57
[24] A Thompson, Multilateralism, bilateralism and regime design, (OH: US. Department of Political Science, 2013), pp. 1-44.

for the purpose of this intellectual piece, bilateralism refers to economic relations between Nigeria and China.

1.11 Chapterization

This study is delineated into five chapters as follows:Chapter one introduces the work and embodies the introduction, background to the study, statement of problem, aims and objectives, research questions, research methodology, significance of the study, definition of terms and the structure of the study.

Chapter two is the literature review of the research, it begins with an introduction, examines the nature of available literature, highlights the conceptual framework, the concept of foreign investment, forms of foreign investment, parties to foreign investment, the doctrine of sovereignty, origin of sovereignty, scope of state sovereignty in international law, political sovereignty, economic sovereignty, territorial Integrity, conclusion

Chapter three is titled the regulatory framework for the operation of international investment. It begins with an introduction, examines the host state domestic regulatory framework and discusses the regulatory rights of host states over investment within its jurisdiction, expropriation and nationalization rights of host states over international investment, limitation to states right of expropriation. It proceeds to examine the nature of international investment treaties, touching bilateral and regional investment treaties and investor-state concession contracts. It also examines the status of domestic laws of host states in international investment touching the regulatory rights of host states over investment within its jurisdiction, expropriation rights of host states over international

investment, impacts of economic sovereign decisions of host states on international investment and impacts of political environment of host states on international investment. It also examines the organs of state involved in the regulation of international investment considering the executive, the legislature and the judiciary. It ends with a conclusion.

Chapter four is titled the Nigeria-china bilateral trade relationship. It begins with an Introduction, History of the Niger-China Relationship**.** It further considers the nature of the Nigeria-china investment relationship**,** export and import trade between Nigeria and china**,** foreign direct investment, china's investment in Nigeria's energy, oil and gas, china's investment in Nigeria's railway transport sector, china's investment in Nigeria's agricultural sector, Chinese aid in Nigeria and assessment of the Nigeria-china investment relationship. It also examines the nature of the investment regulatory framework between Nigeria and china, protection of the investment, settlement of disputes, and the impact of the China-Nigeria investment relationship on the Nigerian and ends with Conclusion

Chapter five involves the summary, conclusion and recommendations of the study.

CHAPTER TWO

LITERATURE REVIEW

2.0 Introduction

The pre-occupation of this chapter is to consider the issues surrounding the development of investment in international law in order to substantiate the themes of this study and develop a framework for the study of the investment relationship between Nigeria and China.

2.1 Nature of Available Literature

The major materials forming the discourse in this study are products of research and guidelines released by international organizations although, the study incorporates literature from works undertaken by scholars in theses and journals.

2.2 Conceptual Framework

This section provides an exposition on the key concepts in the subject of study, this section exposes the following concepts:

i. Foreign Investment

ii. State Sovereignty

2.3 The Concept of Foreign Investment

Like many terms in our jurisprudence, there is no single definition of what constitutes foreign investment, hence, this discourse may use more of 'international investment' to describe the concept of foreign investment since many of the available materials used the term international investment interchangeably with foreign investment.[25] According to Juillard and Carreau, the absence of a common legal definition is due to the fact that the meaning of the term 'investment' varies according to the object and purpose of different investment instruments which contain it.[26] Meanwhile, Yannaka-Small while exploring the available definitions on this topic stated that customary international law and earlier international agreements did not use the notion of investment to describe this concept but used the notion of foreign property dealing in a similar manner with imported capital and property of long-resident foreign nationals.[27]

Etymologically, the term international investment may be explained by defining investment and fixing same into the international context. Most of the available definitions on investment were extracted from the existing International Investment Agreements (IIAs) .The *United Nations Conference on Trade and Development* defines

[25] C Yannaca-Small, International Investment Law: Understanding Concepts and Tracking Innovations, OECD, 2008, P. 46; Although, the author made use of "foreign Investment" to interchange International Investment.
[26] D Carreau, P Juillard & Droit, *International Economique* (3rd ed., Dalloz, Paris, 2007), p. 403.
[27] C Yannakka-Small, *Arbitration under International Investment Agreements: A Guide to the Key Issues*, (2nd ed., Oxford University Press, 2018), p. 7.

investment in three ways, that is; (a) Broad Asset-based definition (b) Enterprise-based and transaction-based and; (c) Development based.[28]

2.3.1 The Broad Asset-Based Definition

International Investment Agreements (IIAs) that adopt an asset-based approach to the definition of investment typically provide that investment means "every kind of asset" and contain an illustrative list of assets that normally comprises (1) movable and immovable property and other property rights such as mortgages, liens and pledges; (2) shares, stock and debentures and any other kind of participation in companies; (3) claims to money and titles to performance having a financial value; (4) intellectual property rights; and (5) concessions conferred by law or under contract. For example, Article 4 (c) of the *Association of Southeast Asian Nations (ASEAN)*[29] *Agreement for the Promotion and Protection of Investments* provides:

> The term 'investment' shall mean every kind of asset and in particular shall include, though not exclusively: a) movable and immovable property and any other property rights such as mortgages, liens and pledges; b) shares, stocks and debentures of companies or interests in the property of such companies; c) claims to money or to any performance under contract having a financial value; d) intellectual property rights and goodwill; e) business concessions

[28] See the United Nations Conference on Trade and Development Series on Issues in International Investment Agreements II, New York and Geneva, 2011, P. 112

[29] The Member States of the ASEAN comprise The Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam.

> conferred by law or under contract, including concessions to search for, cultivate, extract, or exploit natural resources."

The asset-based definition does not require that an investor have a controlling interest in companies and includes both debt and equity interests. It thus covers both portfolio and direct investment.[30] Moreover, the inclusion of various kinds of property and property rights shows that the term "investment", as defined in this asset-based approach, is also broader in scope than the term "capital", which is usually understood to refer to productive capacity.[31]

2.3.2 Enterprise-based and transaction-based definitions of investment

An enterprise-based definition of investment focuses on foreign investment as the establishment of a new enterprise, or the acquisition of a controlling interest in an existing enterprise, in the territory of another State. This approach was exemplified by the definition of investment in the *United State-Mexico-Canada Agreement, 2020*[32]

> a) the establishment of a new business enterprise, or b) the acquisition of a business enterprise; and includes: c) as carried on, the new business enterprise so established or the business enterprise so acquired, and controlled by the

[30] See the United Nations Conference on Trade and Development, Key Terms and Concepts in IIAs: A Glossary, UNCTAD Series on Issues in International Investment Agreements. New York and Geneva, 2004, P. 93

[31] Ibid.

[32] The United State-Mexico-Canada Agreement came into effect on 1st July, 2020 and by the Preamble repeals and replaces the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement to support mutually beneficial trade leading to freer, fairer markets, and to robust economic growth in the region;

> investor who has made the investment; and d) the share or other investment interest in such business enterprise owned by the investor provided that such business enterprise continues to be controlled by such investor.

The enterprise-based definition as seen above emphasizes the notion of "enterprise control" and whether the control is exercised directly or indirectly unlike the asset-based where there is no requirement of control of such asset.

In furtherance of the enterprise-based definition, article 14 of the *United State-Mexico-Canada Agreement, 2020* defines investment to mean every asset that an investor owns or controls, directly or indirectly; that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

Generally, an investment may then include: (a) an enterprise; (b) shares, stock and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to a Party's law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as liens, mortgages, pledges, and leases.[33]

[33] United Nations Conference on Trade and Development, Key Terms and Concepts in IIAs: A Glossary, UNCTAD Series on Issues in International Investment Agreements. New York and Geneva, 2004, P. 93.

The definition of investment here combines the second approach of the asset-based model and the modern version of the enterprise-based model, making it quite different from any traditional model. Besides requiring the assets to be investment-natured and a general description to the forms of assets, there is almost no other limitation to the assets that are formed into. It also incorporates futures, options, and other derivatives which are purely assets of indirect investment.

In the whole, an international investment in whatever way it is defined has certain features, some of these features were developed by The International Centre for Settlement of Investment Disputes (ICSID) while exercising its jurisdiction under Article 25 (1) of the *International Centre for Settlement of Investment Disputes Convention*. The tribunals have developed certain basic features that an asset should possess to qualify as an investment. The implications of ICSID jurisprudence on Article 25(1) are that certain basic features of an investment have been developed. Countries that are parties to the ICSID Convention cannot easily deviate from these basic features of an investment in their respective Bilateral Investment Treaties (BITs).[34] It is important to keep in mind that there is no system of precedent in ICSID and the interpretations made by the tribunals are not binding on future tribunals. Nevertheless, the tribunals' interpretations are important as they constitute an important body of judicial decisions for new tribunals to refer to.[35]

Investment in the international law may be direct investment and may be indirect such as portfolio. In *Fedax v. Venezuela,*[36] a case involving promissory notes arising out of the

[34] P. Ranjan, Definition of Investment in Bilateral Investment Treaties of South Asian Countries and Regulatory Discretion Definition of Investment in Bilateral Investment Treaties of South Asian Countries and Regulatory Discretion, (2009), Vol. 26 (2), Journal of International Arbitration, P. 220.
[35] Ibid, p. 221
[36] *Fedax v. Venezuela, July 11, 1997, 37 I.L.M. 1378 (1998)* [hereinafter called "Fedax"]

Netherlands-Venezuela BIT. Holders of the promissory notes who were not entitled to any investment protection transferred the notes to a company of a country (Netherlands) which had a BIT with the host country (Venezuela). This entitled the new promissory note holders to enjoy treaty protection. The issue in *Fedax* was therefore, whether promissory notes are investments or not. Venezuela argued that since there was no direct foreign investment and the notes did not involve a long-term flow of capital resources, there was no foreign investment. The tribunal rejected Venezuela's argument and held that for an asset to fall under the category of foreign investment, it is immaterial whether the foreign investment is direct or indirect. This has a policy implication for countries as it brings portfolio investment within the ambit of investment.

It has also been argued that the basic features of an investment involve certain duration and regularity of profit and return which has a substantial commitment and significance for the development of the capital importing country and an assumption of risk by the investor.[37] A similar approach was adopted in *CSOB v. Slovakia,*[38] where the tribunal found that if by setting up an undertaking, a significant contribution to the economic development of the host nation is involved; the undertaking would qualify as an investment. From the ICSID jurisprudence, one can safely state that the following have been found to fall under the category of investment; contractual corporate governance rights, construction contracts, shares in companies, and public concession agreements.[39] None of these assets involve foreign direct investment.

[37] M. Hwang & J.F.L Cheng, Definition of ''Investment''—A Voice from the Eye of the Storm, (2011), Asian Journal of International Law, p. 101.
[38] *CSOB v. Slovak Republic, May 24, 1999, 14 ICSID Rev. 251 (1999)*
[39] P. Ranjan, op. cit., p. 223

However, arguably, speculative portfolio investments for a short duration do not satisfy the basic features of investment and hence are not investments under Article 25(1) of the *ICSID Convention*. Further, if a host country can show that a portfolio investment is speculative and it does not contribute to the host country's development, then such portfolio investment will not qualify as investment under Article 25(1).

2.4 Forms of foreign investment

International investments can be divided into two principal categories: (i) the Foreign Direct Investment (FDI) and (ii) the Portfolio Investment.[40]

2.4.1 Foreign Direct Investment (FDI)

According to a report on trade and foreign direct investment published by the Secretariat of the World Trade Organization (WTO) in 1996,[41] foreign direct investment is a situation in which an investor residing in its parent country (investor-state) owns assets in another country (the host-state) and aims to manage these assets.

Foreign direct investment may be distinguished from portfolio investment by the difference in management, which concentrates on overseas stocks, bonds, and other financial instruments. According to the research, there are three major categories of foreign direct investment: a) equity capital; b) earnings reinvested; c) other capital (i.e., short or long-term borrowing and lending of cash between the Multi-National Company and its affiliates).

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[40] N.M Al-Adba, The Limitation of State Sovereignty in Hosting Foreign Investments and The Role of Investor-State Arbitration to Rebalance the Investment Relationship (Unpublished), a PhD Thesis Submitted to the University of Manchester, 2014, P. 28.

[41] Cited in L Hai-Qing, Relationship between Trade and Foreign Direct Investment and the Implications for the WTO (Unpublished) Thesis submitted in partial Fulfillment of the Masters of Law (LLM) to the University of Toronto, 2001, P. 42.

Foreign direct investment occurs when a resident enterprise direct investor develops a long-term stake in a direct investment enterprise based in another economy, according to the Benchmark Definition of Foreign Direct Investment (BMD4).[42] A long-term relationship between a direct investor and a direct investment firm is what lasting interest in an FDI entails. Furthermore, this link has a significant impact on business management. Owning 10% or more of the voting power of a direct investment firm, whether directly or indirectly, can be considered to be the requirement for an FDI venture.

However, by the OECD, the threshold which a foreign investor is required to have in a foreign direct venture is strictly dictated host states' requirement, this is binding on states who are members of the OECD.[43]

The International Monetary Fund's Balance of Payments and International Investment Position Manual defines direct investment as a type of cross-border investment in which a resident of one economy has control or a significant degree of influence over the management of a resident of another economy.

Finally, the United Nations Conference on Trade and Development (UNCTAD) 1999 defines FDI as an investment involving a long-term relationship and reflecting a long-term interest and control of a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (that is, it may mean the FDI enterprise, affiliate enterprise, or foreign affiliate).

[42] OECD Benchmark Definition of Foreign Direct Investment (2008), available at www. oecd.org, last accessed, 18/12/2022, P. 48.
[43] Ibid.

2.4.2 Portfolio

'Portfolio Investment' depicts that the foreign investor does not own any physical undertaking in the host state, rather, the investor only has interests in debt and equity securities for the purpose of receiving gains in terms of return on investment but does meet up with the requirement of having a lasting interest as against the FDI, in essence, the investor is not in control of an enterprise'.[44] Here, the purchase of bonds or debt securities have little or no physical manifestation in host state territory. These commitments may qualify as investments; but it is generally accepted that the investor takes on any risk involved in the making of such a transaction and not regulated by most of the available IIAs and BITs.[45] This depicts that the investor is not entitled to institute a legal action in any case that he loses against the domestic stock exchange, he cannot also sue the public body that issued the bond.[46]

Al-Adba explains that there is no remedy to the investor for losses incurred in the trading of foreign shares, bonds or other financial instruments.[47] Arguably, the major differences between the FDI and Portfolio is that the investor merely receives financial return for the undertaking of his risk.

2.4.3 Parties to foreign investment

[44] Al-Adba N.M (2014), The Limitation of State Sovereignty in Hosting Foreign Investments and The Role of Investor-State Arbitration to Rebalance the Investment Relationship (Unpublished), a PhD Thesis Submitted to the University of Manchester, p. 28 available at <research.manchester.ac.uk/en/studentTheses/the-limitation-of-state-sovereignty-in-hosting-foreign-investment> last accessed on 22/2/2023.
[45] Ibid; Van Duzer J.A, Simons P & Mayeda G (2013), *Integrating Sustainable Development Into International Investment Agreements – A Guide for Developing Country Negotiator* (Commonwealth Secretariat), 57
[46] Ibid.
[47] Ibid.

Foreign Investment are usually recognized by certain agreements known as the International Investment Agreements (IIAs), the available Bilateral Investment Treaties (BITs) and the Concession Agreements. These treaties generally stipulate the duties and rights of parties, the parties in a foreign investment are the investor; the host state and the investor-state. The parties and their characteristics are discussed in the succeeding sections of this chapter.

2.4.3.1 The investor in foreign investment

The investor in a foreign investment occupies a very important position as he is the owner of the said investment in whom the investment begins and ends with, he provides the investment capital and manages same, the investor here, may be an artificial person or an entity of shareholders who provide the investment capital and are responsible for the management of the investment.

In most of the BITs and IIAs, the investor is always regarded as a citizen of a state being party to the treaty to which the host state is also a part. For instance, Article 4(d) of the *Association of South East Asian Nations Comprehensive Investment Agreement, 2009* provides:

> "investor" means a natural person of a member state or a juridical person of a member state that is making, or has made an investment in the territory of any other member state.

Summarily, an investor in a foreign investment is a foreign national (juridical, natural or artificial person), not being a national of the host state. It will be stressed that the

nationality of the foreign investor is part of the factors that determine the body of laws or treaties that will regulate the foreign business and the jurisdiction of the tribunal (whether local or international) in any case of disputes. In this sense, Article 25(2) of the *ICSID Convention* refers to the foreign investor as:

> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date
>
> also had the nationality of the Contracting State party to the dispute; and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

2.4.3.2 Natural person as an investor

If we say that the natural person who floats an investment in a host state is the investor, this means that the person is treated as one and the same with the investment and as such, the BIT or IIA between the host state and the Investor-state will regulate the relationship between such natural person and the host state as it relates to his investment.[48] Individuals or natural persons are often considered as nationals or investors of a party to an investment agreement if their country of nationality is a party to the relevant BIT or IIA in any dispute.[49] This principle is contained in Article 1 (b) of the *Agreement between the Kingdom of the Netherlands and the Republic of Paraguay on Encouragement and Reciprocal Protection of Investment, 1992* "[T]he term 'nationals' shall comprise with regard to either Contracting Party: (i) natural persons having the nationality of that contracting party…".

In some cases, a criterion of permanent residence has been used either in addition to or as an alternative to nationality.[50] For example, the BITs of Canada define investor as including: "Any natural person possessing the citizenship of or permanently residing in Canada in accordance with its laws…"

Meanwhile, the situation is a bit complex when the said natural person has dual nationality, such as where he holds nationality of the host state and that of the investor-state. The available Customary International Law in deciding the applicable nationality of

[48] Kao C (2011) Definition of Investors and Related Issues in Investment Treaty Arbitration under the Proposed Taiwan-China Bilateral Investment Agreement Contemporary Asia Arbitration Journal, Vol. 4 (2), 179 at 183

[49] See the United Nations Conference on Trade and Development, Key Terms and Concepts in IIAs: A Glossary, UNCTAD Series on Issues in International Investment Agreements. New York and Geneva, 2004, P. 112

[50] Ibid

the investor have been judicially tested and upheld in the *Nottebohm's case*[51] which came before the International Court of Justice (ICJ) in 1955. In this case, Nottebohm emigrated to Guatemala, and later acquired numerous investments there; and on the commencement of the second world war, purported to relinquish his German citizenship; adopting the nationality of neutral Liechtenstein despite never having established a residence there. In 1943, Guatemala classified him not as neutral, but as a German citizen and subsequently classed him as an enemy alien. As a consequence, he was deported to the United States and Guatemala treated his assets as enemy property. Liechtenstein brought an ICJ claim on behalf of Nottebohm against Guatemala after the war, arguing that he should have been regarded as a citizen of non-combatant, neutral Liechtenstein, and not treated as an enemy alien. In a definitive judgment, the ICJ stated that: 'international law leaves it to each State to lay down the rules governing the granting of its own nationality'.

Meanwhile, other principles have been subsequently laid down such as the 'Real and Effective Nationality'[52]. The position is somewhat different under the *Convention for Settlement of International Disputes between States and Nationals of other States, 1965*. By Article 25 (2) (a) of the Convention which has the effect of excluding a person who has a dual citizenship including that of the investor-state from being recognized as a foreign investor, the classical illustration of this principle is seen in the *Champion*

[51] Nottebohm case (*Liechtenstein v Guatemala) I.C.J. 4 Second Phase, Judgment of 6 April 1955* - hereafter cited as 'Nottebohm case'

[52] Which means that nationality was measurable by an individual's circumstances, such as 'habitual residence, his participation in public life, attachment shown by him for a given country and inculcated in his children'. See the Mergé Case, 14 R. International Arbitration Awards Italy-United States Conciliation Commission 1955 236; In the same vein, the ASEAN Agreement for Promotion and Protection of Investments of 1987 defines "natural person" as "any natural person possessing the nationality or citizenship of, or right of permanent residence in the Member State in accordance with its laws, regulations and national policies". On the other hand, a concept like permanent residence can be used not only in addition to a nationality link but also as an alternative; See United Nations Conference on Trade and Development, P. 76

Trading v Egypt,[53] In this case, the complainant's case was against the expropriation of their investment by Egypt (the home state), the ICSID tribunal was faced with whether investors who hold dual nationality of Egypt and the United states of America were to be treated as foreign investors in Egypt which is their father's country of origin despite being born and raised in America, the tribunal having found that they were holding dual citizenship including that of the host state held that the investors could not be treated as foreign investors and that Article 25 (2) (a) of the ICSID *Convention,* was applicable to the case. The court therefore, rejected the "effective link test" which states that the nationality of the investor is the investor's actual place of birth.

2.4.3.3 Artificial entity or company in foreign investment

An artificial entity is a legal entity or corporate organization that can accomplish things on its own and carry out specific obligations through its established organ or guiding mind known as the alter ego of the aforementioned body. In essence, an artificial person can be created by law in the form of a public corporation; in the case of a firm, it can also be founded and registered in accordance with local legislations. In common law jurisdictions, at least, following registration, the company is legally distinct from the shareholders or owners once formed. This is to state that, while a business is not a proper person or human being in the true sense, the law gives it the status of an artificial person and recognizes it as a legal person who may sue and be sued.[54] Thus, the company has a corporate personality. The purport of this is that the liability of the members of the

[53] *Champion Trading Co v Egypt ICSID Case No. ARB/02/9 Decision on Jurisdiction 21 October [2003]*
[54] See the *English Companies Act, Section 15 (2) and (3)*

company is severed from that of the company except in cases of an unlimited company where the liabilities of the members are not limited.[55]

It is important to add at this juncture, that the principle of corporate legal personality stated above is not a new concept and as a matter of fact, had existed in the English jurisprudence from a long time. Corporate Personality depicts according to the Black's Law Dictionary, the legal conception in which a human being or an artificial entity is regarded as a person in law.[56] The principle was introduced in the English case of *Salomon v. Salomon and Co.*[57] where Lord Macnaughten held that a company cannot be treated as the same with the members regardless of whether the profit was going to the same hands as the share and once incorporated; the business does not belong to the subscribers and promoters but the company. In this case, a sole-proprietor incorporated his business and nominated six of his family as shareholders, upon the winding up of the company, the receiver appointed paid all the holders of the unsecured debenture of the company but refused to pay Mr. Salomon whose debenture is secured on the ground that the business is still that of Salomon, upon appeal, the house of lords held that the company is distinct from Salomon and as such cannot be held liable for the expenses of the company. This was also applied in *Lee v. Lee,*[58] where the executive director made himself a staff of the company and also the major shareholder, upon his death, his dependants brought an action for compensation in furtherance of him being a staff of the company, the company refused on the ground that the company still belonged to Mr. Lee,

[55] Ibid, Section 3 (4)
[56] See B.A Garner, The Black's Law Dictionary, (USA: Thompson Reuters West Publishers, 2009). P. 612
[57] (1897) AC 22
[58] (1961) AC 12

the court treated the company and lee as separate persons and so the dependants were entitled to the compensation. This doctrine vests a company with the following status:

a. The power to hold property and hold same distinctly from the members of the company, this was demonstrated in *Macaura v. Nothern Assurance Co.*[59] where it was held that a member of the company has no insurable interest in the property of the company. Also, a company's account is distinct from the account of the operators of the company, in the Nigerian case of *Habib Bank ltd. V. Ochette,*[60] the respondent had a personal account and his company account with the bank, he paid a cheque into his personal account, the bank then posted it into his company account in order to deduct the debt which the company owed to the bank claiming that the company and the personal account were operated by the same person, the company stated the rule of corporate personality that once the company is incorporated, it assumes a separate and distinct personality from its members.

b. Limited Liability of the members, that is, the company becomes liable for civil actions or tortuous liability and criminal liability.

c. The power to sue and be sued in its own name, this was further stated in the rule in *Foss v. Harbottle*[61] where it was held that when the company has a claim, it is only the company itself that can sue for same and not any of its members.

d. The company has a common seal

e. It has perpetual succession in the sense that it is capable of outliving its members.

[59] (1925) AC 619
[60] (2001) 3 NWLR (pt. 699) CA 114
[61] (1843) 2 KB 461

From the background above, it becomes necessary to state that in determining whether a company is an International of foreign investor, the status of the company will generally be looked into rather than the shareholders or operators of the company. However, as shall soon be seen, this general rule accommodates certain exceptions. Meanwhile, regardless of the doctrine of Legal Personality, a State has the exclusive preserve to determine whether to recognize a legal entity without legal personality as an investor. This will largely depend on the applicable municipal legislations of such states and the operating IIAs and BITs. A state may wish to consider whether to include entities without legal personality, branches of enterprises, non-profit entities and government-owned entities. Some IIAs only cover those entities that have legal personality, while others also include those without it.[62]

2.4.3.4 Determinants of the nationality of a company

Whether a legal entity will qualify as a foreign company will definitely depend on a number of facts which include the place of incorporation, the nationality of the controlling shareholders, and the headquarters of the company.[63]

2.4.3.4.1 Place of incorporation

If the doctrine of Legal Personality is to be followed *stricto sensu*, then, the proper way of determining a company's nationality is by looking at the state of incorporation of the

[62] For example, German BITs consistently mention entities "with or without legal personality" in order to protect those German undertakings that operate without adopting a separate legal personality. Some IIAs further specify that the term "investor" also includes branches of legal entities (see, for example, Canada-Jordan BIT (2009), Article 1(j) and 1(t). The Mexico-Singapore BIT, 2009 as well as many others, explicitly covers non-profit organization (Article 1(2) and 1(8). The kinds of activities in which a non-profit entity engages may produce desirable forms of investment, such as a research facility or a hospital. Further, non-profit entities often acquire shares in commercial enterprises in order to earn revenue to support their charitable or educational activities. In that capacity, non-profit entities are likely to act in the same way as any other portfolio investor and their distinct status as non-profit entities would seem of little significance.

[63] Al-Adba, Op. Cit. Pp. 47-53

company, this implies that the company is treated as a person on its own regardless of its shareholders. As a matter of fact, Sornarajah[64] describes this criterion as the prevalent theory of determining the nationality of legal entities. This criterion is adopted by the available jus gentum (customary international law) in determining the nationality of legal persons. Article 9 of the United Nations Draft Articles on Diplomatic Protection additionally states that "the state of nationality of a corporation means the State under whose law the corporation was incorporated."

This principle was espoused in *Tokios Tokeles v Ukraine case*[65], the question here was whether a company registered in Lithuania is a foreign investor in Ukraine given that overwhelming majority of its shareholders are Ukrainian, it was on this ground that Ukraine challenged the jurisdiction of the tribunal. The substantive issue was a complaint that Ukraine violated the operative BIT between Ukraine and Lithuania and the company was registered under Lithuanian law, Ukraine then argued that since majority of the shares were owned by Ukraine nationals. However, the tribunal decided the case on the basis of the company's nationality since the company is the claimant and in fact, the investor, the tribunal discountenanced the issue of whether the owners were nationals of the host state since the company is a different person in law, 'claimant is a thing of real legal existence that was founded on a secure basis in the territory of Lithuania'.[66]

Al-Adba puts the essence of this approach succinctly as follows:

[64] Sornarjah M (1986) The Pursuit of Nationalized Property, Martinus Nijhoff Publishers, P. 8-9
[65] Tokios Tokeles v Ukraine, ICSID Case No. ARB/02/18 Decision on Jurisdiction 29 April [2004]
[66] The ICSID tribunal in Wena Hotels v Egypt ICSID Case No. ARB/98/4 Decision on Jurisdiction 25 May (1999) Reported in 41 I.L.M. 881 886–889 (2002) held that a company incorporated in the United Kingdom could bring a case against Egypt for violation of the UK-Egyptian BIT, even though the British company was owned and controlled by an individual who was an Egyptian national.

> The 'incorporation test' appears simple in its utility. A joint venture company may be established on the territory and in accordance with the law of the host state. The nationality of that 'legal person', formed in the mixing of foreign and domestic investment, can be determined by looking to the state in which it is incorporated, largely through the examination of its memorandum of association or other such evidence. International investment protection can then be claimed by invocation of the appropriate BIT agreed between the incorporation home state and that of the host.[67]

According to the UNCTAD Series on Issues in International Investment Agreements II:[68]

> …the advantage of using the country-of-organization test is ease of application, as there usually will not be any doubt concerning the country under whose law a company is organized. Further, the country-of-organization is not easily changed, meaning that the nationality of the investor usually will be permanent under this approach. Because an important purpose of some investment agreements is to attract investment by providing a stable investment regime and because changes in the nationality of an investor will result in the loss of treaty protection for investment owned by the investor, a definition of "investor" that stabilizes the

[67] See Al-Adba, Op. Cit. P. 48
[68] Op. cit. Pp. 81-82

> nationality of the investor and thus the protection afforded to investment is particularly consistent with the purposes of IIAs…

Meanwhile, the disadvantage of using country-of-organization is that the link between the investor and its country of nationality may be insignificant. Under this test, a company may claim the nationality of a particular country even though no nationals of that country participate in the ownership or management of the company and even though the company engages in no activity in that country. In effect, the company could claim the benefits of nationality of a particular country, including protection under the treaties of that country, despite the fact that it conferred no economic benefit of any kind on that country.[69]

2.4.3.4.2 Nationality of controlling shareholders

The origin of this criterion is based on the determination of whether a company is of enemy character as it showed after the World War I.[70] The country of ownership or control criterion means that a legal entity will be considered an investor of a State whose nationals own or control it. This test may be the most difficult to ascertain and the least permanent, particularly in the case of companies whose stock is traded on major stock exchanges. Its principal benefit as a test is that it links coverage by an agreement with a genuine economic link. Perhaps for these reasons, the ownership or control test sometimes is used in conjunction with one of the other tests. Combining the criteria in this way lends a degree of certainty and permanence to the test of nationality, while also ensuring that treaty coverage and economic benefit are linked. The control test is of great

[69] Ibid.
[70] Al-Adba Op. Cit.

relevance when dealing with issues of multiple claims by discrete members of a corporate group and also as a means of controlling treaty shopping. Also, this principle becomes applicable where the company is not carrying out substantial business in its state of incorporation; in this case, the state of the controlling shareholders will be looked into.[71]

2.4.3.4.3 Headquarters of the company or seige theory

The BIT or IIA may specify that the seat of operation of a company be made to determine the nationality of such company, an example of a treaty using this test as the basis for attributing nationality is the 2005 German model BIT. That treaty defines "company" in Article 1(3) (a) to include in respect of Germany "any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany".[72] The seat of a company may not be as easy to determine as the country of organization, but it does reflect a more significant economic relationship between the company and the country of nationality. Generally speaking, "seat of a company" connotes the place where effective management takes place. The seat is also likely to be relatively permanent as well. To strengthen the country-of-seat test further and avoid granting protection to "mail-box" companies, some IIAs provide that to be eligible as an investor of a contracting party, a legal entity must carry out "real economic activities in the territory of that party.[73]

2.5 Doctrine of sovereignty

[71] See Article 9 of Draft Articles on Diplomatic Protection

[72] Article 1(2) of the China-Portugal BIT brings together elements of the incorporation and siege social tests, it states that in respect of Portuguese nationality, an 'investor' is deemed to mean 'legal entities, including companies, associations, partnerships and other organizations, incorporated or constituted under its laws and regulations and have their seats in Portugal'

[73] See the Colombia-Switzerland BIT, 2006, Article 1(2) (b); Canada-Jordan BIT, 2009, Article 1(k)

Most of the available authors who have written on this subject agree that the concept of sovereignty is one of the most complex in political science,[74] with many definitions, some totally contradictory.[75] Usually, sovereignty is defined in one of two ways. The first definition applies to supreme public power, which has the right and, in theory, the capacity to impose its authority in the last instance. The second definition refers to the holder of legitimate power, who is recognized to have authority.[76] The context of this study is concerned with national sovereignty and as such, it is apt to subscribe the first description above.

Sovereignty is defined in international law as a state's independence from any other authority in both international and domestic relations. This includes the state's external independence and autonomy, as well as its internal independence. Furthermore, a sovereign state is not bound by anything other than the other nations' sovereign rights, basic international law, and voluntarily accepted international obligations[77]. Stankiewicz[78] while attempting an expansive description of the concept cites Chatterjee as follows:

> …sovereignty means omnipotence. The term omnipotence means all powerful. The sovereign, who is the head of the State…can do or undo anything within its territorial jurisdiction and sovereign is the "law-maker" who has the

[74]J Maritain, The Concept of Sovereignty, The American Political Science Review, (1950), Vol. 44 (2), Pp. 343-357; J Bartelson, The Concept of Sovereignty Revisited, The European Journal of International Law, (2006), Vol. 17 (2), P.467

[75]See A de-Benoist, What is Sovereignty?, (Unpublished, 30 March 2000) available at http://www.alaindebenoist.com/pdf/what_is_sovereignty.pdf, last accessed on 12 December, (2022.) P. 99

[76] Ibid.

[77] V Kosco, *Sovereignty: Analysis of its Current Issues in Certain Countries,* (Letrik, 2016), p. 29.

[78] W Stankiewicz, A Rigid View of Sovereignty in International Diplomacy, Polish Political Science, (2010), VOL. XXXIX, p. 276

> opportunity to opt to be accountable towards the citizens, depending on the system of the State (whether democratic or not). Sovereign…also has the authority to dominate internal matters including "fiscal matters". Moreover, sovereign has the authority extended to include its territorial waters and airspaces. sovereigns have the sole appreciation as to whom they will engage into diplomatic relations and can also terminate the relations as they wish… sovereign has the power to decide whether to foster foreign investment in their country or not and sovereign also has the authority to dominate foreign and trade policy of the State…[79]

The right and power of a state to make authoritative decisions over its territory without being subject to any higher authority is defined as state sovereignty. It is often carried out by the government, which is defined as a "constitutionally recognized body acting on behalf of the state." Sovereignty grants control over the development of political, economic, social, and cultural systems, as well as formulation of foreign policy.

Theoretically, Jean Bodin (1520-1596) in his book, *La Republique,*[80] published in 1576 gave an exposition into what is meant by the modern concept of Sovereignty. Meanwhile, Bodin did not invent sovereignty, but he was the first to make a conceptual analysis of it and to propose a systematic formulation. In La République, Bodin used the word

[79] Ibid.
[80] J Bodin, The Six Books of a Commonweale, a facsimile reprint of the English translation of 1606, corrected and supplemented in the light of a new comparison with the French and Latin texts, edited with an Introduction by Kenneth Douglas McRae, Cambridge: Harvard University Press, 1962.

majestas (sovereignty) to mean the prerogative of authority, being itself one of the presuppositions of politics.[81] Like the majority of the authors of his time, he asserts that a government is strong only when it is legitimate, and he emphasizes the fact that a government's actions always should be in accord with certain norms, which are determined by justice and reason[82]. Nevertheless, he understands that such considerations do not suffice to clarify the idea of sovereign power. Thus, he asserts that the source of power lies in the law, and that the capacity to make and break laws belongs only to the sovereign: the powers to legislate and to rule are identical.[83]

De Benoist[84] stated that the conclusion Bodin reaches is radical: since the prince is not subject to his own decisions or decrees, he is above the law. Bodin writes that those who are sovereign must not be subject to the authority of anyone else. This is why the law says that the prince must be excluded from the power of law. The law of the prince depends exclusively upon his pure and sincere will.[85]

Meanwhile, in the opinion of Laski, sovereignty relates to a means of organizing power and it is an incident in the evolution of power.[86] Giving a utilitarian perspective, he states that the most important aspect in the nature of power is the end that it seeks to serve, which should be the promotion of the interests of its citizens.[87] Viewing State as a moral entity,[88] he thinks that the government's legitimacy is dependent on the conditions it creates for its citizens to achieve the best in themselves and advance their interests.

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[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Op. Cit. P. 101
[85] Op. Cit.
[86] L J Laski, *The Grammar of Politics*, (4th ed. London: George Allen and Unwin Ltd, 1938), p. 48-49.
[87]Ibid, P. 45
[88]Ibid, P. 62

According to Laski, the law sets a moral restraint on the State's power and authority, and its most significant component is that it should embody the will of the people. Furthermore, Laski, like a real pluralist, thinks that the State is just like any other association with a clearly defined domain of authority and duty, which is to exert influence on the conduct of government itself.[89]

In relating the doctrine of sovereignty to relationship among states, Laski that the traditional form of absolute sovereignty does not exist within the international and external relations. This argument is explained by the growing interdependence among States.

Sovereignty as a concept may also be seen as internal and external in the sense of the ability of as state to control its domestic affairs including the political affairs, local economy and other domestic affairs of the state without the intervention of any imperialist or supranatural power, to this end, sovereignty is the most important feature of a state. It is submitted that the external sovereignty in the conception of Krasner[90] was referred to as International Legal Sovereignty and Westaphalia Sovereignty.[91] He describes the international legal sovereignty as the relations between the mutually recognized "territorial entities which have formal juridical independence". Westphalian sovereignty, according to Krasner, is based on the political entity which outlaws foreign components from the ruling mechanism over a certain territory.

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[89]Ibid.

[90] S.D Krasner, *Sovereignty: Organised Hypocrisy*, (Princeton University, New Jersey, 1999), p. 4–5

[91] According to Howland, Contemporary international law of sovereignty can be traced back to the treaties of Westphalia in 1648, 148 when the major European powers of the time, after a protracted and expensive series of wars, gathered in Germany to agree to respect the territorial integrity of signatory nations. See D Howland and L White, *The State of Sovereignty: Territories, Laws, Populations*, (Indiana University Press, 2009), P. 3; See also M.N Shaw, International Law, (6th ed., New York: Cambridge University Press, 2008).

2.5.1 Origin of sovereignty

According to Stankiewicz,[92] sovereignty can be best understood more precisely only through its history. It is vital to note that there was an evolution towards a European continent which took the form of a movement which later metamorphosed into a globe of sovereign states. It will be stated although, by 1300, Britain and France looked like sovereign states because their kings possessed supremacy within their bounded territories, however, that the *Treaty of Westaphalia, 1648* is the first prominent attempt at international law to pronounce the concept of sovereignty in states after the inability of the *Treaty of Ausburg, 1555* to prevent the outbreak of war.[93] Article 4 of the *Treaty of Westphalia* lays the foundation for the concept of sovereignty in international law by providing that independent empires in Europe have the right to make their own regulations and possess sovereignty.

By the *Treaty of Westaphalia*, states emerged as the sole form of substantial constitutional authority in Europe, because their authority was no longer seriously challenged by the Holy Roman Empire and also the temporal powers of the Church were also curtailed to the point that they no longer challenged the state sovereignty, in response to that Pope Innocent X condemned the treaties of the people as null, invalid, unjust, damnable, reprobate, inane, empty of meaning and effect for all.[94] Also, Westphalia ended the intervention in matters of religion up to the most commonly practiced abridgement of sovereign prerogatives, it effectively established the authority of princes and kings over religion so that no European state would fight to affect the religious governance of another state. As a result of this it culminated in the decline of

[92] Op. Cit. P. 277
[93] Ibid, p. 278.
[94] Ibid, p. 278.

European colonial empires in the mid-20th century which became the only form of polity over the entire globe.[95]

The porous nature at which the concept of sovereignty is treated led to the various external aggressions in the international community, it is the recognition of this fact that has led to Article 2 (4) of the *United Nations Charter* which prohibit attacks on political independence

and territorial integrity of states, it states as follows:

> all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

2.5.2 Scope of Sovereignty

The scope of sovereignty refers to the aspect of state policy where each sovereign state has the right to determine its own functions, this covers;

i. Territorial integrity of state
ii. Political Sovereignty
iii. Economic Sovereignty

2.5.2.1 Territorial Sovereignty

Upon independence, a state must possess a definite territory which will define the extent of the exercise of its sovereignty, upon the independence of African states for example,

[95] See Stankiewicz, Op. Cit. P. 278

the Organization of African Unity (OAU) adopted the maintenance of colonial borders and insisted on the territorial integrity of such borders[96]. Historically, it would be seen that most of the activities in the Internal space leading to war such as the Concert of Europe, 1st World War and the 2nd World War all had to do with the invasion of the territories of states. Thus, Article 2 (4) of the Charter of the United Nations in conforming to the UN's commitment to protect the United Nations from the scourge of war which had been witnessed twice in our life time provides that all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The principle of territorial integrity protects the sovereign state against all sorts of violations of its territory.[97] It renders illegal acts of direct physical effect in the territory of another state as well as sovereign acts that one state carries out on the territory of another state.[98] The states' territorial sovereignty is protected against forceful as well as non-forceful interventions. Non-forceful illegal interventions that have been relevant in practice include, for example, violations of borders in the attempt to arrest a suspect or state vessels or aircrafts entering into the territorial waters or airspace without permission.[99] More severe and therefore in the center of the political and academic debate are violations of the territory that are carried out by the use of force.

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[96] *Resolution 16 (1) of the Organization of African Unity (OAU) Conference of African Heads of State and Government, 1964.*

[97] P. M Butchard, Territorial integrity, political independence, and consent: the limitations of military assistance on request under the prohibition of force, Journal on the Use of Force and International Law, (2020), Vol. 7 (1), p. 37.

[98] Ibid, p. 36

[99] C Marxsen, Territorial Integrity in International Law – Its Concept and Implications for Crimea, Heidelberg Journal of International Law, (2015), Vol. 75, p. 13.

2.5.2.2 Political Sovereignty

Political Sovereignty on the other hand refers to the power of a state to determine its own governance within its territory and also make decisions within the international community which affects its local organizations, the dimensions of political sovereignty are discussed below.

2.5.2.2.1 Sovereignty and international organizations

In the process of examining the place of sovereignty in the international scene, Laski adopted the League of Nations as his point of examination being an association of Nation-States politically unequal but juridically equal.[100] Further in this forum, the representatives of the States were required to act upon the orders given to them by those from whom their authority was derived.[101] Following an examination of the perspectives of famous scholars on the essence of sovereignty, it would be instructive to investigate its application in the context of international organizations, particularly under the UN Charter.

In political theory, sovereignty is the ultimate supervisor, or authority, in the state's decision-making process and the preservation of order. One of the most contentious topics in political science and international law is the concept of sovereignty, which is intimately tied to the challenging concepts of state and government, as well as independence and democracy. Sovereignty was originally intended to be the counterpart of supreme authority, derived from the Latin term superanus via the French phrase

[100]See Stankiewicz, Op. Cit. P. 278; also M.N Shaw, International Law, (6th ed., New York: Cambridge University Press, 2008). P. 56

[101]Ibid.

souveraineté. However, in reality, it has frequently deviated from this conventional definition.[102]

2.5.2.2.2 Sovereignty and international diplomacy

A fundamental premise of international law is that every state, regardless of size or wealth, has complete and exclusive sovereignty over its territory. Although the idea of sovereignty has had a significant impact on developments within states, it has had the largest impact on interstate relations. The issues here may be traced back to Bodin's 1576 assertion that the sovereign who creates the laws cannot be bound by them (majestas est summa in elves cie subditos legibusque soluta potestas). This remark has frequently been understood to suggest that a sovereign is not accountable to anybody and is not subject to any laws.[103]

A deeper examination of Bodin's texts, however, contradicts this conclusion. He emphasized that a sovereign is bound to observe certain basic rules derived from divine law, natural or rational law, and universal law (jus gentium), as well as the fundamental laws of the state that determine who the sovereign is, and what limits the sovereign power. Thus, Bodin's sovereign was a constitutional sovereign and also bound by the higher law just like every other human being. In fact, Bodin discussed as binding upon states many of those rules that were later woven into the fabric of international law. Nevertheless, his theories have been used as justifying absolutism in the internal political order and anarchy in the international sphere.[104]

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[102] Ibid.
[103] H.K Henrikson, Sovereignty, Diplomacy and Democracy: The Changing Character of International Representation – From State to Self, (2014) Vol. 2 (15) *Comparative Politics*; 7-8.
[104] Ibid.

Hobbes took this idea to its logical conclusion in Leviathan (1651), where the sovereign was equated with power rather than law. The sovereign commands the law, and it cannot restrict his power; royal power is absolute. This circumstance resulted in a constant state of war, with one sovereign attempting to impose his will by force on all other sovereigns. This situation has changed little over time, with sovereign states claiming the right to be judges in their own controversies, to enforce their own conception of their rights through war, to treat their own citizens however they see fit, and to regulate their economic life with complete disregard for possible repercussions in other states.

During the 20th century important restrictions on the freedom of action of states began to appear. The Hague conventions of 1899 and 1907 established detailed rules governing the conduct of wars on land and at sea. The Covenant of the League of Nations, the forerunner of the United Nations (UN), restricted the right to wage war, and the Kellogg-Briand Pact of 1928 condemned recourse to war for the solution of international controversies and its use as an instrument of national policy.[105] They were followed by the Charter of the United Nations, which imposed the duty on member states to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered"[106] and supplemented it with the injunction that all members "shall refrain in their international relations from the threat or use of force." However, the Charter listed as one of the basic principles of the UN "the principle of sovereign equality of all its Members".[107]

[105] See the Pact of Paris, available at <history.state.gov> last accessed, 22/02/2023.
[106] Art 2 (3)UN Charter 1945,
[107] Ibid, art 2 (4).

As a result of such changes, sovereignty was no longer seen synonymous with unrestrained authority. States have embraced a substantial corpus of legislation that limits their sovereign ability to act as they see fit. Those restrictions on sovereignty are typically explained as arising from consent or auto-limitation, but it is easily demonstrated that in some cases, states have been held to be bound by certain rules of international law despite a lack of satisfactory proof that these rules were expressly or implicitly accepted by them. In contrast, new regulations cannot normally be imposed on a state without its approval, notwithstanding the intent of other governments. In this approach, a balance has been struck between the requirements of international society and the desire of governments to safeguard their own interests.

2.5.2.3 Economic sovereignty

Chapter II of the *Charter of Economic Rights and Duties of States*[108]was adopted by the *United Nations General Assembly* in 1974, Article 1 asserts that:

> Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural system in accordance with the will of people, without outside interference, coercion or threat in any form whatsoever

Article 2 further provides that:

[108] *The Charter of Economic Rights and Duties of States: A Resolution adopted by the General Assembly 1974*

> Every State has the right (a) to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment; (b) to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its law, rules and regulations and conform with its economic and social policies. Transnational Corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign right, cooperate with other States in the exercise of the right set forth in this subparagraph.[109]

It will be important to state before a discussion on this section that the forms of absolute sovereignty as seen in the opinion of Jean Bodin where the sovereign cannot be subject to any law is not totally applicable with regards to International Investment.[110] Meanwhile, this is not to say that the State cannot prescribe the kind of foreign investment that comes within its territory, the proper thing is that once a state allows a foreigner to bring his investment, the state must afford such foreigner, such level of permissible protection in accordance with the domestic laws regulating such investment, the BITs and IIAs which

[109] Ibid.
[110] J Bodin, Op. cit, p. 35

the state may have entered with the home state of such foreigner (usually some forms of diplomatic instrument based of reciprocal bilateral or multilateral obligations).[111]

As noted by Al-Adba the state as a party to an investment agreement is in a position of some considerable power to impose conditions that suit its sovereign interests over and above commercial considerations.[112] Such regulations may include domestic laws which lay down certain requirement, for instance, in Nigeria, foreign participation in any undertaking must be registered in accordance with the *Companies and Allied Matters Act,*[113] and other extant laws regulating foreign participation in businesses. It is important to note that the difficulties that may be encountered by foreign investors in developing countries may arise from the stability of state macro-policies which may be in form legislative, economic, and political issues. The incidences of state sovereignty on foreign businesses are treated in this section.

2.5.2.3.1 The Right to Supervise Foreign Undertakings

The fundamental premise that a host state is authorized by virtue of its sovereignty to monitor the investment project and its development does not contradict the foreign investor's right to control the project. Its objective is to guarantee that the foreign investor follows the host country's business rules and regulations. Under the Nigerian law for instance, a foreign company must be registered in Nigeria, the law provides as follows:

> …every foreign company which…was incorporated outside Nigeria, and having the intention of carrying on business in

[111] See for example, Article 2 (2), Preamble, Agreement between the Government of the Peoples' Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investment (China-Nigeria, BIT).
[112] Al-Adba, Op. Cit. P. 59
[113] Section 78, CAMA, 2020

> Nigeria, shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not carry on business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents…[114]

The UN New International Economic Order (NIEO), 2009 emphasizes 'respect' in the pursuit of economic goals by investors, and in host state oversight.[115] Article 4 (d) and (e) of the Resolution expresses that the New international economic order should be founded on full respect for the following principles: (d) the right of every country to adopt the economic and social system that it deems the most appropriate for its own development and not to be subjected to discrimination of any kind as a result; (e) full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation.[116] The forms of regulation

[114] A host state's entitlement to "exercise effective control" over foreign investments includes such activities as registration, licensing, observation and inspection of corporation records, and as such is an overt and obvious expression of state sovereignty over any international investments on its land. See Al-Adba Op. Cit.
[115] Article 4d,*The United Nations Resolution on the New International Economic Order (NIEO), 2009*
[116] Ibid.

and supervision conducted by the host state may be in terms of various subjects such as environmental protection, local content.[117]

2.5.2.3.2 Environmental protection as an offshoot of sovereignty

Environmental degradation is inherent in every industrial production and unless legal checks and balances are imposed on mankind's present activities, future generations may unduly suffer for present generation's reckless environmentally damaging activities.[118] An example of a poorly regulated environmental space is the pre 1988 Nigerian regime, a diplomatic issue which arose therefrom is the Koko incident of 1988.[119] The conservation of the environment has a tremendous influence not only on the investment host country, but also on the international community as a whole. Both authorities and investors are obligated to protect the environment against pollution and other potentially ecologically destructive actions when pursuing their projects, especially considering the link between environmental concerns and public health. Article 19 (3) (b) of *the European Energy Charter Conference (ECT)* defines the concept:

[117] Local Content in this context refers to the power of the state to make laws requiring Multi-national Companies to employ or engage locals of the host state in the execution of business activities.

[118] International treaties addressing environmental issues include inter alia; The Basel Convention on the Control of Trans-boundary Movement of Hazardous Matter and their Disposal; the Bamako Convention on the Trans-shipment of Waste in Africa; the Vienna Convention on the Protection of the Ozone Layer; and the Montreal Protocol on Substances that deplete the Ozone Layer

[119] For years, an Italian importer living in Nigeria, one Gianfranco Raffaelli, had managed to divert ships from their legal destinations to smaller port cities like Koko in Southern Nigeria, where cargo inspections were forgiving or virtually nonexistent. It was Raffaelli who paid off Sunday Nana to dump these items which were actually toxic waste, this exposed neighbors to the toxic waste, which contained PCBs, dimethyl formaldehyde, and asbestos fibers, suffered nausea, paralysis, and premature births. Sunday Nana himself died of throat cancer. Even Nigerian Port Authority workers who helped transport the poison back onto the Italian ship walked away with chemical burns, despite having worn protective suits. This event was embarrassing to Nigeria and led to Nigeria's enactment of laws against toxic waste.

> Environmental impact' means any effect caused by a given activity on the environment, including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interactions among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors.[120]

Meanwhile, it will be stated that environmental protection in international relations supersede every kind of international treaty so long as the measures adopted by states to protect its environment is reasonable as to override the International treaty. The *North American Free Trade Agreement (NAFTA)* in Article 1114 (1) asserts as follows:

> Nothing in this chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measures otherwise inconsistent with this chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

Further, Article 24 (2) of the ECT states that Part III of the Treaty shall not preclude any Contracting Party from adopting or enforcing any measure necessary to protect human, animal or plant life or health. It will also be stated that the environment cannot be

[120] European Energy Charter Conference: Final Act, Energy Charter Treaty, Decisions and Energy Charter Protocol on Energy Efficiency and related Environmental Aspects 16-17 December 1994.

protected by means of local legislations alone and in consequence of this; states have the attitude of establishing agencies to ensure protection of the environment.[121]

2.5.2.3.3 Local content issues in international investment

It is observable that in most developing countries, employment rate is usually a focal point of discussion, it will also be stated that most developing countries have the desire to attract foreign investors as a way of curbing the unemployment problems. One of the ways by which the states may provide both empowerment and employment to its nationals through foreign investment is by exercising its sovereignty towards Local Content to secure the employment of its domestic workforce in manufacturing, operational, technical and managerial roles. This promotes worthwhile goals of training, development and economic and social progress. The use of Local Content Requirements (LCRs) has been growing for a long time and it is used by developed as well as developing countries, they aim to promote the use of local inputs and serve the purpose of fostering domestic industries.

This regulatory approach is more pronounced in the oil sector of countries like Nigeria, for instance, Nigeria has a law known as the *Nigerian Oil and Gas Industry Content Development (Local Content Act) 2010* for the purpose of provides for the development of Nigerian content in the Nigerian oil and gas industry.

Conclusively, international investment and sovereignty is a concept rooted in international commercial law, hence, most of the authorities in this study relate to

[121] For instance, the National Environmental Standards and Regulation Enforcement Agency Act, 2007 established an entity known as the National Environmental Standards and Regulations Enforcement Agency with the enforcement of environmental standards, regulations, rules, laws, policies and guidelines.

international business law. One of the authors who wrote extensively on this topic is Al-Adba who in his thesis explored the concept of foreign investment in relation to sovereignty; the author's pre-occupation is geared towards the determination of the jurisdiction of the arbitration in the inherent disputes. Al-Adba holds the view that international investment may be divided into foreign direct investment and Portfolio investment. Meanwhile, Adba[122] noted as follows:

> Arguably, the major differences between the FDI and Portfolio Investment arise from issues of management and control. An investment can be considered an FDI when the share owned by the investor is sufficient to facilitate control of the company, whereas the mere provision of a financial return for the undertaking of risk is a portfolio investment. This generally relegates the portfolio investment from the realm of protection by international investment law, deeming it to be an ordinary commercial risk of which the investor ought to have been aware; even though it may suffer from the risks resulting from state action. In consequence, international investment law and rules developed in ICSID case law allow portfolio

[122] Op. Cit. P. 29

investments to be protected against non-commercial risks under the principle of state responsibility.[123]

Meanwhile, it cannot be said that exclusion of portfolio from international Investment is a universal principle, it is submitted that whether or not Portfolio Investment will be said to be a part of International Investment will depend on the BIT or IIA between the states concerned, and this is to say that certain BITs and IIAs include the protection of Portfolio. For instance, the United States - Sri Lanka BIT, 1991 provides an example of such investment protection instruments, providing in Article 1(1): (a) 'investment' means every kind of investment in the territory of one party owned or controlled directly or indirectly by nationals or companies of the other party, such as equity, debt, and service and investment contracts; and includes: (i) tangible and intangible property, including rights such as mortgages, liens and pledges; (ii) a company or shares of stock or other interests in a company or interests in the assets thereof; (iii) a claim of money or a claim to performance having economic value, and associated with an investment.

A review of the available authorities also shows that Sovereignty may be absolute as in the opinion of Jean Bodin. De Benoist[124] stated that the conclusion Bodin reaches is radical: since the prince is not subject to his own decisions or decrees, he is above the law. Bodin writes that those who are sovereign must not be subject to the authority of anyone else. This is why the law says that the prince must be excluded from the power of law. The law of the prince depends exclusively upon his pure and sincere will.[125] However, it

[123] The opinion stated above is drawn from the positions of other authors like Alexander Bohmer; see Bohmer A (1998), The Struggle for a Multilateral Agreement on Investment: An Assessment of the Negotiation Process in the OECD (1998) 41 German Yearbook of International Law 267.
[124] Op. Cit. P. 101
[125] Op. Cit.

may not be currently obtainable to find the concept of an absolute sovereignty in International, at the domestic level, it is true that the states do have a total control of its affairs and government, it is also true that the focal point at the level of International Relations is the Sovereignty and territorial integrity of states, this further include the economic and political superiority of states. Meanwhile, in cases of investment disputes, state parties to the ICSID are subject to its jurisdiction. Therefore, a state being a party to a BIT or IIA is subject to the provisions thereof.[126]

This chapter has undertaken an analysis of the concepts of international investment and sovereignty which are considered as the general terms propelling the course of this study. The subsequent chapter builds on these general principles to analyze the regulatory framework for the operation of international investment domiciled in the host states. This is done by conducting an examination of both local and international legal frameworks on investments.

The next chapter therefore, examines the available laws and treaties regulating international investment in order to lay a foundation for the discourse on the regulation of the investment relationship between Nigeria and China.

[126] This is on the basis of the principle of Pacta suct servanda and the application of same has the effect of de-absolutizing the concept of sovereignty. This is in line with the theory of relative sovereignty which provides the essential prerequisites for the co-existence of States within the international community. However, keeping in mind the preponderant western influence in the constitution of the norms of international law, the subjection of sovereignties of states to such norms may amount to erosion of sovereignty of the developing countries.

CHAPTER THREE

REGULATORY FRAMEWORK FOR THE OPERATION OF INTERNATIONAL INVESTMENT

3.0 Introduction

International investment includes portfolio investment and foreign direct investment which may be regulated by the following means:

a. The bilateral treaties between the host states and the investor states

b. The applicable local legislation within the host state

c. Concession Contracts

d. The applicable international investment treaties[127]

On the whole, we can say that international investment is basically regulated by two regimes which are the National Regulatory Framework and the International Regulatory Framework.[128]

3.1 The Host States Domestic Regulatory Framework

At the national level, many host states and especially emerging markets, have special laws and regulations in place that govern International Investment typically complemented by provisions in other laws and regulations (e.g., concerning taxation).[129] The right of a state to control the entry of foreign investment and to exercise jurisdiction on the activity of foreign investors in its territory is firmly established in Customary International Law as an attribute of state sovereignty, or more precisely, its territorial jurisdiction.[130]

This right is only qualified where the host state has entered into treaty commitments that guarantee foreign investors' rights of entry, establishment or a certain treatment, and by general international rules regarding the treatment of aliens.[131]

The legal regime of domestic framework for the control of international investment is usually found in domestic legislation which guide the entry of foreigners, registration of

[127] The international investment law regime also consists of various regional, interregional and partial multilateral agreements (collectively "international investment agreements" -- IIAs). In the absence of a comprehensive multilateral agreement on investment, the international investment law regime today consists therefore of a patchwork of rules, including voluntary instruments, that is multi-layered and multi-faceted. See K. P Sauvant, The regulatory framework for investment: where are we headed? The Future of Foreign Direct Investment and the Multinational Enterprise Research in Global Strategic Management, (Emerald Group Publishing Ltd, 2011), Vol. 15, Pp. 407–433, P. 408.
[128] K. P Sauvant, p. 409.
[129] K. P Sauvant, Op. cit., p. 409
[130] F.I Ibrahim-Shihata, Regulation of Foreign Investment, International Sustainable Development Law, (2008) Vol. II, p. 6
[131] Ibid.

businesses, employment of labour etc. In Nigeria for instance, domestic regulation of foreign business is done by way of local legislation like the Companies and Allied Matters Act, 2020, *Nigerian Investment Promotion Commission Act,*[132] *Foreign Exchange (Monitoring and Miscellaneous) Provisions Act,*[133] *National Office for Technology and Promotion (NOTAP) Act,*[134] *The Immigration Act, 2020.*

3.2 Regulatory Rights of Host States over Investment within its Jurisdiction

It is a truism that foreign nationals are subject to the domestic law of the host State in whose territory they are present.[135] As codified in the *Montevideo Convention, 1933*[136] "[t]he jurisdiction of states within the limits of national territory applies to all the inhabitants".[137] This is a function of the principle of territorial sovereignty of States and the corollary exclusive jurisdiction they have within their own territory, in particular, the right to regulate and choose their own political, social and economic system.[138]

As noted in *France v. Turkey*[139] (popularly called the Lotus case), "restrictions upon the independence of States cannot…be presumed" and further, States have a wide measure of discretion with respect to their territorial jurisdiction and the application of their laws the

[132] CAP N117, Laws of the Federation of Nigeria (LFN), 2004 (formerly Decree 16 of 1995).
[133] CAP F34, LFN, 2004.
[134] CAP N62, LFN, 2004.
[135] See for example, Moloo R & Khachaturian A, (2011), The Compliance with the Law Requirement in International Investment Law, *Fordham International Law Journal*, Vol. 34 (6), P. 1474; See also generally, Yotova R, (2018), Compliance with Domestic Laws: An Implied Condition in Treaties Conferring Rights and Protections on Foreign Nationals and their Property?, UK: University of Cambridge, Faculty of Law, Legal Studies Research Paper Series, Article 1, P. 2; In the same vein, Article 9 of the Montevideo Convention, 1933 makes every person within the territory of a state to be within the jurisdiction of such state.
[136] *Montevideo Convention on the Rights and Duties of States*
[137] See Article 9, Montevideo Convention, 1933.
[138] Yotova R, Op. cit. P. 2
[139] (1927) PCIJ, Series A, No. 10.

title for which rests upon their sovereignty[140]. Accordingly, the signing of international treaties conferring rights on third-State nationals cannot and should not be interpreted as an abrogation of the State's right to regulate the foreign nationals operating on its territory or to require that they comply with its domestic laws. Such an abrogation would be a significant restriction of the host State's sovereignty and would thus require an express stipulation to this effect[141]. Accordingly, the extent of the exercise of states sovereignty extends to the following:

i. That Investment treaties must be in accordance with the laws of the host states
ii. That foreign investors conduct all their activities in accordance with the Laws of the Host States.

Reference could be made to the *Vienna Conventions on Diplomatic and on Consular Relations*, *1961* which stress that "the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State".[142] Despite the otherwise extensive privileges granted to foreign nationals under these treaties, including immunity from enforcement jurisdiction, the receiving States retained their prescriptive jurisdiction and the duty of compliance with domestic laws remained intact.[143]

Indeed, out of 2572 international investment agreements mapped by UNCTAD, over 60 % (or 1642), contain an express clause requiring investments to comply with the domestic law of the host State as part of the very definition of what constitutes an

[140] The Lotus Case (France v. Turkey), Ibid. where the Court decided on whether Turkey had jurisdiction to try a French National who committed an offence outside Turkey
[141] Yotova R, Op. Cit. p. 3
[142] See the Vienna Convention on Diplomatic Relations Done at Vienna on 18 April 1961, Article 41
[143] Yotova R, Op. Cit. p. 3

investment, thus conditioning its protection.[144] It will be added in agreement with the opinion of McNair[145] that observance of Domestic laws despite any right conferred by an Investment Agreement is an implied condition in International Investment.[146]

The *North Atlantic Coast Fisheries Case*[147] is particularly informative in this context. The arbitral tribunal was called upon to interpret an 1818 Treaty between the USA and Great Britain ("GB") whereby GB conferred upon US nationals the liberty to fish in British waters. One of the questions of contention between the parties was whether GB maintained the right to reasonably regulate the liberties conferred by the treaty in the absence of express language to this effect. The tribunal rejected the American contention that since the treaty conferred 'liberties' on American nationals 'for ever', they were exempted from the local legislation of GB in the absence of express stipulation to the contrary. It stressed instead that the right to regulate "is an attribute of State sovereignty, and as such must be held to reside in the territorial sovereign, unless the contrary be provided". The tribunal further underlined that the burden of proving an abdication by GB of its sovereign right to regulate within its territory was on the US. Accordingly, it concluded that "no reason has been shown why this Treaty…should be considered as different from every other Treaty under which the right of a State to regulate the action of foreigners admitted by it on its territory is recognized."

This element introduced in the relations between the State and the individual entails specific consequences in cases of non-compliance with domestic law, enforceable not

[144] See the Untied Nations Conference on Trade and Development Series on International Investment Agreements II, New York and Geneva, 2011, P. 112
[145] A McNair, The Law of Treaties Oxford: Clarendon Press, 1961, 45
[146] Ibid
[147] The North Atlantic Coast Fisheries Case (Great Britain v USA), PCA, Award (1910), 11 RIAA 173

only before domestic courts but also before investment treaty tribunals.[148] A key argument for that is the principle of good faith in treaty interpretation codified in Article 31 of the Vienna Convention on Laws of Treaties (VCLT).[149] The general principle of good faith requires the parties to refrain from taking unfair advantage and to act in the "spirit of honesty and respect for the law".[150] Interpreting the term "investment" in BITs in good faith would entail that investments made in violation of the domestic law of the host State should not qualify as falling under the scope of the treaty and thus should not benefit from its protection, given the presumption that foreigners are subject to and ought to respect the domestic law of the host State.[151] This also follows from the general principle of law postulating *ex injuria non oritur jus*, meaning that no one should be allowed to benefit from their own wrong.

Clauses requiring compliance with the domestic law of the host State are common in BITs and take various forms.[152] They are also evidence of the recognition of the principle of compliance with domestic law as an interpretative presumption for treaties conferring rights on third party nationals on the territory of the host State. The first attempts at codifying investment law are also telling with respect to the evolution of the requirement to comply with domestic law. The League of Nations formed a Special Joint Committee on Foreign Private Investment to consolidate international standards in the area of investment. It saw legality not merely as a condition for economic activities, but as a positive obligation of foreign investors under international law, stressing in paragraph 32 of the Committee report that:

[148] Yotova R, Op. Cit. p. 4
[149] Ibid
[150] Ibid
[151] Ibid
[152] Ibid

> Foreign enterprises should comply in letter and in spirit with the domestic laws of the country in which they do business, should refrain from inducing domestic contracts, which they know to be detrimental to the other party or impossible to fulfill, should abstain from any action that might be considered as an interference in the conduct of national affairs and should seek no illegal favour from public officials.*153*

These early attempts at multilateral investment codification under the auspices of international organizations used compliance with domestic law as a condition for protection of foreigners under the treaty.[154]

A review of existing and model BITs is strong evidence of the general recognition in State practice that compliance with domestic law plays an important interpretative role as a condition in treaties conferring rights and protections on foreign nationals and their property that ought to be satisfied for the treaty to apply and produce its intended legal effects[155]. A systematic reading of BITs concluded by a number of both capital exporting and importing States indicates that the compliance of foreign investments with domestic law is broadly incorporated in BIT provisions, ranging from preambular paragraphs to conditions for applying the substantive standards of protection.

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[153] See Par. 32, Chapter III of the Economic and Financial Organization Conditions of Private Foreign Investment Report by the Special Joint Committee Communicated to the League of Nations, 1946

[154] See also the 1960 OECD Draft Convention on the Protection of Foreign Private Property, which does not contain an express legality clause in its wide definition of property in article 9(c), but the Commentaries to the provision specify that in order "[t]o come within the provisions of this Convention, property must be lawfully acquired." Accordingly, domestic law is used to construe the scope of the term 'property' under the treaty and non-compliance with it would deprive the object of international protection.

[155] Ibid.

Clauses requiring compliance with domestic law were commonplace in Treaties of Friendship, Commerce and Navigations (TFCNs). In contrast to modern BITs, which require that investments are made in accordance with domestic law, most TFCNs contained compliance with domestic law requirements addressed directly not only to the property, but also to the individual beneficiaries. They required that foreigners act in conformity with the laws of the host State, not only for the purposes of admission but more importantly, as a condition for their freedom to exercise economic rights and to benefit from favourable treaty standards.

For example, the *Hawaiian-American Treaty of Friendship, Commerce and Navigation (TFCN), 1849* imposed a condition of compliance with domestic law (hereinafter "legality") on the protection of persons and property, as well as on the national and MFN treatment of foreigners. The *Italy-USA Treaty of Friendship, Commerce and Navigation (TFCN), 1948* stands out as containing a remarkable number of specific legality clauses in relation to admission, national treatment, MFN treatment, access to courts, the acquisition, ownership and transactions with property, as well as the exploitation of mineral resources.

Accordingly, the scope of protection under each of these standards was explicitly conditioned by the compliance with the domestic law of the host State. The International Court of Justice (ICJ) had the occasion to interpret a TFCN clause containing two compliance with domestic law requirements in *United States of America v. Italy [Elettronica Sicula (ELSI) case],*[156] where the issue was whether Italy breached the 1948 Italy-USA TFCN by interfering in the bankruptcy proceedings of ELSI, a corporation

[156] (1989), ICJ 15

controlled by US nationals. The US claim was based, *inter alia*, on article 3(2) of the TFCN, which provided for the admission and national treatment of foreigners, both conditioned on compliance with domestic law as follows:

> Corporations and associations, controlled by nationals, corporations and associations of either High Contracting Party and created or organized under the applicable laws and regulations within the territories of the other High Contracting Party, shall be permitted to engage in [commercial, manufacturing, processing, mining, educational, philanthropic, religious and scientific]… activities therein, in conformity with the applicable laws and regulations...

The Chamber interpreted the legality clauses as conditions for the operation of foreign corporations in the territory of the host State, irrespective of the accordance of the domestic law in question with the TFCN:

> The reference to conformity with "the applicable laws and regulations" surely means … that Italian corporations and associations controlled by United States nationals must conform to the local applicable laws and regulations; moreover, they must do so even if they believe a law or regulation to be in breach of the FCN Treaty, and, indeed, even if it were in breach of the FCN Treaty.

The effect of compliance with domestic law requirements in TFCNs as a corollary of State sovereignty and the right to regulate was interpreted by the Court as a condition for protection under the treaty, notably irrespective of the content of that law or its compliance with the standards of the treaty. The respect for the law of the host State was broadly regarded as the *quid pro quo* for admitting and protecting foreigners and their property.

3.3 Expropriation and Nationalization Rights of Host States over International Investment

The idea of 'nationalization' varies from that of 'expropriation' in breadth and extent. The latter is usually used to characterize particular steps done by the host state, but the idea of 'nationalization' is a measure of wider change in a state's economic and social function. Occasionally, depending on the scope of the host state's seizure action, the phrases are used interchangeably; therefore, Newcombe and Paradell describe 'expropriation' of entire industries or sections of the economy as nationalization.[157] The Tribunal in the *Lauder v Czech Republic*[158] case stated that:

> In general, expropriation means the coercive appropriation by the State of private property, usually by means of individual administrative measures. Nationalization involves large-scale taking on the basis of an executive or legislative act for the purpose of transferring property or interest into the public domain.

[157] Newcombe A and Paradell L, (2009), Law and Practice of Investment Treaties: Standards of Treatment, *Kluwer Law International*, 342 cited in Al-Adba, Op. Cit. P. 108
[158] Lauder v Czech Republic UNICITRAL Award 3 September 2001 Para 200

Many BITs and MITs do not discriminate between the ideas of nationalization and expropriation, possibly because they have the same practical and legal implications for foreign investors.[159] As a result, the word 'expropriation' will be used in this study to denote activities in which a state strives to deprive a foreign investor, whole or partially, of its rights to exploit or administer a project, as indicated above.

Expropriation may be defined as the power of a host state to deprive foreign investors of their rights to manage or undertake their investment, this expropriation may take away the entirety or part of the foreign investor's rights, however, in international law which municipal laws conform to, expropriation of a foreign undertaking cannot be done except:

i. The expropriation is done in accordance with its requirement for public good or purpose,
ii. The expropriation is done indiscriminately and not selectively and
iii. The owner of the investment is adequately compensated.

These conditions above must be conjunctively present in any expropriation exercise as it becomes 'unlawful' when one of these conditions is absent. In state-foreign investor conflicts involving the unfair enrichment of a host state, the failure to provide proper compensation or reparation to the injured party is often the most contentious factor.[160] 'Fairness' is an issue that becomes relevant when attempts are made to negotiate a settlement between the investment parties, before an arbitration authority is called upon to deal with a failure to agree. The question to be considered is whether a state, using its sovereign authority, has a right to expropriate the property of a foreign investor, and the

[159] See Al-Adba Op. Cit.
[160] Ibid

limitations on its exercise should such an entitlement exist. An answer is contained in paragraph 4 of the *General Assembly Resolution on Permanent Sovereignty over Natural Resources*, 1962:

> Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest, which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.[161]

The power of expropriation as seen in Resolution 1803 is provided in order to protect host states sovereignty and also ensure the wellbeing of states. It will also be mentioned that the host state's expropriation right is governed by customary international law and subsequently codified in the applicable BITs. Clearly, authoritative international accords grant nations the authority to expropriate and nationalize foreign assets on their territory,

[161] See Par. 4, General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources"

this, definitely is of great concern to people looking to invest their money abroad.[162] The conditions for the expropriation of foreign investment is a point of focus for many of the BITs.Article IV (I) of the Sweden–Mexico BIT, for example, stipulates that:

> 'neither contracting party shall expropriate or nationalize an investment of an investor of the other contracting party, either directly or indirectly through measures tantamount to expropriation or nationalization (hereinafter referred to as 'expropriation')'.

This is same for Chapter 1110 of NAFTA which failed to provide any meaning to the term 'expropriation' but goes ahead to provide that:

> 'no party may directly or indirectly nationalize or expropriate an investment of an investor or another party in its territory or take a measures tantamount to nationalization or expropriation of such an investment ('expropriation')'.[163]

Where the host state fails to compensate the investor for the seizure of his assets, international dispute is said to have arisen between the host state and the investor's home state, this is considered as unwarranted enrichment of the host state at the expense of a foreign investor's home country.[164]

[162] Ibid
[163] See Angeles M. & Fergusson F (2017), The North American Free Trade Agreement (NAFTA), Congressional Research Service, P. 8
[164] Ibid

It is seen as an international dispute since resources which could have increased the Gross Domestic Product of the investor's home state would have been transported to the territory of the host state in order to carry out the investment project, only to be illegally seized. It may be considered as the deprivation of another sovereign state via proxy in the context of 'unjust enrichment' and expropriation. Expropriation of foreign assets is a fertile ground for litigation. When a foreign investor and their home country invest money and skills in a host country, they are primarily interested in profit rather than altruism. The definition of 'expropriation' and the risks and methods of limiting its effect need to be considered.

3.3.1 Direct Expropriation

Direct expropriation is said to occur when the host state to an investment forces the transfer of property from a private individual to the state; it is the state's coercive appropriation of individuals' physical or intangible property by administrative or legislative action.[165] It appears that before a direct expropriation can be said to have occurred, there must have been a transfer of property of an individual or private entity to the state, this qualification was affirmed in *Enron v Argentina case.*[166]

Direct expropriation may simply be enacted by the issue of a legislative instrument or decree by a host state.[167] This results in the authorities taking enforcement action, seizing

[165] LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1(2006-2007)
[166] Enron Corporation Ponderosa Assets, L.P. v Argentina Republic ICSID Case No. ARB/01/3 Award 22 May 2007 Para 243
[167] An example of this can be found in the Nigerian Indigenization Policy promulgated via the Nigerian Enterprise Promotion Decree, 1972

and transferring ownership of an investment project's property. The investment is therefore directly taken over by the host state through such actions.[168]

3.3.2 Indirect Expropriation

There are numerous definitions and explanations of indirect expropriation in both international conventions and case law.[169] The United Nations Conference on Trade and Development (UNCTAD) refers to it as creeping expropriation and defines it as:

> [T]he use of a series of measures in order to achieve a deprivation of the economic value of the investment. In this case, no individual measure in itself would amount to an expropriation'.[170]

Indirect expropriation involves total or near-total deprivation of an investment but without a formal transfer of title or outright seizure. The notion was recognized in international law long before the appearance of investment treaties, there are several well-known international cases in which it has been recognized that property rights may be so interfered with that it may be said that to all intents and purposes those property rights have been expropriated even though the State in question has not purported to expropriate.[171]

It is not usually an overt, evident conduct on the part of a host state, but rather a collection of factors, none of which may constitute an international wrong on their own.

[168] Al-Adba, Op. cit.
[169] Al-Adba, Op. Cit.
[170] United Nations Conference on Trade and Development (2012), Expropriation, UNCTAD Series on Issues in International Investment Agreements II, p. 7; See also, Christie G C (1962), What constitutes a taking of property under international law? British Yearbook of International Law. 38: 307– 338. P. 362
[171] Ibid

It involves series of indirect actions or frustrating measures which may lead the investor to abandon the investment, it may include Non-payment, non-reimbursement, cancellation, denial of juridical access, real practice to exclude, non-conforming treatment, inconsistent legal barriers, and so on.[172]

Investment dispute arbitration tribunals recognize creeping expropriation as an illegitimate programme conducted by a state to deprive a foreign investor of their property and entitlements. The tribunal in the *Santa Elena v Costa Rica case*[173] emphasizes that a range of behaviour used by states to deprive foreign investors is key to understanding how indirect expropriation is operated: A state may establish control over property through a variety of means, ranging from limited restriction of its usage to total and formal loss of the owner's legal title. Similarly, the length of time required in the process can vary, from an instantaneous and thorough taking to one that only gradually and in little increments achieves a position in which the owner can be considered to have really lost all the traits of ownership. It is clear, however, that measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title.

In all business projects, timing is a major factor in achieving success and profitability, and a host state, by its sovereign conduct, can achieve the aspiration of a visionary through the manipulation of time. In a contract made under the BIT between Italy and Lebanon, the duration of a road construction project in the case of *Toto Costruzioni Generali S.P.A v Republic of Lebanon*[174] was predicted to last some 18 months, but due

[172] Ibid
[173] Supra
[174] Toto Costrzioni Generali S.P.A v Republic of Lebanon ICSID Case No. ARB/07/12 Award 7 June 2012

to the alleged interference by the state of Lebanon, actually took in excess of five years to complete. The claimant from the Italian company argued before the ICSID tribunal: By extending the time for completion, because of acts and measures adopted by the Respondent in addition to changing the institutional framework by decisions adopted by the Respondent through increasing taxes, closing quarries and other similar measures, the Respondent eroded the Claimant's profit and deprived the investment of economical values which is equivalent to an indirect expropriation. The tribunal disagreed, and made no finding against Lebanon. This was largely because the claimant failed to prove the particular elements and to explain how each of the individual delays could be blamed on the host state. An allegation of 'creeping' conduct is thus exceedingly difficult to prove.

In the *CME Czech Republic B.V (The Netherlands) v The Czech Republic case,*[175] the claimant, CME argued that an indirect expropriation had been undertaken by the host state under the BIT between the Netherlands and the Czech Republic. The Czech media regulatory agency (the Media Council) took action that required the foreign investor to restructure its deal with the licence holder. The Council had previously approved an arrangement in which CNTS, a company owned by CME, would have the right to use the television licence of CET 21, a Czech company. CNTS was in fact granted certain protections under the Memorandum of Association, related to both its use of the licence and its exclusive service agreement with CET 21. Some years later, the Media Council launched administrative and criminal investigations, which forced CME to surrender some of those protections. Three years after that, in response to a request by CET 21 (the Czech licence holder), the Council issued a letter stating that service agreements could

[175] Supra

only be undertaken on a non-exclusive basis, thereby causing CET 21 to terminate the agreement and commence operation of the TV station.

The tribunal agreed and cited this fact as an example of indirect expropriation predicating the decision on the fact that the CNTS' investment would have continued had the Media Council not frustrated its operation, thus, activities of the Media Council left the CNTS with no business. Consequently, the Tribunal awarded CME damages of US$ 270 million plus simple interest of 10% per annum from the date of the arbitration request up to the date of payment.

3.3.3 *Limitations to the State's Right of Expropriation*

Although there is an expectation of respect from the host state for these entitlements, international treaties typically acknowledge foreign investors' proprietary rights such as ownership and the exploitation and control of resources in their investment projects. Under the idea of sovereignty, any action taken by a host state to expropriate property belonging to an investor (whether physical, commercial, or intellectual) must be limited.[176] Treaties incorporate restrictions on the absolutist interpretation of sovereignty[177] in order to facilitate the promotion of world trade. This principle has been codified in applicable BITs and MITs. Multilateral treaties incorporate remarkably similar specifications for expropriation. Article (4) of the General Assembly Resolution in Permanent Sovereignty Over Natural Resources (1962) declared that

> Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or

[176] Ibid
[177] Ibid.

> the national interest, which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation.

Also, Article 3 of the Organization for Economic Co-operation and Development Draft (1967) (OECD Draft) states that

> No Party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless the following conditions are complied with: (i) The measures are taken in the public interest and under due process of law; (ii) The measures are not discriminatory or contrary to any undertaking which the former Party may have given; and (iii) The measures are accompanied by provisions for the payment of just compensation.

In the same vein, Article 13 of the ECT states that:

> [The] Investment of investor of a contracting party in the area of any other contracting party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent no nationalization or expropriation (hereinafter referred to as "expropriation") except where such expropriation is: (a) For a purpose which is in the public interest; (b) Not discriminatory; (c) Carried out

> under due process of law; and (d) Accompanied by the payment of prompt, adequate and effective compensation.[178]

Where clauses of such nature are included in the BITs, they are modeled after the vocabulary of multilateral treaties and contain considerable similarities. Article 6 of the United States model BIT provides a definitive example, stating that

> Neither party may directly or indirectly expropriate or nationalize a covered investment, either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b)[179] in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article

Expropriation of a foreign investment project by a host state is certainly not forbidden in and of itself. As previously demonstrated, international law would tolerate expropriation if three conditions are met: (i) it must be for a public purpose; (ii) it must be done without

[178] Chapter 1110 of the NAFTA also deals with similar limitations: No party may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory or take a measures tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) For a public purpose; (b) On a non-discriminatory basis; (c) In accordance with due process of law and Article 1105(1) [providing for minimum international standards of treatment, including fair and equitable treatment]; and (d) Upon payment of compensation in accordance with paragraph 2 to 6 [which] require compensation at fair market value, to paid without delay, with interest.

[179] IIAs generally refer to "public purpose", although some treaties use other formulations such as "public benefit" (GermanyPakistan BIT (2009)), "public interest" (China-Peru FTA (2009)), "public order and social interest" (Canada-Colombia FTA (2008)), "internal needs" (Hong Kong, China-Thailand BIT (2006) and Israel-Slovakia BIT (2001)), "legal ends" (Malaysia-Uruguay BIT (1996)), "national interest" (Chile-Philippines BIT (1997) and Malaysia-United Arab Emirates BIT (1992)), "public necessity" (Peru-Singapore FTA (2008)) and "public purpose related to internal needs" (Angola-United Kingdom BIT (2000)). See UNCTAD, 2012, Op. Cit. p, 27.

discrimination; and (iii) compensation must be provided. Each of these ideas has its own set of case law. In *Siag and Vecchi v. Egypt*, the Egyptian authorities expropriated the land owned by the claimants on grounds of delays in the construction of a tourist project. The measure did not contain an explicitly stated public policy objective. Six years after the date of the taking, the property was transferred to a public gas company for the construction of a pipeline. For the tribunal, the fact that the land was later used in a public-interest project was irrelevant. The Tribunal does not accept that because an investment was eventually put to public use, the expropriation of that investment must necessarily be said to have been 'for' a public purpose.

Even though pursued for a public purpose, the direct expropriation, in order to be lawful under international law, must be accompanied by compensation to the investor. At the same time, when dealing with an allegation of an indirect (regulatory) expropriation, a broader assessment of the nature of the measure (which includes, but is not limited to, the public purpose) is essential in order to distinguish an indirect expropriation from the ordinary and legitimate regulatory conduct of the State, which is non-compensable

3.4 Nature of International Investment Treaties

It will be stated that apart from the power of a state to exercise its sovereignty in the control of Investment within its territory, Foreign Investment is also regulated by International Investment Law which comprise; (a) Bilateral Treaties and International Investment Agreements (voluntarily entered into by the host state) (b) Concession Contracts created between host states and foreign investors (c) Customary International Law. In the whole, it will be stated that International Investment Law may be taken to mean the set of voluntary and mutual undertakings with reciprocal legal obligations

entered into on the basis of *pacta sunct servanda.* The forms of International regulatory frameworks are discussed below.

3.4.1 Bilateral and Regional Treaties

According to Bernasconi-Osterwalder,[180] in the last two decades of the 20th century, great changes have taken place in policies and legal structures relating to foreign investment. The rapid changes in foreign investment have found their expression in numerous bilateral and multilateral investment treaties. The proliferation of such instruments has direct impacts on national sovereignty, federalism, and states' ability to regulate in areas such as environmental protection and human health. The emergence of the international regulation regime on international investment began with the introduction of bilateral treaties in the 1980s.[181] In analyzing the status of Bilateral Treaties in the regulation of International investment, Bernasconi-Osterwalder writes:

> To date, over 2000 bilateral investment treaties (BITs) have been concluded across the globe.[182] The number of investment treaties increased rapidly over the past 20 years, with an accelerating pace in the past five years. While all these multilateral agreements are limited to a specific region, no global investment agreement exists to date. Negotiations under the auspices of the Organization for Economic Cooperation and Development (OECD) to adopt

[180] Bernasconi-Osterwalder N, (2003), Corporate Responsibility: Governance Principles for Foreign Direct Investment in Hazardous Activities, Paper presented at the Center for International Environmental Law (CIEL) for the Fifth Ministerial Conference "Environment for Europe", P. 2
[181] Ibid.
[182] Ibid.

> a global agreement on investment were broken off in 1998 when countries realized that granting extensive investor protection could lead to serious problems for the host state to regulate in areas such as the environment and public health and that the negative effects of a far reaching investment agreement could outweigh the benefits of investment liberalization and investor protection.

The basic goal of BITs, as indicated in their title, is the "promotion and protection" of investments from one contractual party in the territory of the other contracting party. The majority of bilateral investment treaties (BITs) have been signed between developed nations which export capital and developing capital importing countries, although an increasing number are being negotiated between developing countries.[183] As a result, states' interests are getting larger and more diverse. China, India, and Malaysia, for example, have completed a number of BITs with both industrialized and developing countries. While there are variants, two primary model BITs have arisen thus far: (a) the "European model" based on the Abs-Shawcross Draft Convention model agreed by OECD Ministers in 1962, and (b) the "North American model" created in the early 1980s.[184]

Both models address the pivotal issues including how investments are admitted and treated, how local contents are addressed and how disputes are resolved. The primary difference between the two models is that the rules relating to how foreign investments

[183] Bernasconi-Osterwalder N, op. Cit. p. 3
[184] Ibid.

are treated in the European model only becomes applicable after the establishment of the investment, whilst the treatment provisions in the second also apply to pre-establishment investments. Nonetheless, each party in both models can make or maintain exceptions, normally using a "top down approach" (in which all non-conforming measures must be notified), under one of the sectors or matters listed in an Annex to the treaty or resulting from laws and regulations in effect on the date the treaty entered into force. In addition, the two types of BITs may contain general exemptions to address special situations (such as balance of payments problems, taxation) or concerns (national security or public order). However, the drafting of these commitments varies as the scope of the obligations.

Another significant difference is that the US model limits the implementation of a number of performance conditions put on investors or their investments, as well as having more developed rules on specific issues (such as right of entrance and sojourn of foreigners) than European BITs.

The ideas for preserving established investments in both models are similar: national treatment and MFN treatment, free transfers of money, timely, appropriate, and effective compensation in the case of expropriation, fair and equitable treatment, and full protection and security. They also include methods for resolving disputes between states and between investors and states. In most circumstances, investments include "all kinds of assets".[185]

The Bilateral Investment Treaty (BIT) is an agreement between two sovereign governments that serves to attract foreign investment by lowering the probability of unprincipled and arbitrary acts by the host receiver. It also adds to effective governance,

[185] Ibid.

which is required for economic success in the host country. The BIT provides foreign investors with a set of stated substantive rights, including the assurance of fair and equal treatment by the receiving state, as well as adequate compensation for the expropriation of resources given by the investing party.

A properly negotiated BIT will ensure Physical and legal protection, this is usually provided by the implementation of state law. Both the investor's home country and the host country will work to guarantee that its nationals' investments are treated in accordance with international law. A well negotiated BIT will also allow the investor's home state to foresee and plan for noncommercial risks with another sovereign nation, establishing an umbrella set of measures to protect their people, whether individuals or corporate investors. Since its origins (first acknowledged to have been reached between Germany and Pakistan in 1959), the BIT has been recognized as a cornerstone of international law protection of foreign investment interests. Currently, over 3000 BITs have been signed throughout the world.[186]

Bilateral and regional investment treaties often address two sorts of challenges. One set of provisions addresses investment liberalization, while the other addresses investor protection. The first category is based on the notion that more investment leads to increased economic efficiency. These measures attempt to reduce or eliminate barriers on foreign investment's admission and operation in a host country. The second set of clauses protects foreign investments from government action after they are established in the host nation. Both kinds of rules are found in various forms in almost all investment

[186] Ibid, P. 7.

agreements. Having stated above that there are certain salient issues which are central to the model BITs, it remains to undertake an examination of such issues below:

3.4.1.1 National Treatment

It is the responsibility of host states under most of the BITs to ensure that foreign investments and projects are not treated with discriminations and that the applicable laws are not discriminatory in nature. At first glance, it appears that this condition will not be objected to but it is troublesome in practice since it involves the comparison of actions that are not always straightforward to compare. Recent NAFTA decisions, for example, reveal that when comparing local versus foreign investments, investment tribunals tend to concentrate largely on commercial factors rather than environmental and legal constraints.

Minimum Standard of Treatment

Many investment treaties include a basic treatment criteria that compels a host country to treat the foreign investor fairly and equally. Historically, this sort of rule applied only to extreme examples of abuse; however, arbitrators under NAFTA's investment chapter have construed this article exceedingly liberally, determining that nearly any action seen as unfair by the investor might violate the minimal standard. In response to the worrying broadening of the reach of this Article by arbitral panels, the NAFTA countries' trade ministers published an interpretative note in July 2001 aiming to limit overly wide interpretations. The precise extent and effect of the interpretative comment and the underlying requirement are unknown.

3.4.1.2 Performance Requirements

Investment agreements prohibit the use of a number of "performance requirements," which have traditionally been used by developing countries to ensure that foreign investment furthered their developmental goals. Examples of performance requirements include technology transfer obligations, local hiring and training requirements, and domestic content rules. Being able to guide incoming investments so that they meet local and national priorities is critical to harness private investment to further environmentally and socially sustainable development. NAFTA, for example, disallows such controls 'in connection with the establishment, acquisition, expansion, management, conduct or operation of a foreign investment.' The language makes clear that performance requirements are disallowed at every stage of the investment, thus significantly weakening the bargaining position of developing country governments to promote national environmental and social goals.

3.4.1.3 Expropriation

As noted earlier,[187] the rules relating to expropriation of investment is central to most of the investment treaties. Early instruments governing foreign investment typically included provisions for "nationalization" and/or "expropriation." These expressions were interpreted to refer to direct expropriations of property by the host state by legislative or administrative procedures that resulted in a forcible transfer of property rights. Recent investment treaties broadened the definition of expropriation to include indirect expropriation. Indirect expropriation is sometimes known as "disguised" or "creeping expropriation" and is the legal counterpart of a "regulatory taking" in the United States.

[187] See P. 57, *ante.*

The question then is whether an indirect expropriation also includes usual actions of regulatory agencies for the enforcement of laws. The legitimate use of state regulatory authorities appears to be exempt from the duty to pay for expropriation under international law and practice. However, tribunals dealing with this issue have construed indirect expropriations to include environmental and public health requirements.

As a consequence, public interest groups as well as governments have expressed concerns about the potential chilling effect of such provisions on the ability and willingness of governments to adopt and implement environmental and other public welfare regulations.

3.4.2 Investor-State Concession Contracts

Concession contracts, also known as host government agreements, are an important component of the foreign investment system. They are entered into by governments and international investors in order to discipline their investment initiatives. Unlike in a Private-Public Partnership where the government has part of the capital as counter-part funding, the investor in this case totally bears the cost of the undertaking but receives rights to explore and exploit natural resources through these concession contracts, such as access to water, forests, minerals, fisheries, and so on. This is done in most capital intensive project which the state finds difficult to fund and as such, only a percentage of the profit is due to the state. Despite the fact that access to natural resources raises serious public interest problems, these contracts are negotiated behind closed doors, with no public input. The secret nature of these contracts severely limits civil society's capacity to raise public-interest issues.

The host government agreements in the Baku-Tbilisi-Ceyhan (BTC) Crude Oil Pipeline Project, for example, contain a number of troubling stipulations. Expropriation requirements, for example, go much beyond what is recognized in international law. Furthermore, the stabilization provisions provide that the host government must 'take every action available' (including exclusions from the law) to'restore the economic equilibrium' that might be harmed by any new health, environmental, tax, or labor laws. As a result, host governments are likely to be hesitant to enact any new environmental or other regulation that reduces predicted revenues for the investor.

Most host government agreements include a dispute settlement clause referring to international arbitration. Additionally, recent (March 2003) bilateral free trade agreements concluded between the United States and Singapore and between the United States and Chile, provide that the breach of such agreements is a new and separate cause of action for investors against host governments before international arbitral tribunals. Thus, the non-transparent structure of the investment dispute-settlement system used in the context of international investment treaties described above, is also inherent to disputes arising from host government agreements.

3.5 Organs of State involved in the Regulation of International Investment

We have stated earlier that international investment is a regulated venture starting from the operation of the IIAs, BITs and the available international treaties. Also, it is obvious that investment across boundaries require international funding and certain human rights situations may be created, it also extend to the area of dispute settlement. These then translates to the fact that the institutional frameworks or bodies involved in the regulation

of international investment include the sovereign state itself through the executive, legislature and the judiciary.

It is well known that the negotiation of an investment treaty involves states, most of the bilateral investment treaties and international investment agreements are products of consensus of independent states who create with the intention of creating an enabling business environment for their citizens abroad. These sovereign states are the host states where the said investment is domiciled and the home states of the investors. We have earlier discussed how states regulate investment within their territories.[188] It then becomes necessary to examine the regulatory organs by which states regulate international investment, it should be noted however, that there are as many regulatory agencies across countries and it becomes impracticable to evaluate all of them. However, this study will discuss generally, the stat regulatory organs on the basis of the law making functions of states, the executive powers and the judicial powers of states.

3.5.1 The Executive

Elementarily, the executive is the most visible organ of government in the initiation of stat polices and implementation of state directives, in essences, investment arrangements and bilateral treaties are effected by the executive arms of government representing the state, this executive arm of government comprise officials of the relevant ministries and government agencies, with the direction and agreement of ministers.[189] Treaty negotiations are sometimes conducted in "rounds" separated by intervals in which officials spend time in capitals establishing policies and getting instructions on the

[188] Ante

[189] See Cabinet Office, Collective Government Agreement Process Guidance, March 2013 available at https://civilservicelearning.civilservice.gov.uk/sites/default/files/cabinet_office_collective_agreement_process_guidance_0.pdf, last accessed, 19/04/2023

approach to adopt in the following negotiating round.[190] The process often formally starts with the creation, and sometimes also the publication, of a negotiating mandate by both sides, although informal meetings between ministers and officials from each party may precede this.[191]

The mandate will be created in ministries and agreed upon by ministers from all levels of government. Policymakers, economists, and lawyers inside ministries begin by consulting the plethora of views from outside the state and among states mentioned below. This process include gathering, evaluating, contemplating, debating, presenting, refining, and clarifying the available policy and legal choices. The outcome of this process is fed into national viewpoints represented in the negotiating mandate and refined throughout discussions by officials both within and outside the negotiating chamber.[192]

Various ministers and ministries may hold opposing policy stances that must be harmonized. Investment treaties may generate concerns that affect the policy goals of multiple departments, including those in charge of the treasury, international relations, commerce, environment, energy, business, agriculture, taxation, health, and other levels of government. Governments usually have a procedure in place for making choices that touch several policy areas and settling opposing policy viewpoints.

During negotiations with their counterparts, negotiators may be forced to make reactive judgments or adopt backup positions. Furthermore, despite conversations regarding the variety of policy and legal choices available, officials from either negotiating side may be

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[190] Ibid.
[191] Ibid.
[192] See Mavromati C and Spottiswood S, Voices That Shape Investment Treaties: Inside, Outside and Among States, In C Titi, Public Actors in International Investment Law, (2021), European Yearbook of International Economic Law, Springer Publications, P. 4.

unable to resolve a problem after several rounds of negotiations. Difficult issues that cannot be handled at the official level are escalated to meetings between ministers and colleagues from other governments.

It is however, important to state that in states like Nigeria, while bilateral agreements and contracts may be complete upon the activities of the executive organ of government, it is not the same for the negotiation of a treaty, this is to say that while treaties can be negotiated by the executive organ, it does not bind Nigeria except to the extent that the said treaty has been passed as part of the local legislations.[193]

While the investment is domiciled in the host state, the executive arm of government through specialized agencies further have the duty to ensure that foreign investors comply with the policies and regulations in respect of such investments just like other local investors. An example is in the oil and gas sector, the Nigerian framework regulates the operation of the Multi-national Oil Companies (MOCs) through executive authorities like the National Oil Spill Detection and Regulatory Agency (NOSDRA), National Environmental Standards and Regulations Enforcement Agency (NESREA), Department of Petroleum Resources (DPR) etc.

3.5.2 The Legislature

The legislature is the law-making organ of the state which is also saddled with the oversight functions on the powers of the executive, naturally, the legislature sets the guidelines for the executive organ of government to implement.[194] Depending on the state's constitutional arrangements, the legislature may exercise influence either before

[193] See Section 12 (1), Constitution of the Federal Republic of Nigeria, 1999.
[194] See C Titi, Op. cit, P. 7

talks begin or after a signed version of the treaty is presented to the legislature as part of the ratification procedures.[195] The most apparent option for the legislature to affect investment treaties is to establish laws outlining negotiation instructions and, more generally, prescribing the negotiating mandate's boundaries. US negotiators, for example, are led by foreign investment negotiating objectives outlined in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015.[196]

Parliamentary committees, such as Australia's Joint and Senate Standing Committees on Foreign Affairs, Defence and Trade, and Treaties, may undertake investigations before, during, or after a treaty is signed. Committees are informed by written and oral testimony presented by witnesses from industry, academia, or civil society. Members of legislative committees, along with research personnel, then create reports that provide recommendations to the government. These studies are then examined by the government, as well as interested civil society organizations and businesses, who may use them to reinforce their viewpoints.

Depending on the ratification process in each country, legislatures may be able to shape investment treaties by refusing to ratify agreements due to concerns with specific content, or to amend the negotiating mandate in the course of the negotiations. The system found in States like Nigeria where treaties do not become binding unless they are ratified by the legislature, this is the provision of *Section 12 (1) of the Nigerian Constitution of the Federal Republic of Nigeria, (CFRN) 1999* which provides as follows:

[195] Ibid.
[196] 19 USC § 3802

> No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.[197]

3.5.3 The Judiciary

The judiciary is the court saddled with the responsibilities of interpretation of laws for the purpose of adjudication as can be seen in Section 6, CFRN, 1999. The local courts are definitely the first resort to any investment dispute between a state and the foreign investor, this is predicated on the principle of "exploring all local remedies". They also have an impact on the presence and substance of investment clauses. For example, Colombia's Constitutional Court recently ruled that certain provisions of the BIT between Colombia and France were "conditionally constitutional" ("condicionalmente exequible") subject to the publication of a joint interpretative note clarifying the meaning of certain treatment standards.[198]

Opinion 1/17 of the Court of Justice the European Union (CJEU) provides another illustration of how the judiciary may shape the content of investment treaties.[199] The CJEU was asked in that case if the Investment Court System under CETA was compatible with EU law, and the Court determined that it was. This case demonstrates two ways the courts might impact investment treaties. First, the arguments advanced by the European Commission and certain member states demonstrate how EU treaty

[197] Constitution of the Federal Republic of Nigeria, (CFRN) 1999
[198] Mavromati C and Spottiswood S Op. Cit. P. 8
[199] Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341.

negotiators tried to incorporate "safeguards" in the CETA investment chapter that followed past EU jurisprudence on the establishment of foreign tribunals.[200]

Second, the ruling might be seen as establishing basic requirements for investor-state dispute resolution clauses in EU treaties. Another example of judicial impact on investment treaties is the language of investor safeguards in US investment treaties, which frequently closely follow analogous standards established in domestic law by US courts. For example, the factors set out in Annex B of the 2012 US Model BIT for determining whether a party's action or series of actions has an effect equivalent to direct expropriation, that is, formal transfer of title or outright seizure, are drawn from US Supreme Court jurisprudence on compensable takings under the US Constitution's Fifth Amendment.[201] In this way, US judicial decisions have indirectly influenced or inspired the standards negotiated by the executive branch of the US government.

Earlier in this study,[202] consideration has been made of the major determinant terms in international investment. This Chapter has considered the regulatory frameworks for the operation of international investment. The position projected here is that the legal framework of the host state supersedes all forms of regulatory provisions including the bilateral treaties and investment agreements entered by the host state.

As a matter of law, the host states have the power to make laws in relation to certain things which include the standard of treating foreign investments, local contents, environmental consideration and expropriation of investment which has shown itself to be one of the most controversial issues in international investment.

[200] Ibid.
[201] Penn Central Transportation Co v New York City, 438 US 104 (1978). See Caplan and Sharpe (2013), p. 755, 790
[202] Chapter Two, ante.

It is also imperative to add that international investment agreements have effect on the absolute sovereignty of a state in the sense that upon execution of a BIT or IIA, the party-state has subjected itself to the pact therein and can be bound by decisions of international dispute resolution mechanisms where there is a breach. On the other hand, the customary international law allows the laws of host state to be primarily binding on all foreign undertakings.

Thus, as discussed in the next chapter, the general provisions of BITs and IIAs vest the host states with the right of expropriation of foreign investment although, with legal qualifications, this is the case of the Nigeria-China BIT.

The next chapter will discuss the nature of the Sino-Nigerian investment relationship, especially the legal implications of the trade relationship with a view to bringing to the fore of this discourse, whether international investment have eroding effect on the sovereignty of the developing states, with Nigeria as a case study.

CHAPTER FOUR

THE NIGERIA-CHINA BILATERAL TRADE RELATIONSHIP

4.0 Introduction

One of the ways to create mutual alliance between states in the global village which the world is turning into is to establish beneficial trade relationship across borders. Economically, international trade works on the basis of production possibility advantage where a state is to produce products which it has the optimum capacity to produce and exchange same with the products of another state. This idea testifies to the fact that bilateral trade is usually initiated for the purpose of even development.

Thus, international trade is a phenomenon that cannot be avoided by nations like Nigeria which has a lot of import needs. The essence of international trade is therefore, explained by Okolie as follows:

> The world of a man is in a flux. The fluidity of social relations conduces into the search for social coalescence, partnership and cooperation. Naturally, man is created with inbuilt and ever elastic gregarious instincts which propel man to enter into social relations with other men basically to eke out a living. These gregarious instincts combine with differential natural resource endowments to induce man to develop the propensity to partner with others to address the needs of the community…[203]

The question to be answered is whether or not the nature of trade relations between Nigeria and China reflect the characteristics enumerated by Okolie.

4.1 History of the Nigeria-China Relationship

At independence, Nigeria as a sovereign state began to conduct her foreign relations under the political and governmental leadership of its Prime Minister, the late Alhaji (Sir) Abubakar Tafawa Balewa whose administration emphasized Africa to be centerpiece of Nigeria's foreign policy.[204] At this stage, Nigeria's foreign policy was pro-western and communism was seen as evil which should be kept at bay according to Balewa.[205]

At this stage, the policy adopted by the Balewa government was pro-Britain which showed that the umbilical cord with Britain was nit severed upon independence. A

[203] A.M Okolie, Contemporary Readings on Nigeria's External Relations: Issues, Perspectives and Challenges. (Abakaliki: Willyrose and Appleseed Publishing Coy, 2009), p. 96.
[204] See A Ogunsanwo, Selected Essays on Politics and International Relations, (Lagos: Concept Publications, 2015), P. 72.
[205] Ibid, P. 337.

reflection of this may be seen in the October 1, 1960 speech of Balewa as reproduced by Akinboye as follows:

> Based on the happy experience of a successful partnership, our future relations with the United Kingdom will be more cordial than ever, bound together as we shall be in the commonwealth by a common allegiance to her majesty, Queen Elizabeth who we proudly acclaim as Queen of Nigeria. We are grateful to the British officers who we have known, first as masters and then as leaders and finally as partners but always as friends.[206]

At this period, China's economic activities in Africa were primarily driven by its political agenda, with a focus on providing economic assistance to newly independent African nations in order to foster diplomatic relations, support Africa's "anti-imperialism, anti-colonialism struggle," and gain international support for the People's Republic of China.[207] The first phase of Chinese engagement with Africa began during the Bandung Conference of Non-Aligned Nation in 1955.[208] There was a substantial improvement in the relationship towards the end of 1950s as a result of its worsening ties with the Soviet Union.[209] Owing to its own history of colonization, China saw itself as the leader of Third World countries.

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[206] See S. O. Akinboye, Beautiful Abroad but Ugly at Home: Issues and Contradictions in Nigeria's Foreign Policy. Lagos: University of Lagos Inaugural Lecture Series, 2013, p. 5

[207] M.R Rindap, An Assessment of Nigeria-China Economic Relations from 1999-2014, (2015), Vol. 4 (1), International Journal of Arts and Humanities, p. 23.

[208] Ibid.

[209] D Chime, Analysis of Nigeria-China Trade and Investment Relations, 1999-2012, Unpublished Thesis Submitted to the Department of Political Science, University of Nigeria, 2013, P. 39.

Apart from having African countries on its side in the diplomatic squabble with Taiwan and gaining a seat at the United Nations Security Council, China had seen African counties as strategic partners since the 1950s.[210] It funded many construction projects and supported independence struggles between the 1960s and 1970s. It promoted bilateral relations among African countries. During the period, China provided aid to thirty African countries.[211]

The relationship with Africa plummeted in the 1980s when China shifted its focus to domestic economy development. The period marked a gradual departure from socialist economic development to reform in favour of capitalist economy. The reform necessitated looking around for Foreign Direct Investment (FDI) from Western countries.[212] However, the relationship with the West was cut-short when China was hit by economic sanctions and political isolation over the crackdown of students' protest in Tiananmen Square in 1989. China must have learnt a useful lesson during the isolation and sanctions imposed by the western nations that it would be counter-productive to trade and rely on western countries for Foreign Direct Investment. This prompted China once again to widen its contacts in the developing countries such as Africa.

Meanwhile, Nigeria refused to even open any diplomatic contact with China at the period before 1970.[213] However, the external activities during the Civil war between 1967 and 1970 taught Nigeria a lesson that its permanent friends, the United Kingdom could not be totally relied upon as the United Kingdom and the United States refused to sell weapons

[210] Ibid.
[211] E. O Ogunkola, A S Bankole & A Adewuyi, China-Nigeria Economic Relations, Revised Report submitted to the African Economic Research Consortium (AERC), 2008, P. 3
[212] See A Ogunsanwo, Op. Cit, P. 343.
[213] A. Ogunsanwo, Op. cit, p. 345

to Nigeria.[214] Thus, at the 26th session of the United Nations General Assembly, Nigeria surprised the West and in particular the United States, when she recognized the inclusion of mainland China in the United Nations as well as to the exclusion of Taiwan.[215] China is appreciative of this African solidarity as Jin Yongjian, a Chinese ambassador acknowledged that the 1971 UN episode remains indelible to the Chinese people:

> The Chinese people will never forget that in 1971 it was African countries that helped restore the legitimate seat of the People's Republic of China in the UN. Over the years, without the firm support from African countries, China could not have defeated anti-China draft resolutions tabled by some Western countries at the United Nations…and moves made by a handful of countries on Taiwan's so called participation in the UN and WHO …The Chinese Government always attaches great importance to Africa…As China is the largest developing country in the world and Africa has more developing nations than any other continent, China-Africa co-operation constitutes an important part and parcel of the South-South co-operation.[216]

Nigeria and China established diplomatic relations in February 1971, the same year the communist People's Republic of China obtained the right of place in the UN Security

[214] Ibid.
[215] Ibid, P. 345
[216] J Yongjian, China's economic development: New opportunities for the Sino-African relations, In speech delivered at African Institute of South Africa Seminar, 17 May, 2005

Council; 1971 simultaneously coincides with the expulsion from the United Nations of the nationalist government in Taiwan, which previously occupied the seat.[217] China's permanent presence in the Security Council meant that from 1971, it started to enjoy the use of veto and participate effectively in the deliberations of the UN Agencies such as the International Monetary Fund (IMF) and the specialized fields, like the International Atomic Energy Agency (IAEA). Diplomatic relations was formally established between Nigeria and China in 1972 and the central idea of that 1972 with the signing of the treaty in connection to technological and scientific co-operation.[218]

The regime of General Sani Abacha between 1993 and 1998 made Nigeria to seek greater ties with China because the West isolated Nigeria.[219] Nigeria's trade relations with China was seen as a better alternative because of the genuine interest of China in trading with Nigeria based on some of its comparative advantage products such as energy, raw materials and market expansion.[220] Abacha initiated contact with the Chinese government early in his rule. The Nigerian– Chinese Chamber of Commerce was founded in 1994, the China Civil Engineering Construction Corporation (CCECC) won a $529 million contract to rehabilitate the Nigerian railway system in 1995 (with Abacha's children allegedly in the deal), and the former premier of China's State Council, Li Ping, visited Nigeria in 1997, signing protocols relating to power generation, steel and oil.[221]

[217] Ibid.
[218] E. O Ogunkola, A S Bankole & A Adewuyi, Op. cit. p. 7.
[219] The isolation of Nigeria by the West was a result of the calamitous decisions and gross abuse of Human Rights during the Abacha regime; see E Osayande, A Tortuous Trajectory: Nigerian Foreign Policy under Military Rule, 1985 – 1999, (2020), Vol. 14 (1), African Research Review, p. 148.

[221] D Chime, Analysis of Nigeria-China Trade and Investment Relations, 1999-2012, Unpublished Thesis Submitted to the Department of Political Science, University of Nigeria, 2013, P. 39

Chinese investment has since expanded into other areas of Nigerian economy such as construction, telecommunication services, manufacturing and many sole-owned or joint venture companies.[222] Chinese private investors have invested in the agro-allied industries, manufacturing and telecommunication while Chinese State owned enterprise invests in natural resources, power and transportation infrastructure. Nigeria also enjoys bilateral flow of foreign direct investment from China especially in oil and mineral resources.[223]

It would be seen that most of the activities of Nigeria in this trade relationship is import as till date, there exist a surge in Nigeria imports of Chinese goods if compared to its exports to China, resulting in a trade deficit with China.

4.2 Nature of the Nigeria-China Investment Relationship

The Nigeria- China investment relationship represents the kind of business relationship between a developed economy and a developing one. China in this case, represents the developed economy while Nigeria represents the developing economy. The Chinese government has seen Nigeria as a partner for a viable bilateral trade in Africa, this is a result of the strategic economic position of Nigeria's among African countries.

The Chinese ministry of commerce summarized the main aim of government policy towards Nigeria into three (3) points. They are as follows: (i) to increase the market share of Chinese Multinational Companies in the Nigerian market. (ii) To expand the Nigerian market for Chinese manufactured goods. (iii) To increase China's presence in Nigeria oil

[222] Ibid.
[223] Ibid.

and gas sector and leverage its investment in Nigeria as a gateway for entering the Economic Community of West African States (ECOWAS) market.[224]

Meanwhile, the trade relations between Nigeria and China involves; (a) export trade (b) import trade (c) Foreign Direct Investment (d) Infrastructural Development. The dimensions of this trade are discussed *ad seriatim*.

4.2.1 Export and Import Trade between Nigeria and China

Nigeria has remained one of the major trading partners of China in the whole African continent as it provides a market for various Chinese products.[225] Upon the signing of the *Nigeria-China BIT, 2001 on the Reciprocal Promotion and Protection of Investment, 2021*,[226] trade between the two countries has grown significantly.[227]

Bilateral trade between the two countries reached a peak in 2014 with a total trade value of $18.05 billion which declined to $14.94 billion and $10.62 billion in 2015 and 2016.[228] This decline in bilateral trade was as a result of government policy which aimed at reducing importation of foreign manufactured goods.[229] In spite of all this, presently now, China is Nigeria's major source of import, as imports from China hits $13.7 billion in 2015 though it declined to $9.7 billion in 2016. The increase in China's export to Nigeria is at the expense of Nigeria's traditional trading partners like USA, Canada, and Europe. In 2014, almost fifteen years after signing a trade agreement between Nigeria and China,

[224] A. D Oluwabiyi & M.M Duruji, The Implication of Nigeria-China Relations on the Actualization of Sustainable Food Security in Nigeria, (2021), Vol. 14 (1), Acta Universitatis Danubius Relationes Internationales, p. 55.

[225] G.U Osimen & E.M Micah, Nigeria-China Economic Relations: Matters Arising, (2022), Vol.10, (3), Global Journal of Political Science and Administration), pp.42-54.

[226] Agreement between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments, 2021.

[227] G.U Osimen & E.M Micah, Op. Cit. p. 43

[228] Ibid.

[229] Ibid.

bilateral trade increased almost 16 times its value before signing a trade agreement in 2001.[230]

According to Bukarambe,[231] from the time when actual functional contacts began, the pattern has been such that China exported manufactured and industrial items to Nigeria and imported unprocessed agricultural and mineral items from it. As time went by, China added mechanical and human expertise and investment capital to the list of items it exports to Nigeria. He further asserted that, "the continuation of the trend uninterrupted, unaltered and unabated indicate that China had a net industrial and developmental advantages over Nigeria from the beginning and the imbalance remained.[232]

Chinese manufacturing sector has created enormous demand for oil, material and energy resources and these they need is what Nigeria is blessed with. Hence, China has entered a trade relation with Nigeria in exchange for their oil to finance the Chinese industry for the transfer of technology, goods and services (goods include; telecommunications, rail systems, mobile roads, gas, other goods been imported by Nigeria).

Nigeria's exports to China include food, animals, crude materials, oils, chemical products and manufactured products.[233] In 2000, four broad commodities were exported totalling US$307.3 million, with the main export commodity being mineral fuel and lubricants which represented US$273.7 million followed by crude materials which totalled US$33.3

[230] C.O Onuba & U Ndubuisi, An Analysis of the Structure and Character of Nigeria-China Oil Bilateral Relations, 2008-2018, (2019), Vol. 5 (1), Renaissance University Journal of Management and Social Sciences, P. 114.
[231] See B Bukarambe, Nigeria-China Relations: The Unacknowledged Sino-Dynamics, Paper Presented at the Conference of Nigeria and the World after Forty Years; Policy Perspectives for a New Century, National Institute of International Affairs, 2007, p. 20.
[232] Ibid.
[233] E. O Ogunkola, A S Bankole & A Adewuyi, China-Nigeria Economic Relations, Revised Report submitted to the African Economic Research Consortium (AERC), 2008, P. 5.

million, others such as vegetable oil, wax, fats totalled US$0.1 million, while food and animals totalled US$0.2 million. While Nigeria's exports to China increased from US$307.3 million in 2000 to US$526.9 million in 2005, China's share in Nigeria's total exports fell from 1.5 percent to 1.2 in 2005.[234]

Meanwhile, in the trade relations, Chinese exports accounted for around 80 percent of total bilateral trade volumes. This has resulted in a serious trade imbalance with Nigeria importing ten times more than it exports to China. Nigeria's economy is becoming over-reliant on cheap foreign imports to sustain the country's economy which has resulted in a clear decline in Nigerian industries under such arrangements. Nigeria recorded a trade deficit of 1.1 USD billion in September of 2021. Nigeria also recorded a trade deficit of NGN 588.7 billion in December of 2020 compared to a surplus of NGN 362.7 billion in the same month a year ago. Exports fell by 33.4 percent to NGN 1,171 billion as crude oil exports declined by 29.6 percent, while imports were up 26.0 percent to NGN 1,760 billion. Considering 2020 full year, Nigeria posted a trade deficit of NGN 7,375 billion, compared with a NGN 2,232 billion surplus in 2019.

4.2.2 Foreign Direct Investment

Foreign Direct Investment from China is one of the economic concerns in Nigeria and this phenomenon has increased dramatically in recent years.[235] Since 2003, China has been known as a destination of global investment and her investment abroad by the local firms has increased substantially.[236] As China seeks to expand its trade relation with

[234] Ibid.
[235] I. Oji-Okoro & D. Ofori, Why South-South FDI Is Booming: Case Study of China FDI in Nigeria, (2014), Vol. 4 (3), Asian Economic and Financial Review, P. 361-376.
[236] Ibid. P. 375.

Africa, she is becoming one of Nigeria most important source of FDI.[237] This progress can be seen in the fact that China's FDI in Nigeria was $3 billion in 2003 and as of 2021, China's direct investment in Nigeria is reported to be now worth about 201. 67 billion dollars[238] It has been argued that one major factor leading to heavy investment in Nigeria by China is the fact that Nigeria is one of the largest oil-producing countries in the world and statistics has shown that oil and gas sector receives 75% of China's FDI in Nigeria.[239] Meanwhile, Chinese FDIs in Nigeria include solely owned and joint venture companies actively involved in construction, oil and gas, technology, manufacturing, services and education sectors of the Nigerian economy.

China-Nigeria investment is not a one-way issue, as with trade, the traffic in the opposite direction is booming. Although on a smaller scale, Nigerian companies and investors are making progress into the Chinese market. Direct investment by African countries is close to USD 10 billion by the end of 2009, and Nigeria ranked top five among the African countries investing in China.[240] For instance, in 2010, First Bank of Nigeria Plc opened a representative office in Beijing, becoming the first Nigerian bank to penetrate the Chinese market.[241] The bank offers an array of services to its customers in Asia, including Chinese companies seeking to enter the Nigerian market. Among First Bank's other clients, undoubtedly, are some of the Nigerians' in diaspora, many of who are engaged in exporting Chinese products to Nigeria.

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[237] C Claassen, E Loots & H Bezuidenhout, Chinese Foreign Direct Investment in Africa, Working Paper 261 presented at the Biennial Conference of the Economic Society of South Africa, 5-7 September 2011, Stellenbosch, South Africa, P. 3

[238] C Textor, Annual FDI Flows from China to Nigeria, 2011-2021, available at <www.statista.com/statistics/659081/china-net-overseas-direct-investment-odi-volume-to-nigeria> last accessed on 6/2/2023.

[239] I. Oji-Okoro & D. Ofori, Op. Cit. p. 366.

Another aspect of the Chinese involvement in the Nigerian economic sector is the Lekki Free Trade Zone (LFTZ). The Lagos State Government signed a memorandum of understanding with the Chinese Government in 2007 wherein the Nanjing Jiangning Development Zone in Jiangsu Province and China Railway Construction Corporation were represented.[242] This marked the beginning of the Lekki Free Trade Zone (LFTZ). Prior to the signing of the MOU, the Lekki-Free Trade Development Company was incorporated in Lagos in April 2006 as a joint venture among with the China Civil Engineering Construction Company (CCECC). The main objective of the LFTZ include the following: to develop an offshore economic growth zone; attract foreign investment; promote export; create job opportunities; minimize capital flight; and establish a one-stop global business haven.[243] In an attempt to provide adequate infrastructure in the zone, construction of roads into the zone began in October 2007. Other infrastructure put in place is a functional power plant, which is independent of the national grid to ensure regular supply of energy, and also water and sewage treatment plants.[244]

4.2.3 China's Investment in Nigeria's Energy, Oil and Gas

China's interest in the Oil and Gas sector was encouraged in Nigeria by the policy tagged as the "Oil for infrastructure".[245] This policy implied that that the Nigerian government auctioned oil blocs to Chinese companies on the condition that the Chinese investors shall build infrastructures in exchange in Nigeria.[246] For instance, projects like the rehabilitation of the Kaduna Oil refinery were initiated with the "oil for infrastructure"

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[243] Ibid.
[244] Ibid.
[245] G. Mthembu-Salter, China's Engagement with Nigeria's Oil Sector, SA Institute of International Affairs (SAIIA) Policy Briefing 11, 2009, p. 1
[246] Ibid, P. 1.

Memorandum of Understanding entered with the China National Petroleum Corporation (CNPC) and in consideration, the CNPC won two blocs (OPLs4 471 and 298) in the Niger Delta and two (OPLs 732 and 721) in the Chad basin.[247]

However, this policy lasted between 1999 and 2007 and by the beginning of 2009, Chinese investment in the Oil and Gas sector was done by acquisition of rights in the mining sector. By this, there is the presence of Chinese investment and development companies such as Petro-China and later on the CNOOC Group (China National Offshore Oil Corporation) which in December, 2005 bought a 45% stake in an offshore Nigerian oil field for $2.27 billion, an acquisition which eclipsed Chinese computer manufacturer Lenovo's $1.75 billion purchase of IBM's personal computer business in 2004.[248]

Chinese companies are also investing tremendously in the oil and gas sector in Nigeria. For example, China Petroleum and Chemical Group (SINOPEC) which is state- owned Chinese oil MNC and the largest in Asia and third largest in the world acquired Addax Petroleum (Canadian oil Multinational Company) operating in the oil and gas sector of Nigeria. Also, in November 2012, SINOPEC acquired a total of 20% stake in a Nigerian offshore oilfield.[249] Within the Nigerian oil and gas industry, there exist operating contractual arrangements for Concession Agreements (Sole Risk); Joint Venture; Production Sharing Contracts (PSC) and Service Contract. The Addax Petroleum (Canadian oil Multinational Company) acquired by China Petroleum and Chemical

[247] Ibid, P.1
[248] I. Oji-Okoro & D. Ofori, Op. Cit. p. 367.
[249] C.O Onuba & U Ndubuisi, Op. Cit., P. 116.

Group (SINOPEC) is the only Chinese oil multinational company engaged in Production Sharing Contracts (PSC).[250]

The power sector remains one of Nigeria's greatest infrastructure challenges, despite the abundant availability of energy resources in the form hydro and other renewable sources.[251] African countries, including Nigeria have in the recent decade shown the dire need for large-scale Hydropower Plants (HPPs), this need has offered the opportunity for Chinese companies to become involved in international hydropower dam development, funded by Chinese governmental loans.[252] In this sector of the hydropower generation, the China Gezhouba Group and Sinohydro Corporation are known as the two leading firms.[253]

As of 2020, Nigeria's total power output stood between 3,500MW-3,800MW, with nonrenewable sources accounting for 80%-85%. This is a low generation for a country that hoped to grow its economy at a rate of 11 to 13% in order to be among the world's 20 largest economies by 2020. The government set hydropower development objectives of 6,156 MW for 2020 and 12,801 MW for 2030 to accomplish this ambitious growth aim.[254] It aims to achieve 30% renewable energy by 2030, as well as 70% of energy consumption produced on-grid, compared to the present 74% self-generation, according to the International Hydropower Association, 2020.[255]

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[250] Ibid.
[251] E.O Ezeani & R.O Ngoka, Nigeria-China Relations and Infrastructural Development in Nigeria, University of Nigeria Journal of Political Economy, Vol. 12 (2), P. 254.
[252] T. K Yuguda, S. A Imanche, T. Ze, T. Y Akintunde & B. S Luka, Hydropower development, policy and partnership in the 21st century: A China-Nigeria outlook, Review Paper on Energy and Environment , 2022, P. 17
[253] Ibid.
[254] Ibid.
[255] Available at <www.hydropower.org/country-profiles/nigeria> last accessed on 9/2/2023.

One way by which the China has an infrastructural development undertaking in Nigeria is via the development of hydropower construction which is more of a foreign direct investment of Chinese Companies in Nigeria. It is seen that this infrastructure development deal is executed through loan from China which Nigeria must as a precondition award the project for which the loan is to be applied to Chinese companies.[256] This manifests in the September 2013 deal with two Chinese firms (China National Electrical Engineering Corporation and Sinohydro) to build the 700 MW Zungeru hydropower plant, this deal is the second major hydroelectric power project awarded to a Chinese firm by Nigeria.[257] The government approved funding for 25 percent of the project with the Export-Import Bank of China funding 75 percent via low-interest loans. The project is the largest power project in Africa to be funded with government concessional loans.[258]

The Mambilla 3,050 MW hydropower facility in Taraba State is another Chinese-funded project. Chinese financiers contributed more than half of the financing for Nigeria's US$5.8 billion Mambila Hydropower facility.[259] Negotiations began in 2006 with a consortium comprised of China Gezhouba Group Company Limited and China Geo-Engineering Corporation (CGGC/CGC), which was granted the project's EPC contract. The Nigerian government then unilaterally and controversially terminated the contract and granted it to Sinohydro. However, the project has been delayed for far too long due to

[256] Ibid.
[257] Ibid.
[258] T. K Yuguda, S. A Imanche, T. Ze, T. Y Akintunde & B. S Luka, Op. Cit. P. 18.
[259] Ibid.

Chinese indifference in Nigeria's sustainable energy transition and the Nigerian government's lack of willpower to take control of her fate.[260]

In addition, in 2019, the Federal Executive Council authorized a $1 billion loan from Exim Bank of China. The money were to be used to create the Gurara II hydropower project as a renewable energy project in Kaduna State in northern Nigeria. The Gurara River already generates 30 MW of energy and provides agricultural water in the northern state.[261] The Gurara II hydropower project, which is still under construction, is planned to provide 360 MW of power.

Given Nigeria's abundant energy resources, particularly hydropower, the potential for making it a viable energy source is enormous. Greater global cooperation may benefit everyone, eventually increasing energy availability and economic prosperity. China's participation in Nigeria, on the other hand, is part of the Chinese imperialistic goal, as is the internationalization of Chinese firms and the government's "going abroad" plan.[262]

It is also important to note that Chinese interest in Nigeria is prompted by China's economic downturn and overcapacity in numerous industries. Chinese players consider Nigeria's industrialization and economic growth as crucial for Chinese exports of manufactured products in the region, thus they invest in sectors that benefit them, such as hydropower. In terms of Nigeria-China relations, China's investment in hydropower has had little influence on the growth of Nigeria's hydroelectric energy, consequently impeding sustainable energy transition in that sector.

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[260] E.D Oruonye, Assessment of the Socio-economic Impact of Kashimbilla Multipurpose dam Project in Takum LGA, Taraba State, Nigeria, (2015), Vol. 4 (5), Global Journal of Interdisciplinary Social Sciences, p. 14.

[261] Ibid, p. 15.

[262] Ibid.

As long as this situation persists, the implication is that there is lack of sincerity in execution of such acclaimed projects and contracts. Nigeria badly needs investment to improve power supplies for its 206 million people. By implication therefore, Nigeria's optimism that increased Chinese presence in her economy (especially in the energy sector) means development is a mirage.

4.2.4 China's Investment in Nigeria's Railway Transport Sector

Rail transportation had existed in Nigeria since the colonial period when the rail tracks connecting Lagos Colony and Ibadan was built in March 1896, by the British government.[263] The Lagos Government Railway began operations in March 1901 and was extended to Minna, Niger State, in 1911, where it met the Baro–Kano Railway Station that was built by the government of Northern Nigeria between 1907 and 1911.[264]

Following the discovery of coal at Udi, the Eastern Railway was built to Port Harcourt between 1913 and 1916. This railway was extended to Kaduna in 1927, connecting the Eastern Railway to the Lagos–Kano Railway. The Eastern Railway was extended to its northeastern terminus of Maiduguri between 1958 and 1964 [by the administration of Sir Abubakar Tafawa Balewa].[265] By 1995, the nation's rail system consisted of 3,505 kilometre of 3 feet 6 inches (1,067 mm) Cape gauge lines and 507 km of standard gauge lines. The Nigerian railways has same track gauge used in most other British colonies in Africa.[266]

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[263] Infrastructure Concession Regulation Commission (ICRC), Nigeria's Railway System: Development, Decline and Rebirth, 4th ed. ICRC Buletin, 2020, P. 6.
[264] Ibid.
[265] Ibid.
[266] Ibid.

Despite the early development of rail transportation, rail Transportation is a big deal in Nigeria's relations with China because of the fact that in more recent times, rail transportation is fast going into extinction, this fact is due to the neglect of the sector by successive governments. The decline experienced in terms of passenger and freight movements over the decades was as a result of differed investments for both the locomotive and rolling stocks.[267]

Also, obsolete locomotives and rolling stocks have reduced the capacity and utility of the rail system as reflect in the passenger and cargo traffic data 1964-2003.[268] By early 2013, the only operational segment of Nigeria's rail network was between Lagos and Kano. Passenger trains took 31 hours to complete the journey at an average speed of 45 km/h.[269]

Transportation infrastructure works as veins of the country, connects people with goods, utilities, services and ideas. It is one of the basic equipment needed for a country to function. Investment in uprating transportation is not a waste of funds, especially in low-income countries, that need to boost its economy.[270] Transportation also contributes to the citizens' wellbeing.

According to Popova, transportation is the enabling element for the so-called social infrastructure (healthcare, education, culture).[271] The notion of infrastructure takes into account two huge categories: social infrastructure and economic or production infrastructure. The social infrastructure comprises such subsystems as healthcare and education, culture, tourism, etc., while the economic infrastructure consists of transport

[267]Ibid, P. 7
[268] Ibid.
[269] Ibid.
[270] E.O Ezeani & R.O Ngoka, P. 253.
[271] Y. Popova, Relations between Wellbeing and Transport Infrastructure, paper delivered at the 16th Conference and Statistics in Transportation and Communication, 2016, p. 581.

and transportation system, telecommunication, electrical grid, water supply system, bridges, roads etc.

This division is relatively symbolic. The social infrastructure has significant impact on the economic one, and the economic infrastructure presupposes the level of development of the social infrastructure. Transportation infrastructure is interconnected with all the other industries crucial for the economy and personal standard of living.[272] Therefore it is crucial for the continent to build a global, efficient connection network to transport people and cargo between the countries and towards the shore. The landlocked countries would gain a large trade-boosting possibility, while the non-landlocked countries could expand their infrastructure around it (ports, warehouses, services).

In recent years, China has been exceptionally active in the railway sector. Nigerian rail communication network is still considered the best in Western Africa but also neglected and inefficient.[273] After independence, Nigeria maintained the colonial railway structures and they were not modernized as a result of which the facilities deteriorated.[274]

President Obasanjo launched a railway renovation project in Nigeria in 2006. The plan has always been intertwined with China. China Exim Bank was scheduled to pay the $8.3 billion contract given to China Civil Engineering Construction Company (CCECC). The plan called for the rehabilitation of existing lines as well as the development of new ones. The network would then be connecting all the Nigerian states, develop the connectivity of

[272] Ibid.
[273] Y. Chen, China's Role in Nigerian Railway Development and Implication for Security and Development, United State Institute of peace Special Report, 2018, P. 4
[274] Ibid.

the capital and modernize the Western line. The largest works were projected to be done on the Lagos-Kano (Western) line.[275]

The new, standard gauge tracks were planned to be built parallel to the old ones, constructed by British in the 20th century. The new tracks would then replace the old one. A few new branches were also supposed to be added.[276] The line would reach the Niger border on the North but also gain a connection with the capitol – Abuja.[277] The modernization project was also answering the need for more connections between the East and West. By now, the rail tracks were directed in the majority from North to South due to the economic needs of the British Empire.

4.2.5 China's Investment in Nigeria's Agricultural Sector

Cotton production is the foremost trade relationship between China and Nigeria when we speak about the trade relationship between the two states.[278] From 2007- 2009, China sent 104 senior agricultural technology experts to 33 African countries including Nigeria to assist in the creation of agricultural development plans. China also organized extensive training on topics including the cultivation of rice and vegetables, fishery management, meat processing, and the use of agricultural machinery. Also, in 2009, China provided training to 568 African agricultural officials and technicians in rural economic reform and development, food production, soil and water conservation and dry cultivation techniques,

[275] Ibid.
[276] Ibid.
[277] Ibid.
[278] A Gbadamosi & A.C Oniku, The Strategic Implications of China's Economic Pacts with Sub-Saharan African Countries: The Case of Nigeria. Conference of the International Journal of Arts and Sciences, (2009), Vol. 1 (18), p. 6

the development of new cotton varieties, the use of agricultural machinery and continuing education for agricultural teachers.[279]

China is also increasing investment in Africa's biofuel agricultural products. It is making efforts to diversify its structure of energy resources in transferring from fossil fuel to biofuel production, to mitigate the impact of climate change and to improve environmental conditions.[280] The Chinese government has stated that the country will use minor crops, such as cassava, palm oil and sugarcane, rather than staple food crops to produce biofuel. Accordingly, the Chinese government has accelerated its imports of agriculture-related raw materials for biofuel production from Africa. China is set to increase its agricultural investment in Africa, with the Chinese government encouraging companies to invest.[281] Chinese enterprises have built numerous agricultural infrastructure and irrigation facilities in Africa. The China Metallurgical Group Corporation (MCC) has reached agreements with 35 African countries in supporting large-scale infrastructure of which 70% of investments are in Nigeria, Angola, Sudan and Ethiopia. Chinese agricultural professionals are helping to establish agricultural demonstration bases in Africa.

To help improve African exports as a means to reduce trade imbalances, China introduced duty free status for over 10 major export products (including agricultural goods) of 31 African countries including Nigeria. Furthermore, to build the export capacity, promote development of African economies, and create chances of technology

[279] See H.L Sun, Understanding China's Agricultural Investments in Africa, South African Institute of International Affairs, SAIIA Occasional Paper No 102, 2011, P. 9.
[280] G. H Daniel & S Maiwada, Chinese Trade and Investment in Nigeria's Agricultural Sector: a Critical Analysis, (2015), Vol. 4 (2) American International Journal of Social Science, p. 281.
[281] H.L Sun, Op. cit, P. 11.

transfer, China has constructed Special Economic and Trade Zones including Nigeria-Guangdong Economic Cooperation Zone among others.[282] China is the world's largest cassava importer and Nigeria is the world's largest cassava exporter to China. In 2019, Nigeria exported cassava worth 734, 000.00 dollars, majority of which were exported to China.[283] It is seen above that cassava dominates the Nigeria-China export trade, the probable cause of this is that China has a highest demand for cassava importation and Nigeria is the largest exporter of Chinese cassava in Africa.[284]

4.2.6 Chinese Aid in Nigeria

The rising prominence of Chinese aid, export credits, and bank finance has aroused both enthusiasm and concern within development circles. Some believe that Chinese practices in official aid, preferential export credits, and other forms of development finance pose a significant challenge to the norms governing the international aid architecture. Others welcome the rise of a new development partner, one with seemingly deep pockets, and suggest that the Chinese might provide new leverage to countries faced with conditionality-based aid advocated by traditional donors.[285]

Yet despite the intense interest, debates over the impact of China as a donor and financier have largely taken place with very little information. China's rise is taking place within a set of rules, norms, and sometimes competing institutions that make up what is known as the global aid architecture. Although often called an "emerging donor," China has in fact

[282] B, Z. Osei-Hwedie, The Dynamics of China-Africa Cooperation, (2012), Vol. 3 (3.1) Afro Asian Journal of Social Sciences, p. 7.

[284] P. I Tom-Jack, The Evolving Geopolitical Relations of Nigeria and China: What is the impact of the Nigeria-China trade and direct investment on the Nigerian economy? (unpublished), Thesis Submitted to Department of Public and International Affairs, The University of Ottawa, 2016, P. 35

[285] See D. Brautigan, China, Africa and the International Aid Architecture, (2010), African Development Bank Working Paper Series, P. 6.

had an aid programme since the 1950s. Egypt was the first African recipient of aid from China in 1956. Chinese aid is almost automatic for African countries with formal diplomatic ties with Beijing. Every country in Africa, with the exception of Swaziland, has been a recipient of Chinese aid. Countries such as Chad, Burkina Faso, and The Gambia, have switched diplomatic recognition back and forth between Beijing and Chinese Taipei.[286]

In the peak period of the mid 1970s, after Beijing had won back its United Nations seat from Chinese Taipei, China had aid programmes in more African countries than did the United States.[287] Although the quantity of funding dipped during the 1980s, Chinese aid programmes remained, with a focus on sustaining and consolidating the results of aid investments made during the 1970s. Some knew that China continued to support its flagship project -- the Tanzania-Zambia Railway -- but it was less known that in the 1980s and 1990s, China sent teams to dozens of African countries to repair, rebuild, and consolidate many of their earlier infrastructure and production projects.[288]

It is widely said that China does not have a central aid agency, but in fact, China's aid programme is organised by the Department of Foreign Aid in the Ministry of Commerce (MOFCOM), which cooperates with the Ministry of Foreign Affairs. The Department of Foreign Aid operates China's grant programme, zero-interest aid loans, youth volunteer programme, and technical assistance. Under direction from the Ministry of Commerce, China's Export-Import Bank (Eximbank) administers China's concessional foreign aid

[286] D. Brautigam, "China's African Aid: Transatlantic Challenges," (2008), German Marshall Fund of the United States, Washington, DC, P. 12-13
[287] D. Brautigam, Chinese Aid and African Development: Exporting Green Revolution, London: Macmillan, 1998. P. 54.
[288] Ibid, P. 34.

loan programme using subsidies from the foreign aid budget to soften the terms of its concessional loans. China Eximbank is one of three "policy banks" (along with China Development Bank, and China Agricultural Development Bank) set up in 1994 to better enable the government to directly finance its development goals as it transitioned to a market economy. As a Chinese analyst put it, "policy loans are heavily influenced by government policies and are not to operate in full compliance with market rules".[289]

From the above, it would be deduced that the various assistance and aid received from China by Nigeria are advanced as Chinese loans to Nigeria. It will be added that these loans are not afforded to Nigeria in cash but are used to execute projects in Nigeria.

Some technical and financial assistance have been rendered by the two countries to support each other. For instance, during the visit of China President (President Hu Jintao) to Nigeria in April 2006, Nigeria and China signed four Agreements and three Memoranda of understanding (MOUs) on a range of programmes to enhance their economic ties.[290] Available data show that some of the technical and financial assistance provided by China for Nigeria in recent times are in the areas of health, education, communication and infrastructural development.[291]

In the area of health, China supported Nigeria's Rollback malaria programme with anti-malarial drugs and treated mosquito nets worth about N400 million in 2002. In an attempt to further support the programme in 2006, China signed an MOU with government to supply anti-malaria drugs worth N83.6 million.[292] In the area of education, China signed

[289] Institute of Economic and Resource Management, A Report on the Development of China's Market Economy Beijing: China Foreign Economic Relations and Trade Publishing House, 2003, P. 128
[290] Ibid.
[291] Ibid, P. 38
[292] Mthembu-Salter, Op. Cit, P. 4.

an MOU in 2006 with the Nigerian government to provide about N670 million for the training of 50 Nigerian officials and medical personnel on comprehensive malaria prevention and control.[293] Further, some educational institutions in Nigeria have established linkages with China with a view to showcasing the Chinese culture, landscape and innovations. For instance, in collaboration with the Chinese Embassy, Abuja, the Federal Polytechnic, Offa organised an exhibition on Chinese Culture and Landscape to advance the cultural bond between the two countries.[294]

Similarly, China is working with the Nnamdi Azikiwe University, Awka to provide Chinese language teaching to Nigerian students. Under this scheme, the Chinese government is to fully sponsor the training of the university's staff to study Mandarin in China up to master's and doctorate degree level.[295] This scheme is also characterized by frequent exchanges of cultural troupes and students. In 2006, a memorandum of understanding on the provision of National Information Communication Technology Infrastructure Backbone was signed between the Federal Ministry of Science and Technology and Huwaei Technologies.[296] In order to support infrastructural development in Nigeria, China through its Export Import Bank entered into a financing agreement (of N8.36 billion concessionary export grants) with Nigeria.[297]

The infrastructure aspect of China's intervention in Nigeria is visible in the transport sector, energy sector, steel production and internet connection. These projects which Chinese government are executed through financial aids from China. Meanwhile, it

[293] Ibid.
[294] Ibid, P. 5
[295] Ibid.
[296] Ibid.
[297] Ibid, P. 4

should be understood that some of the "so-called" financial aids are in form of infrastructure loans payable to China overtime.

The succeeding sections of this chapter conducts an assessment of China-Nigeria trade and investment relations and the impact of that relationship on the sovereignty of Nigeria.

4.3 Assessment of the Nigeria-China Investment Relationship

Assessing the investment relationship between Nigeria and China involves the consideration of certain critical factors discussed under the following headings:

iv. A critical assessment of the regulatory framework of investment relationship between Nigeria and China
v. An assessment of the impact of China-Nigeria trade and investment relations on the sovereignty of Nigeria.

These factors are discussed below.

4.3.1 A critical assessment of the regulatory framework of investment relationship between Nigeria and China.

It has been stated earlier that investment relations between states are consummated by BITs and IIAs.[298] Indeed, the relationship between Nigeria and China is regulated by existing BITs executed between the two states, also existing are contractual agreements and Memorandum of Understanding between both states in sectors like Oil and Gas, loan agreements, transportation, and import and export trade.

[298] Chapter two, *ante*

The BITs regulate the inter-state business relationship, the business relationship between Nigeria and the Chinese companies that operate FDIs within Nigeria and between the Chinese government and Nigerian indigenous investors operating within China.

Going by the provision of the *Constitution of the Federal Republic of Nigeria,* 1999, these treaties do not become binding on Nigeria in their ordinary form. This is more so by section 12 (1) which provides that no treaty between the Federation and any other country shall have force of law except any such treaty has been enacted into law by the National Assembly. In *The Registered Trustees of National Association of Community Health Practitioner of Nigeria & Ors V. Medical And Health Workers Union Of Nigeria & Ors*[299] the appellants sought a declaration that it is unconstitutional, illegal, unlawful and against the provisions of convention 87 and 89 of the International Labour Organisation (ILO) for the respondents to refuse to register the applicant as a Senior Staff Trade Union. It is important to note that the appellants' claim was premised upon the provisions of the *Convention of the International Labour Organisation* which had not at the time, been domesticated in accordance to Section 12 of the Constitution, Mukhtar JSC,[300] held that in so far as the I.L.O. Convention has not been enacted into law by the National Assembly, it has no force of law in Nigeria and it cannot possibly apply. In *Abacha v. Fawehinmi,*[301] Ogundare, J.S.C alluded to this fact when he stated that an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly.

[299] (2008) LPELR-3196(SC)
[300] Ibid, P.35, Par. F
[301] (2000) 6 NWLR (Pt. 660) 228 at Pp. 288 - 289

However the 3rd Alteration of the Constitution exempts the application by the NICN of ratified labour and employment related international conventions, treaties and protocols from the generality of s. 12 CFRN.

The operative BIT between Nigeria and China is the *Agreement between the Government of the Peoples' Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investment, 2001* [hereafter referred to as the *"China-Nigeria Agreement on Investment, 2001"*][302] which replaced the 1997 BIT and meant to be in operation by 2010. The *China-Nigeria Agreement on Investment, 2001*is intended to create favorable conditions for greater investment by investors of either of the contracting parties in the territory of the other contracting parties.[303] The areas of coverage of the *China-Nigeria Agreement on Investment, 2001* includes; (i) protection of the Investment and, (ii) Settlement of Disputes.

The reciprocal obligations between Nigeria and China over the encouragement of Foreign Direct Investment is provided under Article 2 of the *China-Nigeria Agreement on Investment, 2001*[304]. This duty includes the obligation on the host state to provide enabling environment and legislations towards equal treatment of investment from the investor-state. However, this is subject to the duty of the investor to comply with the local legislation of the host state[305]. Further, the *China-Nigeria Agreement on Investment, 2001* prohibits the host state from expropriating the investment of the foreign investor[306] except where the said expropriation is supported by the following reasons;

[302] Available at <investmentpolicy.unctad.org> last accessed on 7/3/2023.
[303] See the Preamble, Agreement between the Government of the Peoples' Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investment (China-Nigeria, BIT). Available at <investmentpolicy.unctad.org> last accessed on 7/3/2023.
[304] Ibid, Article 2 (2).
[305] Ibid, Article 3 (3).
[306] Ibid, Article 4 (1).

i. Where the expropriation is for public interest

ii. Conducted in line with domestic legal procedure

iii. It is done without discrimination and;

iv. Fair compensation is paid.[307]

The provision above is in line with customary international law. International treaties negotiated between states to facilitate the smooth exchange of trade generally accept foreign investor proprietary rights such as ownership and the exploitation and management of resources in their investment projects, though there is an expectation that these entitlements will be respected by the host state. Under the idea of sovereignty, any action taken by a host state to expropriate property belonging to an investor (whether physical, commercial, or intellectual) must be limited. Treaties include limitations on the absolutist conception of sovereignty in order to promote global trade.[308]

In accordance to this, *Article 4 of the General Assembly Resolution in Permanent Sovereignty over Natural Resources, 1962* provides that:

> Nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest, which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation[309]

[307] Ibid, Article 4 (1) (a)-(d)
[308] Al-Adba, Op. Cit, P. 116.
[309] UN Resolution on Permanent Sovereignty over Natural Resources

A foreign investor must be shielded against ambiguity when operating in the international investment environment, particularly when a host state wants to use its sovereign rights to harm either the investment project or the foreign investor. Uncertainty may come from the state's activities in pursuit of its own interests, such as compromising or breaching contractual requirements, or obstructing the investment process.

The interaction between a host state and an investor arising from an international financial venture has a high potential for conflict, especially when the administration of the host state lacks a stable legal system based on the principles of 'transparency, efficacy, accessibility, and equality'.[310]

The China-Nigeria BIT caters for situation of disputes between; (i) contracting parties, that is, Nigeria and China (ii) between the host state and the investor. By Article 8 (1) of the BIT, disputes between the contracting states are meant to be settled through diplomatic channels and by way of arbitration. Meanwhile, in the case of disputes between a contracting state and an investor, the settlement mechanism is by way of negotiation and arbitration.[311]

4.3.2 An assessment of the impact of China-Nigeria trade and investment relations on the sovereignty of Nigeria.

The aspect of the investment which touches the sovereignty of states is the aspect of loan advancement. Just like any relationship between a developed state and a developing one,

[310] C. G Garcia, All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration, (2004), Vol. 16, Florida Journal of International Law, p. 323.
[311] See Article 9 of the China-Nigeria BIT.

Nigeria's relationship with China is one of a rich state and a less privileged state.[312] Chinese financiers have committed US$ 153 billion to African public sector borrowers between 2000 and 2019[313]. At least 80 percent of these loans financed economic and social infrastructure projects mainly transport, power, telecoms, and water.[314]

The Chinese model of advancing loans to developing states may be described as the resource-backed lending model which entails that infrastructure projects undertaken by Chinese companies are often financed by soft loans from the Chinese government, on the condition that they are carried out by Chinese companies which is in line with the "going out" strategy of the Chinese government to internationalize Chinese firms into global chains.[315] Chinese government concessional loans are disbursed by China Exim Bank, currently one of the largest such institutions in the world.[316]

As of 2022, it was reported that Chinese lenders account for 12 per cent of Africa's private and public external debt, which increased more than fivefold to $696 billion from 2000 to 2020.[317] More than 80 percent of these in terms of value were to resource-rich African countries, such as Angola, Nigeria, Zimbabwe and Sudan.[318] According to the China Exim Bank's concessional loan requirements, Chinese contractors must be

[312] D. Mihalyi, J. Hwang-Diego R. James Cust, Resource-Backed Loans in Sub-Saharan Africa, World Bank Group, Policy Research Working Paper 9923, 2002, P. 2.
[313] M.I Opusunju, A. Murat & E.V Inim, Assessment of China - Nigeria Trade Relations (1990-2018), (2020), Randwick International Social Science Journal, Vol. 1 (1). P. 18.
[314] Ibid.
[315] P. Konijn, Chinese Resources for Infrastructure (R4I) Swaps: An Escape from the Resource Curse, South Africa Institute of International Affairs (SIIA), 2014, Governance of Africa's Resource Programme, p. 5.
[316] Ibid.
[317] See A Vines, C Butler & Y Jie, The response to debt distress in Africa and the role of China, Exploring solutions to African debt distress through multilateral cooperation, (2022), Chatham House Research Paper, p. 5, available at <2022-12-15-africa-china-debt-distress-vines-et-al (chathamhouse.org)> last accessed on 15/3/2023.

[318]Ibid;

awarded the infrastructure contract financed by the loan. Furthermore, in principle, no less than 50 percent of the contracts procurement in terms of equipment, materials, technology or services must come from China.[319]

It is important to state here that the Chinese loan is not a collateral free loan. Under the resource-backed lending, developing states that receive lending from China usually contract future revenues from natural resource exports as loan repayment to China.[320] For instance, the first of such lending by China in Africa was initiated in Angola in 2004. A $2 billion loan from Exim was used to finance the reconstruction of infrastructure damaged in Angola's civil war.[321] The export revenue from 10, 000 barrels of oil a day over a period of 17 years would be used to repay the loan. In accordance with the loan agreement, 70% of public tenders for the infrastructure projects related to the deal was to be awarded to Chinese construction corporations.[322]

It is submitted that any provision in any agreement which restricts a sovereign state to a particular contractor and way of carrying out a project as seen above is a restriction on the rights of the state to regulate its internal affairs. A pivotal issue which is also worthy of consideration is Article 8(1) of the $400 million Loan Agreement ("Loan Agreement") executed by the Ministry of Finance on behalf of Nigeria and the Export –Import Bank of China for the Nigeria National Information and Communication Technology (ICT) Infrastructure Backbone Phase II Project in 2018. The said Article 8 (1) provides;

[319] T. Moss & S. Rose, China Exim Bank and Africa; New Lending, New Challenges, (Centre for Global Development, 2006).
[320] Ibid.
[321] Ibid.
[322] Ibid.

> The borrower hereby irrevocably waives any immunity on the grounds of sovereign or otherwise for itself or its property in connection with any arbitration proceedings pursuant to Article 8(5), thereof with the enforcement of any arbitral award pursuant thereto, except for military assets and diplomatic assets.[323]

Although, most of the provisions of the Loan Agreement between Nigeria and China are not made public[324] but a look at the provision of Article 8(1) above means that the principle of sovereign immunity has to be waived in relation to the legal action which China may institute against Nigeria as it relates to enforcement of the loan agreement.

Generally, as a principle of public international law, a sovereign state is deemed to be immune from legal proceedings (including arbitration) and/or any process of execution of judgment against its property in the court of a foreign state.[325] This principle is premised basically on broad considerations of public policy, International law and comity as well as on the dignity, equality and independence of States rather than on any technical rules of law.[326]

However, this principle can be eroded if the state itself consent to waive its sovereign immunity. This is to say that where a state through enters into a contract with another state, the terms of the will be binding on the state despite its sovereign immunity. In the

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[323] China-Nigeria Loan Agreement, 2018.
[324] See K. Pinhiero, $400 Million Chinese Railway Loan; Has Nigeria Truly Mortgaged Its Sovereignty? A Legal Perspective, available at < SPECIAL ARTICLE.cdr (pinheirolp.com)> last accessed on 15/3/2023.
[325] This is known as the Sovereign Immunity Clause designed to protect the sovereignty of independent states; see Ibid.
[326] Ibid.

case of *Trendex Trading v Central Bank of Nigeria,*[327] the Central Bank of Nigeria's (CBN) attempted to rely on the principle of sovereign immunity to avoid the exercise of jurisdiction by the English court in a claim against the bank for payments due in respect of letters of credit issued. In dismissing the claim of sovereign immunity raised by the CBN, it was held inter alia that international law no longer recognize immunity from legal proceedings for a government department in respect of ordinary commercial transactions.

One issue in Article 8 (1) above is that the assets in relation to which Nigeria waives its rights are only military and diplomatic assets, this means that the Republic of China may levy execution on every other asset belonging to Nigeria, this is a wide provision which leaves too much of the discretion to the lender (China) and capable of floating across Nigeria's vast resources.

From the understanding above, it may not be accurate to conclude that the Nigerian government used its sovereignty as a bargaining chip as that goes beyond the scope of a waiver of sovereign or jurisdictional immunity. However, it is clear that economic sovereignty is at stake from the provision above. More prominently is the fact that the African Development Bank and other international bodies have adjudged the Chinese loans to be non-transparent in relation to its terms and conditions.[328] Furthermore, Nigeria had plunged itself into a large indebtedness burden with China; the Debt Management

[327] (1977) 1 Q.B 529
[328] See ECOFIN Agency, Chinese loans to Africa increased sharply, but a large majority is not transparent (AfDB).

Office (DMO) reports that as at March 31, 2020, the total borrowing by Nigeria from China was USD3.121 billion.[329]

From the experience above, the loans advanced by China to developing states are often in large figures that it takes a miracle for developing countries to eventually honour its debt at the maturity date of the loan deal. With the too much loan facility in Beijing's fat purse, developing countries often fight their temptations a short while only to give in to the possibility of concluding big projects that could propel economic activities and swell the Gross Domestic Product (GDP) enough to offset its indebtedness to the Chinese Government.[330] Most times, and from recent ordeals, the borrowers regret their choices.

To cite just few examples,[331] in June 25, 2018, *the New York Times* reported the fate of Hambantota, Sri Lanka. With the rate of Sri Lanka's debt ballooning under Mr Rajapaska, Hambantota port was handed over to the Chinese Government and 15, 000 acres of land around it for 99 years in December. Scary too is the 2006 loan to Tonga sought to rebuild infrastructure where from 2013 to 2014, the country suffered a debt crisis. The EXIM Bank of China, to whom the loans were owed, did not forgive them. The loans claimed 44% of Tonga's GDP.

In Zambia, the Chinese Government seeks control over Glencore's Zambian operation Mopani and the country's largest producer, First Quantum Minerals; the Chinese firms are seeking to capitalize on the liquidation of Konkola Copper mines, a subsidiary of London-based Vedanta Resources (Zambia is Africa's second-largest producer of copper).

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[329] See <FACTS ABOUT CHINESE LOANS TO NIGERIA - Debt Management Office Nigeria (dmo.gov.ng)>, last accessed on 15/3/2023.
[330] Ibid.
[331] https://www.google.com/amp/s/www.trtworld.com/africa/is-debt-trap-diplomacy-china-s-neocolonialist-tool-in-africa-27672/amp (accessed 2/8/2023).

It would appear that the victims could not stop borrowing from China; sad as debt reliefs, renegotiation and restructuring proved abortive as China ever plays hardball. The questionable motives of China should preach caution to the Nigerian Government and it is to this end that Tillerson, the United States Secretary of State warns African countries against taking the terms of Chinese loans without proper consideration, describing China foreign policy as "debt trap diplomacy".[332]

This chapter considered the critical issues in the Nigeria-China investment relations, particularly a review of the regulatory framework guiding the bilateral investment between Nigeria and China. From that discussion, it can be deduced that the investment process is imbalanced as the indices in the export trade is to the disadvantage of Nigeria. It therefore underscores the need for Nigeria to be cautious of loan advancement from China as such advances enhances the risk by which the sovereignty of Nigeria may be subjected to the authority or control of China.

The next chapter presents a conclusion to this study, and it contains recommendations as to how Nigeria, and perforce, other developing countries sharing the characteristics of Nigeria, can defend and preserve their sovereignty despite being engaged in international trade and investment relationship with developed states.

[332] See Premium Times Newspaper, 8th March, 2018, available at <www.premiumtimesng.com/newsheadlines> last accessed on 19/9/2023.

CHAPTER FIVE

CONCLUSION

5.1 Summary of Findings

This study sets out to examine the investment relationship between developed states and developing states and how it affects the sovereignty of the state actors, this is done by using the examples of China and the Federal Republic of Nigeria being examples of one of the largest developed economies and developing economies respectively. The key concepts propelling the course of this study are foreign investment and sovereignty. This study considers the dimensions of investment placing much emphasis on the area of foreign direct investment carried out by foreign investors and governments.

In examining the concept of investment under the international law, the study conceptualized the key term "foreign investment" which is a concept without a universally accepted definition. This is done by adopting the definitions provided by the *United Nations Conference on Trade and Development.* The concept is defined based on the models provided in the various Bilateral International Treaties and International Investment Agreements, this definitions include the (a) Broad Asset-based definition (b) Enterprise-based and transaction-based and; (c) Development based. Meanwhile, the study adopted the definition under Article 25(1) of the *ICSID Convention* which includes Foreign Direct Investment and Portfolio Investment which contributes to the state's development.

Meanwhile, this study laid more emphasis on foreign direct investment since it is the form of foreign investment that affects the exercise of state sovereignty over citizens of other states. Foreign direct investment occurs when a resident enterprise direct investor develops a long-term stake in a direct investment enterprise situated in another economy. A long-term relationship between a direct investor and a direct investment business is referred to as enduring interest. Furthermore, this link has a significant impact on corporate management. The requisite relationship can be established by directly or indirectly owning 10% or more of the voting power of a direct investment firm.

Usually nationals of foreign states establishes businesses which are operated by companies in the host states. For instance, the Companies and Allied Matters Act requires that all businesses must be registered including those operated by foreigners. Upon incorporation, the companies become artificial entity or artificial citizens of Nigeria, one issue which arose in the course of the study was whether such companies registered in

accordance with the host state laws can be given the status of foreign undertakings by virtue of the nationality of its promoters. In answering this question, various international law theories were considered. However, it is submitted in this study that the appropriate theory to be applied in strict legal sense is the incorporation theory which postulates that the nationality of a business is determined by its place of incorporation, this is in line with Article 9 of the United Nations Draft Articles on Diplomatic Protection which also maintains that for the purposes of the diplomatic protection of a corporation, the state of nationality means the State under whose law the corporation was incorporated. The interpretation here is that a company registered in Nigeria but promoted by Chinese citizens will not be seen as a foreign company. However, in practical sense, the BITs usually vest such companies with foreign status.

In relating international investment to sovereignty, the study found that the concept of absolute sovereignty in its traditional form is not applicable in the modern international investment parlance. Traditionally, economic sovereignty in international investment includes the rights of states to supervise its undertakings and the environmental consideration in the sovereign states. It is clear that there are limitations placed upon the exercise of state sovereignty, when considering the rights of a foreign investor. Such restrictions may be incorporated into a bilateral investment treaty between the states concerned, or written into the specific investment contract itself. Customary international law also has a role to play in the constraint of unrestricted host state action, allowing sovereign authority to be negotiated in the attempt to attract foreign investment. Investors are likely to understand that the absence of limitations on formal sovereign power poses a considerable risk to their business, and host states acknowledge that without such

restrictions, there will be little prospect of attracting foreign resources into the economy; and as a consequence, regulations have been established in order to improve the protections available to a foreign investor.

The study further examines the regulatory frameworks for the operation of international investment pointing at host state legislation, Bilateral Investment Treaties (BITs) and International Investment Agreements (IIAs), customary international laws and judicial authorities. It was pointed out that foreign investment does not sacrifice the sovereign status of the host state and as such, citizens and operatives of the foreign states are bound by the municipal laws of the host states. These sovereign powers further empower the host state expropriate and nationalize foreign investments but to the extent that same is not oppressive and is in accordance with the law. These provisions are further enshrined in the BITs. The agreements contained in the BITs and the agreements between states usually subject the states to judicial and arbitration processes, it is submitted that this is a limitation to the absolute sovereign status of states. This limitation process can be found in Article 8(1) of the $400 million Loan Agreement ("Loan Agreement") executed by the Ministry of Finance on behalf of Nigeria and the Export –Import Bank of China for the Nigeria National Information and Communication Technology (ICT) Infrastructure Backbone Phase II Project in 2018.

It is submitted that this clause does not have the effect of trading off Nigeria's sovereignty, rather, it is contained in the agreement in order to give effect to the principle of *pacta sunct servanda*, and it is a limitation to the principle of absolute sovereignty and sovereign immunity.

The study drives home the point by conducting an examination into the foreign direct investments between Nigeria and China in the area of energy, oil and gas, infrastructural development. Of great importance is the analysis of the Nigeria-China BIT. The study also conducts a historical discussion of the Nigeria-China bilateral relations.

5.2 Conclusion

For many economies, foreign investment forms an important source of capital as such investments have become the largest source of external finance. Such development has surpassed the flow of portfolio investments or the remittances of the official development assistance. The amount of the FDI flow to the development of countries in 2016 was recorded at $ 1.75 trillion. The developing economies benefits from both inflow and outflow of foreign investments. Inflow of FDI is considered as critical enhancement that creates capital, engender prospects of employment, boost improvement in technology, enhances management proficiency and improves production efficiency and thereby contributing significantly to the development and growth of the economy. Although, the empirical evident suggesting the impact of the foreign investment on the developing economies economic growth at the national and firm level remains ambiguous and varies with time period and across the economies.

It is concluded from this discourse that both developed and developing states are involved in international investment and the most of the interest is in foreign direct investment. Governments of developing states are in fact, involved in a great effort to attract foreign direct investments for a number of reasons.

To begin, it should be stated that attracting Foreign Direct Investment is a major concern for all countries around the world, whether developed or developing. For example, a recent study shows that as of 2015, nearly US$ 1.73 billion was injected into FDI globally through cross-border mergers and acquisitions, primarily in developed countries, particularly the United States. Furthermore, the rise in flows to developing nations is mostly due to greater inflows to developing Asia (15%), whereas FDI flows to Africa, Latin America, and the Caribbean declined by 31% and 9.1%, respectively. Following that, it will be claimed that all nations undertake attempts to attract foreign investment in order to assure successful accumulation of intangible capital.

Furthermore, Foreign Investment, particularly Foreign Direct Investment, has a variety of positive economic effects on the recipient economies; FDI typically supplements national savings by injecting new capital and transferring technology, which improves management systems and allows for productive modernization.

Transnational firms may contribute significantly to economic growth by assisting in the transformation of economies through the production of intangible capital. The benefits of FDI may be communicated through knowledge transfer and talent development, while also encouraging local enterprises to join value chains that boost their exposure to the world economy.

Economic literature identifies technology transfers as perhaps the most important channel through which foreign corporate presence may produce positive externalities in the host developing economy. Multinational Enterprises (MNE), are the developed world's most important source of corporate research and development (R&D) activity, and they

generally possess a higher level of technology than is available in developing countries, so they have the potential to generate considerable technological spillovers.

While international trade differs widely between nations and economic sectors, there is growing agreement that the FDI trade relationship must be seen in a broader context than the direct impact of investment on imports and exports. For developing countries, the main trade-related benefit of FDI is its long-term contribution to more closely integrating the host economy into the global economy, a process that is likely to involve increasing imports as well as exports. To put it another way, trade and investment are increasingly seen as mutually reinforcing cross-border pathways.

Another significant influence of FDI on human capital in developing nations appears to be indirect, coming not primarily through MNE initiatives, but rather through government policies aimed at attracting FDI through improved human capital. Individuals who are hired by MNE subsidiaries may have their human capital strengthened further through training and on-the-job learning. FDI and MNE presence may have a major impact on competitiveness in host-country markets. Foreign direct investment has the ability to greatly boost firm growth in host nations.

The immediate impact on the targeted company includes synergies within the acquiring MNE, attempts to increase efficiency and lower costs in the targeted enterprise, and the creation of new activities. Furthermore, efficiency increases in unrelated firms may emerge as a result of demonstration effects and other spillovers similar to those that contribute to technology and human capital spillovers.

In all, it can be stated that foreign investment has revealed that the primordial concept of absolute sovereignty does not have a place in the current organization of states. However, the over-reliance on developed states for investment platforms is prejudicial to state sovereignty. For instance, the investment relationship between Nigeria and China is an indication of over-reliance of developing states on the developed economy and same is an indication of neo-colonialism. Also, the developed states gain more in terms of balance of trade in the investment relationship between developed and developing states.

Conclusively, the traditional concept of sovereignty in international relations included the right of a state to govern itself without external interference. However, it is concluded from the discourse in this study that one of the factors that makes it impossible to avoid external interference is international investment. With foreign direct investment, developing states now execute BITs which allow foreign states to interfere in the host states. From this study, there are problems observed between the Nigeria-China investment relationships which have adverse effect on Nigeria, they are discussed in the following paragraphs.

In the case of Nigeria and China, upon the execution of the BIT, both countries are now subject to the dispute resolution mechanisms provided under the agreement in case of any breach. This, definitely is not the intention of the absolute nature of sovereignty.

Another important conclusion to draw from the discourse is that although, the legislation of the host state is said to be binding on the foreign investment and the promoters of same, it will however, not be totally correct that the host state legislation has the status of an emperor over foreign investment. In expatiating this point, it is noteworthy to state that by *Section 78 of the Companies and Allied Matters Act, 2020* treats the foreign direct

investments from foreign states as a local business since they have to be registered in accordance with the laws of Nigeria and are seen as Nigerian companies.

However, the true practice is that these businesses are still considered to be foreign businesses since the promoters therein are at liberty to seek protection and remedies under the BITs between Nigeria and the investors' states. Therefore, instead of the host state legislations to have absolute regulation of the businesses, recourse still have to be made to the BITs.

It is further concluded in relation to this discourse that the Nigerian-China experiment shows that most of the infrastructural aids advanced to Nigeria by China are on the basis of loan standing to Nigeria's debit and with certain conditions that Chinese companies shall execute the projects or run the particular venture which the loans are designed to finance. This, definitely is a complete erosion of the doctrine of non-interference in the affairs of a state.

Already, the resource-backed lending model which developed countries like China are operating in developing countries allows the developed states to enter the territories of the developing states and receive revenue since the resources of the developing states are staked as collaterals for the loans received by the developing states. This concept is already in operation in the relationship between China and some African countries, for instance, in 2021, China received 72 percent of Angola's oil as part of the repayment for the infrastructure loan advanced by China for the rebuilding of Angola. Also, the construction of railway in Congo via the infrastructure loan was the means by which China secured the mining lease in Congo. The classical situation is that of Zambia where much of the Zambian external debt is to China and same is secured with copper exports

which continues to create national tension is the sense of loss of control and sovereignty to China. This is definitely against the concept of sovereignty under the treaty of Westphalia.

Also, the fact cannot be denied that the investment relationship between developed and developing states create export market for raw materials and goods from developing states. However, the relationship between Nigeria and China shows a high rate of trade imbalance. As a matter of fact, it is a situation of negative trade balance over time which favours the Chinese space the relationship between Nigeria and China is one where raw materials are being supplied to China, and finished products are being imported from the same; it is one where elements of western exploitation are present but in more subtle and dangerous forms.

The effect of this trade imbalance on developing states like Nigeria include situations of dumping and the nature of Nigeria-Chinese relations opens Nigeria's economic gates to large chunks of cheaply-made, low-quality and inferior products. This not only threatens and displaces Nigerian industries but also effectively displaces workers from such industries, leading to unemployment and thus limiting the capability of persons to afford good and nutritious food.

Also, a number of international investment which Nigeria has been involved show that some of the international investments were tainted with corruption which has the effect of bringing Nigeria into unconscionable bargains. An example is the "Gas Supply and Processing Agreement for Accelerated Gas Development" ("the GSPA") between Nigeria and the Processing and Industrial Development Ltd (P & ID), it was found by the High Court of England that the said arbitration award sought to be enforced by P & ID

against Nigeria was predicated on a contract which was heavily tainted with high level corruption.[333] But for the intervention of the English Court, Nigeria would have suffered the payment of Final Award of US$ 6.6 billion.

This study sought to test the impact of China's infrastructure investment on economic growth in Africa. A survey of the literature showed that the central question about Chinese infrastructural loans in Africa is whether they will be effective at establishing long-term sustainable development. A well-maintained infrastructure should be the base upon which the economy can flourish, and good infrastructure should provide opportunities for economic growth.

The provision and maintenance of adequate infrastructure facilities is essential for achieving sustainable economic growth. One of the reasons leading to the poor performance in African countries is lack of infrastructure. Although much of the literature suggested that infrastructure can promote growth, the manner of the infrastructure funding (loans from China) process has been seen as unproductive.

Against this backdrop, the study sought to empirically tests the impact of China's infrastructure investment on economic growth in Africa. The main conclusion from the analysis of China's infrastructural loans in Africa is that China's efforts in developing infrastructure are translating to economic growth. Given the evidence of this study, it is recommended that African governments should, with caution, embrace China's infrastructural loans.

[333] Federal Republic of Nigeria v. P & ID [2023] EWHC 2638 (Comm)

China has been and continues to be a major force in assisting African countries in financing their development. Based on the findings from this study, financial support from China should be welcomed in order to help Africa bridge its finance deficit. However, it should be noted that, while China's infrastructure loans may lead to long-term economic progress, excessive amounts of foreign debt can be particularly dangerous for African countries. It is, therefore, critical for African governments to have policies in place to cope with debt obligations and to prevent a catastrophe due to debt overhang. A positive relationship between China loans and growth in Africa has been established; however, African governments should bear in mind that foreign borrowing only stimulates growth to the extent that the additional capital financed by this new borrowing enhances the country's productive capacity.

5.3 Recommendation

This study has examined the investment relationship between Nigeria and China, employing same relationship as a yardstick to examine the investment relationship between developed states and developing states in relation to the issue of sovereignty between developing states. A number of conclusion was drawn in this discourse and they are summarized as;

i. That the investment relationship between Nigeria and China is capable of limiting the sovereignty of Nigeria.
ii. That there is trade imbalance between the Nigeria-China investment relationships with Nigeria at the receiving end.

Having stated above, that the investment between Nigeria and China is one that is capable of limiting the sovereignty of Nigeria. It remains to be added that Nigeria is also

involved in the resource-backed lending model with China just like other African countries and it took the Yar'adua administration to revoke the oil for infrastructure operated during the Obasanjo administration. Meanwhile, this model should be treated carefully by the government of developing countries in order that independent states are not returned to slavery. Thus, as juicy as this model seems, it should be employed sparingly if the circumstances will allow for the operation of Public-Private Partnership (PPP). Therefore, it is suggested that Nigeria like other developing states should learn from the way states like Angola mortgaged their right to natural resources within their territory to China in the name of the resource-backed lending.

Importantly, developing nations should understand that their natural resources are capable of sustaining their economic needs, only that they are left untapped. Developing nations must enhance their capacity to govern more efficiently and manage their environment and natural resources much more effectively to curtail much loss through vulnerability arising from Chinese loans and other funds.

It is recognized that developing states like Nigeria require a large level of foreign direct investments which is readily available from China upon the condition that there is a benefit that is accruable to the investor-states, it is on the basis of accruable benefit that China has open its FDIs in Nigeria and even provided infrastructure funds to Nigeria. However, the Nigerian investment template must incorporate the local content requirement in every sector of the foreign investment, it is not enough that the developed investor-states build an infrastructure for the developing states since such infrastructure is a loan which must be paid.

Also, the imbalanced trade index between Nigeria and China has led to more exports from China, thereby, increasing the incidence of dumping of unsuitable products and technology in the Nigerian economy. Developing states like Nigeria, therefore, need to encourage local production of goods and eradicate the acts of depending solely on foreign states like China finished products. In the development of the FDI, the Nigerian government must ensure proper supervision of projects undertaken by China within Nigeria as many of those projects which include the Mambila power project undertaken by China can be regarded as a failure despite series of agreements and concession entered between Nigeria and China over the project.[334]

5.4 Contribution to Knowledge

Most existing studies related to the relationship between Nigeria and China are more concerned with the economic implication of the relationship between Nigeria and China, thus, most of the conclusions look towards the economic exploitation of Nigeria by China. Some of those conclusions are that the balance of trade is unfavourable to Nigeria. Although, these study does not dispute such conclusions, the study goes further to examine the legal implication of the relationship as it concerns the sovereignty of Nigeria. Thus, this study posits that the trade relationship between Nigeria and China is a threat to the economic sovereignty of Nigeria and it may affect the territorial sovereignty of Nigeria.

This study considers the issues arising from foreign investments between developed and developing economies and how same affects the sovereignty of the states involved, the

[334] As discussed in Chapter 4 *ante*

standard example considered here is the business relationship between Nigeria and China which has been described as one of the largest bilateral relationships in Africa.

5.5 Areas for further Study

The following issues were raised and tackled in the course of this study;

i. The Foreign Direct Investment between Nigeria and China

ii. The Bilateral Investment Agreements between Nigeria and China

iii. The effect of the Nigeria-China trade relationship on the exercise of Nigeria's sovereignty.

It then became clear in the course of the study that the Chinese lending system which had been extended to Nigeria and some other African states is predicated on the resource-backed lending model. A popular method is the adoption of resource-backed lending model, usually resorted to where the debtor-states have valuable resources needed to achieve the expansionist and economic goals of the creditor-states. Resource-Backed Loans (RBL) describe the practice of using a country's natural resources to serve as either a direct source of repayment or as an underlying guarantee of repayment in respect of the loans.[335] It is clear that the system of RBL introduces a form of collateral loan, as seen in the case of Angola, where future earnings from the proceeds which Angola would derive from the sale of its crude oil were used as guarantee for the loan advanced by the Chinese Export-Import bank.

[335] D Mihalyi, J Hwang, D Rivetti & J Cust, Resource-Backed Loans in Sub-Saharan Africa, Washington DC: World Bank Publications, 2021, P. 1.

This borrowing model is common in Africa, especially in relation to borrowing relationship between African states and China, as evident in a World Bank 2021 publication indicating that between 2004 and 2018, the total value of RBLs entered into by African countries with China was US$ 46.5 billion.[336]

A major concern associated with RBLs relates to the potential that in such relationships, the sovereignty of debtor-states is not mortgaged to the detriment of its citizens. This is because an undertaking external to the borrowing state is given the liberty to enter upon the territory of an independent state and control its resources. The concern is further heightened in that the agreements would normally waive the immunity of the sovereign (debtor) state to excuse itself from observing the terms of the RBLs.

It is therefore, believed that the legal effect of the Resource-backed lending model is a source of research that can be explored in further studies. The model will then involve a study of other states apart from Nigeria and China.

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[336] Ibid, P. 8.

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