THE RIGHT TO ECONOMIC SELF-DETERMINATION, INTERNATIONAL LAW AND THE NIGERIAN CHALLENGE

BY

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DECLARATION

I solemnly declare that this thesis is a product of my personal endeavour and it has not been presented, to the best of my knowledge, anywhere before. All ideas from previous writers have been duly acknowledged. I remain solely responsible for all views expressed and errors therein.

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CERTIFICATION

This thesis titled: The Right to Economic Self-Determination, International Law and the Nigerian Challenge, by Nuraddeen Ado Ayagi, meets the regulations governing the award of Doctor of Philosophy (PhD, Public Law) Ahmadu Bello University, Zaria, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

Say: Lo! My worship and my sacrifice and my living and my dying are for Allah, Lord of the Creation. He hath no partner. This am I commanded, and I am first of Those Who Surrender (unto Him).- Quran 6: 163-164.

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world economy. I took the challenge and that actually gave birth to my current topic which scaled through all the academic rigours and metamorphosed today into this PhD Thesis. And when the learned Professor again emerged as the chair for my PhD internal defence/final seminar, I knew that only God could have arranged such coincidence. It indeed came to pass that my work got the final touch of expertise and refinement from the revered professor. I am thus deeply touched by the fatherly and gentle guidance, the deeper insights provided and the keen interest and fascination shown by him towards my humble endeavour. I can only pray for the peace of Allah to abide with him and his family.

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ABBREVIATIONS

AC	Appeal Cases
ACHPR	African Charter on Human and Peoples' Rights
AFCFTA	Africa Continental Free Trade Area
All FWLR	All Federation Weekly Law Report
AU	African Union
BC	Before Christ
BITS	Bilateral Investment Treaties
CRT	Critical Racial Theory
DCs	Developing Countries
ENPH	Enron Nigeria Power Holding
EU	European Union
FDI	Foreign Direct Investment
FGN	Federal Government of Nigeria
FHC	Federal High Court
GATT	General Agreement on Tariffs and Trade
GNP	Gross National Products
IBRD	International Bank for Reconstruction and Development
ICC	International Chambers of Commerce (Court of Arbitration)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICSID	International Centre for the Settlement of Investment Disputes
IDA	International Development Association
IFC	International Finance Corporation
IHRL	International Human Rights Law
ILC	International Law Commission
ILR	International Law Report
IMF	International Monetary Fund
JV	Joint Venture
LDCs	Less Developing Countries
LEEDS	Local Economic Empowerment and Development Strategies

MAN	Manufacturers Association of Nigeria
MFN	Most Favoured Nation
MIGA	Multilateral International Guarantee Agency
MNC	Multinational Corporations
NEEDS	National Economic Empowerment and Development Strategy
NIEO	New International Economic Order
NIOC	National Iranian Oil Company
NIPC	Nigerian Investment Promotion Commission
NNPC	Nigerian National Petroleum Company
NOTN	Nigeria Office for Trade Negotiations
NSIA	Nigeria Sovereign Investment Authority
NT	National Treatment
NWLR	Nigerian Weekly Law Report
OAU	Organisation for African Unity
OECD	Organization for Economic Cooperation and Development
PAPLRR	Pan-African Programme on Land Resource Rights
PIN	Public Information Notice
RMAFC	Revenue Mobilisation, Allocation and Fiscal Commission
RTAs	Regional Trade Agreements
SAN	Senior Advocate of Nigeria
SAP	Structural Adjustment Programme
SCNJ	Supreme Court of Nigeria Judgments
SDR	Special Drawing Right
SEEDS	State Economic Empowerment and Development Strategy
SFEM	Second Tier Foreign Exchange Market
TCMD	Transnational Corporations' Management Division
TNC	Transnational Corporations
TRIMs	Trade-Related Investment Measures
TRIP	Trade Related Aspects of Intellectual Property
UK	United Kingdom
UN	United Nation

UNCITRAL	United Nations Commission on International Trade Law
UNDRD	UN Declaration on the Right to Development
US	United States
USA	United State of America
WTO	World Trade Organisation

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ABSTRACT

The status of the right to economic self-determination for states and peoples has been firmly established in international, regional and domestic laws. However, the evidence of practical enjoyment of such right by the beneficiaries of the laws is scanty, to say the least, as neither states nor peoples fully enjoy such right in the face of the economic reality of today's global world. It also appears that there exists a disconnect between the legal regime guaranteeing the right in international law and the provisions of international economic law which stand on the way to the optimum realization of the right. Using the doctrinal and elements of empirical research methodologies which include statutes, judicial authorities, journal publications, academic papers as well as other sources on the one hand, and data through interviews and official statistics; this work attempts to unravel the missing link between legal provisions guaranteeing the right and those that hinder practical realization of economic self-determination. Thus, the objective is to examine the adequacy or otherwise of the legal regime (international, regional and domestic) on the subject matter vis-à-vis it's harmony with international economic law and practices with a view to identifying issues that impede the practical realization of the right to economic self-determination. It has accordingly been found that whereas on the one hand elaborate provisions exists in international law guaranteeing the right to economic self-determination for states, the efficacy of the provisions is blunted by the existence some of limiting provisions and practices. Internal economic self-determination for peoples within a state is hampered by domestic constitutional constraints and the overriding force of state sovereignty that resides in central governments as against federating units or peoples. In the final analysis, it is therefore recommended, inter alia, that for the enjoyment of the full complement of the right to economic self-determination, Nigeria must also garner the political will to attempt to realise the economic self-determination. Besides working in concert with other states in negotiating economic and other treaties, Nigeria should, where appropriate, employ the instrumentality of reservation. In all these, developing appropriate and knowledgeable manpower backed by viable and effective institutions is sine qua non.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Research

The general concept of self-determination has evolved into a legal and enforceable right enabling peoples, states and communities to assert and claim same upon its inclusion in the Charter of the United Nations[1]. Later, as an offshoot of the Charter, were promulgated the International Covenant on Economic Social and Cultural Rights [2] and the International Covenant on Civil and Political Rights[3]. On the basis of self determination, the power of peoples to have unfettered control over their political fate, economic fortunes, as well as social and cultural destinies are held sacred and inviolable. This work thus, is centred on the economic aspect of the right to self-determination, a right that occupies an important and pivotal position among and in relation to the other components for the role economy plays in the realisation and enjoyment of the other components.

The right to economic self-determination has enjoyed international responses and initiatives at the global continental and regional levels culminating in many various instruments including the UN General Assembly Resolution 1514 of 1973 which confers, a permanent sovereignty over all natural resources on states.[4] Added to these, is the economic right of a state to enjoy its natural wealth fully[5] as well as to even expropriate and nationalize foreign capital subject only to compensation.[6] The clear intendment of these instruments is to protect weaker

[1] Article 55 of the United Nation's Charter
[2] ICESCR, 1996
[3] ICCPR,1996
[4] Starke, J.G. (1967) *An Introduction to International Law*, Butterworth's London. p.145
[5] Art. 25 ICESCR, op. cit.
[6] UN. Gen. Res. 1803 (XXII) V. 1962 and UN Charter on Economic Rights and Duties of Status of 1974.

states from the over-bearing influence of more powerful nations in the unhindered utilization of their resources.

Conversely however, it seems that what the international law provides for through the right on the one hand in terms of rights over the economy and its control, has been divested on the other by way of laws governing international economy the contents of which run counter to the spirit, if not the letters of the right to economic self-determination of LDCs. For instance, where the latter upholds the exclusive right of a state over its natural resources and on its soil and oceans and the control of same[7], multinational corporations control the vast majority of the resources in those nations, through international multilateral and bi-lateral treaties under the influence of their home states. In the words of Akinjide, pertaining to oil resources, "we have not got oil. What we collect from our oil is rent because we lease out our oil and collect rent on it. The actual owners are the people that pay us the rent".[8] Knowing what oil means to our economy in Nigeria, that is a sobering revelation, to say the least. Again, where the economic rights imply the power to adopt any economic model in the form of capitalism, socialism etcetera, to practice by a state[9], free market economic model seems to have been imposed on almost all nations through the instrumentality of the World Trade Organisation.[10]

In the same vein, state's fiscal and monetary control, two elements of economic independence, have been negatively influenced by the International Monetary Fund.[11] Equally, trade in goods, commodities and subsidies are largely regulated by the General Agreement in

[7] UN General Assembly Resolution 1514 of 1973 and Article 25 of the ICESCR
[8] Richard Akinjide, SAN, in *Daily Trust Newspaper,* Saturday 12th December, 2015. p.3
[9] Umozurike, U.O. (1979) *International Law and Colonialism in Africa,* Nwamife Publishers Limited. Enugu, p.132
[10] Browne, K. (2014) *Capitalism, Socialism and Communism.* 8th January 2014. Accessed at http://prez1.com/m/bfizmqulx_yr/captalism-socialism-communismandwto. 8th Mrach,2016.
[11] "The IMF and the World Bank: Puppets of the Neoliberal Onslaught". *The Thistle.* Volume 3, Number 2 of September/October 2000. Accessed at www.mit.edu./~thistle/v13/2/imf.html. 8th March,2016.

Tariffs and Trade. Generally, the reality of international cooperation and the province of international law has engendered an interplay of systems: both domestic and international.

1.2 Statement of the Research Problem

The right to self-determination has been said to be a peremptory norm of international law by virtue of which it has attained the status of a *jus cogens*[12] that makes it sacrosanct and paramount in the event of a conflict with any other principle of international law of lesser stature. This special position naturally extends to all its components to wit: political, social, cultural and economic self-determination. In respect of economic self-determination, its benefits ought to be manifestly present and ought to have translated into meaningful and sustainable development.. The stark reality in Nigeria and all over the developing world is however to the contrary. This casts a shadow of doubt on, and calls to question the efficacy of the right to economic self-determination mantra for resource and trade rich countries like Nigeria. The following research questions can therefore be formulated viz:

i. What does the right to economic self-determination entail?

ii. Is the global economic system beneficial to the realisation of economic self-determination by nation states?

iii. Does Nigeria have the political will to capture the benefits of the right of economic self-determination?

1.3 Aim and Objectives of the Research

The aim of the research is to critically examine the attainability of the right to economic self-determination by and within particularly developing nations with emphasis on Nigeria. This is by examining the right under the international law and its application in Nigeria with a view to achieving the following objectives:

[12] Umozurike, U.O. (1979), Op cit. p.31

1. To establish and explore the legal foundations and conceptual formulations of the right to economic self-determination, its components and branches under international law and their intercourse with regional and domestic laws.
2. To examine the influence of international trade and investment laws and practices and other aspects of international economic law on domestic economy and evaluate the challenges faced by Nigeria in the realisation of the right to economic self-determination.
3. To develop a comprehensive treatise that addresses the challenges of economic self-determination with a view to making appropriate recommendation that contributes to the sphere of knowledge as well as setting an agenda for further enquiry.

1.4 Justification of the Research

Upon successful completion, this work will serve as an opener to a relatively novel topic in international law. It can be readily handy for diplomats representing states in trade and other economically-related negotiations in warding off proposals that could eventually be harmful to their states. In the conduct of international commercial arbitrations and litigations, lawyers will have acquired a new tool for challenging certain practices irrespective of old usage and stand a chance of upturning same. Judges involved in international adjudications of economic nature between states can also now possess another yardstick to be used for measuring and discarding of obnoxious international economic principles that possess hidden negative effects on the weaker resource-owning states and are also in conflict with other overriding international law provisions. For agitators for internal economic self-determination within Nigeria, they will know the limit it is achievable within Nigeria and the extent they can legitimately go in its pursuit without encountering legal obstacles on the way.

For students, it will be a reference material exposing them to basic concepts in international economic law, its intersection with human rights and the intricacies of the eternal struggle to control and utilize world resources through the law. This is by way of analysing concepts and appraising their practical significance and application to the economic life of developing states, particularly Nigeria, as a state and that of its peoples.

1.5 Scope of the Research

In substance, the scope of this research principally covers economic aspects of international human rights law on the one hand, and aspects of international economic law as they affect Nigeria's economic independence. The research will deal with domestic laws and experiences that have direct bearing on the study. While Nigeria is the focus of this research, comparison may be drawn from other countries with similar experiences.

1.6 Research Methodology

The main methodology to be employed in this work is the doctrinal method and thus libraries, data banks and similar mediums shall be used in gathering both primary and secondary data. Primary data includes charters, treaties, conventions, protocols and other international instruments as well as domestic legislations. There will also be consideration of secondary sources with scholarly works that examine, highlight and shed more light on the primary sources.

In the same vein, elements of empirical method may be employed for on-the-field data gathering through direct contact with the original sources by way of structured or unstructured interviews, when and if the need arises.

1.7 Literature Review

Many authors have written various treatises on the topic of self-determination. Some relate to general self-determination right comprising of political, social, cultural and economic

self-determination of states or peoples. Invariably, the discussion centres on conceptual definitions, exploration of scope or general application. Few, if any, literature assesses the practical attainability of the right or any of its components particularly the economic aspect relative to any society. Certainly none related to Nigeria. Nevertheless, a review of some of them hereunder sheds more light on some aspects of the problem of this research work and reinforces the desirability of further investigation of the areas within the scope of this study.

Writing on self-determination, Starke,[13] confronts the issue of general right to self-determination from the angle of dependant territories under foreign control or occupation. He highlights the duty of each state to, by virtue of its legal obligation, not only recognize but also to see to the promotion and giving effect to it.[14] Directly relevant to the current work is Starke's discussion of UN General Assembly Resolution on Economic Rights and Duties of States of 1952. The Resolution provides for the right and power of a people to the use and control of its resources as a catalyst to development.[15] This reference to the power to control its resources by a people by Starke canvasses an important element of the right to economic self-determination to be discussed by this work. That his reference to same is cursory and not in-depth nor in relation to a specific society justifies further discussion which this work undertakes for an in-depth analyses of the right of resource control of a people, as an aspect of economic self-determination, particularly in the Nigerian legal and constitutional context.

To Umozuruike,[16] the normative frontier of economic self-determination goes beyond the right of a people over their resources, but extends to their power to choose and to practice any economic model. Should any other state try to interfere in that choice, the act amounts to a

[13] Starke, J. G. (1976) *An Introduction to International* Law Butterworth's, London.
[14] Ibid, p.143
[15] Ibid.
[16] Umozuruike, U. O. (1979) *International Law and Colonialism in Africa* Nwamife Publishers Limited, Enugu.

violation of the right to economic self-determination.[17] Umozuruike writes in the context of colonialism and discusses other aspects of self-determination. But by far his novel exposition on the right to choose and practice a particular economic model stands out as a significant milestone in the study of the subject particularly as he writes in the heat of the Cold War when the Super Powers were intent on seeing that a particular economic ideology took root in developing countries. Whether his thesis is relevant in today's world in which the economy increasingly tilts in favour of free market capitalism, and whether the law shall stand with him in that position, remains to be analysed by this work.

In his work[18], Kibwana studies the relationship between human rights generally on the one hand and economic development on the other. He particularly challenges the notion that for economic development to be achieved especially in third-world countries, human right has to take the back burner or assume secondary status comparatively; either seeing as antithetical to the other.[19] This thinking to him, is the result of 'Celtian' attitude assumed regarding issues of human rights which makes the latter elastic and thus regarded as a Western concept fit for and practicable only in that environment.[20] Having recognized the indispensability of human rights in the attainment of lasting development, economic or otherwise, Kibwana concludes his treatise by rallying the international community, particularly the West, in lending a helping hand to assure the attainment of such objective. In his words, "… the west will have to participate in ensuring a foothold of human rights in Africa by redesigning the world economic order so that economic independence and viability is possible globally…"[21]

[17] Ibid.p.131
[18] Kibwana, K. (1993) *"Human Rights and/or Economic Development: Which Way for Africa?" Third World Legal Studies:* Vol. 12, Article 3. Available at http://scholar.valpo.edu/tools/vol.12/iss1/3
[19] Ibid. p.8
[20] Ibid. p.3
[21] Ibid. p.17

Kibwana's last sentence quoted above reveals two facts: one, that "international economic order", and the way it is "designed" or "redesigned" has everything to do with "economic independence", i.e. economic self-determination or its attainability. Second is the universality of human rights irrespective of region or race and its indispensability in the attainment of economic equilibrium globally. This is a validation of the theme of this work and an affirmation that indeed a systematic study as set out for by this work is needed for detailed diagnosis of the world economic order in relation to economic self-determination in search for appropriate legal prescription.

Toeing the line of Kibwana, Petersmann[22] appraises the relationship between human rights and international economic law. Human rights being fundamentally a constitutional matter in most nation-states, he advocates for the entrenchment of same in international law, particularly WTO rules and practices such that these reflect its presence. He posits:

> UN human rights must overcome its longstanding neglect of economic liberties, property right and of competition law as a necessary complement of human rights. The universalization of human rights and of WTO law offer mutually beneficial synergies that require increased cooperation between human rights activists, the WTO and the world trade community for the benefit of the citizens and their human rights.[23]

Though with particular reference to WTO, like Kibwana above, Petersmann affirms the absence of rights content in international economic practices including trade and property. Arguably the missing rights alluded to encapsulate the right to economic self-determination which is made nugatory of, and unrealizable by, the body of laws and principles that govern trade, commerce, labour and similar relations between states. Petermann's work though on general human rights beyond the right to self-determination, is albeit limited to WTO and its law.

[22] Petersmann, E.U. (2001) "*Human Rights and International Economic Law in the 21st Century. The Need to Clarify their Interrelationship*". *Journal of International Economic Law*, 4(1): 3-39, 21:10.1093
[23] Ibid.

This justifies further research to try to relate a particular human right to particular rules of international economic law relative to a specific society as this work seeks to do.

Bunn[24] focuses her research on UN Declaration on the Right to Development of 1986.. She traces the evolution of the right to development, explores the challenges in its conceptualisation and practicalisation, narrows to the linkage of same with international economic law and exposes the futility of realizing same without corresponding rectification in international trade laws that impede its implementation. She identifies such impediments as dearth of foreign aid, the debt burden and Structural Adjustment Policies, activities of transnational corporations, unilateral coercive measures (i.e. economic sanctions) and more aptly and directly, "unfair trading rules".[25] All these obstacles which stultify development, conversely stem from the absence of the realization of the right to economic self-determination, an indispensable catalyst to development. In effect, agitators for the implementation of UNDRD should simply fall back to, and insist on, the right to economic self-determination, something Bunn's otherwise rich and well researched work misses.

Howse and Mutua[26], approach the problem from the angle of general human rights and investigate the apparent divorce from, and conspicuous absence of, human rights contents in the body of WTO laws and in particular, the General Agreement on Tariffs and Trade (GATT). They highlight the anti-human rights aspects of WTO/GATT system to include aspects of the free-trade principles, anti-dumping provision and Article XX of the GATT as well as the practice of shrouding the dispute settlement processes of the WTO in secrecy. Citing the provisions of the WTO treaties themselves, they argue that free-trade cannot be used to immune international trade

[24] Bunn, I.D. (2000) *The Right to Development: Implication for International Economic Law,* American University International Law Review, Vol. 15 Issue 6.
[25] Ibid. pp.34-39
[26] Howse , R. and Mutua, M. (2011) *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organisation*. Accessed at www.wto.org 17th April, 2016 at 00:25 hours.

practices from observance of human rights etiquettes and from being subject to same. More particularly because in the hierarchy of international norms, for being peremptory principle of international law and *erga omnes*, human rights take precedence over all trade related rules which are of subordinate status.

Although focused on general human rights not specifically centered on the right to economic self-determination, their work seems to uphold the desirability for further investigation into the role of economic laws on the realisation of recognised rights in their following words: "Critically however, trade policies and globalisation affect economic, social and cultural rights, in particular. Hence the necessity of safeguarding these rights within the context of the WTO/GATT regime".[27]

Thomas[28] examines the fallacy of blanket application of the classical liberalism's doctrine of legal equality in the treatment of developing and developed countries at par in international economic legal relations. Using what he calls Critical Racial Theory (CRT), he finds the yardstick of legal equality applied in international economic legal relation as an instrument forcing less developed countries to measure up with Western society's standard with little regard to their economic, social, political and cultural environment and conditionality. A test they naturally fail. Providing specific examples of the incongruity inherent in the legal equality principle, Thomas states:

> In international trade law, for example, the General Agreement on Tariffs and Trade (GATT) received several intensive applications of the structuralist, or dependency, critique. Critics showed that "free-trade" – depriving governments of the right to favour domestic producers over foreign producers in their domestic markets – hindered industrialization in Developing Countries

[27] Ibid.
[28] Thomas, Chartel (1999) "*Causes of Inequality in the International Economic Order: Critical Race Theory and Post-Colonial Development*". Cornell Law Faculty Publications. Papers 1103. Available at http://scholarship.law&cornell.edu/facpub/1103 Accessed on 20th April,2016 at 01:09 hours.

> (DCs). Free trade prevented DC producers from breaking into industrial sectors and consigned them to the production of raw material and to dependency on imports. In the area of foreign investments, international legal rules perpetuated economic dominance of Northern actors by prohibiting (actually or effectively through strict compensation requirement) the nationalization of foreign owned property that had been acquired in developing countries during colonialism.[29]

In other words, the principles national treatment and expropriation of foreign assets, are alleged to impede economic self-determination of smaller nations.

Thomas may be on point regarding the effect of the two international trade law rules exemplified, but his work is principally focused on the inequity inherent in the blanket application of legal equality principle in economic matters between states. Not surprisingly, thus, he leaves out of his analysis a multitude of other principles and rules of international law that do hinder the economic independence of Less Developed States. This work intends to fill in the gaps by examining trade and investment issues like expropriation, antidumping and subsidies, national treatment and other rules and their impact on the economic self-determination of Nigerian state.

Raustiala's[30] addresses the impact of international economic governance on sovereignty of states. He examines the mainstream theory that the advent of international institutions serves as a funnel through which sovereignty of states is sapped and usurped. Raustiala argues that in fact the reverse may be the case in that international institutions may serve as a means by which states reclaim lost sovereignty since the latter had been on the decline due to overpowering forces of globalisation, technology and other factors, some internal. On the other hand according to Raustiala, since what states surrender to economic institutions is not paramount sovereignty

[29] Ibid. p.5
[30] Raustiala, K. (2003) Rethinking the Sovereignty Debate in International Economic Laws, *Journal of International Economic Law.* Oxford University Press, 2003. pp.841-878

per se, but rather a delegation of some of their sovereign powers, the power of retractibility, wherein states can always opt out of the institutions, ensures that such sovereignty in the long run remains inherent where it resided *ab initio*.[31]It is to be noted that reference to sovereignty in his exposition must of necessity include self-determination a term considered a part and parcel of state sovereignty and often indistinguishable therefrom.

While his work clearly upholds the principal hypothesis of the current work that the prevailing international economic order negates the notion of state sovereignty and hence self-determination in the economic sense, the attempt at justifying same based on the "suppleness" of sovereignty seems feeble. In any case, it concentrates more on justifying the erosion based on the virtues of "global governance" which tilts towards political control, rather than the economic angle the title of the work projects. In this way, the work leaves out much detailed analysis of the impact of international economic order on sovereignty cum economic self-determination of states. This work shall attempt to undertake such task.

Haugen's[32] discussion on the topic of economic self-determination centres on natural resources aspect of the right with particular reference to Western Sahara and its natural resources vis-à-vis their inappropriate exploitation by external forces for purposes outside the wellbeing of the people of Western Sahara. Relying on the provisions of paragraph 2 of Article 1 of the International Covenant on Economic, Social and Cultural Rights, he makes a case for the inviolability of the right and the prohibition of any outside force or occupying power to exploit or deal with a people's resources for purposes other than the promotion of the welfare of the said

[31] Ibid. p.6
[32] Haugen, H.M. (2007) The Right to Self-Determination and Natural Resources: The Case of Western Sahara, *3/1 Law, Environmental and Development Journal* , p.70 Available at http://www.lead-journal.org/contnet/07070.pdf. accessed on 10th October, 2016, at 23: 17 hours.

people. Hence the illegitimacy of Morocco's exploitation of Western Sahara's natural resources including fisheries, phosphate, oil and gas and other resources.

Of significance and relevance to this work is the casting of veil of ineffectuality on treaties as entered by European countries that seek to legitimize the usurpation of Western Saharan resources through dealing with Morocco in resources extracted out of Western Sahara. He backs up this position with the stance taken by the United States on similar issue in US-Morocco Free Trade Agreement.[33] This position supports the view that all aspects of international economic law inclusive of bilateral trade treaties are to be subservient to and take into account the right of people to economic self-determination, an integral part of which is the use of resources by the people and for their welfare.

In addition to elaborating on the validity of the above proposition, which has not been dealt with by Haugen, the consequences of derogation from same is investigated by this work. Munchlinski[34] deals with aspects of international economic law in relation to multinational enterprises and the law that governs their investments within host states. Though usually governed by investment contracts on the basis of the doctrine of *pacta sunt servandi,* invariably the doctrine of "internationalisation" creeps in, to not only impose certain international economic principles in it with the effect of taking away municipal legal application, but to also out rightly negate the resource sovereignty (or economic self-determination) of the state. In his words:

> Although the internal law of the host state may be the proper law of the investment agreement, and will therefore offer the initial legal framework of determining the legality of a contractual renegotiation or expropriation of foreign owned assets,

[33] Ibid. p.14
[34] Muchlinski P.T. (1999) *Multinational Enterprises and the Law,* Blackwell Publishers Inc. UK.

> international law can be – and has been – invoked by foreign investors as the ultimate standard of legality in such cases.[35]

In practice such deprivation of control is effected by the usage of 'claw-back' clauses called "stabilization clauses" that not only limit the host state's powers to apply its domestic law in the event of dispute, but even prevent them from making any future legislation capable of reversing the contents of the agreement.[36] The consequences of this is that in the event of expropriation of the foreign assets by the host state, the general provisions of international law of "prompt, adequate and effective compensation" and its conditionalities of without discrimination and for public interest – apply to divest the host state of the power to expropriate or at least limit same. Note that the power to expropriate and nationalize foreign assets is one of the integral aspects of right to economic self-determination guaranteed by international law.[37] Though unconcerned with that possibly for being outside the scope of his work, Munchlinski highlights the negative effects of claw-back clauses citing Prof. Depuy in *Texaco Arbitration* case, thus: "that the affect of the stabilization clause was to limit the state's sovereignty in relation to its right over natural resources for the limited period of the concession."[38] Nevertheless, his uncritical statements are in passing and in scope limited only to investment matters in relation to Multinational Enterprises and expropriation with no practical linkage to a particular state. His allusion to self-determination in the economic sense is cursory and thus calls for deeper and further investigation as this proposed work seeks and undertakes to do.

[35] Ibid. p.493
[36] Ibid. p.494
[37] Stake, J.G *op. cit.* footnote 6 and U.N General Resolution 1803 (XXI) of 1962 and the UN Charter on the Rights and Duties of States of 074 and Under UN Conference on Trade and Development, UNCTAD.
[38] Muchlinski, P.T. (1999) *Multinational Enterprises and the Law.* Blackwell Publishers, U.K. p.496.

Although the discourse of Ladan[39] on mineral resources relates exclusively to Nigerian law with limited or no reference to international law, his analysis of the ownership structure of land cum minerals touches upon an aspect of the right to economic self-determination that this work views as deserving a critical appraisal. While affirming the general understanding that by section 1 of the Petroleum Act and section 44(3) of the 1999 Constitution of Nigeria, ownership and control of mineral resources in and on Nigerian soil and waters belongs to the Government of the Federation for the people, and the requirement of authorization and licence as the basis for exploitation, Ladan goes on to state what qualifies (and divests) the state of absolute ownership and control in the following words:

> Though the ownership of all natural resources in the country are vested in the Federal Government by section 44(3) of the 1999 Constitution and is with respect to oil and gas resources restated in Section 1 of the Petroleum Act, once a party is duly granted a licence or other concession it becomes a piece of property protected by section 44(1) of the same constitution…[40]

In other words, in our view, the licence once granted acts to divest the state of property in the mineral resource in question and thus control over same. And when, as is usual, the concession or allocation contract is with an international corporation, same will then be governed by agreement containing a "stablisation clause" as stated above, depriving the state of all powers to rescind and subjecting all to principles of international economic `law that have little sympathy for the state's right to economic self-determination. Note that even though there is freedom of contract, any contract including international investment contract can be tainted by undue influence and other vitiating elements recognise by law and discussed later in Chapter Four, item 4.4.7 of this work.

[39] Ladan, M.T.(2009) *Law, Cases and Policies on Energy, Mineral Resources, Climate Change, Environment, Water, Maritime and Human Rights in Nigeria*. Ahmadu Bello University Press Ltd. Zaria.
[40] Ibid.p.10

Ladan's work is not central on any principle of international economic law nor its convergence or divergence with the right to economic self-determination. It is however relevant on important aspects of the economic self-determination, namely, mineral resources and their control and utilization. Elsewhere[41] in the work while commenting on the case of *Gbemre v. Shell PDC Ltd.*,[42] he applauds the application of fundamental rights in environmental cases. This work intends to appraise the validity of the application of rights approach to trade and other economic issues with particular bias to the right to economic self-determination and its realisation in Nigeria's internal sphere.

Savanovic[43] discusses economic independence of states from the angle of economic sovereignty, a term he uses interchangeably with self-determination. His investigation centres on the impact and influence of supranational entities and multinational enterprises on the economic sovereignty of states. Having thoroughly examined the changing economic relationship between states and those entities, he concludes that although sovereignty may still superficially subsist in states in global economic stage, it has been greatly eroded in multi-faceted way by various transfers of chunks of sovereignty to divers supranational formations and international institutions like the International Monetary Fund, the World Bank, WTO and generally, the whims of the corporate world.[44] The effect of this encroachment is more far reaching than it seems on the surface. As sovereignty originally emanates from the people who delegate same to the state to act as an agent in the social contract, this power of the people no longer holds sway as governments:

[41] Ibid.p.15
[42] (Unreported) Suit No. FHC/CS/53//2005.
[43] Savanovic, A.(2014) *12th International Academic Conference, Prague.* 01/09/14. Available at http://proceedings-iises.net/index.php?action=proceedingsindexConference&id=7. Accessed on 19th July, 2016, at 23: 40 hours.
[44] Ibid.p.1036

> …are blackmailed by centres of financial/economic power and they actually have to implement their agendas, instead of implementing those of voters. A key task of the government is no longer to materialise the citizens' will, but to persuade the citizens that those externally imposed policies actually represent their own interest and will…[45]

Consequently, only the formal cloak of sovereignty is preserved devoid of its traditional force as states become helpless and must kowtow to the dictates of external factors that instrumentalise governments based on their private interest. Without such subservience, they have no hope in partaking in global economy (for which they lose their power to legislate) or to attract capital, the price of which is losing control over their economic lives including the control over the exploitation of their resources.[46] The overall effect of these, in his view, goes beyond the question of sovereignty, but extends to the very existence of political society as it is known.[47] Further, having lost the power to control resources and set the rules to govern their economies, both the state and citizenry may remain politically sovereign, but "…they are not economically sovereign. Political sovereignty becomes a chimera, an empty word whose meaning is increasingly symbolic, while the real power and sovereignty are manifested in the issue of formulation of resource use rules"[48]. In other words, real power resides in those who dictate the economic rules, in this case the external entities. Consequently, no self-determination in the economic sense

As a general critique of the impact of multinational businesses, Savanovic's exposition has done justice to the overall sorry state of state's sovereignty in the face of contemporary corporate interest that dominate the global economy of this part of the twenty-first century. For being too general in scope and non-specific in target, the work is deficient. The richness of the

[45] Ibid.p.1037
[46] Ibid.p.1038
[47] Ibid.p.1037
[48] Ibid.p.1040

treatise would have been enhanced with specific state by state analysis of specific practices or corporate principles that serve as impedance to state economic sovereignty cum self-determination. These identified gaps justifies this further work which aims at not only examining specific factors that affect the realization of states' economic self-determination, but does so with specific reference to the Nigerian state.

The doctoral work of Akaagerger[49] explores the topic of economic self-determination from the general prism of transnational investment agreements as they relate to developing countries. The work highlights the foundations for the promulgation of the right to self-determination in the economic sense by navigating from the history of its evolution as an antidote to colonialisation to the role of resources and the place of resource sovereignty; all of which combine to make up what is now in the international legal parlance known and referred to as economic self-determination. Dissected in the work are instruments that make provisions for the right beginning with UN Resolution on Economic Rights and Duties of States and economic self-determination, the UN Charter, and the UN Conference on Trade and Development.[50]

Having laid the background for the main theme of the work, economic self-determination, Akaagerger proceeds to discuss the other important segment of his work by tracing the basic motives behind transnational investment agreements which include globalization of capital, cultural exchange and economic cooperation between states towards reduction of inequality and to enhance international trade.[51] For their constant involvement in investment agreements, the writer explores the status of transnational corporations whose contributions, he posits, can be a mixture of positive contribution to state development as well as

[49] Akagerger,I.(2001) *Legal Perspectives on the Right to Economic Self-determination and Transnational Investment Agreements with Special Reference to Developing Nations.* PhD. Dissertation(unpublished). School of Postgraduate Studies, Ahmadu Bello University, Zaria.
[50] Ibid. pp. 25-60
[51] Ibid.p.61

negative retardation, "destabilisation and stagnation".[52] This is followed by an enumeration of the three typology of investment contracts namely, contracts between nationals of the host state and foreign investor, bilateral treaty between the home and host state and agreements between host states and private foreign investor.[53]

Coming to the evaluation of the effect of transnational agreements on developing nation's economic self-determination, the writer advocates caution pointing out that the medium of the agreement can be used as a basis to make or mar a state's sovereignty, particularly in view of the imbalance of the bargaining power between the states and the multinationals in which the latter stand on a higher pedestal under the shadow of their formidable, often superpower, home states. Thus, citing Maldonaldo, J. of Peru, he opines thus:

> The stealth, the underhand manner in which they (MNCs) conduct their businesses and the relentless efficacy with which they use the weakness of governments that act behind their peoples' backs are pursued to unscrupulous advantage by the multinational enterprises which simultaneously create and encourage that weakness incessantly manipulating the so called "public opinions" which they themselves bring into being through a certain press, written and spoken, and most fundamentally by advertising. This vast economic, political and cultural aggressive action is what is called imperialism.[54]

To escape this, clear investment legislations must be put in place and their contents made to reflect in all transnational agreements against undue and wholesale reliance on international instruments and legislations that are not adequate in giving protection and taking into account the peculiarity of individual states and their internal economic circumstances.[55]

Akagerger's exposition is rich in its exploration of the locus of the right of economic self-determination. In scope however, the commendable endeavour is limited to just a fraction of

[52] Ibid.
[53] Ibid.p.69
[54] Ibid.p.83
[55] Ibid.p.84

economic legal sphere, namely, investment contracts. That alone, it is submitted, cannot accurately measure a state's economic self-determination or otherwise. The omission of many other spheres of economic law like trade, investments, resources and finance *inter alia,* that have bearing on economic independence of a sate is a minus to the depth of the work. In the same token, the inordinate wideness of the geographical scope of the work does little in aiding precision and the exactness of the investigation process and the final outcome. The current work thus aims to narrow the territorial size to Nigeria while attempting to investigate all relevant examinable variables having bearing with her economic self-determination.

Finally worthy of a review is Onuh's work[56] which centres on the effect of international trade agreements on developing economies with particular reference to Nigeria. The work particularly examines the implication of the application of certain trade rules as encapsulated in the WTO/GATT system particularly the General Agreement on Trade in Services, (GATS) and the Trade Related Aspects of Intellectual Property (TRIPs). Having intensively analysed the individual rules of the WTO, the writer surmised that as a direct consequences of the agreement and the relative disadvantaged bargaining position relative to advanced economies developing countries, Nigeria inclusive have seen their independent policy-making capacity eroded and have to adopt policies made by global entities, which may on balance be detrimental to the countries concerned. The developed countries on the other hand where the majority economic players reside and which also control the process and policies of international economic agencies, are better able to maintain control over their own national policies as well as determine the policies and practices of international institutions and the global system.[57]

[56] Onuh, P.I.(2015) *An Examination of International Trade Agreements: Issues and Challenges for Nigeria*. PhD Dissertation(unpublished). School of Postgraduate Studies, Ahmadu Bello University, Zaria
[57] Ibid.p.230

This summation simply corroborate this writer's hypothesis herein that there exists some elements in the law and global practices that make economies like Nigeria to be subjected and subordinate and perpetually dependant, a situation that remains a paradox to the right to economic self-determination they claim to posses and are entitled to by international law. It is also the finding of the writer that not only in the content of the rules and agreements are the developing counties short-changed and emasculated, but also in the process itself. He exemplified that by stating that developing counties are excluded from "Green Room" negotiations reserved only for some special developed members. But "... decisions which emerge from the Green rooms are to be implemented by all members" [58] this buttresses the dependency and vulnerability of such members to ameliorate which the writer suggests the protection of its economy by Nigeria through the restriction "on the free inflow of foreign good except in areas where local substitutes are completely unavailable".[59]

Onuh's treatise may be limited to trade agreements and not specifically on economic self-determination, but the work exposes us to the glaring instances of dependency and stark helplessness of developing nations like Nigeria even in areas of world trade policy-making wherein they have to settle for what larger economies push down to them. This work intends to go further by highlighting how insistence on and the application of the right to economic self-determination could have played a role in insulating developing states from vulnerability.

Although most of the above reviewed literature have in one way or the other dealt with an aspect of the research, it is clear that such discussion is neither direct nor comprehensive and in many cases, superficial. An in depth discussion assessing the overriding principle of right to economic sovereignty or self-determination has proved hard to come by, especially something

[58] Ibid.p.240
[59] Ibid.p.238

with a Nigerian flavour. This gives credence to the proclaimed need to conduct further research by way of a systematic examination of the right, its realisation and how that affect all of us especially those of us on this side of the world economic divide.

1.8 Organisational Layout

Chapter One provides the general framework of the research by introducing the topic of discussion as well as setting out the research questions. The Chapter goes on to outline the Aims and Objective of the research which is followed by a Literature Review of previous works on or related to the topic. The Chapter also states the Methodology to be employed in conducting the research and culminates with the Justification for the research stating to what end is the research and the likely benefits derivable therefrom and the prospective beneficiaries.

Chapter Two principally deals with a conceptual discourse of major economic concepts and terms that interface with economic self-determination and thus together forming the basic themes of the work. It elucidates on the concept of economic self-determination and resource/economic sovereignty on the one hand and goes on to shed light on other major terms conceptually clarified including rules of international trade law like the National Treatment principle, Most Favoured Nation principle, Anti-dumping and Subsidy and the concept of Expropriation and nationalization of foreign assets, *inter alia*.. it also clarifies important economic models comprising of Capitalism and Socialism from the international economic and legal points of view.

Chapter Three studies the normative status of economic self-determination as a rule of human right. The place of economic self-determination in international instruments like the International Covenant on Economic, Social and Cultural Rights as well as in regional instruments like the African Charter as well as in domestic legislations. It makes exposition of

Nigeria's experience, as a member of the global economic community, regarding the application of the right to economic self-determination both within Nigeria as a federal state and between her and other nation-states *inter se*. In the former respect, fiscal federalism, autonomy and resource control and land ownership are studied. All with the objective of assessing whether or not Nigeria is economically self-determinant having taken advantage of the legally guaranteed right.

Chapter Four explores the interface between economic self-determination and international trade and investment laws and practices. This way, it examines the role of multinational corporations, analyses international investment contracts, some international trade rules and practices and culminates with an appraisal of how same promotes or demotes the attainment of economic self-determination of less developed nations.

Chapter Five examines Nigeria's fiscal and monetary policies for their important role on economic independence. In doing this, Nigeria's relevant domestic legislations, including relevant parts of the Constitution would be studied. International monetary and fiscal laws and practices as well as international institutions that govern monetary and fiscal matters are also examined and their influence on the Nigerian economy appraised. .

Chapter Six concludes the work by a Summary of what has been studied heretofore, drawing Conclusion on the final outcome of the study. Findings are made on discovered facts and solutions proffered to identified problems by way of Recommendations.

CHAPTER TWO

CONCEPTUAL DISCOURSE

2.1 Introduction

For its importance and the strategic position it occupies in relation to the body of general human rights and as a social phenomenon, economic self-determination possesses a complex framework that has intercourse and admixture with a plethora of other technical concepts both within the law and other fields of human endeavour. Within the discipline of law, it interacts with other legal concepts, principles and rules that engage this enquiry. Outside the field of law, various terminologies abound that feature prominently in the discussion and exposition of the concept of economic self-determination. To aid clarity and for proper comprehension of the topic and subject of research, such terms have been listed hereunder, and the import, purport and conception provided in relation to the subject of research below.

2.2 The Province of Economic Self-Determination

The concept of self-determination has, itself, been conceptualized as the right of a people to manage and control their social, political and economic destinies free from interference by, or dictation of, any external entity or being.[1] This protection extends to the listed components of political, social and economic spheres of the right. To this end, economic self-determination, an offshoot of the general right to self-determination, connotes the unfettered right of a people, to manage and control their economic fortunes. In Starke's exposition of the UN General Assembly's Resolution on Economic Rights and Duties of States, he holds that economic self-

[1] Ladan, M.T.(2007) *Materials and Cases on Public International Law.* Ahmadu Bello University, Zaria Press Limited, p. 119.

determination goes deeper than the mere right of a people to control its resources, but also extends to the power of the said people to utilize such resources as catalyst to development[2].

Such right over economy translates also to the power of the people to, also freely choose any economic model they want to practice without hindrance.[3] This is in sync with the provisions of section 16(1)(a) of the 1999 Constitution of Nigeria, which enjoins the State to "harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy".

From another angle, economic self-determination has been viewed as the right which indigenous peoples within a state possess to exercise control over their natural resources. This is premised upon the claim of permanent sovereignty over natural resources as recognized by international law. It has been argued that this should go beyond being a state commodity based on sovereignty, but extend to peoples self-determination within the state based on human rights law.[4] Relying on the pronouncement of the UN Human Rights Committee in relation to indigenous peoples, the view posits that Article 1(2) of the International Covenant on Civil and Political Rights (ICCPR), which deals with economic self-determination, "includes an obligation to ensure a right for indigenous peoples to control their lands and natural resources".[5] This forms the basis for the right to internal economic self-determination within a state by constituent units. Cambou and Sims argue that to achieve which "it is not sufficient to recognize indigenous autonomy and to create independent political institutions. It is crucial to protect their interest in

[2] Starke, J.G.(1976) *An Introduction to International Law*. Butterworths, London. p.143
[3]Umozuruike, U.O.(1979) *International Law and Colonialism in Africa*. Nwamife Publishers Limited, Enugu. p.131
[4] Cambou, D. and Smis, S.(2013)Permanent Sovereignty over Natural Resources from Human Rights Perspective: Natural Resources Exploitation and Indigenous Peoples' Rights in the Arctic. *Michigan State International Law Review.* Volume 22:1.pp.358-359 and 376
[5] Ibid.p.361

the governance and management of natural resources so as to ensure that their right to freely dispose of their natural resources is also realized.[6]

2.3 Economic Sovereignty

In accord with the traditional definition of *sovereignty*, economic sovereignty has been conceptualized as connoting all or any of the following four thematic definitions:

(i) State ownership
(ii) Self-sufficiency: the thesis is that a state is economically sovereign if it is able to meet the needs of its population based on its own resources and its own production.
(iii) Lack of budget deficit and subsequent lack of indebtedness to foreign creditors (commercial or institutional). Financial stability of the state and regular servicing of the budget.
(iv) The ability of the "state" to independently decide on the use of its own resources (policies)[7]

For their historical rejection and mismatch in the economic realities of twenty-first century world, based on the new meaning of sovereignty, the first three thematic definitions have been faulted as defective in conceptualising economic sovereignty in the contemporary world. The fourth dimension, however, appears congruent and in sync with the prevailing world economic structure and the intendment of international laws that govern economic sovereignty. Note that sovereignty no longer conveys the meaning and the independence and force it exuded a century ago principally due to globalization and internationalization of world economy. Its impact is therefore concisely captured in the following words of Savanovic:

> …being sovereign implies that one is actually, *de facto*, able to manage the resources, i.e. to impose the rules of appropriation, exchange and use of resources. We call this economic sovereignty. It is represented by "people"/citizens of the state in the framework of nation-state and in the "Westphalian" system…[8]

[6] Ibid.p.375
[7] Savanovic, A. (2014) *Economic Sovereignty.* 12th International Academic Conference, Prague. 01 September, 2014.
[8]. Ibid.p.1038

The above theoretical exposition of economic sovereignty has been rationalized in practical terms elsewhere as the prerogative inherent in government to control the economic destiny of its state, which prerogative underpins true national independence.[9] By the foregoing it is discernible how proximate economic sovereignty is to economic self-determination. Besides buttressing the interrelationship between the two terms, the convergence does not render them interchangeable *per se*. For, whereas sovereignty is legally more potent and politically carries more force, in application it is restrictive in that it is possessed by states that qualify to be such. Conversely economic self-determination is in scope wider for being claimable by both state actors and non-state entities-specifically, people, as conveyed by the tenor of almost all international instruments recognizing the right.[10] This is more in line with the conception of this work wherein to be examined is the economic self-determination of not only Nigeria as a state, but also of its constituent peoples as allowable by international law.

2.4 Resources Conceptualized

From what has been discussed in the foregoing, it can be seen that a major recurring and pervasive term in the conceptualisation of both sovereignty and self-determination in the economic sense, is the term "resources". This underscores its centrality to the discussion on the economy of nations and its prominence.

Resource(s) refer to, "a supply of something that a country, an organization or a person has and can use, especially to increase their wealth: the exploitation of minerals and other resources".[11] Although this definition gives the general character of what a resource is and

[9] Akume, A.A. (2010) Economic Deregulation and Corporate Investments in Nigeria, in Agom, A. and Igoche, P.O.*(eds.*) *Ogebe & The Law.* Tamaza Publishing Company, Zaria.p.323

[10]Preamble to the UN Charter, Article 20 of the African Charter on Human and Peoples' Rights and common Articles 1 of the ICESCR and ICCPR.

[11]Wehmeir, S.(ed.)(2000)*Oxford Advanced Learner's Dictionary of Current English.* Oxford University Press, Oxford. p. 1001.

possesses some elements of the more technical legal conception of the word, it is short in many respects and leaves out the broader purview envisioned by this work. This could be due to the broadness of the concept and the multiplicity of its diverse applications even in the legal parlance where it assumes various dimensions. One noticeable feature in all definitions however, is the recurrence of the term "mineral" in reference to most resources. This serves to demarcate natural resources from other class of resources.

In line with the provisions of the Minerals and Mining Act[12], mineral resources have been defined as:

> …any substance whether in solid, liquid or gaseous form occurring in or on the earth, formed by or subjected to geological processes, including occurrences or deposits of rocks, coals, coal bed gases, bituminous shale, tar sands, any substance that may be extracted from coal, shale or tar sands, mineral water, and mineral components in railing and waste piles, but with the exclusion of petroleum and water without mineral content.[13]

Two salient features are noticeable in the above conception of mineral resources. One, it encompasses all imaginable natural resources that can be found on top, beneath a states soil or in the sub-soil, waters and seabed as enunciated by Starke.[14] Secondly, it curiously exempts "petroleum" from the perimeter of the definition even though the latter is generally regarded as a mineral resource. It is submitted that the exemption could have been informed by the desire to demarcate the resources dealt with by the Act and to avoid duplication and legislative transgression into the sphere of the Petroleum Act. This considered view is reinforced by the fact that a segregated definition of "Petroleum" elsewhere in the Act reads like a recasting of section 164 in the reverse. It reads:

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[12] Minerals and Mining Act, Cap.M12, Volume 8, Laws of The Federation of Nigeria
[13]Ladan, M.T.(2009) Law, *Cases and Policies on Energy, Mineral Resources, Climate Change, Environment, Water, Maritime and Human Rights in Nigeria*. The Ahmadu Bello University Press Limited, Zaria.p.4
[14]Starke, J.G., Op. cit. p.145

> Petroleum means any naturally occurring hydrocarbons, or any naturally occurring mixture of hydrocarbons, or any occurring mixture of one or more hydrocarbons, whether in gaseous, liquid or solid state and any other substance, and including the substances already named that has been returned to a natural reservoir, but does not include coal, bituminous shales, tar sands, any substances that be extracted from coal, shale or tar sands or any other stratified deposits from which oil can be extracted by destructive distillation.[15]

In other words, any mineral other than those defined in section 164 *infra*, and water, is petroleum, its form and method of extraction irrespective. The definition of the word "petroleum" in the Petroleum Act", does not, in any significant manner, differ from the above cited in the Minerals Act. In effect, the two statutory definitions, read in community, can be said to have comprehensively outlined what constitutes mineral resources.

The mineral categorization of resources as seen above is not exhaustive. Other forms of resources, (some also natural like solar and wind energy) that are neither on top or beneath a states soil or seabed, do exist. With them also, the all- important "human resources" which form the baseline for labour and in turn, in the words of Adams Smith[16], is the basis of all capital, not "silver or gold". It can thus be summed up that resources connote the sum total of what an entity possesses, tangible and intangible, that is transferable and convertible in to a usable capital. Finally, in judicially settling the question of what constitutes natural resources and what does not, the Supreme Court of Nigeria has, in the case of *Attorney General of the Federation v. Attorney General of Abia State and 35 Others*[17], held that "oil, natural gas and coal come within the definition of natural resources but not ports, wharves, mangoes, livestock, hide and skin,

[15]Petroleum Act, Cap P10, Volume 12, Laws of the Federation of Nigeria.
[16]Smith, Adams(1904) *An Inquiry into the Nature and Causes of the Wealth of Nations*. Metheun & Co. Ltd. London. (5th edition). Accessed at www.econlib.org./smith/smWN8,
[17] *(2002) 4 SCNJ, 1 at page 16, holden 28*

horns, groundnuts, beans, grains, pepper, cotton and gum Arabic. Mangoes, livestock etc. are not natural resources but agricultural products".

2.5 Most Favoured Nation Principle (MFN)

Formulated in Article 1 of (GATT), the Most Favoured Nation is one of the two omnipotent rules of international trade law. The term assumes the status of a practice in the world of international trade politics and diplomacy and also a principle of law in legal academics. In the former case, it has been defined as "[t]he practice or policy of automatically and unconditionally granting any intellectual-property protection, advantage, favour, privilege, or immunity that by treaty is extended to nationals of all member countries".[18]

Concise and authoritative as the above definition is particularly regarding the practical application of the rule, it is deficient for the conspicuous limit of its scope to only intellectual property matters, whereas its judicial and legal application and conception transcend the stated boundary. It is possible the author has in mind the rule's connotation as conveyed in the earlier Berne Convention[19] on Copyrights wherein it featured prominently years ahead of the incorporation of the same, but wider, provisions in the body of the GATT/WTO rules. In the latter case and in line with its wider legal conceptualisation as a principle of law, it has been, generally, referred to connote a "…provision in a treaty under which a state agrees to accord to the other contracting partner treatment that is no less favourable than that which it accords to other or third states".[20]

This conception differs from the earlier one in one, albeit, important respect: the imputation of the universal application of the principle in all (trade) dealings between states

[18]Garner, A.B.*et al*(eds.)(2009)*Black's Law Dictionary*. Thompson Reuters. United States. (Ninth edition),p.1105
[19]Berne Convention on Copyrights.
[20]International Law Commission (ILC), 5TH Session, Report of the Working Group: Most-Favoured-Nation-Clause,Annex, p.3, UN Doc. A/CN.4/L 719(July 20 2007). Available at http://www.untreaty.un.org/ilc/documentation/english/a_cn4 1719.pdf. Accessed on 20th July, 2016.

beyond copyright matters implied by the earlier conception. Nevertheless, difficulties have always been acknowledged as regards the precise normative connotation of the principle by many authors.[21] For the same reason and the confusion engendered by the term, the United States in 1998 replaced same in its statute books and in its place the term "Normal Trade Relations" is substituted for easy comprehension by policy makers and the general public.[22]

The principle is therefore an anti-discriminatory rule which prohibits states, in commercial dealings, from treating one state different from the other where both are signatories to the GATT. Historically, prior to GATT, as far back as 1417 and up to the eighteenth century, traces of MFN could be found mostly in bilateral agreements which in effect set the pace for trade liberalisation that came to characterise world economic relations.[23] Subsequently, the League of Nations' Covenant also contained provisions geared towards "the equitable treatment for the commerce of all members". This, and other efforts at formally and separately entrenching the MFN as independent principle with universal application failed to materialize despite the United States' effort in that regard to counterbalance the then superior trade force of the Common Wealth system up to and beyond the formation of the United Nations.

It was not until 1947 during the discussions for the GATT that, realising the dangers of protectionism engendered by discriminatory trade practices in inhibiting free trade, the nations of the world agreed to enact the Most Favoured Nation principle as, in fact, the first article of the GATT. The fundamental and most notable character of the MFN provisions in the GATT is the removal of conditional MFN, hitherto in application, which stipulated reciprocity as the basis for

[21]Mclean, A. and McMillan, A.(eds).(2003) *Oxford Concise Dictionary of Politics*. Oxford University Press, New York.p.354

[22]Encyclopedia Britannica on Most-favoured-nation treatment. Available at http://www.m.eb.com/topic/393837. Accessed on 3rd October, 2012.

[23]Bashkar, A.(2010) *Concept of Most Faviured Nation Treatment under the General Agreement of Tariff and Trade*. National Law School of India, Bangalore University, Bangalore.p.2. Available at http://www.legalserviceindia.com. 04/10/12..

which a state accorded the treatment to the other. Now it is unconditional and reciprocity was done away with.[24]

In settling the confusion surrounding what constitutes an MFN treatment, Article I (1) of the GATT comes to aid in the following words:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and separation, and with respect to all matters referred to in paragraph 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

However, Article XXIV GATT permits the formulation of regional trade agreements (RTAs) in the form of free trade area or custom union between certain states. In the same vein, as a form of incentive, developing nation members of the GATT are excused in the form of: generalized system of preferences and to exchange tariff preferences among themselves.[25] Other exceptions are also in the nature of historical exemptions, public policy considerations, security, remedying balance of payment deficiencies/difficulties, and threat of injury to domestic producers.[26]

2.6 National Treatment

In conjunction with the Most Favoured Nation principle, the National Treatment principle constitute the twin-pillars of the WTO and serve as a cornerstone in the operability of

[24]A United Nation's Conference Paper on Most Favoured Nation's Treatment, UNCTAD Series on Issues of International Investment Agreements II, New York, 2010.p.26.
[25]Article xxxiv GATT.
[26]Article xix, GATT.

the entire system embodied in the GATT. Again, as in the case of MFN, Garner[27] defines National Treatment as "the policy or practice of a country that accords the citizens of the other countries the same intellectual property protection that it gives its own citizen with no formal treaty of reciprocity required…". And again, he has meandered into the same problem of restrictiveness that characterises his definition of MFN in limiting the scope of the definition to intellectual property matters reminiscent of the Paris and Berne Conventions where they featured prominently. As stated above, years after Berne Convention, the twin principles have come to occupy a broader connotation and wider application in almost all economically related treaties of post-UN era with explicitness and elaboration only enjoyed by few international trade law principles.

More accurately and in tune with its prominence in the scheme of the prevailing world economic order, the national treatment principle has been conceptualized as a principle whereby a host country extends to foreign investors treatment that is as favourable as the treatment that it accords to its national investors in like circumstances.[28] This is more in sync with its own self-definition as provided by Article III (1) of the GATT. A point worth noting from Article III is that its application goes beyond relations between individuals of different nationalities, but also covers corporate entities that operate or conduct their businesses as foreign entities or multinational corporations within a host state. In that scenario, the host country comes under obligation to treat those foreign entities and their products as it would indigenous enterprises in like situation. This segment of the NT principle dealing with foreign investors is so important that it was singled out by the Organization for Economic Cooperation and Development (OECD) in its Declaration of 21st June, 1976 and given a special mention as follows:

[27]Garner,A.B., op.cit.
[28]http://www.oecd.org/china. Accessed on 4th October, 2012, at 10: 29 hours.

> Member countries should, consistent with their needs to maintain public order, to protect their essential security interest and to fulfill commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another member country (hereinafter referred to as "foreign-controlled enterprises') treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable that accorded in like situations to domestic enterprise (hereinafter referred to "National Treatment").[29]

It is also pertinent to highlight that though the twin principles of Most Favoured Nation and the National Treatment invariably go together and are in most cases invoked simultaneously as anti-discriminatory antidote in international trade, a marked difference does exist. The Most Favoured Nation is generally applicable between a state and another in their economic relationships and policies; whereas the National Treatment principle is principally regarding domestic relations between a state and individuals or entities (non-nationals) operating in the state.

As with all legal principles, national treatment is not without exceptions. Limitations thus exist to circumscribe its application on grounds of public policy, security and economic concerns for developing nations. Specifically, By Article III (8)(a), an exception is made with respect to government procurement whereby a state is allowed, as a government, to patronize local or indigenous industries/retailers in purchases as against foreign vendors. Besides the incentivisation of indigenous enterprises by such patronage, security exigencies might also underlie its inclusion and protection of such choices by all contracting parties. A state that permanently relies on foreign supply for its domestic needs of all types can hardly boast of security in the face of the fluidity and temporariness for which foreign relations are known.

Following closely on the heels of government procurement, another important exception allowed by Article III (8)(b) is the limited permissibility of granting subsidies to local producers.

[29]Muchlinski, P.(1999) *Multinational Enterprises and the Law*. Blackwell Publishers Ltd. Oxford.p.583

However, this important allowance seems to be of decimal effect having been conditioned upon the general provisions of Article III and also in line with the Agreement on Subsidies and Countervailing Measures, a separate pact that is subscribed to by the contracting parties. The recognition of subsidy regime as a viable tool for policy intervention does little in allowing states unfettered discretion to use same in respect of domestic businesses outside the NT rule.

In the same vein, Article III (8)(c) GATT provides for general power of a developing state to come up with measures geared towards rescuing its domestic industries from decline or stagnation. The exercise and imposition of such measure shall however be upon a prior notification of same and the reasoning that informs the decision to other members of GATT aimed at triggering consultations to consider and uphold the proposed measures. In this regard too, issues arise regarding efficacy and applicability of the provisions in view of the conditionalities which, albeit, are beyond the scope of this segment.

2.7 Dumping and Subsidy

By Article VI (1), dumping refers to as the sale of an imported product in the importing market below its normal value. It is thus a case of price discrimination between the two markets: the exporting market from where the goods emanate and the importing market in which the product is sold. This should be distinguished from "price undercutting" which refers to a "sale of imported product for less than the price charged for the same product produced domestically"[30]. The watchword here is normal value with respect to goods imported into the domestic market. In simple terms, dumping happens in two markets (home market and ex porting market), while price undercutting happens within one and the same market[31].

[30] WTO E-learning,p.111. Available at www.wto.org.english/docs_e/legal_e/index/e/html. Accessed on 17th May, 20212.
[31] Ibid.

Due to the obvious negative effect on developing nations' economies inhibiting local industrial growth, the General Agreement on Tariffs and Trade, has, by Article VI (1) and (3) provides for measures to counter the effect of dumping by empowering the importing states to impose a counter-veiling duty to offset the effects and fill up the balance of price differentiation between the home price and domestic market price. These measures are called anti-dumping measures. Conditions precedents however exist that must be met by the importing state before such imposition, namely the obligation to show injury suffered or to be suffered by the importing country as a result of the dumping act, if allowed. Such requirements of injury predate GATT and are actually found as far back as 1916 in the US Anti-dumping Act of that year aimed at combating dumping of underpriced goods on an America soil[32]. In effect, the importation of a stricter version of the injury requirement in GATT in the form of material injury rather than mere injury, happened at the insistence of the United States[33].

Notwithstanding the above attempt by the GATT to go a step further than the US Act in detailing the important injury requirement procedure, it contains no criteria for the determination of material injury. For this lacunae, GATT 1947 was supplemented by "Codes" of Antidumping starting with ineffectual first Agreement on Antidumping of the Kennedy Round in 1967 and culminating with another antidumping agreement of the 1980 Tokyo Round which, for the first time, introduced Guidelines for determining injury and methods of investigating same by importing countries. The code also highlighted processes as well as due process to be followed in carrying out investigation as permitted by GATT/WTO Agreement. Sadly this code too encountered the same fate as that of Kennedy Round due to controversies and ambiguities surrounding some of its provisions and the relatively sparse number of its state signatories.

[32] Sykes, A.O.(1997) "The Economics of Antidumping and Counterveiling Duty Case" in Bhadari, J.S. and Sykes, A.O.(eds.)(1997) *Economic Dimensions in International Law.* Cambridge University Press. UK. p.88
[33] Ibid.

For the importance of the yardstick in measuring injury in dumping cases and the perennial failure of attempts to come up with uniform multilateral provisions to cater for same, the WTO had to step in and formulate a widely accepted instrument on anti-dumping as an annexure to GATT which finally is imbued with comprehensive provisions that take cognizance of all views. It is called Antidumping Agreement of WTO/GATT and it works in concert with Article VI of the GATT. Provisions relating to the actual occurrence of dumping, the occasioning of injury thereby and the causal link between the two have been explicitly provided. Also provided are steps to be taken in calculating dumping in view of the constructive price and the normal value of the commodity for the purpose of determining the origin of dumping. All these, and many more, technical criteria must be met for an importing country like Nigeria to be able to ward off the negative effect of dumping on its economic independence through the adoption of countervailing measures[34].

On the other hand, subsidy or subsidization as a term that features regularly side by side dumping for their similarities in international trade literature refers to a "bounty" or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandize"[35]. Its convergence with dumping is manifest in that having received subsidy from home, an imported merchandize is likely to sell at a lower price than products internally manufactured in the consuming market and thereby retard the growth of local industries, a backbone of economic growth. For this reason therefore and to cajole developing economies into staying in, and subscribing to, the WTO system, importing nation are then allowed by GATT to impose duty or levy above normal tariff on subsidised (or dumped) products brought into their countries to counterbalance the effect on their domestic industries and by extension,

[34] Ibid.
[35] Article VI(3) of the GATT

economies. These are called anti-subsidy measures which would normally, violate the WTO/GATT rules but which are specially allowed as palliative to the consuming countries as some sort of incentive to allow the injuring goods into their markets rather than turn them back[36].

Still, the power to impose countervailing duty in subsidy cases is not limitless. As usual, claw-back provisions apply to proscribe the importing states from imposing such duty or levy in excess of an amount equal to the estimated bounty or subsidy determined to have been granted[37]. This is about the only measure the WTO provides against subsidy regarding same as indirect penalisation of erring exporting states through the WTO's Subsidies and Countervailing Measures Agreement. Yet even these are subjected to conditionalities that have the effect of negativing any benefit they might hold or of rendering same unrealizable due to technicalities as in the case of anti-dumping measures. Requirements regarding the nature of the subsidy include its financial character and emanating from a public body. There is also the requirement of specificity and susceptibility to concrete ascertainment. Even where these requirements are met, for application of a countervailing measure, serious prejudices that impede like product and cause injury to domestic industry, must be established[38].

It is only after meeting all of the above that a countervailing duty may be imposed in the form of provisional duties, definitive duties and voluntary undertakings between the members. Even then, they must be preceded by compliance with Article VI of the GATT and be sequel to an investigation in line with Article 10 of the SCM Agreement. Understandably, these obstacles are too stringent to be surmounted by many importing countries which invariably happen to be less developed and pre-industrial particularly in the face provisions of the SCM that makes it

[36] WTO E-learning,p.111. Available at www.wto.org.english/docs_e/legal_e/index/e/html. Accessed on 13th June, 2017, at 17: 30 hours.
[37] Article VI(2) and (3) of the GATT.
[38] WTO E-learning,p.111. Available at www.wto.org.english/docs_e/legal_e/index/e/html. Accessed on 13th June, 2017, at 17: 55 hours.

impossible to challenge subsidy on agricultural products, potentially the mainstay of developing economies. The reasons being that the Agreement on Agriculture predates the SCM and that such subsidies possess a "minimal production-distortion effect"[39].

2.8 Capitalism

The term capitalism has, in general terms, been defined as "….a distinct form of social organization based on generalized commodity production in which there is a private ownership and/or control of the means of production."[40] The term is said to have first appeared in usage in 1854 and was later popularised by the writings of Karl Marx with his numerous discussions and writings on capitalist mode of production or bourgeois society[41]. The essence and character of capitalism based on the thoughts of its most prominent critic, Karl Marx, are summoned up in these words:

> Capitalism therefore combines formal and legal equality in exchange with subordination and exploitation in production. The existence of trade, rational calculation, productions for the market, the use of money, and the presence of financiers is not enough to constitute a capitalist society. For Marx capitalism is based on specific form of private property which enables capital to yoke labour to create surplus value in production.[42]

Historically, capitalism began to evolve in the sixth century according to Karl Marx. However, other thinkers like Karl Polanyi conclude that capitalism was firstly brought about by the British Poor Law Reform Act of 1834, though capital existed even before then in many forms including commercial and money dealing capital. For this, the periodisation was done in stages with sixteenth and eighteenth centuries as the merchant capital phase. Industrial revolution of the

[39] Ibid.
[40] Mclean, A, and McMillian, A., op. cit. p.62
[41] Ibid.
[42] Ibid.p.64

eighteenth century finally capped up the domination of the capitalist mode of production.[43] Nineteenth century ushered in the era of the *lessaize-faire* stage of capitalism based on the ideologies of Adam Smith through a series of reforms in Britain in areas of navigation and banking practices[44]. Later happenings in the world political economy including 1930's recession and the economic boom of 1950s to 70s only reshaped the capitalist system and did not stand in the way of its current form of globalisation of capital[45].

On the other hand, in legal parlance, capitalism has been defined as:

> …an economic system in which the means of production and distribution are privately or corporately owned and development is proportionate to the accumulation and reinvestment of profits gained in a free market. In a capitalist economy, personal profit can be acquired through investment of capital and employment of labour.[46]

This definition is more elaborate in relation to the earlier definition for its reference to corporate ownership, a feature of contemporary capitalism and the freedom of reinvestment of accumulated profit.

2.9 Socialism

Socialism is a "…political and economic theory or system of social organisation based on collective or state ownership of the means of production, distribution and exchange…"[47]. Its advent in 1803 Britain was sequel to the desire to develop a system that de-emphasised private and individual gain and subordinated same to collective *welfarism* for all by transforming western industrial societies into more socially conscious and collectively responsible for the means of production with the proletariat (i.e. the working class) elevated to a higher social

[43] Ibid.
[44] Ibid.p.65
[45] www.definitions.uslegal.com/capitalism. Accessed on 21st July, 2016, at 18:08 hours.
[46] Mclean, A, and McMillian,A. op. cit. pp. 496-497
[47] Ibid.p.497

pedestal than the capital-owning few. In general, the major figures behind the socialist ideology-Marx and Engels – see the system as a "transitional phase between capitalism and full economic and social communism".[48]

Dichotomies in ideological perception and disparities in practical approach led to the division of the socialist movement into divisions between soviet-socialism and German's national socialism under Hitler even before the World War II. Thereafter the Western world became divided into the Western Bloc dominated by liberal democratic and the eastern Marxist-Lennin socialist states, though elements of socialists advocating for welfare-state continued to be present even in the western democratic states of Europe. The events of the late 1980s and early 1990s which saw the balkanization of the Soviet-bloc left socialism groping for a hold in the world political-economic equation having lost majority of its adherents in the Third World countries of particularly Africa and Latin America.

These economic cleavages that pervaded the Western and industrialized world in the form of models competing for place in the body polities were transported into Africa and elsewhere in the third world through colonialism. When the latter abated they were bequeathed, upheld and practiced by the legacy states and were seen as the remaining shackles of imperialism. In effect this mischief constitutes one of the bases for the formulation in international law of the right to economic self-determination which according to Umozuruike[49] comprises of the right of a people or developing state to freely choose which of the models it desires to practice. Whether the right of economic self-determination has succeeded in guaranteeing that free choice is examined in the later part of this work.

[48] Umozuruike, U.O. op. cit. p.131
[49] Ibid.

2.10 Expropriation

Expropriation could mean the act of confiscation of private property by government through the instrumentality of its sovereign might against nationals and non-nationals alike.[50] But in a more sublime wording, "expropriation is the act of a government in taking privately owned property, ostensibly to be used for purposes designed to benefit the overall public…"[51] Both these definitions are bereft of technical and legal precision as discernible from their contents and they appear to be more suited for the common parlance.

In its legal and technical sense therefore, particularly in international economic law, the act of expropriation has been defined by what it amounts to and constitutes thus:

> An act of expropriation involves the compulsory taking of property belonging to another upon payment of compensation for its loss. The taker is usually a public authority or a private entity acting on behalf of a public authority. The expropriated property may be acquired by a third party or be taken into public ownership and control in which case it is said to have been nationalized…[52]

Aside the extensive definition of what constitutes an act of expropriation and by whom against whose property, one salient feature of the above definition is the statement of the destination or end of the acquired property by way of transfer to other entities or being nationalized to the taking state's ownership. While the former raises the moral and the ethical requirement of public interest as condition for such takeover as treated below, the latter brings up the indispensable other half of expropriation in the form of nationalisation separately discussed hereunder.

Irrespective of the garment in which an expropriation act may be clad, the debate has been settled that the basis has to be public interest for legal validity. In the words of

[50] http://www.investopedia.com/expropriationDefinition_investopedia.htm. Accessed 27th October, 2016, at 01: 30 hours.
[51] Ibid.
[52] Muchlinski, P.(1999) *Multinational Enterprises and the Law*. Blackwell Publishers Ltd. Oxford.p.501

Muchlinski,[53] "[a]ccording to the repeated practice of the major capital exporting powers, expropriation is lawful only in cases where it is carried out for a clear public purposes, without discrimination and upon payment of adequate and effective compensation".[54] This is inspite of the scepticism of capital importing countries on its justness, a controversy that could be responsible for the principle's inability to attain the status of a customary international law.[55]

To curb the excesses and wider leverage that a state may have in manipulating and giving any *malafide* confiscation a semblance of public interest, a yardstick has been judicially evolved by which to gauge the validity of such claim. Thi is to say that irrespective of any manifestation of intent and how outwardly altruistic, every confiscatory measures is to be weighed against the imaginary scale of justice and it is only when the element of justice is not missing in the exercise that the act would escape the judicial hammer. Numerous scenarios thus exist: for instance an element of justice would be missing where government officials are established to have personal interest or benefit in the takeover process or where the motive is personal aggrandisement of a few or their cronies. In same the vein, the law cannot be made to bend over backwards in legitimizing an expropriation that was done at a time when the act was not designated as public interest by the extant laws.[56]

Related to the above vitiating scenarios is confiscatory act based on political motives or considerations, or pursuant to an illegal act, for instance, human rights violation, or subsequent upon the commission of crimes against humanity or genocide. Other instances with similar fate include retaliatory measure against a home state foreign policy.[57] In general, the action must conform to the principle of national treatment the basis of which is non-discrimination in the

[53]Ibid.
[54]Ibid.p.503
[55]Ibid.
[56]Ibid.p.504
[57]Ibid.p.505

treatment meted out to indigenous industries vis-à-vis foreign enterprise,[58] and a plethora of judicial pronouncements can be found upholding and further enunciating the rules so outlined.[59]

Notwithstanding the above requirements however, it is likely that an expropriation act, even an irregular one, done by a state may scale through and escape the judicial hammer so long as the important element of compensation is satisfied. It is noteworthy that the apparent bias of the law in favour of the expropriating state is in recognition of the overriding (economic) sovereignty of the host state as against a corporate private interest. In the words of Muchlinski;

> As long as expropriation is regarded as a legitimate exercise of sovereign power, the measure of compensation payable in the case of a lawful expropriation will have to moderate the valuation of private losses in the light of broader public interest concerns. This may lead to the recovery of less than the full loss to the owner, where it is objectively justifiable in the light of the political and economic realities of the case…[60]

The above statement not only highlights the status of economic sovereignty as the most important consideration for the validity of an act of expropriation, but also underscores its prevalence even in the face of contention regarding the valuation or measure of the quantum of the compensation. The varying judicial attitudes manifested in that regard in *Liamco*[61], *Iran-US claims*[62], *Aminoil*[63], *Texaco Arbitration*[64] *and BP v. Libya*[65] cases notwithstanding, this work in later pages, measures the realisability of the expropriation power in, and as an element of the economic self-determination of the Nigeria state.

[58]Ibid.
[59]See the House of Lords in *Oppenheirmer v. Cattermole*(1976) AC 249 and *BP v. Libya* (1974) 53 ILR, 297.
[60]Muchlinski, P.(1999) *Multinational Enterprises and the Law*. Blackwell Publishers Ltd. Oxford.p.512
[61](1982) 20 ILM, 1.
[62]*Amoco International Finance corp. v. Iran* (1987) 15 US-Iran CTR, 189
[63](1982) 21 ILM 976; (1982) 66 ILR 519.
[64]*Texaco v. Libya*(1978) 17 ILM,1.
[65]*BP v. Libya(1974*) 53 ILR,297.

2.11 Nationalisation

In its general economic sense, the term nationalisation refers to an act of taking ownership of property previously privately owned, by a state. In this sense, it is the reverse of the term privatization. The transfer can be to a national government or to a municipality in which case it may also be referred to as municipalisation.[66] Thus, the concept of property itself and its ownership form the basis of nationalization-at least to those who are in accord with the concept outside some socialist and anarchist elements.[67] The end result of nationalisation, to some economists, is often monopolisation whether or not the taking state decides to engage in same itself or through transfer to another private entity as "[w]hat has been nationalised or taken away in such case is the former right of others to conduct a competing enterprise within the sphere of what has been monopolised".[68] All these are from the economic angle.

In its legal sense, of which this work is more concerned however, the term nationalisation refers to the process by which a state takes over foreign owned capital or property through the medium of expropriation, as discussed above, and then converts the property to a state enterprise in terms of ownership or control.[69]Several factors thus arise in the above definition. Firstly, the limitation of the nationalisation act to foreign owned property or undertaking. (Note that a takeover of indigenous property carries a different terminology, for instance, acquisition, and is subject to different rules derivable from the municipal jurisdiction). Due to the element of international involvement therefore, international law plays an important role in spelling the modalities and ethos of such takeover as discussed shortly below. Secondly from the definition, is the presence of expropriation, an exercise that goes hand in hand with nationalisation and

[66]David Sharp(2005) *An Introduction to Basic Economics*. Available at http://www.econmicsimplicities.com/ec0532.htm. Accessed on 11th July, 2016, at 12: 15 hours.
[67]Ibid.
[68]Ibid.
[69]Ibid.

invariably precedes same. Thirdly, and related to the second factor is the conversion of the taken property to state ownership and or control rather than in its disposal or utilisation as expropriation can lead to when it is short of nationalisation. This last point is, in essence, what distinguishes expropriation from nationalisation, two terms that are otherwise concomitant and often used interchangeably. The legal foundations for nationalisation in modern international law can be said to have been laid by the provisions of Article 2(c) of the U.N. Charter on Economic Rights and Duties of States copiously cited above.

It is clear from that provision that economic self-determination cum sovereignty are at the root of nationalisation and aimed at giving effect to same. Claw-back provisions always exist to diminish the overall efficacy and absoluteness of the power to nationalize in the form "prompt, adequate and effective" compensation with all its conditionalities as applied in the case of expropriation..

2.12 Fiscal Federalism

Fiscal federalism has been conceptualized to refer to a political and constitutional "…arrangements around who determines and collects taxes and other revenues and who spends them, how and on what…"[70]. Several issues and questions arise from this conceptualization. These includes the "who" question; meaning the entity charged with the responsibility of tax collection; the "how" question on the modalities of the revenue collection, sharing and application, and "on what". The latter question lends itself to dual meaning. Firstly, "on what" (resources) should the tax be levied or revenue generated from. Secondly, on " how" should the collected tax or revenue be applied and by whom, among the orders of government. In the

[70] Anderson, G. (2008) *Federalism: An Introduction.* Oxford University Press, Ontario.p.30

Nigerian context, answer to these is to be found in the Constitution, particularly in the Second Schedule thereof[71].

While the above conceptualization conjures up a picture of cooperation and cordial division of tasks between orders of government in a federation, others project the relationship as a competition between the tiers' to exert control over the financial or economic fortunes of the entity. "This implies that each tier of government is (to) coordinate its sphere of authority and should have appropriate taxing powers to exploit its independent sources of revenue…"[72]. To this view, fiscal federalism provides an avenue for assertion of a right to, and claim over fiscal control, which assertion can be forceful by the constituent units against the centre in a fierce demonstration of independence. For this reason, according to this view, if the state authorities… call the federal authorities for grants and subsides to assist them, they are no longer coordinate but subordinate to it, which subordination ruins federalism.[73]

To this school of thought, unlike the majority view of fiscal federalism as a consensual arrangement for legal and administrative convenience, fiscal federalism is a zero-sum game in that it is all or nothing for the constituent units. However, the practical feasibility of this view is doubtful and virtually none-existent in all federations around the world as seen below. Fiscal arrangements are generally a give –and –take system which accommodates a range of issues and concerns that combine to make the system workable. For instance, a fiscal arrangement that places constituents units at par with the centre in all ramifications stands the risk of encountering an obstacle with serious legal and political nature from the onset. This relates to sovereignty, as that proposition purports to confer sovereignty on each of the units. Yet in the eyes of the

[71] Part I of the Second Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[72] Okeke, M. I.et al (2013) Issue of Fiscal Federalism and Nationalism in Nigeria During Obasanjo Administration. *Journal of Educational and Social Research.* MCSER Publishing, Rome-Italy. Vol. 3, No. 10.p.109.
[73] Ibid.p.10

international law and international community, sovereignty lies with only one entity-Nigeria, personalized by the central government as sole representative or arbiter for the Nigerian State[74]. This includes economic sovereignty. For these reasons therefore, the Supreme Court of Nigeria has, in the case of *Attorney General of Abia State and 3 Others v. Attorney General of the Federation and 33 Others (supra),* finally settled the controversial status of states as units in the federal scheme of Nigeria. The apex court states that while the states are not to be regarded as "errand boys" in relations with the Federal Government, they also cannot purport to exercise sovereignty which only resides in the nation as a sovereign entity. They only exercise a middle role between those two extremes through "exercising legislative and fiscal autonomy as provided for in the Constitution".[75]

In line with the above judicial guidance thus, other perspectives view fiscal federalism from a more harmonious angle of interrelationship between tiers of government as a by-product of federalism as a political structure[76]. While recognizing the requirement of independence and autonomy of each tier of government in carrying out its financial functions, this view concludes that "[f]iscal federalism is concerned with "understanding of which functions and instruments are best centralized and which are best placed in the sphere of decentralized levels of government." It therefore sums up fiscal federalism as a "… a set of guiding principles or concept that helps in designing financial relations between the national and sub-national levels of government"[77]. Here comes again the discourse as earlier presented of Anderson regarding "who does what and how" as the main objective of fiscal arrangements in a state entity. Beyond theorization, this task is

[74] Cambou, D, and Smis, S. (2013) Permanent Sovereignty over Natural Resources from a Human Right Perspective: Natural Resource Exploitation and Indigenous People's Rights in Arctic. *Michigan State International Law Review.* Vol.22:1,p.376
[75] *Attorney General of Abia State and 3 Others v. Attorney General of the Federation and 33 Others*(2006) 7 SCNJ, 1 at page 8, holden 1.
[76] Ewetan, O. O. (2012) "Fiscal Federalism in Nigeria: Theory and Practice". *International Journal of Development and Sustainability.* Vol. 1, No. 3.p1076
[77] Ibid.p.1077

what laws set out to govern in streamlining and assigning financial powers in a wieldy manner amongst federating units.

2.13 Resource Control

Whereas fiscal federalism is a system by which receivables from resources are controlled, managed and utilized in a federation by the federating units, resource control is the claim of dominion over resource themselves which translate to fiscal expression. The two concepts are therefore not only interrelated but also intertwined such that rarely could one be discussed in isolation of the other. This also explains why most scholars choose to discuss the concepts conjointly. Resource control has thus been conceptualized as:

> "… a basic economic theory grounded in land (rent), labour (wages), capital (interest) and entrepreneurship (profit), (which) are factors of production within the context of federation. It implies that the component states within a federation have a right to primarily control the natural resources within their borders, and to make an agreed contribution towards the maintenance of common services at the centre."[78]

While conveying with it elements of fiscal federalism as discussed above, this conceptualisation equates resources in a federation to a property in capitalism whose ownership is privately held by subjects whose sole and only obligation is to pay taxes to the state in return for full and unfettered control. In this analogy, the constituent units are taken to be the private citizens, while the centre is made to represent the State.

Perhaps, the view of Raji, *et al*, on the concept of resource control can be said to be more plausible and practical in contrast to Ekuri's cited above. To the former, "resource control is the power and right of a community or state to raise funds by way of tax on persons, matters,

[78] Ekuri, K. A. and Etim, E. E. Op. Cit.,p.220

services, services and minerals within its territory."[79] To this definition, resource control is about leveraging by a unit on resources situated in its locality to exert fiscal control over its finances and economy. While it is a rehash of what fiscal federalism entails, it affirms the inseparability of the two concepts and the centeredness of fiscal federalism on resource control as the bedrock of any assertion to fiscal control.

Other scholars like Cambou and Smis[80], have viewed the topic of resource control from the perspective of the permanent sovereignty over natural resources by a people within its geographical indigenous territory. In support of this position, they argue that the provisions of Article 1 of the International Covenant on Economic Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR) have in no uncertain terms guaranteed the right of a people, particularly indigenous people subject of their study, the right to the control of all natural resources in their territory[81]. For this, they particularly rely on the provisions of paragraph 2 of the common articles of the twin Covenants which provides thus:

> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any cooperation arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

In upholding the proprietary right of people over natural resources through the medium of international law, this view worked under the moral prism that the term "people" in the above cited provision should refer to the actual people and not "states" as it is principally taken to be. In protest, they pointed out that "while in human rights law, the beneficiaries of is peoples by

[79] Raji, A. O. Y., *et al* (2013) The Politics of Resource Control in Nigeria: Example of Niger-Delta Region, 1990s-2010. *Kuwait Chapter of Arabian Journal of Business and Management Review.* Vol. 3, No. 2.p.1.
[80] Cambou, D. and Smis, S. (2013) Permanent Sovereignty over Natural Resources from a Human Rights Perspective: Natural Resource Exploitation and indigenous' Rights in the Arctic. *Michigan State International Law Review.* Vol. 22:1.
[81] Ibid.p338

virtue of their right to self-determination, the doctrine of PSNR has evolved towards promoting the understanding that control over natural resources is reserved for state"[82].

Realizing the inherent friction between States and "peoples" on claim over resources, the scholars sought to advance a middle ground that upholds state sovereignty and simultaneously recognizes peoples' claims over resources. They posit:

> Consequently, there is a need to invigorate indigenous peoples' rights as a new source of authority for governing and managing land and natural resources and to stimulate the establishment of a new legal arrangement through which indigenous rights can flourish. Only then will sovereignty be capable of working in tandem with indigenous self-determination with the goal to promote a more equitable, peaceful, stable and humane world[83].

It is submitted that reference to "a new legal arrangement" above implies the necessary constitutional forms that accommodate a measure of resource control by federating units or people, while preserving state sovereignty in the central entity.

2.14 Third World, Developing and Less Developed Countries

These three terminologies have been used interchangeably in much of literature to connote economically backward nations of the world. However, in spite of the similarity in their respective meanings, some subtle differences do exist between them influenced by their historical origins and subject variation particularly in the humanities. Thus, although the coinage of the term third world has proved difficult to trace as regards historical point of its advent, the term was prominently used during the Cold War era to refer to Less Developing Countries that belonged to neither the Soviet Communist bloc, nor to the Western industrialized developed states.[84]

[82] Ibid.359
[83] Ibid.p.379
[84] McLean, I and McMillan, A.(2003) *Oxford Concise Dictionary of Politics*. Oxford University Press , Inc. New York.p.537

Hence, the use of the term "third" was to distinguish the poorer countries from the First World, being the Western Capitalist society and the "Second World" being the then Soviet bloc.[85] After the disappearance of the Soviet bloc in the early 1990s, the term Third World became anachronistic and otiose since now the so called "Second Word" no longer existed.[86] In its wake therefore, came more clearer terminologies of developing or "less developed countries", LDCs used to describe countries of Asia, Africa and Latin America sharing not only disadvantaged economic status, but also historical aversion to colonisation[87] which can be linked to their present economic stagnation.

2.15 The concepts of state and people.

The concepts of state and people are some of the opt-recurring terms that appear throughout of this work and also dominate a large portion of discussion on issues in the work. This is due to the nature of the work which deals principally with a right resident in the people and states alike and also claimable by the people against the state in some instances. In the first instance, people have a right to economic self-determination in the internal sense as conceptualized above which they can claim against their governments within a state. In the second instance, the state itself incidental to its inherent sovereignty possesses the right to economic self-determination in the external sense as against all other states of the world.

In legal instruments however, this distinction is rarely manifest and therefore the two terms are used interchangeably sometimes as duty holder and another time as the right holder thereby occasioning a mix-up in the proper comprehension and demarcation of the role of either of the terms in the discourse that ensues. This is not peculiar to this work as many self-determination scholars and writers have had to deal with a similar confusion resulting from the

[85] Ibid.
[86] Ibid.
[87] Ibid.

interwovenness of the two terms. For this, a concise discourse of the appropriate place of each of the terms is undertaken below.

Thus, to start with, the term state has been conceptualized as a distinct set of institutions whose specific concern is with the organization of domination in the name of the common interest, within a delimited territory .[88] This is a general definition from the general sociological and political point of view which is more concerned with the central character of a state as the exclusive monopolist of coercive powers and instruments.[89] In modern times, besides legal legitimacy and monopoly of power of violence, a state has come to be characterized by its power to represent its citizens in diplomatic dealings with other states of the world without necessarily becoming one and the same with its peoples or nations from whom it receives its power through legitimation.[90]

From legal perspective, state refers to a system embodying a corpus of people in a politically organized environment government by rules which stipulate the ay and matter power is exercised over the entity.[91] This, in many respects, accords with the international law codified definition of state as contained in Article 1 of the Montevideo Convention 1933 to the effect that to qualify as a state and therefore a person of international law, a state must possess these four features, namely Permanent population, Defined territory, Government and capacity to enter into relations with the other states.

On the other hands, the concept of people simply refers to the citizens of a state.[92] International law scholars have however proceeded further made a deeper analysis and expounded a more complex conceptualization of the term particularly bearing in mind the

[88] Ibid.p.512
[89] Ibid.
[90] Ibid.p.514
[91] Garner, A. Ed. (2004) *Black's Law Dictionary*. Ninth Edition. Thomson Reuters, USA.p.1537
[92] Garner, A. Op. Cit. p. 1250

controversy engendered by the interchangeable usage of the term with state in self-determination discourses. Thus, to some scholars like Mayall, J.[93] to lay a claim to and benefit from the self-determination right, a people have to advance to the level of *"*historical nations*"* as different from mere groups. In the same manner, for entitlement, a people has to meet the criteria of either the *"*primodalists" who maintain that nationhood of a people is determined by the people's common "*ethnie":* a prehistoric identity; or the modernists' theory according to which nationality of a people is of recent invention and not anything older than the French or American revolutions.[94] Thus to modernists, ethno-genesis is no basis for claim to self-determination[95].

Other scholars like Gardiner[96] conceptualize what constitutes a "people" capable of benefiting from the right and concludes that in view of the multitude numbers of groupings having one or other common ties on which basis to claim the right, it would be impractical to use the criterion of common identity as a yardstick for entitlement to the right. Doing that would give birth to unending list of groups and infinite number of states for each grouping.[97] From this perspective therefore, an orderly claim of self-determination by peoples in a state even in the internal sense of the right can only be meaningful and feasible not through multifarious groups, but through legally organized entities in the form of federating units or local areas as adopted by this work. States on their parts, being international law persons can lay claim to external self-determination against other states, something a people or community within a state cannot do for the absence of international juridical personality.

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[93] Mayall, J..Sovereignty, Nationalism and Self-Determination in Jackson,R.(ed.) (1999) *Sovereignty at the Millennium*Blackwell Publishers Inc,USA

[94] Mayall, J. Op. Cit. p. 52

[95] Ibid

[96] Gardiner, R. K. (2003)*International Law* Person Education Ltd, London

[97] Ibid.

CHAPTER THREE

ECONOMIC SELF-DETERMINATION AS A RIGHT

3.1 Introduction

The parent right to self-determination, which bifurcated and gave birth to the right to economic self-determination among other sub-components, was in the beginning in the form of a political ideology championed and promoted by some world political figures such as US President Woodrow Wilson in his famous 14-points speech. Up to and beyond the formation of the League of Nations after the World War I, the self-determination ideology could not attain encapsulation into the body of international human rights law despite its political popularity and moral undertones. It was not until the adoption of the UN Charter in 1945 after the formation of the United Nations, that self-determination attained formal status for the first time in a legal document. Before then, most references to the concept were political or rhetorical devoid of any legal character.[1] Over the decades following the establishment of the UNO, several legal instruments were to be enacted embodying self-determination, in all its ramifications, as a legal concept and a right. These instruments traverse all the three tiers of global legislation namely, international, regional and domestic legislations.

3.2 International Instruments on Economic Self-determination as a Right

Most, if not all, of social and economic rights found their existence and foray into legal literature from international instruments usually upon treaties duly entered by the comity of nations through the United Nations. The right to economic self-determination is no exception as it derived its codified origin from the UN Charter from which source other instruments borrowed and expounded further on the various components of the right. Below is a brief look at the major

[1] Harris, D.(2003) *Cases and Materials on International Law.* Sweet & Maxwell, UK, Seventh Edition. p. 104

international instruments that gave birth to and guarantee the economic self-determination right, starting with the UN Charter.

3.2.1 The United Nation's Charter

By Article 1(2) of the United Nations Charter, self-determination has been listed as one of the guiding principles of the world body. The Article specifically declares the cardinal objective of the organization as the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination…". Subsequent provisions of Article 55 of the Charter are by and large to the same effect.

These pioneering provisions of the UN Charter have succeeded in ushering the concept of self-determination in its formal legal sense into the corpus of contemporary international law, but had fallen short of detailing what constituted same and whether or not the concept was a claimable right capable of enforcement judicially. In the words of Higgins "'the self-determination principle as enunciated in the charter was inherently conservative and radically different from how it came to be understood subsequently' ".[2] Limited and nebulous as the reference to self-determination in the UN charter could have been, it nevertheless set the stage for more elaborate codification of the concept not only as a right recognized in intentional law[3]. These Covenants mark the transformation into enforceable right of the concept of self-determination thereby according it an entirely new vista and endowing it with a force that enjoys justiciability. Common Articles 1 of the twin covenant, read in community, not only guarantee the main right of self-determination but, for the first time in a justiciable form, but also provide for the sub-component of the right to economic self-determination.

[2] Rehman, J. (2010) *International Human Rights Law*. Pearson Education Limited, London. p. 474

[3] the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights(ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Emboldened by the clear and unambiguous transformation of self-determination, the United Nations proceeded to pass several resolutions and make other promulgations geared towards safeguarding the right in all its ramifications of political, social, cultural and economic self-determination.[4]. Although these resolutions being conceptually soft law with no binding effect on state, they formed the basis upon which charters and covenants were promulgated with binding effect as studied below. In the international judicial arena, self-determination occupies a pride of place as the International Court of Justice, a UN organ, states, in *Western Sahara* case[5], "…that the right of self-determination was one of the essential principles of contemporary international law".[6] Similarly, in *Katanga vs. Zaire*,[7] the African Commission on Human and Peoples' Rights entertained Katanga's petition principally premised on the right to self-determination which affirms the justiciability of the right in international law following its codification in the international legal instruments.

3.2.2 Economic Self-Determination under the International Covenant on Economic, Social and Cultural Rights (ICESCR)

Following the general provisions of the UN Charter that variously made an allusion to the right of self-determination without much elaboration of what constitutes the other dimensions of the right, the consensus was reached for the promulgation of a specific and more elaborate instrument to carter for specific components of the rights. Hence the promulgation, in 1966, of the Twin Covenants of International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Though both

[4] Examples: the UN General Assembly Resolution 2625 (xxx), the General Assembly Resolution 1514 (xx) and the General Assembly Resolution of 21st December, 1952 that empowers peoples to use and export freely their natural resources and utilize their God-given wealth

[5] *Western Sahara Case*, ICJ, 1975;

[6] Mayal, J. Sovereignty, Nationalism and Self-Determination, in Jackson, R. (ed.) (1999) *Sovereignty in the Millennium.* Blackwell Publishers Inc.

[7] *Katanga vs. Zaire* , Communication No. 75/92, IHRL 174 (ACHPR) 1995.

covenants make reference, in their very and respective Articles 1, to the right of self-determination, for the purpose of this work, ICESCR is more apposite not only for possessing the economic character conveyed by the work but also for going a step further to make elaborate provisions relating to a people's economic freedom. In 1993 Nigeria ratified the twin Covenants[8] thereby making the recognition and observance of the rights protected therein an obligation assumed by the Nigerian state.

Besides the general provisions of Article 1 providing for the composite parent right to self-determination, ICESCR proceeds to make specific provisions relating to the right to economic self-determination by Article 1 (2) in the following words:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.

The import of the above provision is clear: it guarantees the freedom of a people to deal with its resources and for its own end and purpose without qualification save for obligations freely incurred in the peaceful economic relations between states. Another important ramification is the prohibition of the deprivation of a people of its means of subsistence". This clearly takes into account the balance of strength between states and sets to ensure that no such is exerted to deprive the weaker people of their resources. It is noteworthy that the provision is circumspect enough, in reference to the beneficiaries of the right, to use the term "people" instead of "states" in preserving the broadness of the concept of self-determination.

Additionally, Article 25 of ICESCR provides that "nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy, utilize fully and freely their

[8]Ladan, M.T (2007) *Materials and Cases on Public International Law*. Ahmadu Bello University Press, Zaria. p. 119.

natural wealth and resources". Although Article 25 of the ICESCR may sound repetitive of Article 1(2), it is significant in understanding the extent to which the Covenant sets out to protect the guaranteed right to economic self-determination. It is submitted that, Article 25 rather aims at insulating the economic right of people over their resources from being made nugatory of under the pretext of interpretation of any aspect of the covenant. Additionally, any aspect of the Covenant can only add to, the right of the people to utilize and enjoy fully their natural resources. It is a safeguard against any derogation from the clear provisions regarding economic rights.

Commenting on the provisions of Articles 1(2) and 25 of the ICESCR, Rehman posits that the provisions are the products of developing and particularly socialist states' insistence to incorporate economic self-determination in the human rights body especially as it relates to the right to permanent sovereignty over natural wealth and resources along with a right to nationalization of property and other related matters.[9]

By the foregoing provisions thus, there exists no dispute regarding the contents of the right to self-determination as comprising of political, social and economic self-determination. This much is buttressed by the clear tenor and import of the instruments conveying the rights as well as illuminating discourses of international law scholars that have written on the subject.[10] There is also no dearth of judicial pronouncements upholding the sanctity of the right to economic self-determination of peoples and states. Controversy however, ensues only regarding the beneficiaries or objects of the right. This has arisen out of the usual appendage of "human", used in qualifying guaranteed rights which come to be associated with individual rights mostly in the nature of civil and political rights. On the other hand, self-determination being clearly a

[9]Rehman, J. Op. Cit.p. 147
[10] See Starke, J.G (1967) *An Introduction to Internal Law*. Butterworth's, London, p. 146 and Umozunike, U.O (1979) *International Law and Colonialism in Africa.* Nwamife Publishers Limited, Enugu, p.31.

collective right belonging to a group, there is a supposition that individuals lack standing to enforce the same. In the words of Rehman Javaid while commenting on ICESCR: "Article 1 has been referred to not as a human right(s) article but as one providing for 'collective right' of peoples".[11]

This scholastic division does not however deter the UN Human Rights Committee from enunciating the right and its place in the human rights law in these words:

> In accordance with the purposes and principles of the Charter of the United Nations, Article 1 of the international Covenant on Civil and Political Rights recognizes that all peoples have the right of self-determination. The right of self-determination is of particular importance because its realization is an essential condition for the affective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that states set forth the right of self-determination in a provision of positive law in both covenants apart from and before all of the other rights in the two covenants.[12]

In other words, additional to its standing as a collective or group right claimable by the latter, self-determination also assists in the realization of other individual rights guaranteed and thus an important right in the scheme of international human rights protection.

In giving effect to its promising provisions, the ICESCR is imbued with provisions that spell out the procedure for enforcement and for motivating the observance of the covenant. This is contained in Articles 16 to 25 thereof. Specifically, Article 16 provides that:

> 1. The state parties to the present covenant undertake to submit in comforting with this part of the covenant, report on the measures which they have adopted and progress made in achieving the observance of the rights recognized herein.
> 2. (a) All reports will be submitted to the Secretary General of the United Nations, who shall transmit copies to the

[11] Rehman, J. Op. Cit. p 475

[12] UN Human Rights Committee, *The Right to Self-Determination of Peoples* (Art. 1). 13/04/84. CCPR General Commert 12. (General Comments) Para 1. This is probably the most comprehensive commentary by UN on the right to self-determination.

> Economic and Social Council for consideration in accordance with the provisions of the present covenant. (b) The Secretary General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any reference part thereof, from state parties to the present covenant which are also members of these specialized agencies copies of the reports, or any relevant part thereof, from state parties to the present covenant which are also members of these specialized agencies in so for as these reports, or parts thereof relate to any matters which fall within their constitutional instruments.

Article 16 have clearly set out the steps to be taken by the UN Secretariat upon receipt of the reports required by the covenants to be periodically submitted. Article 17 follows with guidelines to states on what is required of them as regards contents of the reports and time for submission.

In 2008, the United Nations adopted an Optional Protocol to ICESCR which mandates parties to the Covenant to submit report to the Economic and Social Council (ECOSOC). By this, ECOSOC has been charged with the duty of coordinating the implementation of the Covenant in addition to other tasks assigned to it. ECOSOC initially set up a 15 member Sessional Working group based on state representation which committee was to later be disbanded for the reason of their conclusions "lacking in substance", among other reasons. This led to the scrapping of the committee and its replacement by the Committee on Economic, Social and Cultural Rights which by November of 2008 had held 41 sessions and which comprises of 18 non-state members for a four year renewable term.[13]

The objectives of the reporting system examinable by the Committee range from ensuring legislative and other administrative adjustments by state parties to align with the spirit of the Covenant, ensuring that state parties discharge their obligations, on regular basis, of monitoring the observance of each of the rights as guaranteed in the Covenant, enabling governments to

[13] Ibid. p 168

showcase their compliance with the obligations in terms of policy–making, facilitation of information-sharing between states and the evaluation of the extent to which progress has been achieved in the realization of the obligations contained in the Covenant, among others.[14]

Procedurally the committee meet twice annually in Geneva and each session lasts for about three weeks. Working groups of five are assigned to handle designated report and in its proceedings, the group is empowered to hear not only state representative submitting the report, but independent report for oral presentation on state of affairs by non-governmental organizations (NGOs). These reports from NGOs serve as an alternative, and often a great and reliable source of information for the group. Such independent reports serve the important purpose of "drawing the attention to inaccuracies and distortions in a government report; they can provide new information and offer ideas for more appropriate policies and legislation. The preparation of alternative reports can also act as a catalyst in the emergence of new coalitions and movements between previously unconnected groups".[15]

Detailed and practical as the reporting procedure of the committee is, it is not without hiccups. Thus, identified as the primary difficulty in the implementation of the Covenant is the State parties' pervasive reluctance to comply, steadfastly, with the reporting procedure. This manifests in the considerable tardiness with which such reports are submitted, if at all, and the skeletal nature of their contents. In itself, the broadness and vagueness of the nature of some of the rights contained in the Covenant as well as the general unwillingness of the State parties to give effect to social and economic rights further exacerbate the problems associated with realization and implementation of the ICESCR. It was thought that the development of rights jurisprudence would go a long way in placing social and economic rights on the same pedestal

[14] Ibid. p 168-169
[15] Ibid. p.172

with their counterpart of civil and political rights. This however seem to be wishful as there exists no evidence of favourable judicial pronouncements in that regard coming from both international and domestic tribunals in any depth.[16] The quality of the committee's analyses are inevitably impaired as a result of this want of guiding jurisprudence.

In all, despite the identified challenges confronting the implementation of ICESCR, its provisions have come a long way and "that economic, social and cultural rights retain the same legal value and binding effect as civil and political rights".[17] This includes the right to economic self-determination which, in the ICESCR and its implementation organs, finds a platform upon which a people may stand in assertion and attempt at realization.

3.2.3 United Nations Declaration on the Right to Development

Article1 of the United Nations Declaration on the Right to Development, defines the right to development as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, and enjoy economic, social and cultural development, in which all human rights and fundamental freedoms can be fully realized". Drawing from the foregoing, self-determination have come up with various normative definitions of what constitutes the right to development. Notable among them is Waarts, who conceptualises the right as freedom of individuals to partake in an international order that guarantees a just and complete realization of all internationally recognized rights.[18] Others, like Okafor, view it as a claim to the means of development: financial capital, human capital and technology.[19]

[16] Ibid.
[17] Ibid. p.309
[18] Waart, P. J.(1992) Implementing the Right to Development in Protection of Democracy, in Chawdhury, S.R. *et al*(eds.) *The Right to Development in International Law*. Martinus Nijhoff Publishers, Neitherlands.p.191
[19] Okafor, O.C .(1975) "The Right to Development in Contemporary International Law", in AJICL Journal, Volume 7, p. 868

The right to development was said to have first been coined and used by a Senegalese legal scholar, Keba M'Baye in 1972, even before it was picked up by international institutions, whence he defined it as a right belonging to all humans as "every man has a right to live and to live better."[20] Subsequently, the UN Commission on Human Rights seised upon the term by reference to it in a 1977 resolution and going further to request the United Nations to look at the proposed right in conjunction with other human rights as espoused in the New International Economic Order(NIEO), upon which several studies were instituted and reports released leading to the adoption of the UNDRD in 1986.[21]

Laudable in objectives, the advent of the right to development into the body of international law was arduous, tortuous as it was controversial. Its evolution followed decades of sustained campaign by less developed members of the United Nations arguing that the developed nations of the world did not only play a direct role in their underdevelopment but are also morally obligated to support the creation of a balanced world economic order in which the developmental aspirations of all nations can be attained. Therefore, by 1974, the developing nations' agitations for the inclusion of new norms in international economic relations yielded fruit and the United Nations succumbed through the adoption of a Declaration and Programme of Action for the establishment of a New Internaational Economic Order (NIEO). NIEO was to serve as the bedrock and springboard for the subsequent promulgation of the UNDRD, eventhough it made no direct reference to the Right to Development. The UNDRD is however copious in its reference to the new economic order espoused by NIEO and actually stop just short of acknowledging NIEO as forming its origin. Article 3 paragraph 3 of the UNDRD states that all States shall "fulfill their rights and duties in such a manner as to promote a new international

[20] Ibid.
[21] Agenda, Item 12, Paragraph 12(3), UN General Assembly Resolution 1161(xii), UN Doc. A/3716 of 1957.

economic order based on sovereign equality, independence, mutual interest and cooperation amongst all states, as well as to encourage the observance and realization of human r]ights."

Two salient issues arise from the above provision. First is the direct reference to the new international economic order as the major focal point of the Declaration. Secondly, the provision radically seeks to tie economic relations to the observance of human rights; a linkage rarely seen in earlier economically related conventions. In essence, NIEO has served as "the only blueprint of the right to development which stands a realistic chance of hardening into law".[22] Additionally, the inclusion of human rights as integral part of development package is an affirmation of earlier view expressed even at the United Nations "that a balanced and integrated social and economic development would contribute towards the promotion and maintenance of peace and security, social progress and better standards of living, and observance of and respect for, human rights and fundamental freedoms for all."[23]

In spite of its great ideals and the accolades with which it was received into the human rights literature, the right to development is not free from criticisms regarding its conception, placement within the human rights sphere and practical realisability. On the conception of the right, having been clearly defined by the Declaration itself, little controvercy exist and mostly to do with its scope. To scholars like Ghai however, the substance of the right is difficult to place in the context of human rights body on the one hand and on the other the problem of identifying the subjects and the beneficiaries of the right. In the words of Ghai:

> The value of the concept of a right is that it creates entitlements, and the entitlements are easier to enforce if the contents and beneficiaries of the right are clearly specified. In the case of the right to development, it is not clear who are the right and duty bearers. Equally vague is the content of the right".[24]

[22] Bunn,I.D. Op. Cit. p.1431
[23] Ibid.p.1432
[24] Ibid.

This scholarly view does not however, detract from the right's progression into the realm of "acceptance as a principle of positive law"[25] particularly in view of its possession of both individual and collective dimensions which in a way answers the criticism regarding its subjects and beneficiaries. It is clear now that states are for the most part the subjects (the duty holders) of the law being parties that sign same, and the people as the beneficiaries or objects of the laws.

Coming to the important interrelationship between the right to development and economic self-determination, UNDRD is explicit on the linkage with Article 1 paragraph 2 of ICESCR which states that:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.

On this linkage, Bunn also adds:

> The right to development implies two specific rights of a particular relevance to the law of development. These are the realization of the right of peoples to self-determination, and the exercise of their inalienable right to sovereignty over their natural wealth and resources.[26]

When this position is juxtaposed with that of Starke, the status of the right as occupying two sides of one coin can easily be discerned; so is the indispensability of economic self-determination in matters of state development both in practice and in theory of the nature of this work.

3.2.4 Charter of Economic Rights and Duties of States

This Charter came into being in the wake of the political independence of most Third World states. No sooner had the euphoria of independence died down than it dawned upon most

[25] Bunn, I.D. Op. Cit. 1443
[26] Ibid.

of the newly independent nations that theirs was a hollow independence. Although the colonialist had left, what the countries were left with was mere empty political control as their resources and general economy were being controlled by transnational entities of foreign origin through the concept of investor-owner of the natural resources. Some states in reaction therefore, swiftly declared state-ownership of such foreign held resources although that action in itself without clear legal framework amounted to little or anything, particularly faced with the question of sanctity of contracts supposedly voluntarily entered:[27]

Respite began to come the way of the Third World in safeguarding the latter's economic self-determination thereby giving true meaning to the spirit of decolonization when the United Nations by a General Resolution of 14th December, 1962, radically rejected the concept of investor-ownership of natural resources. This was in the build-up to the promulgation of the Declaration on the Establishment of New International Economic Order, NIEO[28].

In particular, Article 2 of the Charter makes the following provisions:

> (1)Every state has and shall freely exercise full and permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
> (2)Each state has the right:
> (a) To regulate and supervise the activities of transnational corporations 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.

The foregoing is clear on the right of a state in dealing with its resources in the way it chooses. Importantly, it also empowers the state to regulate foreign investment in accordance with its laws and also based on its priorities and objectives. By virtue of it also, no state can

[27] Asante, S.K.B.(1981)*Transnational Investment Law and National Development.* Lagos University Press, Lagos,p.26
[28] Ibid.p.27

pretend that it was coerced, politically or economically, into discriminatorily treating foreign investment preferentially than others. It will thus be of interest to investigate, in the later part of this work how, if at all, do developing nations like Nigeria strike a balance between their desire to attract foreign capital and the above non-discriminatory obligation.

Revolutionary as Article 2(2)(a) is in relation to foreign investment and their treatment by resource-owning states; paragraphs b and c are more direct and bold in their confrontation of the foreign investment issue vis- a-vis a state's economic self-determination thus:

> To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conforms with its economic and social policies. Transnational corporations shall not interfere in the internal affairs of a host state. Every state should, with full regards to its sovereign rights cooperate with other states in the exercise of the rights set forth in this sub-paragraph.

Whereas in practice, transnational corporations are known to openly interfere with developing states politics and even democratic choices.[29] Yet still, the sub-paragraph goes on to provide for the most important right exercisable by a host state against foreign capital: expropriation and nationalization. It affirms and upholds a state's right, additionally:

> To nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case where the question of a compensation gives rise to controversy, it shall be settled under the domestic laws of the nationalizing State and by its tribunals unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of sovereign equality of states and in accordance with the principle of free choice of means.

This is a clear codification of the rights of states.

[29] Kline, J.M. (2006) MNCs and Surrogate Sovereignty, in *Brown Journal of World Affairs*, Volume XIII, Issue 1. p.124. available at http://www.brown.edu. Accessed on 26th July, 2017.

3.3 Regional Instruments on Economic Self-determination

Africa has adopted a comprehensive code of human rights which takes into account the cultural uniqueness and peculiarities of the region. It has also gone beyond the rights guaranteed by other international and regional instruments, but encapsulated community rights and duties as well as those of individuals and groups. The right to self-determination is therefore an integral part of the corpus of human rights in Africa.

3.3. 1 African Charter and Economic Self-Determination

African Charter on Human and Peoples' Rights came into force on the 21st October, 1986. Earlier on, in June 1981, the Charter was adopted by the 18th Conference of Heads of States and Governments of the defunct Organisation for African Unity (now African Union) in the Gambian capital, Banjul, and thus the Charter came to be known as the Banjul Charter.[30]

African Charter on Human and Peoples' Rights is the unique response of the African continent to the question of human rights and its codification. The Charter deals with the rights of individuals, groups, peoples and states. Article 20, the Charter provides for not only the general right to self-determination, but also the economic sub-component thereof:

> 1. All peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic, social development according to the policy they have freely chosen.
> 2. Colonized or oppressed people shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
> 3. All peoples shall have the right to the assistance of the state parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

[30] Dankofa, Y. (2011)The African Charter on Human and Peoples' Rights: Exposition of its Peculiarities and Dynamism. *ABU Human Rights Review Journa*l. Volume 2, No. 2 of July, 2011. P. 403

Of direct relevance to our present discourse is paragraph 1 of Article 20 cited above. It forcefully asserts self-determination of all people in all ramifications, not the least economic. If there is any ambiguity concerning the import and tenor of Article 20(1) regarding economic self-determination, the Charter swiftly and ardently moves to obliterate same by Article 21 in no uncertain terms that deserve nothing short of full reproduction for their significance and far-reach on the topic at hand. The comprehensive radical and unapologetic provisions of Article 21 run thus:

> 1. All people shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
> 2. In case of spoliation, the dispossessed people shall have their right to lawful recovery of its property as well as to an adequate compensation
> 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligations of promoting international cooperation based on mutual respect, equitable exchange and the principles of international law.
> 4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
> 5. State parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their people to fully benefit from the advantages derived from their national resources.

The force and clarity with which various aspects of economic self-determination are enunciated in the foregoing is unmistakable. But more poignant is the un-patronizing language employed in not only rejecting, but also sublimely condemning, economic exploitation, as well as daringly and overtly ascribing such practice to international monopolies. This is no doubt a departure from the African nations' traditional timid posture on economic matters by which they

soft-peddled on their rights in order to encourage the flow of foreign investments.[31] Whether this boldness of theory is replicated in state practice in ensuring economic self-determination of peoples or left to remain a paper-tiger is examined below. In any case, the Charter has succeeded in achieving what the United Nations has failed to achieve concerning human rights: having both the civil and political freedoms and the social and economic rights comprised in one single document.[32]

In giving effect to its own provisions, the Charter provides for the establishment of a Commission to superintend the implementation. By a resolution of the then OAU General Assembly in 1987 in Banjul, the said Commission was accordingly established. The Commission thrived for a period of time and some of its most notable decisions can be found in the case of *Katanga v. Zaire*[33] which bordered on self-determination. However, weakened by the absence of coercive powers in enforcing its verdict, the Commission was short-lived and the need was felt for a more potent institution to take charge of the enforcement of the provisions of the Charter. According to Yerima,[34] "its decision is incapable of compelling violating states to comply with its decision and provide remedies for victims of human right violations(sic)".[35]

Consequently, by a protocol to the African Charter,[36] the African Court of Human and People's Right was established in order to give "…effect and strength and meaning to the rights guaranteed under the African Charter and any other relevant human rights instruments ratified by the states concerned".[37] Shortly after this, the African Union Constitutive Act that establishes

[31] Rehman, J. Op. Cit P. 148
[32] Ibid. p. 320
[33] Article 30, African Charter on Human and People's Rights
[34] *Katanga vs. Zaire* , Communication No. 75/92, IHRL 174 (ACHPR) 1995.
[35] Yerimah, T.F (2010) African Regional Human Rights Courts: Features and Comparative Critique with the European and Inter-American Courts of Human Rights. *ABU Human Rights Review Journal*, Vol 1, No. 1 of October 2010, p. 343
[36] Doc. OAU/LEG/EXP/AFCHR/PROJ III
[37] Article 31, African Charter on Human and Peoples' Rights

and transformed the OAU into African Union (AU), by its Article 15, established another court with overlapping mandate with the African Court of Human and Peoples' Rights and called it the African Court of Justice. Subsequently, by the Protocol of African Court of Justice and Human Rights which shall come into effect upon the ratification of 15th member, the two courts are merged into one and to be known as such.[38] As this is yet to occur, the African Court of Human and People's Right that had come into effect since 2004 continues to exercise jurisdiction,[39] in giving effect to the Charter including Article 20 and 21 thereof on economic self-determination.

As regards mechanism to ensure states' compliance with their obligation in the Charter, the African Charter has provided a detailed reporting procedure reminiscent of ICECR's, but uniquely more elaborate in structure. This is in the nature of a three-pronged steps namely, a complaint procedure, an inter-state reporting procedure and "other communications". This are provided for by Articles 47-54 and 55-59 respectively.

Regarding the inter-state reporting system, Article 47 of the Charter has empowered any member State that observes or has any reason to believe that another member State has violated the provisions of the Charter, to address a communication to that effect addressed to the erring State and copied to the Secretary General of the African Union. The erring State is then required to send a written response to the enquiring State within three months giving all necessary details and explanation including laws and rules applicable and steps taken to redress the situation. Should there be a failure to resolve the issue within three months of the initial communication, then either of the States involved may proceed to submit the matter to the Commission.[40]

The above requirement of first writing to the erring State does not however, prevent a complaining State which so wishes, to write directly to the Commission or to the Secretary

[38] Article 3 (1) of the Protocol of African Court of Justice and Human Rights.
[39] Yerima, T.F. Op. Cit
[40] Article 48, ACHPR

General of the AU.[41] Consideration of communication by the Commission can only however be done only upon the exhaustion of all available remedies for settlement save where it is considered that such remedies would be unduly prolonged.[42] Upon the receipt of all information it requires for its consideration and a possible written or oral representation by all parties concerned, the Commission shall deliberate upon and make its findings within a reasonable time by issuing a report on its findings to the States concerned as well as to the Assembly of Heads of States and Governments with appropriate recommendations.[43] Periodic reports of its activities are also to be submitted by the Commission to each session of the Assembly of Heads of State and Government.[44]

The Charter also provides for the modalities for other communications in addition to the inter-state process highlighted above from sources other than State Parties to the Charter. This is done through the Secretary to the Commission who then channels such communications to the Commission for consideration as appropriate.[45] Some of the preconditions for the consideration of a commission include complaints not being anonymous, compatibility with the Charter, not insulting or offensive, not purely based on mass media reportage, timeliness as well as the exhaustion of domestic remedies, among others.[46] Concerning special cases involving a series of massive violations of human and peoples' rights, with the clearance from the Assembly of Heads of State and Government, the Commission may launch and in-depth study of the cases and come up with its findings and recommendations.[47]

[41] Ibid. Article 49.
[42] Ibid. Article 50.
[43] Ibid. Article 53.
[44] Ibid. Article 5.
[45]Ibid. Article 55.
[46] Ibid. Article 56(1) -(7).
[47]Ibid. Article 58.

It is to be noted that having been domesticated by Nigerian legislature[48], the African Charter on Human and Peoples' Rights has the effect of a domestic legislation in the form of an Act of the National Assembly as pronounced by the Supreme Court of Nigeria in *Ogogu v. State*[49] in the following dictum:

> By reason of its domestication, the African Charter has become part of Nigeria's domestic laws and the enforcement of its provisions fall within the judicial powers of the courts as provided for by the Constitution and all other laws relating thereto since the African Charter is part of Nigeria' domestic laws.

For this, internal dimensions of the rights to economic self-determination as discussed in the coming segment, are amenable to enforcement through the instrument of Nigerian court, a coverage rarely utilized by internal activists and resource agitators. In effect, the African Charter is as much regional as it is a domestic legislation in Nigeria.

3.3.2 Supranational jurisdiction, ECOWAS Community Court and the Enforcement of the Right to Economic Self-determination

Supranationality refers to the multiple nationality that come to characterise international institutions when nation-states by treaty part with aspects of their sovereignty by submitting to collectivism through institutions that represent several states to achieve one goal or the other.[50] Such goals can for instance be economic cooperation, regional integration or military alliance and other similar international objectives. Example of many such institutions abound starting from the United Nations itself, institutions like IMF and the World Bank, the International Court of Justice, regional bodies like the European Union, African Union, ECOWAS and their various off-springs.

[48] African charter an Human People's Rights (Rratification and Eenforcement) Act, Volume 1, Cap A9, Laws of the Federation of Nigeria, 2004.
[49] (1996) 9 NWLR (Pt 339) at p.21
[50] www.investopedia.com/definition/supranational. Accessed on26th March,2021 at 21: 58 hours.

Of particular interest to this work is the ECOWAS Community Court of Justice first established by the ECOWAS Treaty of 1975 as a supranational judicial institution for the West African Sub-region in response to the ineffectiveness of the national judicial mechanisms of member states.[51] One of such ineffectiveness is for instance the ouster of the jurisdiction of Nigerian courts to entertain cases bordering on the enforcement of the Chapter II of the Nigerian Constitution which encapsulates economic and social rights of which economic self-determination is one. The ECOWAS Community Court of Justice located in the Nigeria's Capital Abuja, came into being pursuant Articles 6 and 15 of the Revised Treaty of the Economic Community of West African States (ECOWAS).[52] It is vested with an autonomous mechanism for operation with Rules of procedure as outlined by protocols A/M/7/91 of July 1996, K/SP.1/01/05 of 2005, A/SP. 2/06 of 2006. Also regulation C/REG.2/06/06 of June 2006.[53] The Court's judges are appointable by the ECOWAS Authority of Heads of States and Governments.

In addition to its advisory role and arbitral powers, has jurisdiction in the following areas:

a. Cases relating to member state's duties and obligations under the Community Law;

b. Disputes relating to the interpretation of the Acts of the Community and duties between institutions of the Community;

c. Cases to do with the liability for or against the Community;

[51] Ojomo, E.(2014) Competing Competences in Adjudication: *Reviewing the Relationship between the ECOWAS Court and National Courts;* in African Journal of Legal Studies.p.89

[52] www.courtecowas.org/site2012/index.php?opion=com_content.p.1

[53] Ibid.

d. Determination of cases of violation of human rights in any member state and declaration concerning directives adopted by ECOWAS[54].

Besides the Court's power to apply the general principles of international law in line with Article 38 of the ICJ statute,[55] , the Court applies all international instruments relating to human rights ratified by the state or states parties to the case at hand.[56] This, in the case of Nigeria, means the African Charter, the ICESCR and ICPR can be invoked and enforced against the Nigerian State. Note that in *Ogagu vs. State(supra),* the Supreme Court of Nigeria has declared the African Charter to be part of Nigeria's domestic legislations. And since Articles 20 and 21 of the African Charter has provided for and recognized the right to economic self-determination, the said right can be enforced, if not in Nigerian court, then in the ECOWAS Court where all aspects of the right including other social and economic rights embodied in the Chapter II of the Constitution can be enforced.

With regard to this supranational exercise of jurisdiction by courts like ECOWAS, issues arise that border on possibility or even probability of conflict with national courts in adjudication. This would appear to have been tackled, albeit impliedly, by the existence of a mixture of vertico-horizontal sphere in the relationship of the two courts which utilize judicial yardsticks like exhaustion of domestic remedies, complaint not arising out of a national legal process, preliminary ruling, *electa una via* and the doctrine of complementarity to mitigate and limit the incidences and effects of overlap of jurisdiction between the two category of courts.[57]in all, the supranational jurisdiction of international courts serves as a veritable tool for giving

[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ojomo, E. Op. Cit.p.103

effect to international legal provisions in situations where national tribunals are constrained to act.

3.4 Domestic Legislations on Economic self determination as a Legal Right

Domestically, Nigeria has enacted laws that give effect to the spirit, if not directly the letters of the economic self-determination right. This is for the most part related to the internal dimensions to the right which include resource control and fiscal federalism. These may not be as comprehensive as they ideally should be, however they represent a foundation upon which future expansion can be made. Starting with the Constitution, the various relevant laws are discussed below.

3.4.1 Constitution of the Federal Republic of Nigeria, 1999, (as amended).

Nigeria's *grundnorm*, the 1999 Constitution, does not contain direct provisions relating to the recognition of the right to economic self determination in specific terms. Save for some unjusticiable social and economic rights contained under the Chapter II of the Constitution on Fundamental Objectives and Directive Principles of State Policy, only civil and political rights can be said to enjoy recognition in the Constitution in clear terms. And with the rendition of the provisions of Chapter II into non-justiciability, social and economic rights are, for all practical purposes, relegated to the background. This notwithstanding however, the provisions of section 16(1 paragraphs (a) and (b) are fundamental and have in essence assert economic self-determination as a binding policy thrust for any administration in Nigeria. Specifically, the subsection enjoins the state to "harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy". Although the entire Chapter II is regarded as non-justiciable, that does not detract from the duty of the policy makers to bear the provisions in mind when dealing with the nation's economy.

Nevertheless, implicit provisions do exist that have the effect of giving life and recognition to certain components of second generation rights including the right to economic self-determination. One such provision is the provisions of section 2 of the Constitution on federalism and federal structure of Nigeria. Section 2 (2) states that "Nigeria shall be a federation consisting of states and a Federal Capital Territory". Additionally, section 2 (6) of the Constitution provides for local government areas as third tier of government in the following words: "[t]here shall be seven hundred and sixty-eight local government areas in Nigeria as shown in the second column of Part I of First Schedule to this Constitution and six Area Councils as shown in Part II of that schedule".

The significance of the provisions relating to federalism in the Constitution and its link with the topic of discussion is evident bearing in mind the well settled scholarrly view that right to self-determination is synonymous with the right to federate[58]. This in turn necessarily includes fiscal federalism, an element of economic self-determination in the internal sense, which though not expressly provided for, has an implicit place in the Nigeria political and legal structure. As posited by Anderson, "…arrangements around who determines and collects taxes and other revenues and who spends them, how and on what, are fundamental to the division of power in a federal system".[59]

In line with the above proposition, the Nigerian Constitution of 1999, proceeds to outline legislative powers on resources in Part I of the Second Schedule thereof. In particular, power to legislate and exert control over mines and minerals, including oil fields, oil mining, geological survey and natural gas, has been vested exclusively in the Federal Government.[60] This is in the

[58] Ladan, M.T. (2007) *Materials and Cases on Public International Law*. Ahmadu Bello University Press Limited, Zaria.p. 118
[59] Anderson, G. (2008) *Federalism: An Introduction*. Oxford University Press, Ontario. p. 30.
[60] Item 39, Part I, Second Schedule, Constitution of the Federal Republic of Niger, 1999 (as amended).

area of resources and its management and control. In the area of fiscal and economic policies, the Constitution again vests the power to legislate on banking, insurance, custom and exercise, entirely on the Central Government by also listing item in the Exclusive Legislative List.[61]The constituent units, namely, states, have, on the other hand been empowered to exert control over aspects of the economy alone or in concert with the Federal Government in the Concurrent List on the following areas of stamp duties collection, capital gains and income tax other than that of a company[62].

By this constitutional arrangement in Nigeria, it is clear that the balance of power on economy tilts in favour of the Central Government. Though this may seem to impede the internal economic self-determination of the constituent units, it is nevertheless more favoured by economists who believe that the concentration of public finance in the central government aids development and accelerates growth of the entire entity holistically:[63] This is based on the reasoning that "… constituent units (and local governments) should have limited control over mobile tax payers and tax bases. Instead they should be given power over property taxes because property does not move[64]. This is to generally prevent capital and human flight and concentration of wealth in a particular region with less tax demand engendered by competition with attendant consequences of skewing growth and development to a particular section.[65].

In any case, federations are dynamic and thus susceptible to changes in order to accommodate changing times, climes and human interactions.[66] Nigeria's fiscal federal arrangements should therefore be able to shift in line with the realities of the day and the

[61]Ibid., Items 6, 16, 25, and 33.
[62] Ibid., Item 7, Part II.
[63] Olowomoni, G.D. (1998) Revenue Allocation and Economics of Federalism, in Amuwo, K. *etal* (eds.) *Federalism and Political Restructuring in Nigeria*. Spectrum, Ibadan.p. 248.
[64] Anderson, G. *Op.cit.*, p. 31
[65] Ibid.
[66] Ibid.

aspirations of the generality of the federation's inhabitants. That is self-determination in the internal economic sense. Nothing captures this truism more aptly than Anderson when he says:

> All federations evolve over time, some have gone through major formal constitutional changes, while others have changed significantly despite stable constitutions. Factors such as the creation of new constituents units, urbanization, major demographic and economic shifts, new technologies, major global and domestic political developments, and the experience of democracy have been critical in shaping federal experiences[67].

It is deducible from the foregoing that discussion on fiscal federalism invariably touches upon and boils down to resource control-an integral element of internal economic self-determination[68] within a nation state. It is also clear that the Nigerian constitution through the legislative lists seems to be restrictive as regards the power of constituents units to control resources. However, although it is tempting to make a case for wider and more profound devolution of economic power to the constituents units as obtains in Canada and the United States, the Canada model may not be easily simulated as it is attributable to the nation's history, stability and level of development. This is more so because the Nigerian model is in current operation in a number of nations, a list which includes hybrid collection of both developed and developing countries like Austria, Australia, Belgium, Brazil, India, Germany and Spain.[69]

Another aspect of the 1999 Constitution of Nigeria dealing with economic self-determination of peoples within the states, are the provisions dealing with the principle of derivation which in itself is a recognition of the right of the people from whose lands the mineral resources is extracted to a share over and above and in addition to what other components of the nation get. By the proviso to section 162 (2), the Constitution provides that "provided that the

[67] Ibid.
[68] Saul, M. (2011) The Normative Status of Self-determination in International Law. A Formular for Uncertainty in the Scope and Content of the Right? *Human Rights Law Review,* volume 11, number 4, Oxford University Press.p.613.
[69] Anderson, G. *Op.cit.*p.33

principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen percent of the revenue accruing to the Federation Account directly from any natural resources". Federalism would be further enhanced if the benefit of derivation is made to trickle down to the peoples or communities from whose land the mineral is extracted.

Nigeria's constitutional choice of derivation model rather than equalization model in resources' revenue sharing unlike what obtains in some advanced federations like Germany and Switzerland[70] may not be in consonance with the principle of equality of states or constituent units. It however recognises the claim of producing units over parts of their natural resources as an ingredient of internal economic self-determination of peoples.

On the general management of the nation's economy eventhough resident in the Federal Government, the Constitution has, by section 153(1)(h) provided for and established a participatory body in the name of the National Economic Council which comprises of all governors of each State of the Federation and other key stakeholders in the economic sector. Paragraph 19 of Part I of the Third Schedule of the Constitution outlines the functions of the Council as having the power to "…to advise the President concerning the economic affairs of the Federation, and in particular on measures necessary for the coordination of the economic planning efforts or economic programmes of the various Governments of the Federation".

The above provision and the institution it creates further enhances the federal nature of the Nigerian state economic wise. It also provides a forum wherein in collaboration with similar bodies studied below the country can increasingly be made more fiscally federal.

[70] Ibid.p.36

3.4.2 The Land Use Act[71]

As one of the principal and pre-eminent legislations in Nigeria, the importance of the Land Use Act can never be over-emphasized. It is so important that it has been captured in and made a part of the Constitution with the attendant prestige even though it is a legislation in its own right.[72] One of the major features of the Act is the delineation and devolution of ownership of land, first in the state where it is situated and then also to the local government in which it is located. Section 1 of the Act, provides that "subject to the provisions of this Act, all land comprised in the territory of each state in the federation are hereby vested in the Governor and shall be held in trust for the use and common benefit of all Nigerians in accordance with the provisions of this Act". Further, section 2(1) (b) of the same Act vests the management of land situated in non-urban areas in the local government concerned.

It is without doubt that the basic logic and reasoning behind the cession of land to states and local governments despite the centripetal nature of Nigeria's federalism, may not be unconnected with the recognition of the constituent units' original entitlement to them. Bearing in mind the importance of land being the embodiment of mineral resources, many scholars have expressed the view that the provisions of the Act, though well intentioned, can be said to have eroded the essence of the right of a people over their natural resources particularly when it vests same in remote state entities and not directly on the people. The practice in the United States referred to above where much of the land is privately held seems capable of addressing the said imbalance. [73]

What is missing in the Land Use Act is the endeavour to balance the yearnings and aspirations of indigenous peoples through their community or local councils for the control of

[71] Cap. 202, Laws of the Federation of Nigeria, 2004.
[72] Section 315(5)(d), Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[73] Anderson, G. *Op.cit.*p.33

their land resources, upon which most of their livelihoods depend, while ensuring its availability to the state for development and other purposes. This indigenous yearning is so potent and universal that the United Nations had to make a legislation respecting same as a right. In many respects it has been equated with the self-determination right in the economic sense and occupies a place in specific United Nation's Declaration[74].

Specifically, Article 26 of the Declaration prohibits "any action that has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities" and "any action which has the aim or effect of dispossessing them of their lands, territories or resources"[75]. This direct recognition of the right of the grass root communities to their ancestral lands and resources prescriptive on states as it is, seems to have been eroded by the Land Use Act despite provisions relating to customary titles in non-urban areas.

It is the view of many rights scholars that indeed the Land Use Act is ripe for a reform to accommodate current global realities as although the Act might have succeeded in making land available to governments for development purposes, same cannot be said as regards private utility.[76] Besides the difficulty created by the Act's entrenchment in the Constitution on any possible reform, the system of patronage created surrounding land administration by Governors as well as the revenue generated by state governments in issuing land rights make the prospect of future reform more bleak.[77] Further, in addition to divesting grass-root owners of their land, the Land Use Act proceeded, by section 29, to limit the quantum and scope of compensation payable to the owner in the event of public acquisition. Section 44(3) of the 1999 Constitution also

[74] UN Declaration on the Rights of Indigenous Peoples, 2007.
[75] Article 26(6), ibid.
[76] Bola Fajemirokun(2002)*Land Resources Rights: Issues of Public Participation and Access to Land in Nigeria*. A paper presented at the First Workshop of Pan-African Programme on Land Resource Rights(PAPLRR) held in Cairo, Egypt, on March, 25-26 2002. Accessed at www.nigerianlawguru.com/articles, on 13th October, 2017.
[77] Ibid.

aggravates the situation when it vests the ownership of all mineral resources in or on the Nigerian soil and waters in the Federal Government instead of directly on or in conjunction with the resource owning communities. By section 14 of the Act, even the statutory right granted is, inter alia, subjected to the overriding claim of miners, oil prospectors and oil pipeline owners eventhough they do not own the oil in principle. This is clearly an affront to the economic self-determination of the peoples. It is against the spirit and purport of the legal maxim: *quic quid plantator solo, solo cedt.* The restriction on compensation also has been condemned as unconstitutional for being in violation of section 44(1)(a) of the 1999 Constitution which guarantees prompt compensation upon any acquisition.[78] Under the international law, even when a state exercises its sovereign power to expropriate a foreign capital, prompt and adequate compensation is mandatory.

3.4.3 Petroleum Act[79] and Mineral Resources Act[80]

By the provisions of the Petroleum Act and those of the Mineral Resources Act, the property of all petroleum resources and mineral resources as defined in section 1 of the respective legislations, are vested exclusively in the Nigerian state. This is in line with Section 44 (3) of the 1999 Constitution which itself vests "… the entire property in, and the control of, all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the exclusive economic zone of Nigeria in the Government of the Federation".

The above provisions are clearly not in harmony with the provisions of section 1 of the Land Use Act, a part of the Constitution itself, which vests "all land in the state in the

[78] Ogbu, O.N. (2008)" The Right not to be Expropriated of Property and the Constitutionality of the Compensation Provisions of the Land Use Act". *Ahmadu Bello University, Zaria Journal of Public and International Law(ABUJPIL).* Vol.1, No. 2.p.12
[79] Cap. P10, Volume 12, Laws of the Federation of Nigeria.
[80] Cap. M12, Volume 8, Laws of the Federation of Nigeria.

Governor" of that state. To that extent the right to economic self-determination of the constituent units and community in terms of the management and control of their resources has been impaired.

This is however also not peculiar to Nigeria as, almost all federations have in place mechanisms to limit appropriation of resources by producing communities for even development and stability. In essence, in some federations the central governments monopolize all such resources which they then share to all the constituent units equally irrespective of the resources' location[81]. Further, in the case of Nigeria, the principle of derivation, serves as recognition of the dominion of the producing communities, through their state governments, on the resources and also acknowledges their indisputable claim to benefit from same in accordance with the law taking into account overriding national sovereignty, security, development and stability interests.

Additionally, the seeming disregard for peoples' right over their resources seems to be addressed, albeit indirectly, by both the Constitution and the Minerals Act in their provisions governing the payment of compensation to persons whose land resources have been acquired for exploration and exploitation of minerals and related matters. Section 44 (1) of the Constitution is to that effect and is in *parri materia* with Section 95 (1) (a) and (b) of the Minerals Act which stipulates that-

> (1) A holder of a mining title, shall on the direction of the Minister, in addition to any other amounts payable under the provisions of this Act, pay to the owner or the occupier of land held under a state lease or the subject of a right of occupancy –
> (a) reasonable compensation for any disturbance of the surface rights of the owner or occupier and for any damage done to the surface of the land on which the prospecting or mining is being or has been, carried on; and
> (b) in addition, pay to the owner of any crop, economic tree, buildings or work damaged, removed or destroyed by the holder of the mining title or by any of its agents or servants, compensation for

[81] Anderson, G. Op.cit.pp.33-34

> the damage, removal or destruction of the crop, economic tree, building or work.

Note the term "owner" in reference to the person possessing the land subject of the acquisition to whom compensation is payable as a matter of obligation. This is a clear recognition of the "owner's" prior dominion being divested.

3.4.4 Revenue Mobilisation, Allocation and Fiscal Commission Act.

Pursuant to section 153(1) of the 1999 Constitution of Nigeria (as amended), the Revenue Mobilisation, Allocation and Fiscal Commission (RMAFC), was established by an Act of the National Assembly.[82] According to its Preamble, the Act has, as its main function "...monitoring the accruals to and disbursement of revenue from the Federal Account and reviewing, from time, the revenue allocation formulae to ensure conformity with changing realities''.

Section 1 of the Act states thus:

> There shall be established for the federation a Revenue Mobilisation, Allocation and Fiscal Commission (in this Act referred to as ''the Commission'') which under that name, shall be body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name, and whose members shall exercise the functions specified in the Constitution of the Federal Republic of Nigeria 1999 and in this Act.

In addition to its functions as outlined in the Act's preamble as cited above, one of the paramount powers of the Commission are encapsulated in section 6 of Act. In particular, the power to review the extant sharing formulae and to advice the federal, state and local governments on modalities of increasing revenue sources and mechanisms to ensure dynamism through periodic changes in the fiscal arrangement which will in turn minimize friction and bring stability to the polity. It is by using the spelt out power that for instance the thirteen percent

[82] Cap. R7, Volume 13, Laws of the Federation of Nigeria.

derivation by section 162(2) of the Constitution can be increased in deserving circumstances in a peaceful and legislative manner.

Another important provision of the Act that ensures equity and balance in the country's fiscal arrangement is the provision of section 2 which deals with the membership of the commission. The section provides for the Commission to consist ''of a chairman and one member from each State of the federation and the Federal Capital Territory, Abuja''. This means that each part of the country is represented on equal basis. The significance of this is that no action can be taken by the commission without the representation and input of each state of the federation and the Federal Capital Territory. This is important in ensuring that no suspicion of collusion by members o f the commission to the disadvantage of a section of the country in revenue sharing in favour of another section or federating unit.

Furthermore, the effectiveness of the Commission is cemented by the provisions of section 7 of the Act which boldly states that 'the Commission shall be an independent and autonomous body and shall not be subject to the direction or control of any other authority or person in the exercise of its power to make appointment or to exercise disciplinary control over persons''. This provision is necessary safeguard in a federal setting where the power of the central government is considered disproportionate and tendency to exert undue influence probable. Curiously, this freedom of action as espoused by the section is threatened when the area of such independence is stated to be "in the exercise of its powers to make appointments or to exercise disciplinary control over persons".

It is imperative to restate that the foregoing discourse on domestic laws that deal with aspects of economic self-determination relates to the right in its internal sense as expounded by

scholars.[83] This generally connotes fiscal federalism and resource control that comes under it. Both go a long way in enhancing the autonomy of the constituent units which itself is a form of political self-determination outside the purview of this work. External economic self-determination as between Nigeria and other states of the world has been provided for by international treaties and customs which have been discussed at the beginning of the chapter.

[83] Ladan, M.T.(2007), Op. Cit.,p. 119 Saul, M., Op. Cit.p.613 and Umozuruik, U.O., Op. Cit.p.31

CHAPTER FOUR

INTERNATIONAL TRADE AND INVESTMENT LAWS AND PRACTICES VIS-À-VIS NIGERIA'S ECONOMIC SELF-DETERMINATION

4.1 Introduction

Among the vital wheels that move a state's economic fortunes and facilitate its development are the medium of trade and investment. Through the two vital activities, nations import what they need and export goods and services they produce thereby earn the needed foreign exchange to pay for imports, secure credits and service debts as well as maintain a currency reserve as a baseline for the economy. For their importance and the need to balance the pendulum which was skewed against developing nations compared to advanced economies, safeguards have been introduced by international law to ensure that nation-states of whatever circumstances benefit from their trade and are not short-changed of their resources through foreign capital investments. One of such safeguards is found in the UN General Assembly Resolution 1803 (XXII) of 1962 which has as its cardinal considerations as contained in its Preamble the desirability to "… promote international cooperation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self determination".

The Resolution also proceeds to declare that –

> International cooperation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information shall be such as to further their independent national development and shall be based upon respect for their sovereignty over natural wealth and resources.[1]

[1] Article 6, ibid.

The import of the resolution is that, in all matters to do with the economic dealings with, or transaction in, state resources in the form of trade in goods and services, transfer of technology and investments, the paramount consideration is the promotion of the economic well–being and progress of the state over and above any other consideration. Another important concern addressed by the Resolution is the overbearing and usually irresistible influence of foreign capital on the economic freedom of host developing nations. In a bid to attract and retain foreign investment, the danger of alienating and usurpation of the state's economic independence is ever real and present. To curtail this and its implication on state economic sovereignty, the Resolution declares that:

> Foreign investment agreements freely entered into by or between states shall be observed in good faith; states and international organisations shall strictly and conscientiously respect the sovereignty of peoples and nations over their national wealth and resources in accordance with the Charter and the principles set forth in the present resolution.[2]

These resolutions are meant to ensure that developing nations, Nigeria inclusive, derive the benefit that is incidental to their resources, trade and investments on their shores. The whole essence thus of the Resolutions is for the developing countries to use the stated mediums of trade, investment and resources as catalysts to their developments.[3] Conversely, the stark reality is that, the far-reaching resolutions have not as yet weaned the developing states like Nigeria from economic dependency, financial and fiscal subjugation through persistent trade deficit, debt burden and general economic retrogression and doldrums in spite of the laws. For instance, research has confirmed the important role international trade plays in accelerating the economic

[2] Article 7, ibid.
[3] Starke, J.G.(1979) *An Introduction to International Law*. Butterworths, London. P.145

development of nations in spurring and accelerating growth and achieving development.[4] In Nigeria's case however, despite resources, the export co-efficient "is insignificant" and contributes little to growth cum development.[5] This calls for an examination of the key policies that govern trade and investment with a view to finding the missing link between theory, practice and result as this chapter sets out to do.

4.2 Nigeria's Trade and Investment Policies: Pre-Independence to Date

In the years since becoming a nation put together by the British, Nigeria has experimented with various trade and investment policies. Whereas the earlier policies were British colonial creation based on their economic preferences at the time, others were to come as a result of the domestic political order of the day or even economic and political happenings at the global stage. From the status of a net exporter of agricultural goods during colonial period and shortly thereafter, to a mono economy that principally depended on petroleum exports, to import substitution economy, then to SAP and it's various off-springs of many names, Nigeria can be said to have had a test of most economic revival packages available in the books. Whether these have led to the attainment of the coveted status of economic independence or equilibrium is assessed at the end of this work.

4.2.1 Nigeria's Trade Policies

Against the backdrop of its potential to stimulate economic growth, one of the important colonial legacies bequeathed upon the Nigerian entity by the British is trade in primary goods which involves foreign or international trade in the nature of "exchange of goods and services

[4] Abimbola, O. S. and Dele, A.O.(2015) "Multinational Corporations and Economic Development In Nigeria". *American Journal of Environmental Policy and Management.*Volume 1(2) 16-24.p. 22. Available at www.aascit.org/journal/ajepm. Accessed on 4th April, 2019, at 23: 05 hours.

[5] Edoumiekumo, S.G. and Okpuri, C.O.(2013) "Economic Growth Factor in Nigeria: The Role of Global Trade". *American Journal of Humanities and Social Sciences.* Vol. 1, No.2. pp.51-55

across international borders or between nations of the world".[6] This kind of exchange has been acknowledged as spurring commerce, promoting technology, stimulating exploration and even contributing in the maintenance of world peace and cementing harmonious relationships between and amongst nations.[7]

Not surprisingly, even after the departure of the British, foreign or international trade in goods remained the mainstay of the nation's economy through which it earned foreign exchange by selling mainly agricultural produce in their primary forms.[8] The policy thrust then was massive agricultural production for export from all the regions in the country. This trend continued through the 1960s and into early 1970s when the discovery, exploitation and exportation of petroleum products in commercial quantities increasingly shifted focus and policy to petroleum and allied resources such that before the end of 1970s, petroleum constituted 78% of Federal Government Revenue and more than 95% of export earnings.[9] This translated into a huge and higher economic growth and resulted in the relegation of other sectors of the economy to the background in favour of the easier earnings from oil.

Partly due to the absence of coherent and well articulated agricultural policy, by as early in the day as 1974, Nigeria hitherto known as a net exporter of agricultural produce started losing its place and gradually began to embark upon huge import of food and other goods. Thus, what the country gained in oil exportation had to be spent on imports. The situation was so dire that whereas the oil sector grew by 31.6% to 44% between 1960 and 1970, non-oil sector, including agricultural sector, grew only by 1.2% and 6.6% within the same period.[10] Despite intermittent

[6] Adesuyi, O.O. and Odeloye, D(2013) Foreign Trade and Economic Growth In Nigeria(1980-2010). *Journal of Economics and Sustaianable Development.* Vol. 4, No. 13. p.73.
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Ibid.

programmes and policies for agricultural resuscitation by successive governments, by the year 2010, the hope had faded for any realistic replacement of oil dominance by any other sector of the economy, and the focus shifted towards the replacement of primary production to secondary and tertiary production which had the potential of expanding the country's economic base.[11] These efforts remained at best wobbly, as economic instability persisted and adverse balance of payment continued which have been attributed to the import-dependent economy being operated with attendant negative effect of stunting the growth of domestic industries both in the productive and service subsectors.[12]

In the wake of the failure and dismal performance of the import substitution policy of the late 1970s and early 1980s in the form of promoting primary production came, in 1986, the Structural Adjustment Programme (SAP) which professed the agenda to "restructure and diversify the productive base of the economy so as to reduce the dependency on the oil sector and imports; (2) achieve fiscal and balance of payments viability over the medium term; (3) promote non-inflationary economic growth; and (4) lessen the dominance of unproductive investments in the public sector, improve the sector's efficiency and intensify the growth potential of the private sectors".[13] This formed part of the International Monetary Fund (IMF)'s two-year comprehensive structural adjustment programme adopted by Nigeria in response to the economic woes of the time despite popular protestation against same which proposed a home-grown economic revival strategy in its place.[14]

[11] Ibid.p74
[12] Ibid.
[13] Ileso, B.S.(2000) *Structural Adjustment Programme and Agricultural Production in Nigeria,(1970-1996).* A Master of Development Economics Thesis(unpublished). Delhousie University, Nova Scotia.p.24. Accessed at www. Books.google.com.ng/books . 12th December, 2017
[14] Ibid.p23

For accepting and implementing the SAP outlined strategy, Nigeria won a debt rescheduling and external debt packages through the IMF, Paris Club and other international creditors.[15] Specifically, the World Bank contributed to the Programme by the provision of a trade policy and export development loan to the tune of about $452 million.[16] The main strategy for the attainment of the set goals of the Programme which had direct effect on the country's foreign trade, was the removal of price controls and thus Commodity Boards, deregulation of interest rates; lowering of tariffs to allow free inflow of imported goods in line with World Bank preferences of trade liberalization, commercialization and privatization of public enterprises to make them competitive and profit-oriented and to affect foreign investment and importantly, the deregulation and virtual marketisation of exchange rate.[17] The rationale for the latter strategy was to leave the naira without any government support with the intent of lowering its value in order to make Nigerian goods seem cheap for export and attractive to foreign investors who would invest fewer dollars and get more naira or commodities in return. To achieve this, a Second Tier Foreign Exchange Market (SFEM) was established as a foreign exchange market parallel to the government's to subject the value of the naira to the market forces as the determining yardstick. Besides its ultimate failure in addressing the economic challenges of the country and contributing to the deterioration of the living conditions of Nigerians, many politico-legal economists have dismissed the appropriateness of the Programme particularly based on its disregard for the economic independence of Nigeria. It has been observed that:

> …an IMF agreement might generate more capital inflow into Nigeria, but questioned the purpose of such funds and the price that the country would pay in exchange. Many were therefore unable to detect the difference between the IMF's conditionality of fiscal and budgetary prudence and the (earlier) Buhari regime's

[15] Ibid.p.24
[16] Ibid.
[17] Ibid.p.25

> austerity policy. The opponents of the Fund also feared that with the devaluation of the naira and subsidy removal, food prices would rise sharply. Members of the Manufacturers Association of Nigeria (MAN), who initially applauded the SAP, mounted greater opposition to the programme and openly criticized devaluation.[18]

Further, in the area of trade liberalization in line with the World Trade Organization's ideology and prescription, the major focus was in the removal of all trade barriers. These include doing away with tariffs and quantitative restrictions on imported goods. This translates also to the removal of protections given to local industries[19] which amounted to giving effect to the national treatment principles. In addition to these, price controls were removed and import licenses abolished. Import prohibition list was reduced from 74 to 16 items and export bans lifted from 11 to zero.[20] This means that the door was open for all goods to come in (irrespective of the effect on local industries) and for all goods to be exported, notwithstanding domestic demand. By these measures on trade and many more, "… the smooth running of the new world order" is facilitated.[21]

Despite a marginal success recorded in the area of agricultural exports particularly as pertained cocoa, SAP failed to attain its main proclaimed objective of diversifying the productive base of the economy by weaning same from its oil centered dependency. Oil continued to gain prominence and to dominate the export trade of the country. This factor, coupled with policy inconsistencies, uncertain political climate and uncontrollable inflationary effect of the devaluation of the naira, sealed the fate of the Programme and by early 1990s it had to be, in

[18] Ileso,B.S. Op. Cit.p.25
[19] Ibid.p.30
[20] Ibid.
[21] Ibid.

theory, jettisoned.[22] Later events, analysed below, would prove that SAP was still in application, albeit in a different form and assuming a different name.

Nevertheless, despite the phasing out of the official SAP Programme after 1993, virtually all other economic recovery and enhancement programmes that were to later follow it had in one way or the other imported the most notable features of SAP in the form of deregulation, economic diversification, privatisation and commercialization and even foreign exchange policy with few adjustments and sectoral refocusing.[23]From Abacha's vision 2010, Obasonjo's National Economic Empowerment and Development Strategy, (NEEDS), Yar'adua's 7 point Agenda and Jonathan's Vision 20:20:20(Transformation Agenda) to Buhari's current economic diversification drive; all possess one element or the other of the original SAP.[24] Specifically, in spite of its progressive leaning, the current Buhari economic policy, in addition to focus on agricultural export revival, borrows a striking feature of the original SAP in the nature of foreign exchange deregulation with the attendant inflationary consequences domestically while visibly promoting export of particularly agricultural produce like rice, millet and similar crops.[25] For these reasons thus, there is currently no marked shift in trade policy from what obtained since the mid 1980s except for the conspicuous absence of Bretton Woods institutions' influence in policy formulation and implementation.

4.2.2 Nigeria's Investment Policy

Like trade policy, investment policies that go with it shoulder to shoulder have not suffered a different fate of success or enduring stability in Nigeria. The evaluation of the Nigeria's investment policies can thus be traced to the pre-colonial era when the Royal Niger

[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.

Company by a Royal Charter in 1886 appropriated to itself the dominion over mineral resources that it discovered were in abundance in the area to be later known as Northern Nigeria.[26] Through various regulations, the Royal Niger Company continued to monopolise mineral resources and investment therein up until 1900 when the British Government revoked the Charter granted them after paying them compensation and took over the control itself through legislations, like Crown Mineral Ordinance, vesting all minerals and their control in the British Crown.[27] By the prevailing laws and regulations of the time, mining rights and privileges were only given to foreigners, mainly Britons or British allies, with nothing to the indigenous owners of the fields.[28] This perhaps laid the background for future preference of foreign enterprises.

In 1922 came the Companies' Ordinance which was fashioned on the British Companies Act of that period and by which law companies incorporated outside Nigeria could register and do business in Nigeria. By the same law, British companies need no registration to enjoy all the privileges conferred by law.[29] This encouraged the proliferation of foreign-owned merchant companies, like UAC, UTC, John Holt and the rest, which not only dominated the import aspect of the economy but exerted political influence which saw to the neglect of any industrialization drive to serve their interest.[30] This monopoly would only be broken in the wake of the World War II, when Indian and Nigerian businessmen and the Greeks made a foray into the system and thereby brought in competition consequent upon which some legislations governing industries were enacted.[31]

[26] Kachikwu, E.I.(1998) *Nigerian Foreign Investment Law and Policy*. Mikzek Publications Limited, Lagos.p.17
[27] Ibid.
[28] Ibid.p.18
[29] Ibid.
[30] Ibid.
[31] Ibid.

Suffice it, never the less, to say that despite the seeming shift and opening of the investment space by the latter-day legislations on industrialization, nothing in the pre-colonial and colonial investment policies favoured or even took Nigeria's development into account and naturally so, as Kachikwu observes, "for although their business activities were in Nigeria, the economic interests of the foreign trading companies were centred in their countries of origin, to which they owed their primary allegiance. Their economic interests were not bound with Nigerian development except in so far as it raised their commercial profits".[32] Sadly, this remains the reality even today, in the form of capital flight, despite advances made in adjustments to policies and laws to address such. A typical empirical example of such occurrence is the illegal repatriation of about 13 billion US dollars by the MTN Communications Limited which in 2016 spurred a national outrage and parliamentary probe.[33] Note that 13 billion dollars exceeded half of Nigeria's foreign reserves at that time.[34]

At the threshold of independence in 1957, Nigerian government introduced measures containing assurances to foreign investors. These included import duty relief by way of 100% refund of duty paid; income tax relief for companies with pioneer status; freedom to expropriate profit, dividends and capital; assurances of non-nationalization unless absolutely necessary subject to fair compensation, among other inducements.[35] This was followed by a litany of legislations[36] geared to promote foreign investment which include the Industrial Development (Income Tax Relief) Act of 1958, and the Income Tax Amendment Act 1958.[37]

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[32] Ibid.p.21
[33] www.thenationonline.net/senate-investigates-mtn-allged-capital-flight. Published on 27th September 2016. Accessed on 22nd May, 2018.
[34] Ibid.
[35] Kachikwu, E.I., Op. Cit. p.23
[36] These include also the Industrial Development (Import Duties Relief) Act of 1957, the Customs and Excise Management Act, 1958 and its offshoot, the Drawback(Customs) Regulations, 1959.
[37] Kachikwu, E.I., Op. Cit.p.24

After independence and by virtue of the first National Development Plan unveiled in 1962, private enterprise was recognised as one of the movers of the economy. In particular also, foreign investors' status was equated with indigenous entrepreneurs in the access and entitlement to all investment incentives going shoulder to shoulder with the requirement for the "fullest Nigerian participation" subject to the foreigners convenience.[38] Conversely, the Second National Development plan of 1970 to 1974 is in way a setback to unfettered private entrepreneurship and foreign investment as it sought to ensure government participation in economic activities by acquisition of equity in strategic enterprises and also the Nigerianisation of the companies' workforce through the expatriate quota system.[39] This coincided with the oil boom era, the growing number of qualified unemployed Nigerians in the industries and the general feeling of economic exclusion by the citizenry.[40]

Despite the cliché that "the government has no business in business", this era of public participation in the ownership and management of enterprises, was one of the most prosperous in Nigeria's history short-lived as it was. Still, this cast a shadow of doubt on the absoluteness of the theory that holistic private enterprise is the only panaceas to sustained economic growth for developing countries. The experiences of emerging economic powers like China also buttressed the viability of public enterprise in boosting economic growth when properly managed. Thus, perhaps encouraged by its early success, Nigeria, still under the second National Development Plan, went further and introduced the controversial indigenization policy in investment matters through the Nigerian Enterprise Promotion Decree No. 43 of 1972 which was later replaced by the Nigeria Enterprises Promotion Decree of 1976 (later Act).[41]

[38] Ibid.
[39] Ibid.p.25
[40] Ibid.p.26
[41] Ibid.p.27

The main rationale for the indigenization drive was "controlling the national economy through government acquisition and indigenous participation".[42] This was further justified by the second National Development Plan in its document thus:

> Economic nationalism does not imply the restriction of international trade. It is directed at progressive elimination of foreign dominance in the national economy, not merely in terms of nominal financial ownership, but really in terms of the level of managerial and technological control. Experience throughout history has shown that a government cannot plan effectively what it does not control.[43]

This courageous declaration ambitious as it sounds was geared towards the guaranteeing and safeguarding the hard-earned, not only political but economic independence of the Nigerian nation. And if there was any doubt regarding the intent and purpose of the policy towards economic self- determination, then the Plan itself had elsewhere cast away that doubt in the following words:

> Experience has shown through history that political independence without economic independence is but an empty shell. The validity of this statement derives from the fact that the interest of foreign private investors in the Nigerian economy cannot be expected to coincide at all times and in every respect with national aspirations… A truly independent nation cannot allow its objectives and priorities to be distorted or frustrated by the manipulations of powerful foreign investors.[44]

The thrust of Nigerian subsequent foreign investment policies is clearly and starkly the reverse since the SAP days. In spite of the positive evidence in the Chinese experience in public participation in entrepreneurship and its driving force for economic growth, Nigeria treads the path of virtually deregulated foreign investment dependency; a path to economic dependency. A path to the outright alienation of national economic self-determination.

[42] Ibid.p.143
[43] Ibid.p.144
[44] Ibid.

Therefore by a combination of fate and design, the lofty ideals contained in the Second National Development as they pertained to investment and espoused in the indigenisation policy could not be fully achieved. These factors included political leadership changes and the attendant policy shifts and the economic burst of the late 1970s and early 1980s.[45] By the time the fourth National Development Plan came on the stream, 1981 – 1985, a political change had taken place and economic realities had changed making any anti-foreign investment policies unfeasible in the face of an imminent budgetary deficits by 1986.[46] By then also SAP had been introduced by which trade and investment policies had converged based on the prescription of the IMF and similar bodies.

One notable post-SAP innovation in Nigeria in the area of foreign investment is the promulgation of Nigerian Investment Promotion Commission Decree, 1995 (now Act)[47], which by section 1(1) established the Nigerian Investment Promotion Commission (NIPC), with the principal responsibility to "address the problems of multiplicity of government agencies which investors confront when they come to Nigeria.[48] In performing its functions, the NIPC specifically-

> ….assists investors in going through the formerly cumbersome process of pre-investment registrations within two weeks. In addition, the Commission has taken the role of being a facilitator by guiding each investor through the processes that leads to the inception of an investment project – acquisition of land, telephones, electricity and other approvals.[49]

The venture of the NIPC into the Nigerian investment scene at the twilight of the SAP era goes on to establish that although in nomenclature SAP days were said to have been over after

[45] Ibid.p.28
[46] Ibid.
[47] Nigerian Investment Promotion Act, Cap. N117, Volume 11, Laws of the Federation of Nigeria.
[48] Joshua, *et al*(2013) Impact of Nigerian Investment Promotion Commission on Nigerian Trade and Investment Policy. *International Journal of Humanities and Social Sciences.* Vol. 3, No. 4(Special issue).p.178
[49] Ibid.

1993, some of its major elements remain in the attempt of further expanding the economic space for participation by foreign investors with minimal stress. This is basically on the belief that industrialisation is at the heart of development and to achieve industrialisation capital injection is needed into the economy which is more readily attainable through Foreign Direct Investment (FDI).[50]Thus, this element of SAP, as others to be seen presently, lives on in the country's quest for economic breakthrough.

Investment-centred economic policy continued up to the return of democracy in 1999 when briefly through a new economic package by name National Economic Empowerment and Development Strategy (NEEDS), the Government made poverty reduction the centre of its economic policy.[51] This was an all inclusive programme involving other tiers of government-states and local governments-with similar economic programmes in the forms of State Economic Empowerment and Development Strategy (SEEDS) and Local Economic Empowerment and Development Strategies (LEEDS) for states and local governments respectively.[52] The novel strategy involved in the programmes was ensuring governmental efficiency in service delivery; establishing a private sector driven economy; social charter implementation in security and welfare participation, and creating a smaller government with a view to reduce patronage.[53]

Impressively, despite the absence of emphasis on investment and associated models, through NEEDS, Nigeria was able to negotiate and settle its way out of the lingering debt-trap running into scores of billion dollars by 2005.[54] Thus, with only minimal modifications to align it with its "Seven-points Agenda," the succeeding Yar'adua administration pledged to uphold and

[50] Ibid.p.174
[51] UNCTAD, Investment Policy Review, Nigeria. United Nations, 2009.p.64
[52] Ibid.
[53] Ibid.
[54] Ibid.

continue with the programme and modalities of NEEDS in achieving its mission of making Nigeria among the top 20 world economies by the year 2020.[55]

Nevertheless, the period between 1999 to 2007 in addition to NEEDS and its emphasis on poverty reduction, was not without a policy on investment. Within the same period, the first privatization wave which recorded little success, was revived with a focus on attracting foreign investment, a feat now made easier by the abandonment of the indigenisation policy and the coming into effect of the NIPC Act.[56] Through three different phases of divestment, the Government divested fully from banks, oil marketing, cement, hostels, insurance, vehicle manufacturing/assembly and partially divested from service industry like electric power, telecommunication, rails, oil and gas[57]. This marked the end of the Government's full participation in the sectors and if the words of Kachikwu[58] as borrowed from the second NDP, are anything to go by, the end of its control in those sectors of the economy.

Although efforts were made to reverse aspects of the above privatisation by the 'Yar'adua administration through the restoration of government participation in oil marketing by establishing NNPC mega filling stations[59] and reversing the sale of some public concerns[60], major aspects of the exercise endured and continued into subsequent administrations. The period between 2010 and 2015, the Jonathan's administration, did not record a marked departure from, nor change of investment policy from those of its predecessors, with an avowed commitment to investment in the energy sector and rail transportation.[61] To buttress its focus and drive towards

[55] Ibid.p.7
[56] Ibid.p.11
[57] Ibid.
[58] Kachikwu, E.I. Op. Cit.
[59] www.gistmania.ccom/topic/18383.0.html. Published on 01/08/2009. Accessed on 25th May, 2018.
[60] www.allafrica.com/stories. Published on 22nd November, 2007. Accessed on 27th February, 2018.
[61] www.Vanguardngr.com. Accessed 27th February, 2018.

trade and investment, a Ministry for Trade and Investment was created in 2010.[62] The centre-piece of the Administration's policy was an all out marketing of the country's potentialities to foreign investors through the Ministry and spearheaded by persons reputed and trusted by outsiders in investment and financial matters.[63]

Against the backdrop of its fight against corruption and economic diversification, the economic policy thrust of Buhari civilian administration starting from 2015, is said to be the diversification of the economy from its hitherto heavy dependence on oil.[64] This is planned to be achieved through shifting emphasis to the solid minerals and agricultural sub-sectors of the economy which is reported to have recorded a considerable growth since the policy inception as against their dismal performance as at 2015[65]. As regards investment, there has been a noticeable improvement in local investment in agricultural production[66] which the government plans to improve through facilitating access to low interest agricultural loans. The policy is also designed with the hope of attracting foreign investment[67], although the latter has not been made its key component.

Although the above inward-looking policies of the Buhari Administration appear to be in sync with and possess a hallmark of attempt to have self-determinant investment policy in particular and economic policy in general, some policy approaches seem to belie their independence and lasting efficacy. These include the planned employment of foreign economic experts from Malaysia to see to the implementation of the Government's overall Economic

[62] Jackson Obiajulu," Trade and Investment as Drivers of Jonathan Transformation Agenda". *News Express Newspaper*. 19th September, 2013.
[63] Ibid.
[64] Isiaka Wakili, Buhari's Policies at a Glance. *Daily Trust Newspapers.* Tuesday, 19th December, 2017
[65] Ibid.
[66] Tony Ailemen. "Local Investors Proves Buhari's Economic Policies Working-Osinbajo". *Business Day Newspaper*. 12th December, 2017. Accessed at www.businessday.com. 23rd December, 2017
[67] Adeola Ajekaiye. "Policies on Trade and Investment Attracting Investment-Buhari"

Recovery and Growth Plan (2017-2020)[68]"whose vision is to restore economic growth, invest in Nigeria, and to build a globally competitive economy".[69] With a seeming homegrown economic recovery package seemingly devoid of the traditional Bretton Wood's prescription, the value addition of the Malaysian experts is doubtful. In any case, this goes on to show the nation's economic dependency even in matters of economic policy implementation. The story is the same, of dependency, in the area of foreign exchange and trade policy. It is a story of deregulation and marketisation all through.

4.3 Multinational Enterprises and Nigeria's Economic Self-Determination

The term "multinational" in reference to corporations was first used in 1980 in a paper delivered to the Carnegie Institute of Technology on "Management and Corporations" by David Lilienthal who defined Multi-Nation Corporation (MNCs) as corporations "which have their home in one country but which operate and live under the laws and customs of other countries as well".[70] This definition is however limited as it envisages only a uni-national corporation operating outside the shores of its country of origin. The converse reality however is the existence of corporations with multiple nationalities and possessing hybrid nationality in both management and or shareholding. The need for apt terminologies was thus felt to clear the attendant confusion in usage and law which confusion was also not helped by the adoption of different terms by economists as against the United Nation's usage.[71]

Economists thus, taking into account the dichotomy between direct investment and portfolio investment defined a multinational enterprise as any corporation which owns (in whole

[68] www.premiumtimesng.com/newsheadlines/249544-ergp-nigeriangovt.hiresmalaysian-consultants.
[69] Isiaka Wakili, op.cit.
[70] Muchlinski, P.T..(1999) *Multinational Enterprises and the Law.* Blackwell Publishers Inc., UK.p.12
[71] Ibid.

or in part), controls and manages income-generating assets in more than one country.[72]To this definition therefore, direct investment qualifies an enterprise as multinational.[73] Note also the use of the term "enterprise" as against corporation. This is so as to not encumber the definition with a requirement for formal incorporation and to give room to all forms of business undertakings' registration.[74] On its part, the United Nations, through ECOSOC, brought into usage and adopted a coinage of transnational corporations (TNC) to indicate a cross-border operation of an enterprise, rather than multinational which only shows the multiple nationality of the enterprise's ownership.[75]Other definitions exist. But it is imperative to distinguish an MNE or TNC from domestic or uni-national corporation with multi-plant operations elsewhere or that which transfers products or have agents or affiliates outside the national shores. All these and more that retain their managerial and operational activities nationally with representatives elsewhere can only be uni-national.[76] This approach guides further discussion in this work on the issue.

Therefore historically with the expansion and explosion of foreign trade and investment after the World War II, through the entity of international business associations that came to be known as multinational enterprises or corporations with investment interest in multiple state jurisdictions, multinational enterprises came to be the principal vehicles for foreign direct investment.[77] Resulting from the almost universal refocusing on foreign investment as panacea to economic growth, these enterprises came to be the darlings of most states, Nigeria inclusive, to whom doors are opened widely for inward investment in the economies of host states. This is not

[72] Abimbola, O. S. and Dele, A.O.(2015) "Multinational Corporations and Economic Development In Nigeria". *American Journal of Environmental Policy and Management.*Volume 1(2) 16-24.p.19. Available at www.aascit.org/journal/ajepm. Acessed on 4th April, 2019, at 23: 05.

[73] Ibid.
[74] Ibid.
[75] Muchlinski, P.T., Op. Cit.p.13
[76] Ibid.p.15
[77] Ibid. p.25

without a flipside as, early in their evolutions, states perceived a threat from many angles in the structure, operations and activities of big corporations that needed to be regulated.[78]

The overbearing and obtrusive influence of Multinational corporations to states politico-legal and economic sovereignty began to manifest itself soon after the World War II with the spread of the United States enterprises into Europe and other parts of the world threatening the survival of not only domestic concerns and dominating the economic space, but also political powers of their governments through the MNEs.[79] The European states though appreciative of US's contribution in their post war economic revival, responded by setting up supranational enterprises to countervail the superior US companies on their shores,[80], thereby also themselves creating further layer of multinational corporations.

Some other countries like Japan however, acutely aware of the dangers of foreign economic domination, despite their postwar circumstances and even bilateral obligations, obstinately restricted the inflow of inward foreign investment. The US had to accept those restrictions partly as a bargaining chip to allow the establishment of the permanent US military bases in the country.[81] For this, there was no visible US foreign direct investment in Japan up to the late 1960s, despite foreign pressure, by which time the Japanese had gone far in consolidating their economic fortunes and had garnered a huge surplus in foreign trade.[82]The Japanese only succumbed into liberalising their economy by 1967 and this was partly due to their own need to ensure continued access to technology and export markets and declined to follow the US's pattern of interference in their economic drive.[83]Today, Japan owes its position as the

[78] Ibid.p.7
[79] Isuaggwu, .G.O. and Obumneke, E.(2013) "Multinational Corporations and the Nigerian Economy". *International Journal of Academic Research in Business and Social Sciences.* Volume 3, No. 4.p. 363.
[80] Muchlinski, P.T. Op. Cit..p.7
[81] Ibid.
[82] Ibid.
[83] Isuaggwu, .G.O. and Obumneke, E., Op. Cit.363

second strongest economy on earth to those initial inward looking and self-governing economic policies.[84]

By 1970s however, the table was to turn against the US, and now it was her own domestic investors that entertained fear of the dominance of foreign imported goods, mostly by US companies based abroad, as threats to their markets and the job security of American citizens.[85] For this, an attempt was made to curtail and control US firms operating abroad.[86] This nevertheless, only succeeded in occasional policy of import control, not outright prevention of the inward or outward movement of capital in the United States.[87] The developing world was also no less concerned about the place and dominance of their economies by the Multinational Corporations particularly as they viewed the continued influence of their former colonial masters through the corporations as a new form of economic imperialism.[88]To address these concerns the developing nations used their then newly acquired voting right at the United Nations and pushed for the New International Economic Order and also the recognition of the right to economic self determination.[89] This was the period between 1949 and 1975, a period that coincided with the commencement and promulgation of indigenisation policies in Nigeria. Note that at the time there existed no international legal framework for the operation and control of the multinational corporations.

By 1974 however, resulting from the increasing complaints against them, the UN stepped in and set up study group to come up with recommendations on the UN policy on multinational enterprises which recommended the setting up of a UN Commission on Multinational

[84] Muchlinski, P.T. Op. Cit..p.7
[85] Ibid.p.5
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.

Corporations later to be known as the Transnational Corporations' Management Division (TCMD) under the UN Department of Economic and Social Development.[90] The major concern of less developed countries behind the creation and acceptance by the UN group was the fear that the-

> size and technological superiority of MNE could threaten the sovereignty of the host state through the ability of the MNE to evade national regulation and taxation, to abuse its competitive power by distorting market conditions and to exploit the lack of technological know-how of the host were the latter needed modern technology to ensure the growth of its economy.[91]

In a nutshell, the aim was to prevent the corporations from subverting the economic independence and well being of their host states. These fears were not without basis and are still real. Instances of abuses by corporations abound.

One notable example of such abuses was the effort of a US company, ITT in overthrowing the Government of Chile. Other US companies were also found to have engaged in subversive activities to sabotage the same country's economy for selfish reasons.[92] Nigeria itself has had a share of interference even of political by multinational corporations as sometimes such corporations are "able to influence the domestic policy outcomes of host developing countries(including Nigeria) by threatening to move jobs overseas".[93] For this and other instances the world over, it became necessary to tame the corporations in order to preserve the economic independence of host states. Whether this has helped in adequately insulating Nigeria is discussed further in this work. In her work on the right to development, Bunn also validates this concerns citing the recommendations of the UN working group on the right which as a measure of curtailing corporations' dominance of, especially developing states, recommended

[90] Ibid.p.5
[91] Ibid.
[92] Ibid.p.7
[93] Abimbola, O. S. and Dele, A.O., Op. Cit. p. 17.

for the adoption of new international legislation and the creation of effective international institutions to regulate the activities of transnational corporations and banks.[94] International legislations that were given birth to as a direct consequence of these concerns and their provisions have been elaborately dealt with in the first segment of Chapter Three of this work.[95]

On the other hand, perceiving the new wave of international legislation on multinationals as having the potential of weakening their firm grip on world economies which they wielded and still do through the MNEs, the mostly western capital exporting countries stepped in and came up with measures to forestall the efficacy of the legislations. This first manifested itself in the inability of developed and developing states to agree on the recommended Code of Conduct on Transnational Corporations.[96] Further areas of divergence and thus suspense, include the question of national treatment from TNCs, the principle to be applied in the case of nationalisation of foreign assets, the binding nature of the Code itself and even the "scope of the prohibition of interference in internal political affairs by the TNC's".[97] Also, using their superior bargaining power as against poorer developing states, the capital exporting countries in defence of multinational companies introduced a regime of bilateral investment treaties through the World Bank and later the General Agreement on Tariffs and Trade (GATT), to circumvent the potency of the international legislations.[98]

The sum total effect of these measures are that the international legal regime introduced through the UN to regulate the multinationals have been rendered illusory and their impact

[94] Bunn, I.D., Op. Cit.p.1457
[95] Such international instruments include the Twin Covenants of 1966, ICESCR and ICCPR, the United Nations Declaration on the Right to Development, and the Charter of Economic Rights and Duties of States.
[96] Muchlinski, P.T., Op. Cit.p.10
[97] Ibid.
[98] Ibid.p.11

minimal. The host capital importing states still wallow in economic dependency and subservience to the powers of multinational corporations and their home state backers.

This further translates to the corporations' unrestrained power by their humongous accumulation of wealth and the control of huge proportion of world capital resources. On this, the sobering statistical data provided by Savanovic says it all about the vulnerability of not only individual states, but the global governmental entities to the mind-numbing economic prowess of the multinationals. He states:

> Data for the control over resources/wealth speak for themselves. (see: UNCITAD, 2007). For example, at one point the 500 largest TNCs controlled 42% of the world's wealth; of the 100 largest economies in the world, 51 are large TNCs and 49 nation-states(Anderson, 2004:4); TNCs are involved in 70% of the world trade; GM and Ford are bigger than the GDP of total sub-Saharan states of Africa, [Samli, 2008:43]. Large companies, such as General Motors, Wall Mart, Daimler Chrysler, Shell, BP, IBM and similar, with their economic power and capacities exceed almost all states in the world, except the ten richest.[Strange, 1996]…These people are able to modify the political organization of the states, if they wish to do.[99]

In short, the above statistics eerily showcases how subservient the entire world economy is to the economic power of the corporate world by virtue of the sheer wealth at their disposal. This is simply because the entire global economic system and laws favour them and provide them with avenues and mechanisms to perpetuate their dominance.

Thus, one such mechanisms at the disposal of multinational corporations and inimical to self-determination and even a derogation from the sovereignty of developing state is the practice of avoiding the jurisdiction of domestic court's or tribunals in investment dispute resolution particularly when the dispute is between the host state and a foreign corporation.[100] And, although "in principle, corporations of municipal law do not have international legal

[99] Savanovic, A. Op. Cit.pp.1029-1030
[100] Muchlinski, P.T., Op. Cit.p.534

personality"[101], necessary adjustments were made through the investment contracts (which developing states eagerly enter into), and even legislations, to divest domestic states of jurisdiction and subject disputes to arbitral and other resolution mechanisms,[102] which are themselves mostly fashioned out by the home capital exporting states. This may not always be in the best interest of the host states nor their economic self-determination as rationalised thus:

> From the host state's perspective, the major problem is to retain control over the dispute. Ideally this would entail the complete exclusion of international methods of dispute settlement and the restriction of the foreign investor to local remedies alone. However, the desire for foreign direct investment may prompt the host state to accept international methods of dispute settlement as a means of displaying concern for the rights of the foreign investor, thereby helping to create a 'good investment climate'.[103]

In doing this, the host state jettisons its domestics judicial mechanisms, which form part of its sovereignty, and adopts at best *ad hoc* mechanisms using the United Nations Commission on International Trade Law (UNCITRAL) Rules which encompass internationally agreed standards for national arbitration laws;[104] or institutional mechanisms, with Rules mostly manufactured somewhere in the developed world. Notable of the latter institutions are the International Centre for the Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce (Court of Arbitration).[105]

Of the two international investment dispute settlement institutions, the International Chamber of Commerce enjoys less prominence and patronage by foreign corporations due to the concentration of its cases on commercial disputes mainly between private parties or corporations

[101] Ibid.p.77
[102] Ibid.p.537
[103] Ibid.p.538
[104] Ibid.p.539
[105] Ibid.

and not involving states.[106] It is however, not unheard of for arbitration clauses to have reference to the Court and a plethora of cases have been reported to have been dealt with by the Court involving governments.[107]

ICSID on the other hand, was specifically created and structured from inception to entertain investment disputes involving governments.[108] It enjoys more prominence between the two. The centre came into being by virtue of the Washington Convention on the Settlement of Investment Disputes between states and nationals of other states (The Washington Declaration) of the World Bank, adopted by the latter in 1965[109]. Needless to state, the fact of being an offspring of a major Breton Wood's institution cast a doubt in the altruism in its conception and affirms it as another "investor protection" approach.[110] For this reason, "by acceding to the Washington Convention the host state accepts that its sovereign power to regulate disputes with foreign investors is to be subjected to review in accordance with the international procedures set out under the Convention and the Rules promulgated under its authority".[111]

More elaborately, although Article 25(1) of the Convention has made its jurisdiction over a state party to be upon the existence of a written declaration submitting itself to the Centre's jurisdiction, a state will nevertheless automatically be held to have consented to the ICSID jurisdiction where it accepts or enters into an investment contract containing a clause of referral to the Centre of disputes arising therefrom.[112] The only remedy open to a state in wriggling out

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[106] Ibid.
[107] *Bridas S.A.P.I.C., et al vs. Government of Turkmenistan, Salini Contruttori SPA vs. Kingdom of Morocco, National Iranian Oil Company (NIOC) vs. The State of Israel, East Cement for Investment Company vs. Poland, Kaliningrad Region vs. Lithuania, Crespo and Others vs. Poland* and even *Enron Nigeria Power Holden (ENPH) vs. Federal Republic of Nigeria*
[108] Muchlinski, P.T., Op. Cit.p.543
[109] Ibid.p.541
[110] Ibid.p.542
[111] Ibid.
[112] Ibid.p.543

of the Centre's jurisdiction is by, in clear terms, making reservation allowed by article 25(4) of the Washington Convention on the extent of its submission if it wishes to preserve its sovereign rights in particular areas of inward foreign investment.[113]

In any case however, the general approach of the Centre is that it will not readily uphold objection to its jurisdiction that would affect its credibility as an effective dispute resolution forum.[114] In other words, for the most part, concerns of sovereignty on the part of a contracting state must give way to the Centre and implementation of its mandates. In the face of all these, the role of "domestic courts is limited to that of judicial assistance in the recognition of ICSID awards".[115]

Finally, it may be well to remember that far from dispute resolution, the primary purpose of the Convention as stated by World Bank Executive Directors is "to provide an additional inducement for, and stimulate a larger flow of, private investment into its territory".[116] Judicially, the attitude of the ICSID tribunals is to subordinate a contracting state's law to its and international law's control even where the parties agreement clearly states that the governing law should be that of the state concerned.[117] For instance, in the case of *Letco vs. Liberia*[118], the tribunal noted that though "the law of the contracting state was paramount within its own territory; it was subject to control by international law"[119]. This position was more clearly restated by the Tribunal in the resubmitted case of *America Asia v. Indonesia*[120] where it held, inter-alia:

[113] Ibid.
[114] Ibid.p.546
[115] Ibid.p.541
[116] Ibid.
[117] Ibid.p.550
[118] (1987) 26 ILM, 657.
[119] Ibid. Paragraph 20
[120] (1992) 89 ILR, 580 at 593.

> Article 42 (1) refers to the application of host state law and international law. If there are no relevant host state laws on a particular matter, a search must be made for the relevant international laws. And, where there are applicable host state laws, they must be checked against international laws, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as "only" supportive and corrective seems a distinction without difference.[121]

By the foregoing, not only does a state that submit to ICSID part with its self determination in matters relating to economy, but also does alienate an aspect of its sovereignty in exchange for foreign investment by a MNE. The latter garner their advantage by the use of Bilateral Investment Treaties (BITS) which their home states use, to circumvent international regulations, and by the instruments of investment contracts.

In any case, even in recent years the validity of the above criticisms in relation to the shortcomings of ICSID has been reechoed especially to the effect that the ICSID mechanism by its design is not equipped to cater for the investment needs of developing world, particularly Nigeria in view of the changing realities and directions of investment presently which now has China as a major entrant into the equation.[122] As a result, a case has been made for the creation of an alternative dispute resolution platform that would be sensitive and conscious of the developing world's needs, as well as the strengthening of internal domestic conflict resolutions institutions versed in tackling and resolving disputes arising out of the multilateral trade and investment system.[123]

4.4 International Investment Contracts and Nigeria's Economic Self-Determination

One of the methods used by multinational corporations in evading or circumventing the safeguards imposed by international law on their operations is the instrument of investment

[121] Muchlinski, P.T., Op. Cit.p.550
[122] Obayemi, O.K. (2015) An Overview of International Investment Agreements in the Context of China-Africa Relations and the Role of ICSID. *The Gravitas Review of Business and Property Law.* Volume 6, number 4.p.69
[123] Ibid.p.70

contracts in their dealings with the usually investment-thirsty host states. These may take either of the outlined forms, namely: "(a) contracts between nationals (including companies) of the host state and foreign private investors which are governed by rules of private international law; (b) inter-state agreements, i.e. treaty governed by principles of public international law …(c) contracts between states and foreign private investor".[124] The latter specie of the investment contract is the preoccupation of this segment of this work for its uniqueness and implications on a state's economic self-determination. Further, in the two former types of contracts, the parties are cloaked with international safeguards both customarily and in instruments, a feature virtually absent in the state/corporation contracts.

From the onset therefore, these types of contracts sometimes called hybrid contracts, venture into a deluge of legal controversy in that they comprise of parties having disparity in their respective statuses in the eyes of the law; viz, a state and a private entity.[125] For this reason some scholars are even of the opinion that being a sovereign, a state cannot unilaterally alienate its sovereign power by entering into contracts with private entities that will entail contracting away part of its sovereignty as part of the conditions therefor.[126] Note that a prominent feature of investment agreements is the agreement by the host state not to do any act by legislative means or otherwise capable of compromising their obligation in the contract or prejudicing the investor. An example is the commitment given by the government of Ghana in the *Ghana–Valco* agreement of 1960 in Article 30, Schedule C thus:

> No general or special legislative or administrative measures or act whatsoever of or emanating from Ghana or any Ghanaian authority shall annul, amend, revoke or modify the provisions of or prevent or hinder the due and effective performance of the terms, the

[124] Nwogogu, E.I.(1965) *The Legal Problem of Foreign Investment in Developing Countries*. Oceana Publications Inc. ,USA.p.166
[125] Ibid.
[126] Ibid.p.173

> (contract); … any such measure or act shall be deemed to be of expropriation within the law of Ghana and under international law".[127]

Additionally, apart from free custom duty and tax exemption of the company and its dividends paid to shareholders[128], the Ghanaian Government also proceeded and made commitment to "repeal of any legislation now existing or future which would prevent or interfere with the carrying into effect, the [Contract] according to its tenor".[129] For these examples of divestiture by a government of aspects of its self- determination economically and otherwise, the antagonists dismiss the creation of such relationship as untenable in the eyes of the law. Similar experience by Nigeria is exemplified in the next segment.

On the other hand, proponents of the arrangement whose having the upper hand is evidenced by the continued prevalence and utilisation of the medium, have argued that state – individual obligations are no longer new in the modern legal arrangements since the World War II when private individuals have become recipients of rights against states.[130] Therefore, the state's eligibility to contract away its sovereign right or aspects of it has been justified by the bindingness of its words against the state itself even if that commitment is to the effect of curtailing legislative power as upheld in the case of *Anglo-Iranian Dispute.*[131] The Tribunal in the case of *Radio Corporation of American V. China*[132] also took a similar view.

Other justifications for upholding a sovereign state's alienation of aspect of its self-determination include the moral prism of unjust enrichment based on the legal principle of *enrichessement sans causa* which calls for reparation in such events[133]; the doctrine of estoppel

[127] Ibid.p.171
[128] Ibid.
[129] Ibid.
[130] Ibid.p.175
[131] Ibid.
[132] (1936) AJIL, 534
[133] Nwogogu, E.I., Op. Cit.p.179

which estopps a party who made oral or other commitments from reneging on same as held by the international Court of Justice in the *Temple case (Cambodia v. Thailand),*[134] and the international law principle of *pacta sunt survanda* which universally enjoins parties, including states, to honour their contractual agreements based on the universal truth that "the sanctity of contracts is fundamental to an orderly and peaceable society".[135]

Oblivious or conscious of the restraints in their economic sovereignty, developing states like Nigeria, nevertheless enter into the said investment contracts notwithstanding the long term repercussions on their exercise of sovereignty. The contracts, depending on the object, often take the broader forms outlined in the next segment. Some of those forms were employed to counter the crippling effect of other methods of economic participation by the foreign corporations. This is principally the hitherto practice of concessions which virtually sold off the assets to the investor without any reversionary right to the host state. In their place new methods are evolved as outlined below.

4.4.1 Joint Venture Agreements

One popular way of counterbalancing foreign corporations' economic monopolies is the use of Joint -Venture (JV) arrangements whereby the host state acquired majority equity in the corporation's local subsidiary.[136] With such acquisition of the controlling shares, the states reason that control of the structure would thereby revert back to them. This is however not the case in many cases as ownership powers are held to be not a guarantor of effective control.[137] The actuality of the situation is the control of the corporation by a managerial class having little

[134] Ibid.p.181
[135] Ibid.pp.185-186
[136] Asante, S.K.B.(1981) *Transnational Investment and National Development*. Lagos University Press, Lagos.p.35
[137] Ibid.p.36

or nothing in terms of equity participation as against the shareholders of the company.[138] In practice, even where the government appoints majority of the members of the Board of Directors of a particular company, its powers to thereby exert control are taken away either by the crude classification of its shares as "non-voting" and thus not *parri passu* with the parent foreign corporations, or through the use of internal regulatory procedures requiring the participation of some directors or members appointed by the foreign corporation in making crucial decisions like sale of assets, issuing additional shares or raising capital among others.[139] This arrangement effectively gives the foreign corporation a sort of veto thereby negating the government's majority power.[140]

Another snag in the effectiveness of the state's control of a joint venture concern is the issue of technical know-how which mostly the state lacks and solely and invariably relies on the foreign entity for that.[141] This is not helped by the political considerations in appointment of representatives by governments on the boards, and their part-time nature as well as the co-option into it of civil servants, who though may be competent, but are bogged down by the demands of their other public engagements.[142] In essence, without dedicated and attentive participation, joint ventures may turn out to be as illusory in exerting ownership, much less control of the corporation and by extension the country's economic fortunes.

4.4.2 Service Contracts

Another technique employed by resource owning states in breaking away from the tradition of concession agreements which invariably turned out to be parting with ownership of the resource concerned, are service contracts. Although in contents they differ from one country

[138] Ibid.
[139] Ibid.p.37
[140] Ibid.p.38
[141] Ibid.p.39
[142] Ibid.

to another and even from one industry to the other, certain fundamental features are common in all forms of them.[143] These common characteristics include the readiness to provide the entire risk capital by the foreign company; provision for the repayment of funds expended by the host state in exploration after discovery of the mineral in question; undertaking by the investor to manage the undertaking and market products; absence of any proprietary rights conferred on the foreign investor in the resource or undertaking concerned and the contracts usually include relinquishment provisions[144]. As a remuneration, usually the foreign investor receives a percentage of the mineral extracted net tax, and also pays royalties to the government concerned.[145]

The visible advantage of service contracts as gleaned from the foregoing is that the state is insulated from the risk inherent in providing the funds for pursuing the undertaking and even when it had already expended something in exploration, a provision is made to reimburse her upon the commencement of the operations. Still, it retains the ultimate ownership of the resources and a reversionary right to it upon relinquishment thereby reckoning sovereign status over its resources.[146] The risk free nature of the arrangement on the part of the state and relative simplicity of the language in which the agreement is usually couched,[147] makes service agreements the more attractive to states.

4.4.3 Production-Sharing Contracts

Production sharing contracts are only distinguishable from service contract by one feature, namely the sharing of production between the state and foreign corporation based on a

[143] Ibid.p.52
[144] Ibid.p.53
[145] Ibid.
[146] Ibid.p.54
[147] Ibid.

formula.[148] Nevertheless, the substance of the contract may vary depending on the nature of the mineral in questions, whether solid mineral or petroleum.[149] Importantly also, in this arrangement ownership of the production rests in the state (or its corporate agent), and the foreign corporation's title to its own share which is usually, in Indonesian style, a third after expenses, passes only to the corporation at the point of export and not at the well–head[150] unlike in traditional concession regimes. This is in conformity " to the external trappings of national sovereignty over natural resources".[151] In the same vein, states also partake in or fully takeover the management aspect of the undertaking leaving operations solely in the foreign corporation's hands for obvious reasons of technical expertise requirements.[152] While Nigeria in its 1973 production-sharing agreement with *Ashland Oil* through the then Nigerian National Oil Corporation (now NNPC) followed the same Indonesian model, it varied from the latter in a material form when it conceded title of the corporation to its share of the oil at the well-head and not the point of export as the model espouse.[153] This may be harmless technically though it negates the symbolism of reference to state sovereignty over natural resources conveyed by the practice. Nigeria also left exclusively all operational and managerial responsibilities to Ashland contrary to what Indonesia did with Phillips Petroleum and Tenreco.[154] This was attributed to the Indonesia's relative higher technical and managerial dexterity compared to Nigeria.[155]

4.4.4 Technical Assistance Agreement

A new entrant into the array of contractual forms with foreign corporations is the technical assistance agreements. Through it "the transnational corporation is engaged to provide

[148] Ibid.p.58
[149] Ibid.
[150] Ibid.p.59
[151] Ibid.
[152] Ibid.
[153] Ibid.p.60
[154] Ibid.p.61
[155] Ibid.

technical services for the execution of a project for a specified fee, without any proprietary interest, whether immediate or ultimate, in the production of the enterprise".[156] By this, clearly the foreign corporation is no more than a contractor. Its main distinguishing feature from the others discussed is that the corporation is not required to provide any capital, thus assumes no financial risk; host state owns the resources, equipment and anything related to the project; the foreign corporation provides only technical assistance in terms of data, training, design and others without responsibility for sale or marketing of the production or purchase of any of the output.[157] In the area of management also, the host state designates the team leadership with only augmentation of same with technical personnel by the foreign corporation usually through a General Manager.[158] The corporation usually gets remunerated through a fee for its service and a share in the proceeds of sale upon commencement for a period of time.[159]

A key feature of this arrangement is that in forgoing any financial contribution or capital from contribution by the foreign corporation, the host state asserts complete sovereignty and ownership over its resources as nothing is transferred to the corporation.[160] In terms of managerial arrangement, this system of mixed staffing resembles the Indonesian model discussed above save for the virtual surrender of operational control to the General Manager which detracts from the states control. It has been severally posited that control without technical expertise is a mere illusion.[161]

All the foregoing legal techniques and forms were evolved as a buffer to safeguard the host state's economic sovereignty and self determination in seeing to it that their fortunes are not

[156] Ibid.
[157] Ibid.p.62
[158] Ibid.
[159] Ibid.p.63
[160] Ibid.
[161] Ibid.

frittered away as had been through the vehicle of international corporations. To allow that would translate into a voyage back into colonialism or worse still, servitude. The question however still remains of the full efficacy of these measures for, in spite of them, little has changed in the fortunes of the host developing states especially of Africa nor of their citizenry. It has also been suggested that high sounding and plausible as they manifestly are, certain clogs invariably exist in the agreements that take away their potency and leave the state vulnerable self-determination wise. Some of these hidden clogs include innocuous clauses in the form of stablisation and internationalization clauses routinely inserted with devastating consequences as examined below.

4.4.5 The Effect of Internationalization and Stabilization Clauses on International Investment Agreements

With all the safeguards that are imbued in international investment contract varieties directed at protecting states and their resources as discussed above, through the forms of the contracts entered and executed, some other legal mechanisms are on the other hand deployed in the substance of the contract to negate their efficacy and ensure that the investor retains the upper hand. The two major such intrinsic methods are "internationalisation" clause, to which we have made an allusion above, and its twin sister "stabilization" clause both which we will discuss in details hereinafter. Suffice it to say that both serve as a restriction "upon the sovereignty of the host state over its internal economic affairs".[162]

4.4.5.1 Internationalization Clauses

Ordinarily and as a matter of constitutional and international law, a state, as part of its sovereignty possesses the power to have agreements entered with it and to be performed within its territory, governed by its own laws. This is however not always the case as foreign investors often insist on internationalising the agreement by inserting a clause therein to the effect that the

[162] Muchlinski, P.T., Op. Cit.p.494

law governing the contract is international, not the state's domestic laws.[163] Although still inimical to state sovereignty and self-determination, the scenario where express provision to that effect is made in the contract presents less problematic scenario and can in a way be justified based on freedom of contract by both parties. This may not be different from what we discussed above in the referral of disputes to institutional arbitral bodies to circumvent domestic tribunals.

Situations however exist in which the agreement is silent on governing law and the internationalisation clause has to be brought in by necessary implication. Such scenario played out in the *Libyan Texaco Arbitration*[164] case where the tribunal held that "an oil concession agreement between a US company and the government of Libya was internationalised".[165] And, although subsequent cases of *Liamco v. Libya*[166] and *Aminoil Arbitration*[167] deviated from Texaco Tribunal's line of reasoning, it goes to show how intent foreign corporations are in avoiding host state's jurisdictions and laws even where the agreement does not clearly reckon with that.

As antidotes to this, states are only left with the option of from inception clearly stating that their domestic law governs the transaction, an option tenable only if they have the superior bargaining power as against the investor.[168] Where however the two parties are *parri passu* it is wiser to adopt a "transnational approach" which involves the adoption of a select of cocktail of laws by the parties to govern the transaction, as against the natural choice of foreign investors of complete delocalization(meaning, subjection to foreign judicial remedy), where it is dominant.[169]

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[163] Ibid.
[164] (1978) 17 ILM
[165] Muchlinski, P.T., Op. Cit.p.494
[166] (1982) 20 ILM, 1
[167] (1982) 21 ILM 976
[168] Muchlinski, P.T., Op. Cit..p.494
[169] Ibid.p.496

4.4.5.2 Stabilization Clauses

Closely related to and bearing striking resemblance with internationalisation clauses in international investment agreements, are stabilization clauses. Like internationalization clause, they can be used "to exclude rules of the host state's laws from the regulation of the agreement".[170] They however go further than that in that stabilisation clause can prevent "further subsequent amendments of a host state law from operating upon the investment contract"[171]. In clear terms, these clauses have the effect of robbing national legislatures from performing their constitutional mandates of lawmaking, or making already made laws ineffectual for the duration of the contract as it affects the investor. It is hard to come by a glaring derogation from a state's sovereignty and right to economic self-determination.

Despite these effects, states readily execute and on the basis of sanctity of contracts founded upon the principle of *pacta sunt survanda*, Tribunals readily uphold their validity as demonstrated also in the *Texaco* case referred to above. The same principle was upheld in *Aminoil* case(*supra*) on the basis of a set of conditionalities not of relevance here. It is imperative to state that the main object of foreign corporation in using stabilization clauses in investment contract is to neutralize the state's inherent right and legal power to nationalise foreign assets where the circumstances demand. Thus, by agreeing to the clause, the state has negotiated her right to nationalize, a right that constitute an element of economic self determination.

4.4.6 Some of Nigeria's Experiences in dealing with Investment Contracts.

If the Ghanaian-Valco Agreement is bad in relation to Ghana's economic sovereignty and self-determination that were sold off on the platter of foreign investment, Nigeria's more recent experience is worse, and more catastrophic. Endowed with abundance of iron-ore deposits,

[170] Ibid.
[171] Ibid.

Nigeria sought to leverage on that natural resource by an ambitious steel project that is capable of catapulting her not only to the position of "African Steel Giant" but also one of the world richest and self-sufficient nations in steel and iron production. This process was put in motion by the establishment in 1971, through the defunct National Steel Development Authority(NSDA) , of an iron plant in Ajoakuta area of Kogi State which sits on the largest deposit of iron-ore in the country.[172]

After spending a fortune in conceptualization, design and initial processes in collaboration with a consortium of Russian and Ukrainian companies who made considerable progress over the years in the management and operationalisation of the company, progress was hindered by the tumultuous political and economic atmosphere that greeted the country for the most part of 1980s into the late 1990s.[173] By the early 2000s through its privatization programme under Obasanjo Administration, the Federal Government of Nigeria removed the Russians and entered into a fresh concession agreement with Global Infrastructure Holdings Limited(GIHL), an Indian owned company.[174] Years after they took off, Ajoakuta's fortunes only worsened. By 2007, worried by the stagnation of the steel project, the government of Umaru Yaradua set up the Magaji Inuwa Panel(the Panel) to, generally, look into the immediate and remote causes behind the dismal performance of the Company despite huge state investment.

In its report[175], the Panel made far reaching discoveries in the contents and operation of the concession agreement that are not only inimical to Nigeria's economic self-determination through self sufficiency in steel production, but also the long term industrial development of the

[172] Ohimain, E.I.(2013) "The Challenge of Domestic Iron and Steel Production in Nigeria". *General Journal of Business and Management Studies.* Vol. 3(5).p.3
[173] Ibid.
[174] Ibid.p.5
[175] Report of the Administrative Panel of Inquiry into the Operations of Ajaokuta Steel Company Limited, National Iron Ore Mining Company Limited and Delta Steel Company Limited,(Magaji Inuwa Report). Submitted to the Minister of Mines and Steel of Nigeria, Abuja. October, 2007.

country. In particular, the Panel made a finding that after spending about $8 billion on the project, Nigerian Government conceded the project to GIHL at practically no cost at all on the understanding that the latter would import capital and inject same into the project, which condition was only met in the breach.[176] Not a single dollar was imported by the concessionaire, but rather, raw material met on the ground was cannibalized or sold out of the country and Government's other assets were used to secure hundreds of millions of dollar worth internal debt incurred by the concessionaire.[177] The only consideration required to be furnished by them was a miserly 1% of the Company's turn-over, which was never paid, and this is backed by paragraph 10 of the Concession Agreement.[178]

In the area of managerial representation, Nigeria retains only a 20% representation on the Company's Board corresponding to its appalling 20% shareholding in its own Company using its own assets and several billion dollar investment. There is also no provision of employing Nigerian workforce by the concessionaire.[179] This formula makes sure that Nigeria lacks any input in the operation and management of the concern and that there is no hope of developing an indigenous workforce to, in the future, oversee the management and the operation of that vital assets. It is a matter of perpetual economic dependency.

Finally, the sorry fate of Nigeria's fortune in the arrangement is sealed by the legal weapon hereinbefore discussed, employed by multinational companies and their home state against capital importing states in the nature of stablisation clauses. Nigeria blindly swallowed the hook buried in Article 4.2.x of the Agreement as follows:

> FGN undertakes for the period beginning on the date hereof and ending on the date of the expiry of this Agreement, not to

[176] Ibid.p.32
[177] Ibid.
[178] Ibid.p.25
[179] Ibid.p.17

> expropriate, nationalize or intervene in, or permit or cause the expropriation of, nationalization or intervention in, any property, right or interest whatsoever of Global (including but not limited to), its right under the ASP Agreement or hereunder or any share in or security of Global and/or held by any person.[180]

Regarding the above, the Panel though substantially lay in composition, rightly observes that the article is aimed at "muzzling the FGN and making her incapable of bringing GIHL to order even in the case of misdemeanours"[181] Nothing further buttresses this predicament and the deliberate intent on impairing Nigeria's position than the provisions of Articles 12.3 and 17.0 of the Agreement which subject the resolution of all disputes arising out of the Agreement to the English Court of Arbitration.[182] Ironically, the Chairman of the concessionaire is an English national.[183] This also explains why over a decade after the discovery of the above infractions and injuries on Nigeria's economic independence, the latter has failed to wriggle out of the arrangement embroiled in unending legal tussle on the issue abroad, leaving the vital national asset comatose.

For its importance, three basic reasons inform the indispensability of steel in any discussion on economic self-determination of any nation. First is the technical place of iron/steel as the "life-wire" or backbone of any industrial breakthrough by any nation.[184] Japan is one of the most industrialized countries in the world, yet, unlike Nigeria which possesses abundant good grade iron-ore, it relies on imported scrap metal to feed its industries whose products are obliviously consumed in large quantities in Nigeria.[185] Secondly, no internal infrastructural development is independently achievable without iron ranging from building constructions,

[180] Ibid.p.17
[181] Ibid.
[182] Ibid.p.18
[183] Bid.
[184] Lawal, G.I.(2015) *Nigeria's Quest for Industrial Development: The Iron and Steel Quagmire.* University of Lagos Press, Lagos.p.50
[185] Ibid.p.49

machinery, military and even space technology. [186]The third is the politico-economic dimension best exemplified by a barely noticed but profound event in the United States of very recent. On 2nd March, 2018, the US Government under President Donald Trump shockingly and against all norms, laws and rules of international trade particularly the WTO/GATT rules discussed herein, announced the imposition of 25% tariff on all iron importation including on Mexico and Canada.[187] This clearly violates the general ideology of trade liberalization through the removal of all trade barriers including tariffs, which form the bedrock of the WTO/GATT system, and particularly goes against Article 1 of the GATT that embodies the quintessential Most Favoured Nation's principle. The latter principle prohibits any preferential treatment towards any member as against the others. However, in dismissing all criticisms and justifying the policy as geared towards the protection of the US steel/iron industry, President Trump summarized all the intrigues in one sentence; he said: "without steel, you don't have a country". [188]This thought-provoking message is what Nigeria seems to have missed in all the years it traded away its iron and steel fortunes at Ajaokuta.

Like the solid mineral sector analysed above, the fate of the petroleum industry is no better as regards control and self-determination. It is mostly governed by Joint Venture agreements, with all the usual trappings, between NNPC and the oil giants, who own the lion share not only in Nigerian, but in global oil industry. These are the "Seven Sisters", a term coined in the 1950s to refer to a monopolist cartel that collude to monopolise the world oil wealth both in ownership and production[189]. They included Exxon, Mobil, Shell BP, Royal Dutch Shell, Chevron, Standard Oil Company and Gulf Oil, though by consolidation their

[186] Ibid.
[187] www.theguardian.com/us-news/2018/mar/08/donald-trump-metal-tariffs-trade-war, at 11: 50 hours.
[188] Ibid.
[189] www.ft.com/companies/energy. Retrieved on 17 August 2014, at 23: 30 hours.

number was to dwindle to four[190]. Together the original Seven Sisters owned more than half of the world oil wealth and production, and they were all western companies with oil ownership cutting across the Middle East, Africa and Asia including the Nigerian oil.

Although in recent years, another group called the "new Seven Sisters" emerged from oil producing nations of Saudi Arabia, Russia, Iran, Brazil, China, Venezuela and Malaysia to, through state-owned corporations like Aramco of Saudi, Iran's NIOC, Russia's Gazprom, China's CNPC, Venezuela's PDVS, Brazil's Petrobras and Malaysia's Petronas, overtake production and ownership of oil from the old Seven Sisters, the latter with now only 10% production and 3% reserves, still earn higher revenues than the new home-based Seven Sisters[191]. In any case, Nigeria despite its prominent place among oil producing countries, is conspicuously absent even among the "new Seven Sisters". Economic self-determination thus seems to be farther away from reach.

As Nigeria exercises ownership over its petroleum assets through joint venture agreements with oil majors and other actors in the industry, the following ratio represents Nigeria's stake relative to the joint venture companies as follows: NNPC/Shell/Elf/Agip Joint Venture equity ratio stands at 55, 30, 10, and 5 percentage point for the respective entities.[192] For NNPC/Mobil Joint Venture, the ratio is 60 by 40 percent respectively.[193] NNPC/Agip/Philips ratio represents 60, 20, 20 percentage points respectively.[194] Also NNPC/Elf Joint Venture equity

[190] Ibid.
[191] Ibid.
[192] www.napims.nnpcgroup.com/partners/jointventurecompanies.aspx. Accessed on the 25th May, 2018, at 19: 23 hours.
[193] Ibid.
[194] Ibid.

ratio is 60/40 to NNPC and Elf respectively,[195] just as in NNPC/Chevron Texaco and NNPC/Panocean Joint Ventures.[196]

By the above official data, it can be summed up that the predominant ownership ratio of Nigeria's asset by her and multinational partners is 60-40 in the country's favour. Whether this figure judiciously suffices in proportion to the country's sovereign ownership of the land and the resources as well as other contributions towards the extraction, exportation and sale of the product, remains a debatable proposition. What remains indisputable even to an outsider to the industry is that, arithmetically Nigeria and her almost 200 million citizens only benefit from just above half of its petroleum resources, all factors notwithstanding in view of the above statistics.. Perhaps, had Nigeria developed its own Seven Sisters or joined the existing new seven as the eighth in petroleum management, the ratio will have been more favourable and more self-determinant. This can be done by upgrading the technical capacity of NNPC to a world standard as did Brazil with Petrobras, Malysia with Petronas and Saudi Arabia with Aramco who now compete with Western oil giants to control world oil resources in all ramifications. Note that what makes nationalization an important element of economic self-determination is that it ensures that investment by foreigners in mineral resources does not confer on the former a perpetual ownership of the resource and that a reversionary right remains with the owning state to exercise at any time subject to compensation.

4.4.7 Freedom of contract, the Doctrine of *Pacta Sunt Servanda* vis-à-vis International Investment Contracts

The foregoing discussion has highlighted how investment thirsty and struggling economies like Nigeria got entangled and enmeshed in the sea of economic quandary and

[195] Ibid.
[196] Ibid.

perennial dependency as a result of contracts they entered into for the exploitation of their natural resources in the hope of propelling their economies into prosperity and enduring viability. It invariably turns out however that the investors end up being the major beneficiaries leaving the countries in perpetual economic backwardness after parting with huge resources. While much blame is heaped on the investors and their home countries for living off the economic misery and dependency of their host resource-owning counterparts through manipulated and skewed investment pacts, a section of opinion questions this trend in view of the voluntariness with which the developing countries subscribe to these arrangements by treaties or contracts and the subsequent consequences of such actions in international law regarding sanctity of contracts based on the doctrine of *pacta sunt servanda* whereby parties must honour their treaty obligations voluntarily entered.[197] For this reason, it is presupposed that such countries should not be heard to complain about what they voluntarily signed. This view also means that such contracts or treaties as the case may be, must be taken as they are.

It is however submitted that the above position, plausible as it may seem, is faulty in that for all its prominence in interstate relations and international law, the principle of *pacta sunt servanda* is not absolute. Neither is it a an elixir that cures and purifies all contaminants that combine to make binding an international investment contract or treaty however obnoxious for the simple fact that parties consensually accede to same. This is because firstly, even in ordinary contracts, the fact of the convergence of voluntariness , *ad idem* and other validating elements for a contracts does not automatically confer upon such relation an enduring toga of eternal validity. Often times, some supervening acts or prior events appear that have the effect of vitiating or invalidating such contracts despite the existence of all other preconditions for validity. Vitiating elements that readily come into mind to invalidate an otherwise pristine

[197] Article 26, Vienna Convention on the Law of Treaties, 1969

contract include for example, mistake[198], illegality[199], immorality[200] and duress and undue influence, *inter alia*. in the case of the latter category which manifests in interstate relations between host developing states and economically strong home economies or their corporations, the courts have defined undue influence as "simply means inequality of bargaining power".[201] Needless to say, that inequality is what characterizes the relationship between the foreign investor and the investment-thirsty developing state to subscribe to all conditionalities due to relatively weak bargaining power. In all these scenarios the obligation abates and the concept of sanctity of contracts cannot be brought to bear in salvaging the agreement.

In the same token, similar exceptions, rarely utilized, exist in international law to curb the absolute nature of the principle of *pacta sunt servanda* such that in deserving circumstance a state may wriggle out of its obligations without the traditional consequences. To start with, Articles 61 and 62 of the Vienna Convention on the law of Treaties allows for derogation from treaty obligations in situations of supervening impossibility of performance or fundamental change of circumstances.[202] Further, the advent of new disciplines governed by specialized treaty regimes in international law such as the international economic law necessitates the recognition of certain provisions to allow for derogation in deserving circumstances.[203] To buttress this, an example has been cited of the Netherlands' from an economically related development cooperation treaty entered with Suriname, on the grounds of fundamental change of circumstances.[204] This supports the view of this work that notwithstanding having voluntarily

[198] Bell vs. Lever Brothers Ltd. (1932) AC, 161
[199] Opara vs. Omolu (2002) 10 NWLR (Pt. 774) 177
[200] Uptill vs. Wright (1911) 1 KB, 506
[201] Lloyd's Bank Ltd. vs. Bundy (1975) QB, 326
[202] Binder, C. (2012) Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servdaner Revisited. *Leiden Journal of International Law,* Volume 25, Issue 4. p.671. Available at www.cambridge.org/journals/leiden-journal-of-international-law/articles. Accessed on the 2nd December, 2019, at 23: 01 hours.
[203] Ibid.p.672
[204] Ibid.p.675

entered the treaties or investments contracts, developing countries still reserve the right in law to bend over backwards, take a look at the obligations created and consider if the relationship is still profitable and has not been affected negatively by any supervening circumstance that can warrant derogation or renegotiation.

4.5 Some International Trade and Investment Rules and Their Effect on Nigeria's Economic Self-Determination

Besides the existence of foreign corporations that serve as vehicles for foreign trade in Nigeria and other developing countries and their impacts on the national economies as studied above, in the actual conduct of the trading and investment activities there exist several rules that evolve to govern the relationship. Most of these rules are a product of longitudinal multinational engagements spanning decades and involving both producer/investor on the one hand and consumer/importer nations on the other. It would appear however, that despite their participation in some stages of negotiating these rules, the latter group of nations have either not taken full advantage of these rules in leveraging their economies, or the rules are in inherently skewed to keep these nations in disadvantageous positions as evidenced in their struggle to remain economically afloat despite huge resources and corresponding trade in them. Effort is thus made hereunder to consider and analyse some of those rules against the backdrop of their influence on the realisation of the economic independence of Nigeria.

4.5.1 Most Favoured Nation (MFN) and the National Treatment Principles

In line with its professed object of trade liberalization through the removal of trade barriers and the establishment of the multinational trading system, the General Agreement on Tariff and Trade as merged with the World Trade Organisation Treaty Of 1994, hereinafter called the WTO/GATT, upheld the well antiquated, important and renowned principles of

international trade, namely, the Most Favoured Nation Principle (MFN) and the national treatment principle (NT).[205] The former rule is between trading partners to the effect that if a state grants a favour or trade concession to one state in WTO/GATT system, then same favour must be extended to all and sundry members of the treaty equally[206]. Such favour, may take the form of lower tariff or customs duty on one of the other state's products or similar favour.[207] For its importance, the very Article 1 of the GATT 1994 spells out the principle to the effect that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product of any other member." Exceptions have however been made to accommodate favourable treatment between members in custom unions like Free Trade Area in the likes of ECOWAS or NAFTA, and the use of trade barriers to counter products unfairly traded from specific countries.[208]

On the other hand, the NT principles are directed at domestic vis-à-vis imported goods from a contracting state party.[209] It is to the effect that the importing state shall not treat goods produced within its borders by its domestic companies any better than it would goods imported from the other country; hence the term "national treatment" which in essence means to treat others as she would her nationals[210] (be they goods, services or corporations). Note that a condition precedent for the application of the principle is the entry of the imported product into

[205] Pam, A.A.(2010) Anti-dumping and Counter-veiling Measures and Developing Countries: Recent Developments. *Nigerian Current Law Review.p.*43
[206] Ibid.
[207] Ibid.p.44
[208] Ibid.
[209] Ibid.
[210] Ibid.

the domestic market and not before. Therefore, charging customs duty at the port does not constitute a violation.[211] Article III of the GATT 1994 establishes the principle as follows:

> 1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products and internal quantitative regulations requiring the mixture, processing or proportions, should not be applied to imported or domestic products in specified amounts or proportion, should not be applied or imported so as to afford protection to domestic production.

Paragraph 2 of the same Article goes on to clarify the intendment of paragraph 1 in the following words:

> 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or any other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

The watchword in the foregoing provisions is principally "like product" which implies, as established in *Asbestors* case[212] and the *Japan taxes on Alcoholic Beverages* Case[213], that the products (domestic and imported) must be similar in all material terms for the rule to apply.[214] Although these longstanding twin trade principles have been applauded as enhancing trade liberalisation and promoting fair trade[215], a more critical consideration reveals that they are not always in the interest of developing economies like Nigeria as they have been held to serve as

[211] Ibid.
[212] WT/D5135/AB/R. Available at www.docs.wto.org. Accessed on 25th May, 2018, at 00: 40 hours.
[213] WT/D8/AB/R. Ibid.
[214] Pam, A.A., Op. Cit.
[215] Ogbonna, J.I.(2012) *Legal Analysis of the Application of Articles I and III of the GATT 1994 on the Economic Development of ECOWAS Member States.* A PhD Thesis(unpublished), Brunel Law School, Brunel University, London.p.1.

"lynch-pins of economic development" of especially developing countries, Nigeria inclusive.[216] It has specifically been argued that "MFN is used to deny access to the developing countries by exposing them to stiff but unequal competitive conditions and the NT to deny national governments the policy space to protect and promote national industries, employment and economic growth".[217] It should be noted that reference to the denial of "policy space" to governments by the WTO/GATTS system implies an impediment to the sovereign right to make policies friendly to the internal economic well being of a state which translates in turn to an impairment to the realization of the economic self-determination and leaves states in perpetual dependency even on what policies to be made to govern their economies.

In addition to the relegation of the development centered approach to the implementation of the two principles of the GATT as espoused by Part IV of the 1964 GATT, the real bane of the principles lies in the treatment of unequals as equals by applying the same rules as between developed industrialized economies and the less developed economies of, for instance, West Africa, whose economies' mainstays are trade in primary goods with negligible share of world trade markets.[218] And whereas a section of opinion has validated the view that developing countries like Nigeria stand no chance of deriving benefit of their trades without having the MFN obligation that has been taken advantage of by developed economies strengthened, a more plausible approach voices the need for "total transformation, a bottom-top approach leading to a new GATT, that would not serve the interest of (developed) countries".[219] The current reality however remains that "the GATT was not created with developing countries in mind: they lack

[216] Ibid.
[217] Ibid.
[218] Ibid.p.316
[219] Ibid.330

the economic size or power for it (the GATT) to provide them great leverage".[220] Not surprisingly thus, notwithstanding its economic might and industry, China declined to join the WTO/GATT system until as recent as 11th December, 2011,[221] by which time it had already developed from within a competitive export-based economy. In contrast, just over a month after its independence, Nigeria joined the GATT treaty on 18th November, 1960 and has been a member of the WTO since 1995.[222] In any case, in the face of the WTO's dispute settlement mechanism's failure to enforce compliance save through reciprocity measures (tit for tat), developing countries lack the wherewithal to retaliate for instance when multinational corporations are "putting local industries out of business".[223]

4.5.2 Anti-Dumping and Subsidies

In Chapter 2, attempt has been made to make clarification concerning the conceptual intricacies surrounding the concept of anti-dumping and subsidies. It is thus not intended at this stage to delve further into those issues save to relate them and the role they play as trade principles in the realization or otherwise of the economic independence or stability of the Nigerian state. It is worthy of recollection that "dumping occurs when goods are exported at a price less than their normal value….or sold at less than production cost"[224] at the importing market. The implication is that domestic production of like product would be negatively affected and impaired thereby causing injury to the domestic economy. International trade laws do not in essence prohibit dumping *per se*, but come up with measures by Article II of the GATT to provide and allow for the imposition by the injured economy of counter-veiling duties to offset

[220] Ibid.p.341
[221] www.wto.org/english/thewto_e/countries_e/china_e.htm. Accessed on 1st June, 2018, 23: 21 hours.
[222] www.wto.org/english/thewto_e/countries_e/nigeria_e.htm. Accessed on 1st June, 2018, at 23 40 hours.
[223] Ogbonna, J.I. Op. Cit.p.342
[224] Pam, A.A., Op. Cit. P.48

the effect of the dumping as a part of tariff-based non-trade barrier mechanisms.[225] These mechanisms allow the importing state to impose a custom duty sufficient enough to defray the differential gap in price between exporting and importing market.

A practice hitherto in the exclusive preserve of developed economies of US, Canada and Austria, the use of anti dumping has become rampant with developing nations since the formation of the WTO in 1995 even though some economists view them as "instruments of protectionism and (misallocation) of resources".[226] This encouraged the developed economies to use the anti-dumping and countervailing measures as a ploy to prevent new competitors from entering the market they dominate by initiation of anti-dumping complaints however baseless which linger for years to the detriment of the new entrant.[227] What this means is that, due to the effect of anti-dumping measures certain markets have been perpetually closed against developing countries howsoever they wish to penetrate and the production of certain goods capable of turning around the fortunes of developing countries like Nigerian has been eternally foreclosed against them to the monopoly of industrialised world.

Conversely, while the efforts of developing countries to break into the domestic markets of industrialised economies is being intently warded off by the latter through the filing of flimsy claims of dumping which frustratingly took forever to resolve, the developing economies particularly Nigeria's, are grappling with large scale dumping from the industrialised economies that are "undermining serious efforts of the Federal governments to support local manufacturers and service providers to competitively grow the economy through integration to global value-

[225] Ibid.
[226] Ibid.p.51
[227] Ibid.p.82

chain in rules–based global economy".[228] One of the factors that hinder Nigeria's ability to tackle dumping or counter same is the dearth of the institutions and technical know-how to track and determine injurious products flooding its market. For this reason, Nigeria through its Nigeria Office for Trade Negotiations (NOTN) in Switzerland had to enlist the service of a Geneva-based law firm as recently as January, 2018, to "support the drafting of Nigeria's trade remedy law as well prepare a legal brief on the rationale and requirements for the legislation, which will effectively stop dumping on the Nigerian market".[229] Note again, the Government's reliance on a foreign legal firm for its policy formulation, another form of economic subordination.

On their part, subsidies, more elaborately conceptualized in Chapter 2, have been defined as "a payment by a government to a firm or household that consumes a commodity.[230] Subsidies are not in themselves inherently undesirable all the time, save when and where they distort markets and impede competition.[231] In its harmful form, a subsidy enables a company to sell its products at lower price than normal. In this sense, subsidy resembles dumping save that subsidy emanates from government to a private company, while dumping is by private entity on its products.[232] Governments thus use subsidy as a strategy to strengthen their economies and competitiveness.[233]

Whereas Articles VI and XVI of the GATT 1994 deal with subsidies summarily, detailed rules have been provided under the Agreement On Subsidiary and Countervailing Measures, SCM Agreement, on when to and when not to provide subsidies and the available countervailing

[228] Suzan Nwachukwu. "Nigeria Signs Agreement to Improve Trade Policy Agreements". *Leadership Newspapers.* First Column, page 10 , Wednesday 10th January, 2018.
[229] Ibid.
[230] Onuh, P.I.(2015) *An Examination of International Trade Agreements: Issues and Challenges for Nigeria*. A PhD Thesis (unpublished)School of Postgraduate Studies, Ahmadu Bello University, Zaria.p.37
[231] Ibid.
[232] Pam, A.A., Op. Cit.p.62
[233] Ibid.

measures to be imposed by a member in the event of wrong subsidy by another member state.[234] The SCM Agreement also establishes a Committee charged with surveillance of subsidy and consideration of notifications of such practices by members.[235] Like in the case of dumping, a state is permitted by SCM Agreement to impose a duty on subsidised imported goods with the aim of defraying its effect or closing the price gap created thereby.

As stated, a major feature of subsidies is the existence of allowable and non-allowable subsidies over which countervailing measures can be taken, and this is where the problem arises for developing economic like Nigeria. For instance, whereas subsidies for agriculture, development diversification and industry upgrading are prohibited and actionable, subsidies mostly preferred by the industrialized countries are allowed in the form of research, regional development and environmental standards.[236] Instructively however, the former class of subsidies prohibited (agriculture, industry diversification, *et cetera)* are what the developing countries need to catapult their economies into growth and competition with the rest of the world.

The implication of the above is that chances of nations like Nigeria breaking into the elite economic class are slimmer as their market access is foreclosed in many fronts. This is not helped by the income disparity between the developed and developing economies such that the former possess the resources to grant an across the board subsidy, which is allowed, and also impose counter-veiling measures with less pains to their economies and markets. Even if the developing economies are willing or have the resources to so do, they are constrained from doing so by the rules they subscribed to within taking into account their weak bargaining power and

[234] Ibid.
[235] Ibid.p.64
[236] Ibid.p.80

primitive industrial levels. It is thus still a matter of treating of unequals as equals with the attendant consequences.

A case in point to underscore the plight and less favourable conditions of developing countries vis-à-vis developed economies, is the *US-subsidies on Upland Cotton*.[237] In that case, Brazil boldly made a complaint to the WTO Dispute Settlement Body to the effect that the United States had granted favours to its cotton farmers in the nature of marketing loans, user marketing (step 2) payments, production flexibility contracts payment, among others, which Brazil argued amounted to subsidisation of its farmers by the United States. These acts were said to be detrimental to Brazil and other developing economies in that the latter's products were rendered unattractive in the international market. This act violated the Agreement on Agriculture and the SCM Agreement. At the proceedings, other affected countries mainly of Africa: Burkina Faso, Mali, Chad and Benin Republic, supported Brazilian submission based on the negative effect they too suffered consequent upon the US's action.

Although ultimately a verdict was returned in Brazil's and others' favour and US directed to rescind subsidization, the latter blatantly ignored the verdict and declined compliance and persisted in its subsidy programme despite losing an appeal on the issue. The US was in the long run only to succumb after a compliance hearing and upon Brazil's threat seeking to be allowed to counter the US by suspending her own certain obligations under the TRIPS and/or GATT.[238] Commenting on the twists and turns of the case, an international trade scholar has this to say:

> It is doubtful whether based entirely on rule of law any of the Fifteen West African countries within ECOWAS, without the resources of Brazil or indeed all of them put together, would have had the resources to muster a credible threat that would have made the United States change her trade policy.[239]

[237] DS267/46. Available at www.wto.org/cases_e/ds267_e. Accessed on 25th May, 2018, at 19: 19 hours.
[238] Ogbonna, J.I., Op. Cit.p.230
[239] Ibid.p.231

In other words, the situation was only salvaged for the benefit of all concerned when Brazil stamped its feet and asserted its economic self-determination by a threat of partially opting out of the GATT system. As the multilateral trade system is principally dependent upon retaliatory measures as remedies for infractions, this brings to the fore the necessity for cooperation by weaker nations like Nigeria in negotiating trade and collectively warding off the disproportionate influence of developed nations. The wind of globalization further makes cohesion between weaker sates not an option, but a lifeline. This reality has been summed up in the scholarly expose to the effect that "the emerging global village is built on interdependence facilitated by the revolution on information technology… For Africa, interdependence is a creative response to the pressure of regional economy and the demand of international trade or commerce".[240] This sense of collectivism should be extended to all dealings arising out of the multilateral trade system. Also the instrumentality of the new Africa Continent-wide Free Trade Area (AfCTA) currently in the offing, provides a glimmer of hope and the possibility of having a viable platform on which Nigeria and other African nations can negotiate or renegotiate certain trade rules that might be militating against their economic independence.

4.5.3 Other Trade and Investment Constraints on Nigeria's Economic Self-determination

Other bottlenecks and constraints do exist in many other aspects of the laws and regulations governing world trade and investment in addition to the ones surveyed above. For instance, concerns have been raised on the constraining effect of the Trade Related Intellectual Property Agreement (TRIPS) on even the rights of developing countries to access medicine under the pretext of intellectual property rights. [241] It has been surmised that for all intent and

[240] Agom, A.(2008)"Harmonisation of Business Laws in Africa: A Gist of the Ohada Treaty and the Nigerian Commercial Law". *A.B.U.J.P.L.L.* Volume 1, Number 2.p.47.
[241] Onuh, P.I., Op. Cit.p.148

purposes, the TRIPS agreement was created to serve the interest of multinational corporations. It has thus been posited:

> The regime for TRIMS, TRIPS and services apparently coincide with interest of the multinational corporations which are the major service providers and exporters of capital and technology in the world. In all of these, the needs of the developing countries are continuously ignored to the extent that even much needed technologies may no longer be available at affordable cost.
>
> It is no surprise then that this is one of the areas which give rise to most of the conflict between developed and developing nations as witnessed most recently at Cancun, Mexico.[242]

What this means is that even in areas of technology transfer that can be the propeller to economic growth and self-reliance, developing nations are constrained in accessing them under the auspicial of intellectual property protection.

Other areas of disadvantage to Nigerian state's economic self-determination in investment practices include the position of the applicable law and standard of compensation in the aftermath of expropriation. Save that in line with the requirement of capital exporting countries, its validity depends on its being for public interest and non-discriminatory[243] whereas from the perspectives of host state it is inherent usually based on statutory or constitutional allowances given, but invariably subject to judicial review.[244] This sovereign manifestation is increasingly being eroded and replaced by the so-called international standard.[245] One reason that informs such erosion of the state's economic sovereignty is the acceptance to jettison internal judicial standards on the matter and through the signing of bilateral agreements with capital exporting developed countries.[246]

[242] Ibid.p.145
[243] Muchlinski, P.T., Op. Cit.p.503
[244] Ibid.p.502
[245] Ibid.p.503
[246] Ibid.

CHAPTER FIVE

GLOBAL FINANCIAL SYSTEM VIS-À-VIS NIGERIA'S ECONOMIC SELF DETERMINATION

5.1 Introduction

In the previous chapters, we have discussed trade and investment as the two major activities that constitute and drive the mechanism called economy which is a key variable in this work. Also discussed are other components of trade and investment that combine to form the fulcrum of a state's economy. Ultimately however, all these make a tangible sense and transform from the realm of abstraction only when translated into concrete monetary terms and only then would the volume, extent and quality and quantity of all activities and resources, be decipherable. In other words, the quantum of a state's resources, proceeds from trade and investments will ultimately be determined by how much it generates in dollars or other currencies. Here thus comes the medium of money which serves as the yardstick by which not only quantum of economic activities is gauged, but also the measurement of its production and distribution within a state in terms of the gross domestic product (GDP) and per capita income. In the end therefore, economic self-determination question will only boil down to whether Nigeria reasonably controls its financial structures, which comprises of her monetary and fiscal fortunes, for itself and by itself through its laws and policies.

Firstly, to understand monetary policy and its role in the economic independence of a state, one needs to come to terms with what money connotes and why monetary policy. By definition therefore, money refers to anything people generally accept as a medium of payment or in exchange for other things.[1] This broad conceptualization of money is informed by the

[1] James Robertson(2012) *The History of Money.* Accessed at www.jamesrobertson.com.p.2. Accessed on12th April, 2018, 16: 59 hours.

fluidity of the term and the variety of objects or mediums that can be and have been used to serve the function of what we know today as money from pre-historic times to the present. With its genesis rooted in the human's inborn desire to, in communal setting, exchange what he owned for what he did not, barter became the first manifestation of money in prehistoric term; but money which could take any form based on mutual want by both parties.[2] As societies expanded and became complex, bartering became outdated since exchange now took place between multiple persons(not just two) with diverse specialization and differing needs that are liable to be exchanged. Hence, objects were introduced including food items like wheat and barley, and later cowries shell, bronze and copper since about 1660 BC in China and Africa.[3] Then came gold and silver from around 600 BC in Greece and dominated the currency scene up until the Middle Ages.[4]

By the 13th Century, with the expansion of inter-trade in Europe and the introduction of banking consequent upon the convergence of various European nations' armies for the Crusades, paper money, perhaps copied from China who had used same since about 3000 BC, flourished in assisting merchants to pay for goods overseas without the burden of having to carry a load of gold and silver.[5] Such banknotes were in the nature of a "promise to pay" the holder and were invariably tied to an amount of gold or silver stated on its face and ultimately redeemable from the issuer.[6] At that time, the paper itself was not the money, but rather the amount of gold or silver it carried on its face. Therefore any banknote that was not tied to a concrete value (like gold) "represents nothing, and is therefore a cheat upon somebody".[7]

[2] Ibid.
[3] Ibid.
[4] Ibid.p.8
[5] Ibid.
[6] Ibid.
[7] Ibid.p.9

With its establishment in 1694, the Bank of England became the very first government-owned bank to issue banknotes and lend currency to both governments and private citizens.[8] It became the first central bank in the world regulating money supply whose role (and that of similar central banks) became more critical in the aftermath of several bursts that happened to world economy up to and including the 1930s Great Depression which was partly due to oversupply of money in the form of banknotes not backed by any tangible value.[9] When subsequently in 1971, the nations of the world followed the footsteps of the United States (to whose dollar they pegged their currencies) and entirely abandoned gold standard leaving their currencies floating against each other in the endless sea of paper money supply, monetary and fiscal policies prescribed by the central banks or borrowed from the Bretton Woods institution became a matter of survival for the fragile and delicate economies they governed which lacked any tangible foothold.

Against the backdrop of the foregoing normative and utilitarian status of money and its place in the orderly existence of all societies, states do interfere to regulate the inflow, outflow, quality, value and transferability of money by way of currencies issued by their central banks. This is by way of monetary policy which refers to measures put in place by central banks of states in order to achieve certain economic objectives through the control of money supply.[10] The main goal of monetary policies is to curb inflation which left unchecked has the effect of negatively stunting the state's balance of payment as well as causing general instability in the state's macroeconomic environment.[11] With effective and well developed money and financial

[8] Ibid.p.10
[9] Ibid.p.18
[10] Abata, M.A.(2012) Fiscal/Monetary Policy and Economic Growth in Nigeria: A Theoretical Exploration. *International Journal of Academic Research in Economics and Management Sciences.* Volume 1, No. 5.p.7. Available at www.hrmars.com. Accessed on 12th April, 2018, at 09: 19 hours.
[11] Ibid.p.78

markets in place, deliberate adjustment in monetary variables influences the mobility of many other variables in the economy.[12]

In general, monetary policy can take the form of the control of the quantity of money in circulation, interest rate and the functioning of the credit market and by extension, the control of the banking sector.[13] The main objective of the stated measures is ensuring that money supply and money value correspond with the level of economic activities and thus avoid inflation with its attendant consequences of bastardizing the state's currency and the economy at large.[14] Other important objectives of monetary policy includes price stability, maintenance of balance of payments, output growth and employment generation as well as, in the long-run, sustainable development.[15] The stated objectives can only be achieved within a conducive economic environment, viable institutional framework, and more importantly, the right mix of the policy instruments used.[16]

On the other hand, fiscal policy as an instrument directly flowing from the government refers to deliberate actions of the latter in the area of taxation, public spending and borrowing with a view to stimulate economic activities in the polity to a certain targeted direction of, for instance, economic growth, employment generation and low level inflation.[17] The aim of fiscal policy is generally economic stabilization. For instance a government that increases her spending and lower interest rates tends to revive a receding economy, whereas low public spending and higher tax rates slow down economic boom.[18] Conversely, what is being witnessed today under Buhari administration of high government spending simultaneously with higher interest rate

[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Falade, O.E. and Folorunso, B.A.(2015) Fiscal and Monetary Policy Instruments and Economic Growth Sustainability in Nigeria. *American Journal of Economics.* Vol.5, No.6.p.587
[16] Ibid.
[17] Abata, M.A., Op. Cit.p.76
[18] Ibid.

lacks economic sense, is contradictory and thus an aberration. This is because, invariably taxes and interest are lowered to boost economic activities, so also government's increased spending. But when high government spending is combined with high tax increase, the benefit of the former would be decimated by the latter and the economy will stagnate.

In practical terms, fiscal policy entails the management of the economy by government through the guided use of its income and spending power in order to grow the overall economy.[19] This is for the most part achieved through the medium of government budget which outlines the government's revenue, expenditure and borrowing plan, with the ultimate goal of stabilizing the economic environment in sync with monetary policy.[20] It is to be noted that both monetary and fiscal policies work complementarily in sustaining the economy and promoting its growth. For instance, economic expansion engendered by monetary policy necessarily translates to increase in tax for the government, which tax the latter then put back into the economy through the provision of infrastructure and other social services.[21]

On the extent of their respective roles on a state's economy, both monetary and fiscal policies have been said to play a key role that is almost on equal measure, but depending on the level of advancement of the economy and the state's development. For instance, although monetary policies have been said to play more important role in promoting the advancement of the economies of developed states, a mixture of both is considered indispensable for the progress of developing economy like Nigeria's.[22] Whatever the case, of importance to this work is the fact that monetary and fiscal policies are tools used by a state to monitor and control its economy as

[19] Ibid.p.77
[20] Ibid.
[21] Flade, O.E., Op. Cit.p.577
[22] Ibid.p.588

part of her sovereign manifestation. Economic self-determination will therefore only be a mirage without control over those policies.

In conclusion, it has been found that in addition to its positive influence on the size of a country's GDP and by extension per capital income, a right mix of both fiscal and monetary policy, drive both nominal and real economic growth in the polity in the long run.[23] In Nigeria however, a consistent disharmony between fiscal and monetary policies over the years, has been attributed to the perennial lackluster performance of the economy despite various economic reforms undertaken over the years.[24] The extent to which these policies are homegrown or foreign prescription and the extent to which they converge or diverge in achieving a self reliant and self controlled economy as envisaged by section 16 (1) (a) of the 1999 Constitution is examined below.

5.2 Nigeria's Domestic Legal Framework on Monetary and Fiscal Policies

In keeping with the contemporary international financial practice, Nigeria has evolved an array of legal regime to govern the ever-complex monetary and fiscal operations in the nation. Prominent of these laws are studied below.

5.2.1 The Central Bank of Nigeria (Establishment) Act[25]

In addition to the establishment of the Central Bank of Nigeria by the provisions of section 1 (1) of Act, one of the most important provisions it contains is the one relating to the objectives of the bank itself. Section 2 of the Act outlines the objects in these words:

> The principal objectives of the Bank shall be to-
> (a) Ensure monetary and price stability;
> (b) Issue legal tender currency in Nigeria;
> (c) Maintain external reserves to safeguard the international value of the legal tender currency;

[23] Falade, O.E., Op. Cit.p593
[24] Abata, M.A. Op. Cit.p.84
[25] Central Bank of Nigeria Act, Cap C4, Volume 1, Laws of the Federation of Nigeria.

(d) promote a sound financial system in Nigeria; and
(e) Act as banker and provide economic and financial advice to the federal government.

In essence, the effect of the provisions of section is to confer upon the Bank the power to formulate, design and implement the state's monetary policy. This is particularly as regards paragraph (a) of the section on ensuring monetary and price stability, two major drivers of monetary policies earlier on alluded to. In fact all the five outlined objectives are intertwined and have to do with monetary control and management through policy instruments of the Central Bank of Nigeria.

This role of monetary control of the Central Bank of Nigeria has been judicially recognized by the Supreme Court of Nigeria in the case of *Central Bank of Nigeria vs. Ukpong*[26] where the apex Court held as follows:

> Section 2 of the Central Bank Act states that the purpose of establishing the Central Bank of Nigeria generally is for the overall control and administration of the monetary and banking policies of the Federal Government. All other sections of the Act, read with clear sight and focus, are geared towards the realization of those objectives.

Directly complimentary and related to its monetary policy section 45(1) of the Act vests, the Central Bank the authority to:

> (a) maintain at all times in the form of cash reserves with the bank, at its office, a sum equal to prescribed ratio of the bank's deposit liabilities;
> (b) hold a minimum amount specified liquid assets which shall be expressed as a ratio of deposit liabilities of the Bank; and
> (c) maintain as special deposit with the Bank at its Head Office a percentage of the Bank's deposit liabilities or percentage of an increase or absolute increase in such deposit liabilities over an amount outstanding on a date, and for a period as shall be specified by the bank.

[26] (2007) All FWLR (pt. 357) 954

The above provision which also has the judicial blessing of the Supreme Court in *Omega Bank (Nig) Plc vs. O.D.C Ltd*.[27], is rooted in the prevailing reality of the modern economy which is principally dependent on, and by and large run by, the banking sector. Thus, any laxity in policy intervention on the operations of the banking sector may lead to catastrophic collapse in the sector which in turn translates to a collapse, or burst, of the entire economy. A recent example is the economic meltdown of 2008 in the United States whose ripple effect was painfully felt globally and which started with just the collapse of Lehman Brothers, a bank in America[28]. This is because all the major Nigerian banks and even including the Central Banks itself have large deposits in the American banks and are largely insured by western insurance firms. Ultimately therefore, Nigeria's economic self determination should mean its effective control of its monetary and by extension, banking sector for itself and by itself.

5.2.2 The Fiscal Responsibility Act

Recognizing the importance and place of fiscal discipline and economic stability of the nation, in 2007 Nigeria enacted the Fiscal Responsibility Act with the following objectives as set out in its preamble thus:

> An act to provide for prudent management of the Nation's resources, ensure Long-Term Macro-Economic stability of the national economy, secure greater accountability and transparency in fiscal operations within the Medium Term Fiscal Policy Framework, and the establishment of the Fiscal Responsibility Commission to ensure the promotion and enforcement of the Nation's Economic objectives; and for related matters.

The Act sets out to achieve its mandate through the setting of criteria for expenditure, taxation and debt procurement as rules-based processes based on transparency, objective analysis

[27] (2002) 16 NWLR (pt. 794) 485

[28] www.economist.com/schools-brief/2013/09/07/crash-course. Published 7th September, 2013. Accessed on 30th May, 2018, 18 06 hours.

of viability and consultation.[29] Section 1 (1) of the Act sets up the Fiscal Responsibility Commission (the Commission). Section 3 charges the Commission with the task of monitoring and enforcing compliance with the Act and promoting international best practices in fiscal matters, among other functions.

To curb uncontrolled expenditure which hitherto characterized governments at all levels thereby occasioning perennial budget deficit, the Act introduced a Medium Term Expenditure Framework for the Federation which comprises a condensed projected expenditure for the next three financial years.[30] The Framework shall contain the macro-economic objectives of the government for the period; fiscal strategy; revenue and expenditure framework; debt statement comprising its significance and measures to reduce same and a statement on modalities in place to prevent the crystallization of such debt liabilities.[31]

Still on expenditure control, budgetary measures have been introduced to govern the annual budgets which are themselves tailored to the Medium Term Framework as a matter of legal obligation.[32] In this vein, in addition to other documents that shall accompany any annual budget, a Fiscal Target Appendix setting out target inflation rate, target fiscal account balance, Fiscal Risk Appendix (which includes measures to offset the risk), and any other development target deemed appropriate must respectively accompany the budget estimates.[33] To achieve nation-wide fiscal uniformity, States and Local Governments are enjoined to adopt and design their annual budget along the line of Part III of the Act above briefly outlined.[34]

[29] Section 3(1)(a)-(e), Fiscal Responsibility Act, Op. Cit.
[30] Ibid. Section 11.
[31]Ibid. Section 41(1)(a).
[32]Ibid. Section 18(1) and (2).
[33] Ibid.Section 19(a)-)f).
[34]Ibid. Section 20.

In further harmonization of the fiscal profile of the nation, government-owned corporations are mandated to prepare and submit annual budget estimates to the Minister, including surpluses, which the latter then forwards to the National Assembly.[35] To minimize the risk of sliding into deficit during implementation segment of the annual budget, the Federal Government is obligated to draw up an Annual Cash Plan ahead of the coming financial year which shall set out monthly projected cash flows which would be subsequently harmonized with actual cash flow.[36] Disbursement schedule is thus designed by the Minister accordingly.[37] Virement shall therefore be strictly according to the schedule and deviation can only be allowable in special circumstances upon a request by the Minister to the National Assembly.[38]

As regards debt, the Act has limited borrowing power of the Government only to those low interests, concessional loans aimed at financing capital projects and human development. Even then the GDP to debt ratio is to be maintained at sustainable level based on the prescription of the National Assembly regarding what constitutes acceptable ratio.[39] Borrowing by governments at all levels has also been regularized and conditioned upon a duly passed appropriation law and also for a project that must be capital in nature.[40] This is in addition to placing a cap on the allowable amount borrowable, quarterly verification of compliance with the limits by the Commission, and the maintenance of a reliable public database by the Debt Management Office, of both internal and external debt profile of public entities.[41]

[35] Ibid. Section 22(1) and (2).
[36] Ibid. Section 21(1) and (2).
[37] Ibid. Section 6.
[38] Ibid. Section 27.
[39] Ibid. Section 41(1)(b), ibid.
[40] Ibid. Section 44(1)(a)-(b).
[41] Ibid. Section 44(3), (4) and (5).

5.2.3 Nigeria Sovereign Investment Authority Act [42]

Another important piece of legislation that possesses a direct bearing on and intercourse with Nigeria's monetary and fiscal policies is the NSIA enacted in the year 2011. The principal objective of the Act as spelt out in its preamble is the establishment of the Sovereign Investment Authority with the responsibility to receive, manage and invest a specified portion of the revenues of all tiers of government in the Federation for a long-term investment in portfolio assets as a contingency fund to fall back on upon the effluxion of Nigeria's petroleum assets. Established by section1 of the Act, the Authority is also imbued with power to (a) build a savings base for the Nigerian people (b) enhance the development of Nigerian infrastructure; (c) provide stabilization support in times of economic stress; and (d) carry out such other matters as may be related to the above objectives.[43] It has the initial take off funding of one billion United States dollars based on a percentage contribution of all tiers of government proportionate to their allocation from the Federation Account.[44] The authority is to create three ring-fenced funds, namely the Future Generation Fund, Nigeria Infrastructure Fund and the Stabilization Fund for which investment, reimbursement would be made aimed at the long term achievement of the objective set for each of the funds as signified by its name.[45]

With the exception of distribution of un-invested part of profit generated to the contributing federating units in proportion to their actual contribution to the Fund,[46] all generated revenues are to be reinvested in the Future Generations, Infrastructure and the Stabilization Funds respectively.[47] In respect of the former Fund, a provision is made for the

[42] Nigerian Sovereign Investment Authority Act
[43] Ibid. Section 3.
[44] Ibid. Section 29(1) and (2).
[45] Ibid. Section 4(a)-(c)
[46] Ibid. Section 35(1) and (2).
[47] Ibid. Sections 39 to 47.

utilization of the assets of the Fund in stabilizing the national economy upon satisfactory justification of the measure by the Minister.[48]

From the foregoing, one of the laudable objectives of the sovereign investment plans is curbing excessive expenditure without due regard to the short term effect on fiscal policy and long term effect on the economy's future. This is from the onset eclipsed by first, its pointed disregard for fiscal federalism, and more importantly its inherently foreign outlook, for being dollar based investment. The provision of section 5 (2) (a) of the Act which allows for investment of the Funds outside the shores of Nigeria worsen the capital flight situation and the nation's economic independence. For these reasons, the usefulness of this Fund is doubtful.

5.2.4 Foreign Exchange (Monitoring and Miscellaneous Provisions) Act[49]

Prior to the advent of SAP in 1985, there existed only a single foreign exchange in Nigeria. A second tier foreign exchange (privatized) market was subsequently introduced by an Act.[50] As an offshoot of the said law, the current Foreign Exchange Act was enacted. Considering the position of foreign exchange as being an important element of a state's fiscal and monetary policy, a discussion on the latter would be incomplete without a venture into the law governing exchange in foreign currency.

In keeping with the privatization drive of the SAP thus, section 51(1) of the Act established an autonomous foreign exchange market. The Central Bank of Nigeria is therefore invested with the power to issue out and set the regulations, guidelines and procedures for the conduct of transactions in the market and other related activities that concern its operation.[51]

[48] Ibid.Section 47(2)
[49] Cap F34, Volume 6, Laws of the Federation of Nigeria.
[50] Second-tier Foreign Exchange Market Act, Cap. 405, Laws of the Federation of Nigeria, 1990.
[51] Section 1(2), Foreign Exchange Act, Op. Cit.

By its provisions, this Act together with its precursor; the Second Tier Foreign Exchange Market Act, have the effect of abrogating the restrictive provisions of the Exchange Control Act,[52] which by its provisions since 1962 set limitations to dealings in foreign currency and maintained only a single state-based window through the Central Bank of Nigeria.[53] In the same vein, persons were prohibited from exporting from or importing into Nigeria any currency that is or was a legal tender in Nigeria and in case of export, or in any other territory.[54] Conversely, by the combined provisions of sections 12 and 13 of the Act, importation of foreign currency and their repatriation abroad has been permitted subject only to declaration of certain amount at the entry port. No approval is now required for doing that from any quarters.[55]

Coming to the crux of the legislation, which is opening of the economy, the Act permits investors to bring in and make investment in foreign currency transferrable into Nigeria through any acceptable means of transfer.[56] Also of further comfort to foreign investors is the provision of subsection (4) of section 15 of the Act which allows for the repatriation of part of the imported currency invested either in the form of profit or even the capital itself upon liquidation, net of only taxes. Paragraphs (a)-(c) of the subsection allow for free transfer of assets abroad concerning "(a) dividends or profits (net taxes) attributable to the investment; (b) payments in respect of loan servicing where foreign loan has been obtained; and (c) the remittance of proceeds (net of all taxes) and other obligations in the event of sale or liquidation of the enterprise or any interest attributable to the investment".

The liberalization of the foreign exchange as a form of monetary policy prescribed by the IMF through SAP, is geared towards catapulting the nation's economy into export-based and

[52] Cap. 113, Laws of the Federation of Nigeria, 1990
[53]Ibid. Section 3
[54] Ibid. Sections 16 and 17, ibid.
[55] Section 13, Foreign Exchange Act, op. Cit.
[56] Ibid. Section 15

global arena. On the flipside it has exposed same to the uncertain and turbulent waters of market forces in competition with stronger export-based industrialized economies of the world. The current forex policy of Buhari Administration is that of having a "floating naira", that is a naira whose value is anchored to the US Dollar and whose exchange rate is determined by market forces through the second-tier, i.e. bureau de change, markets. The current foreign exchange policy of Buhari Civilian administration is a semi-regulated naira partly floating with periodic intervention of the Central Bank, while the second-tier market governed by bureaus de change private operators largely dominate the market and determine exchange rate.[57]

5.3 International Financial Institutions and Economic Self-Determination

One of the hallmarks of a sovereign entity is the power to make policies that govern facets of various sectors of the nation-state. In the economic sector such policy-making includes the design, formulation, and implementation of fiscal and monetary policies like the ones we just discussed above. In the Nigerian case, section 16 (1) and (2) of the 1999 constitution (as amended) has spelt out the guidelines to be followed in the management of the nation's economy which include the fiscal and monetary policies and more. This practically places economic control within, and as one of the domestic and internal affairs of the state. Hence the enactment of the domestic legislation we just discussed above.

In practice however, the reality of the contemporary global economy is that more often the economic matters and control transcend the boundary of the nation-state. This occurs as a result of the interwoven nature of world economy and the economic interaction between states which characterizes modern life. In the beginning, bilateral and multilateral treaties governed such relationships between states, but by the end of the World War II, a new system emerged

[57] www.reuters.com/articles/nigeria-rates/update-2-floating-nigerian-currency, 22/01/2019. Accessed on the 22nd November, 2019 at 23: 00 hour.

bringing with it certain institutions that are globally charged with the responsibility of coordinating international monetary and financial system thereby taking over by multilateral treaty some of the functions and powers reserved for states. These institutions refer to the International Monetary Fund (IMF) and the World Bank and other global institutions that they gave birth to, collectively called international financial institutions.

5.3.1 The International Monetary Fund (IMF)

The idea of having a global mechanism to stabilize world markets began to be mooted as a result of the Great Depression of the 1930s which had the effect of deepening instability in the world currency markets and the contraction of international trade.[58] This led to the convening of the United Nations Monetary and Financial Conference in 1944 at the Bretton Woods in the United States, at where the world's top economic and monetary technocrats, 44 in all including John Keynes of Britain and others from all major world economies then, gathered to draw up plan for the establishment of the IMF and the World Bank.[59] By July 1944, the 44 participating states[60] had signed the Final Act establishing both the IMF and the World Bank, although the Act was to come into effect the following year, 1945.[61] Less than a year after independence, Nigeria subscribed to the IMF Treaty and joined the Fund on the 30th of March, 1961.[62]

The main purpose of the IMF as contained in its Articles of Agreement and which apply up till today are the promotion of international monetary cooperation through a permanent institution that provides the machinery for consultation and collaboration in international

[58] The Levin Institute(2018)*International Monetary Fund and World Bank.* The State University of New York.p.2. available at www.globalization101.org. Accessed on 20th April, 2018. 23: 40 hours.
[59] Ibid.p.3
[60] Belgium, Bolivia, Canada, China, Columbia, Czechoslovakia, Egypt, Ethiopia, France, Greece, Honduras, Iceland, India, Iraq, Luxembourg, Netherlands, Norway, Philippines, South Africa, United Kingdom, United States, Yugoslavia, Dominican Republic, Ecuador, Guatemala, Paraguay, Iran, Chile, Mexico, Peru, Costa Rica, Poland, Brazil, Uruguay, Cuba, El Salvador, Nicaragua, Panama, Denmark, and Venezuela. Source: www.imf.org. Accessed on 4th December, 2019, at 23: 30 hours.
[61] Ibid.
[62] www.imf.org/nigeria. Accessed on 4th May, 2018, 21: 08 hours.

monetary problems; facilitation of the expansion and balanced growth of international trade, and contributing to the promotion and maintenance of high levels of employment and real income and the development of productive resources of all members as primary objective of economic policy; the promotion of exchange stability by maintaining orderly exchange arrangement and avoiding competitive exchange depreciation, and assisting the establishment of multilateral payment system in respect of current transactions between members as well as the elimination of foreign exchange restrictions that hamper the growth of world trade.[63] The Fund is also expected to give confidence to members by making its general resources temporarily available to members under adequate safeguards thereby providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international economy; in the process thus to shorten the duration and lessen the degree of disequilibrium in the international balance of payments of members.

Organizationally, each of the current 189 members of the Fund has a representative in the IMF's Board of Governors which meets once per annum to discuss and take decisions on major issues.[64] The day to day management of the affairs of the Fund is conducted by an Executive Board of 34 persons with eight permanent members from the United States, Britain, Japan, Germany, France, China, Russia and Saudi Arabia for their political and economic stature in the world and by virtue of their shareholding in the Fund.[65] Other 16 directors are elected on rotational basis and shared along the world regions on a two-year term basis.[66]

[63] The Levin Institute, Op. Cit.p.5
[64] Ibid.
[65] Ibid.
[66] Ibid.

The IMF achieves and carries out her mandates using three broad mechanisms of surveillance, financial assistance and technical assistance.[67] Through its surveillance mechanism, the Fund dispatches its economists to analyze the country's economic situation, particularly the fiscal, monetary and exchange rate policies and general and social policy such as pension system.[68] Upon the receipt of a country's analysis, IMF discusses same, forms on opinion and forwards same to the country concerned for necessary action/adjustment.[69] Such is also published in the Fund's Public Information Notice (PIN).[70]

In the area of financial assistance, this is the central activity undertaken by the IMF in relation to the national treasuries of its members by shoring same up in the event of balance of payment problems.[71] The assistance however, is not as a matter of course as the recipient would have to pre-agree through a "letter of intent" to make some adjustments to its fiscal and monetary policies according to the dictates of the Fund,[72] in clear derogation from the receiving state's sovereign economic status and interference in its domestic offers. A similar scenario did play out in Nigeria when the latter first accepted the SAP from IMF. It is aptly captured in these words:

> …with SAP in Nigeria there is no more pretence about national economic independence, as we have become prisoners of national debt foreign dictation and manipulation by the World Bank and IMF, the International Monetary Fund (IMF). Also the London and Paris clubs of creditors have become brazen, most frequent, insistent, arrogant and persuasive. And the people, whose quality of life has thereby been grievously eroded, look on in powerless anger.[73]

[67] Ibid.p.6
[68] Ibid.
[69] Ibid.p.7
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Nwoke, C.(1996) "Nigeria's Quest for Economic Reform and Recovery, 1981-1994". *Nigerian Forum, Lagos. NIIA Journal.* Volume 17, Nos. 7-8.p.124

Despite all the above concerns, countries continue to subscribe to IMF loans and other prescriptions, often against their better judgments.[74] To ensure the implementation of the recommended reforms, IMF loans are given in phases and repayment periods are usually shorter periods not only to discourage overreliance on the Fund's financial assistance, but also as an incentive for lending to states by private banks.[75] IMF loan typology ranges from standby arrangement loans for short term problem extended facility for three to four years to deal with "structural" economic problems occasioned by poor economic planning history, poverty reduction, low interest facility to poor countries, supplemental reserve facility, contingent credit lines to forestall crises waves from becoming widespread and emergency assistance for countries in a state of military conflict.[76]

IMF's Technical Assistance comes in the form of training governments in fiscal and monetary policies, tax policy and regulatory procedures, among other.[77] This they do through training programmes to government officials both at home and at the IMF Institution in Washington, DC.[78] Besides the three mechanisms, IMF deploys other various programmes the sole aim of which is management of the global financial system to ensure stability.[79]

Despite all the above activities, there is almost universal suspicion and disapproval towards IMF and its modalities. This disaffection is not merely borne out of its intrusive meddling in the internal economic affairs of particularly developing states but also due to its ruthless pursuit of the agenda, the so called Washington Consensus. This in essence translates to western idea of economic development through market liberalization, privatization, fiscal

[74] Levin Institute, op. Cit.p.7
[75] Ibid.
[76] Ibid.
[77] Ibid.p.8
[78] Ibid.
[79] Ibid.

austerity and free trade.[80] Getting its name from the IMF's headquarters in Washington DC where it was manufactured, the Consensus came about in the wake of the collapse of the Soviet Union and is built on the assumption of the universality and invincibility of western economic arrangements outlined above that promoted the development of the western industrialized society as against communist-societies.[81] But critics have dismissed the usual IMF conditionalities in promoting the Consensus as going outside the purview of ensuring loan repayment to being a policy tool of manipulation of the borrowing nations.[82] This was exemplified by IMF's meddling into legislative function of some of its debtor states as a condition for further tranche advancement on already granted loans such that-

> the IMF insists that the payment of the tranche depends on the adoption of a new labour law. Without going into the economic feasibility of this request, it is obvious that with this the IMF takes over the legislative function from the parliament (the people). The IMF is not satisfied with collecting interest on the borrowed property, but it also tends to model the internal political relations in the state…[83]

Further, the conditionalities do not take into account the unique circumstances and characteristics of the borrower-state as they promote market fundamentalism in blind adherence to privatization at a rapid pace and the discouragement of public scrutiny and stifling transparency.[84]

5.3.2 The World Bank

Established as the International Bank for Reconstruction and Development (IBRD), contemporaneously with the IMF and by the same treaty,[85] the World Bank, had the initial

[80] Ibid.
[81] Ibid.
[82] Ibid.p.9
[83] Savanovic, A., Op. Cit.p.1029
[84] Levin Institute, Op. Cit.
[85] Ibid.p.11

purpose of rebuilding Europe after World War II.[86] This purpose was later expanded to the provision of low interest loans, interest free credits and grants to developing countries.[87] Additionally, in dealing with the private sector, the Bank provides funding, insurance and dispute resolution. All these factors are performed by the bank itself or through any of its later created organs that collectively are known today as the World Bank Group.[88] These comprise of the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral International Guarantee Agency (MIGA), and International Centre for the settlement of Investment disputes (ICSID).[89] These are part and parcel of international finance institutions conglomeration that run the global financial system.

Similar to the IMF, the World Bank is governed by a Board of Governors consisting of one representative from each member state and decisions are made based on the weighted voting right of each member having regard to the state's predetermined annual contribution to the bank's shareholding.[90] With highest shareholding in the bank, the United States has greater leverage in the bank's decision making organ, which albeit, operates based on consensus between all members.[91] Also as in the case of the IMF, day to day management is overseen by an Executive Body of 24 directors on election basis, with five permanent seats reserved for the United States, Japan, Britain, Germany and France.[92] Also headquartered in Washington DC, the

[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Ibid.p.12

Bank has six regional operations in Africa, East Asia and Pacific, Europe and Central Asia, Latin America and the Caribbean, Middle-East and North Africa and South Asia.[93]

As a *modus operandi*, the World Bank issues loan for two broad purposes, namely, investment loans for projects of social and economic development of the recipient, and secondly adjustment loans to support reforms to government policies.[94] Either of these is conditioned upon the Bank's approval of the investment plan and schedule for the project and repayment of the loan.[95] The far-reaching and usually stifling conditionalities imposed by the World Bank together with its intent of promoting the Washington Consensus at all cost similar to the IMF, have earned the Bank a reputation of being an agent of neo-capitalism and an anti-poor institution.[96] Other grounds for the growing suspicion of the Bank include its nonchalant attitude towards environmental concerns in the pursuit of its objects, turning a blind eye to the plight of indigenous peoples in executing their counter-funded development projects and encouraging the acquisition of unsustainable debt level by especially sub-Saharan African countries a times higher than their combined Gross National Products (GNP), per capita.[97]

Nevertheless, despite the criticism of their methods and the circumspection with which they are dealt with especially by developing countries, the IMF and the World Bank plus the latter's off-springs, IDA, et al, have as international financial institutions, played a key role in the wave of economic globalization and international financial management.[98] The general concern has however remain that these institutions are no respecters of states economic sovereignty by virtue of their intrusive policies on domestic affairs and for living off the developing economies'

[93] Ibid.
[94] Ibid.
[95] Ibid.p.13
[96] Ibid.p.16
[97] Ibid.
[98] Ibid.p.17

woes and dependency on their aids and other packages.[99] This predicament is aptly captured in the following words:

> The second form of the reduction of (economic) sovereignty of the nation-state is a consequence of the growing opportunities of international financial institutions, such as the IMF, WB, and WTO, to impose rules of conduct on governments of sovereign states. This, *eu ipso* implies the reduction of sovereign will of the people.[100]

The contemporary dilemma of nationhood for particularly the developing countries is the submission to the dictates of international financial institutions at the expense of their economic self-determination in return for a stable place in the world's increasingly globalizing economy, or rejecting the institutions, affirming full fledge sovereignty and virtually going it alone in the uncertain terrain of world economy.

5.4 Globalization of Finance

One of the most noticeable transformations brought about by the above studied international financial institutions is the further acceleration and concretization of the wind of globalization of the world financial system, which had been in existence through global mobility of capital mainly through migration for hundreds of years before now.[101] Globalization in this context has therefore been defined "as the integration of a country's local financial system with international financial markets and institutions".[102] In this regard, the subscription into the IMF/World Bank system being the foremost global financial institutions, translates to admission into the global financial markets particularly if the indices of integration into global economy

[99] Ibid.p.18
[100] Savanovic, A., Op. Cit.p.1029
[101] Schmukler, S.L.(2004) *Benefits and Risks of Financial Globalisation for Developing Countries*.p.1. available at www.worldbank.org/research/bios/schmukler. Accessed on 28th April, 2018, at 17: 119 hours.
[102] Ibid.

namely, liberalization, cross-country capital movement and participation in international lending markets, are in place.[103]

Re-echoing and reaffirming the forgoing definition, other scholars see globalization in the financial sense as having association with the increased circulation and flow of capital across national boundaries.[104] This view proceeds to exemplify financial globalization as follows:

> An example of financial globalization is the increasing volumes of net capital inflows into developing countries: in the period 1970-1988 this volume has risen more than 20-fold in nominal terms, reaching an estimated US$255 billion in 1998, down from a record level of almost US$313 billion in the previous year.[105]

Nevertheless, critics have associated financial globalization with further effort at cementing and consolidation of the Washington Consensus discussed above which espouses economic liberalization, privatization and commercialization and other neo-liberal economic measure as the only sure way towards macro-economic stabilization.[106] It has however been argued that despite these measures and the integration of their economies into the global financial system, developing countries, Nigeria inclusive, have not recorded any significant gain and have continued to be in economic quandary.[107] China on the other hand, that had refused to be a major actor in international finance until as recent as 2016, has despite its socialist background become a leading economic power second only to the US in terms of export trade.

Therefore although it has been acknowledged that globalization of world finance has immense benefits that principally go to the developed world, the developing world's main benefits is the development of their financial system through more regulated and stable financial

[103] Ibid.
[104] Yamazawa, I.(*ed.*) (2000) Developing Economics in the Twenty First Century: The Challenges of Globalisation. Japan External Trade Organisation of Developing Economies.p.77
[105] Ibid.
[106] Akaagerger, I., Loc. Cit.p.197
[107] Ibid.

markets.[108] Another benefit of the financial globalization is the free flow of capital through new sources of borrowing in addition to domestic channels.[109] This is in addition to the improvement of the financial infrastructure which means transparency, competiveness and efficiency in the financial system among borrowers and lenders through the minimization of information asymmetry which leads to credit maximization.[110]

On the downside, financial globalization carries with it the risk of getting enmeshed in the occasional crises and ripple effect that visit the global financial system once in a while.[111] As participation in a global financial system implies opening the economy through liberalization, the state's financial system stands the double risk of investor sentiment both from within and without, making the economy vulnerable to such sentiments with their two-pronged sharpness.[112] Further, the economy becomes more susceptible to shocks due to its dependency on capital flow from external sources as any disruption in the flow spells doom to the state economy and domestic financial system.[113] Lastly and importantly, globally integrated developing financial markets are likely to encounter and get debilitated by the "contagion effect", which are shocks emanating across the seas and transmitted across countries.[114]

A typical example of such contagion effect on Nigeria's financial system happened in 2008 when a mortgage crisis in the United States sent shockwaves across the globe such that many Nigerians banks had to become bankrupt and liquidated and others bailed out by government.[115] Ten years after, the mess left behind by the crises is yet to be completely cleaned

[108] Schmukler, L.S. Op. Cit.p.2
[109] Ibid.p.6
[110] Ibid.p.7
[111] Ibid.p.8
[112] Ibid.
[113] Ibid.
[114] Ibid.p.9
[115] The Impact of the Global Financial Crisis on the Nigerian Economy. Published on the 28th November, 2013 at www.proshareng.com/news/nigeria%20Economy/21641. Accessed on 31st May, 2018, at 16: 40 hours.

up in Nigeria. One needs no further evidence of economic dependency occasioned by Nigeria's integration into the global financial system.

Within the premise that globalization in world finance is an irreversible force that has come to stay, solutions have been proffered that would serve as antidotes to its downside and insulate developing economies like Nigeria's from its intrinsic uncertainties. Against the backdrop that developing economies' vulnerability is aggravated by the relative structural deficiencies in their systems, ensuring sound macro-economic and financial fundamentals remain the key to weathering the occasioned storm in global financial system.[116] Sound fundamentals include little or no fiscal deficit and low public debt among others. Also asset-liability mismatch should be avoided.[117] It has also been posited that in view of the unfavourable disposition of the system towards developing countries' economic self determination by a perpetual debt burden that govern its operation, a gradualist approach to its wholesale entry should be adopted as against unrestrained liberalization.[118]

5.5 Dollarization and Global Finance

One of the most significant features of financial globalization is the dominance of the United States currency, the dollar, in all aspects and ramifications of the global economic and financial system. This might be informed by the dominant and prominent role played by the United States in the formation of the Bretton Woods institutions and by the largest stake it possesses in terms of shareholding in the IMF[119]. In any case, dollarization refers to an act of

[116] Schmukler, L.S. Op. Cit.17
[117] Ibid.
[118] Akaagerger, I., Op. Cit.p.198
[119] See www.imf.org/external/np/sec/memdir/members.aspx. Accessed on 31st May, 2017, at 19: 20 hours.

currency and asset substitution which happens when an alien authority adopts the US Dollar as its legal tender or official currency.[120]

In practice, dollarization can take the form of three stages of official, unofficial and semi official dollarization.[121] Whereas official dollarization occurs when a state by itself and as a deliberate policy adopts the dollar, or any foreign currency, as a legal tender in its own shores and thereby making its currency subsidiary thereto, unofficial or *de facto* dollarization, happens when the dollar or foreign currency is given a secondary status by virtue of which it circulates widely without the support of a government legislation or deliberate policy.[122] Note that although the dollar has come to dominate this kind of arrangements, other currencies can be made to play a similar role when adopted such as can be called eurorisation (using the euro) or randisation (using rand).[123]

On the other hand, in semi-official dollarization, the foreign currency or the dollar is used as a secondary legal tender, but with official backing through the states central bank which oversees tagging of prices against the foreign or local currency and regulates foreign licenced shops,[124] something akin to our legalized second tier market. This form of dollarization seems to be the model in Nigeria as not only does the Foreign Exchange Act allow dealing in foreign currencies in Nigeria, the dollar inclusive, but that the Central Bank Act allows for the maintenance of a dollar reserve while still maintaining that domestically only the naira remains a legal tender in the country. Also the Nigeria Sovereign Investment Authority Act mandates the earmarking of an initial one billion US dollars as a take off for its assigned activities.

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[120] Nkomazana, L.(2014) An Overview of the Economic Causes and Effect of Dollarisation: Case of Zimbabwe. *Mediterranean Journal of Social Sciences.* Volume 5, No. 7.p.70
[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] Ibid.

It is noteworthy that in the above conceptualized limited domestic sense, dollarization has been found to have positively affected super-inflation as in the case of Zimbabwe.[125] However, still in the limited domestic sense, dollarization has also been found to hamper the conduct of monetary policy.[126] Further, it engenders currency mismatches due to the impact of exchange rate volatility on foreign currency denominated liabilities.[127] In Nigeria, the existence of dollarization has been established by empirical data to have existed since the 1980s and to also have inflationary effect on the economy.[128] In an empirical research published in the Central Bank of Nigeria's Journal of Statistics, Oluyungbo, *et al* while highlighting the short-term benefits of dollarization during crises and waning confidence in the local currency, also proceeded to warn of the long term negative effect of "the loss of seigniorage revenue, the loss of monetary policy independence, and the loss of exchange rate instrument".[129] Seigniorage revenue refers to the profit realized by the authorities in issuing the currency.[130] For instance, the United States realizes hundreds of billion dollars annually as seigniorage for issuing the dollar for global transactions alone.[131] This is an amount bigger than the economies of many developing countries.

Specifically, it has been found that dollarization is widespread in Nigeria that the US dollar is used to pay for goods and services in luxury hotels, in high brow super-markets and shopping malls and in night clubs.[132] It is also common place to find multinational companies

[125] Nkomazana, L., Op. Cit.
[126] Alvarez-Plata, P. and Garcia-Herrero, A.(2007)To Dollarize or De-dollarize: Consequences for Monetary Policy. A Paper Prepared for the Asian Development Bank.p.20. Available www.ssrn.com/abstract=14. Accessed on 22nd May, 2018, at 15: 40 hours.
[127] Ibid.
[128] Oluyungbo, O.O. and Ajuwon, K.T.(2015) Dollarization, Inflation and Interest Rate in Nigeria. *CBN Journal of Applied Statistics.* Volume 6, No. 1(b).p.241.
[129] Ibid.p.242
[130] Ibid.
[131] James Robertson, Op. Cit.
[132] Oluyungbo, O.O., Op. Cit.p.242

that pay their employees in the dollar particularly in the oil and gas industry.[133] Dollars are even spent (sprayed) in parties and other ceremonies as a mark of social status.[134] The sum total implication of these (mis)uses of the US dollar is the occasioning of high inflation and uncontrolled interest rate.

More importantly, having established a correlation between dollarization, inflation and high interest rate in Nigeria, a causality has also been uncovered between same and negative implication on monetary policy management and financial stability.[135] The former implication has a bearing an economic self-determination as domestic policy formulation is one of the prerogative of a sovereign state. Yet, because the inflow of the dollar is beyond the state's control as regards quantity, its monetary policy management is thereby incapacitated for all practical purposes.[136] This in essence means only the issuer of the dollar (the United States) can effectively control its in and outflow with or outside its own economy.

Despite the repercussions of dollarization on the domestic national economy, such are negligible in scale when compared with the colossal domination of the dollar in the global financial stage since the 1920s.[137] By 1944 with the emergence of the Breton Woods institution, the US dollar consolidated its grief and dominance in the global economy such that by the year 2000, 71 percent of world currency reserve was held in the dollar.[138] From 1944 thus, the global economy as managed, controlled and coordinated by the IMF became principally tied to gold reserves (donated to IMF by the United States and others) and the US dollar.[139] And as most of

[133] Ibid.
[134] Ibid.
[135] Ibid.p.256
[136] Ibid.
[137] Rickards, J.(2012) *Currency Wars: The Making of the Next Global Crisis*. Penguin Group (USA) Inc. New York.p.228
[138] Ibid.p.227
[139] Ibid.p.78

the world national currencies are tied to the dollar (through their reserves),[140] this in effect means their currencies are indirectly anchored to gold, up until 1971 when the United States ditched the gold standard in favour of a floating dollar.[141] This essentially was in order to give the United States government the power, using what it called "quantitative easing", to print dollar notes at will without corresponding value stored in gold.[142] The reasoning behind this, though faulty, was that "the volume of world trade is rising far more quickly than the global supply of gold".[143] From then on, global economy came to be anchored on the goodwill, strong monetary system and perceived invincibility of the US, not on any tangible asset.

Although the US economy possesses unquestioned and undoubted prowess which rests on sound monetary system that is organized and workable, later events were to cast a doubt on the eternal durability of the dollar and the US economy at large. Many economic shocks and even recessions were recorded between 1944 through the 1970s, not the least was the 2008 global financial melt-down which sent shockwaves through the financial world including Nigeria.[144] This is because any stress to the US economy at home results in grave and debilitating consequences to all dollar-denominated economies around the world,[145] including Nigeria. An unfolding examples that as at June 2018 betrays the vulnerability of developing world economies to the dollar is the appreciation of the currency as a result of US's deliberate domestic policy to raise interest rates at home.[146] The implication is that, all dollar based foreign loans would appreciate and countries like Nigeria with billions of dollar external loans shall have

[140] Ibid.
[141] Ibid.p.86
[142] Ibid.p.235
[143] Ibid.p.83
[144] Ibid.p.169
[145] Ibid.p.11
[146] www.aljazeera.com/programmes/countingthecost/2018/06/emerging-debts-strong-dollar-troubles-developing-countries-180622194200677html. 23rd June, 2018. Accessed on 19th August, 2018, at 08: 52 hours.

to repay higher rates not only in servicing interest, but also on capital repayment.[147] Thus, should the US decide to raise the strength of the dollar by 100%, so shall the liabilities of such countries rise by the same percentage point. And in view of the unfolding trade war started by the US against many even developed countries of European Union (EU) and Canada and its embrace of unilateralism and protectionism under President Trump,[148] there is no basis to believe that one day such shifts in dollar policy cannot occur with devastating consequences on smaller dollar-dependant economies like Nigeria's.

Other countries like Turkey have come to this realization the hard way after economic sanctions by the United States have sent their economies spiraling downwards almost irretrievably. According to Turkish President, Erdogan, "we need to gradually end the monopoly of the dollar once and for all by using local and national currencies among us".[149] In line with that vision, as a first step, in September, 2018, Turkey entered into trade negotiations for arms purchase from Russia, itself hurt by US sanctions, without involving the dollar. The aim, according to Erdogan, was to establish economic independence by Turkey particularly in its defence industry.[150] In a similar fashion, faced with a devastated economy with annual inflation at over 1,000,000%, partly blamed also on US sanctions Venezuela, whose currency became virtually valueless at about 250,000 to one US dollar, reacted by creating a new currency called sovereign bolivar the value of which is pegged to the country's huge but mismanaged petroleum resources, for want of the dollar or any kind of currency reserve.[151] This was to enable the citizens pay for basic necessities of life in the face of total economic collapse and resultant mass

[147] Ibid.
[148] www.aljazeera.com/news/2018/03/fears-trade-war-trump-imposes-steel-tariffs-183091040. 9th March, 2018. accessed on the 19th August, 2018, at 10: 22 hours.
[149] www.aljazeera.com/news/2018/09/turkey-erdogan-denounces-dollar-acting-wildwolves-180902112548821.html, of 02/09/2018. Accessed on 2nd September, 2018.
[150] Ibid.
[151] www.inews.co.uk/news/world/venezuela-currency-crisis-inflation-lates-news-bolivar-sovereign, of 21st August, 2018. Accessed on 4th October, 2018, 19: 01 hours

exodus being experienced.[152] Although this measure by Venezuela is desperate and uncertain in efficacy, had they not possessed the mineral resources to fall back on, the chaos can only be imagined.

Partly due to the above realization, and partly due to other factors related to the political and economic dynamics of the contemporary world, economies have begun to move away from the dominance of the US by falling back on multiple reserve currencies including euro, German mark and Yuan and other currencies.[153] Even Nigeria had, around 2012, mooted the idea of diversifying its reserve to include the Chinese Yuan as a safety net.[154] This idea did not materialize in any significant way, but in its place a subtler mechanism ensued in May 2018 when Nigeria sealed a currency swap deal with China worth 720 billion naira or US$2.4 billion, a clear strategy of by-passing the usual intermediary status of the US dollar between Yuan and the naira.[155]

Surprisingly, the IMF itself made a move to find and float a replacement to the dollar in the form of what it calls Special Drawing Right (SDR) given to members in financial strait.[156] SDR has been referred to as "World money, controlled by the IMF, backed by nothing and printed at will".[157] This world currency is however, confronted by two daunting challenges: one, it is presumably not backed by any real asset or commodity and therefore its bubble is bound to burst sooner than later. Secondly, being a brain child of the IMF, it has to have the blessing of the United States whose preponderant voting power is enough to stop the scheme on its track at

[152] Ibid.
[153] Rickards, J. Op. Cit. p.221
[154] See www.cp-africa.com/2012/03/03/central-bank-of-nigeria-adds-500-million-in-chinese-yuan-to-its-reserves/amp. Accessed 31st May, a 2018., 22: 03 hours.
[155] See www.vanguardngr.com/2018/05/nigeria-china-seal-2-4bn-currency-swap-deal. Published on 4th May, 2018. Accessed on 31st May, 2018, 15:50 hours.
[156] Rickard, J. Op. Cit.p.229
[157] Ibid.

whims and without challenge.[158] This is the more likely scenario as the US, like other super economies, will go to any length in perpetuating the dollar dominance as form of global power dynamics, unless there is some hidden benefit in doing the reverse. Nothing buttresses this reality than the reported statement ascribed to former French President, Nicholas Sarkozy, who reportedly said, concerning the French currency, the franc, that "France cannot allow these former colonies to create their own currencies, to have total control over their central banks. If this happens, it will be a disaster for the public treasury which can lead France to the rank of 20th World Economic power".[159]

It is evident from the foregoing that not only are the economies of developing countries like Nigeria tied down to the financial and monetary structures of the industrialized economies and vulnerable to their changes, but also the dream of economic self-determination or independence within and through the current system is but illusory. As periphery states, smaller economies like Nigeria can only successfully participate in the global economy by finding a place in the centre through preparation and religious adherence to the recommendations to be proffered. Such place shall not be given to them by law but they must grab and take it as China did in spite of all odds.

[158] Ibid.p.234
[159] See www.dakar24sn.com/nicolassarkozy-question-de-laisser-colonies-francaise-dafrique-leurs-monies. Accessed on 17th June, 2017, at 17: 45 hours.

CHAPTER SIX

SUMMARY AND CONCLUSION

6.1 Summary

From the onset, Chapter One introduces the research by exploring the background of the legal right of a state to exercise control over its economic fortunes which has been affirmed and codified as the right to economic self-determination which was given birth to by the general right to self-determination under international law. International legal regimes from the UN Charter of 1945, the twin rights covenants of 1966 as well as regional treaties including the African Charter On Human and Peoples' Rights, have made clear provisions safeguarding the said right and its components. Domestically, section 16(1)(a) of the 1999 Constitution of Nigeria, as amended, is also a re–echo of international legislations in enjoining the state to control the economy in such a way as to ensure self-sufficiency, among other things.

In practice, the impact of the laws is however minimal as the story of Nigeria has been of economic dependency despite huge resources and the volume of trade and investment in them. In the latter sector, foreign enterprises have continued to dominate the scene and with it the economic soul of the nation. This disconnect between extant laws and practical result different from what is promised by the right to economic self-determination is of interest to this work and has been of interest and subject of several scholarly writings by authors, albeit not in the specific Nigerian context nor based on her experience, but principally upon the right's manifestations and how they fare upon scrutiny. From Starke,[1] Umozuruike[2], and Haugen's works, the emphasis range from the main object of the right being to achieve development, to freedom of choice in economic model adoptable and a state's exclusive right to natural resources free from external

[1] Starke, J.G., Op. Cit.p.143
[2] Umozuruike, U.O. Loc. Cit.p.131

influence.[3] And the lamentation has been that all are rarely achieved by developing economies. Several other scholars also including indigenous ones like Ladan, Onu and Akaagerger have advanced expository treatises that not only shed light on aspects of the right to economic self-determination, but also justify further research as this work undertakes.

In Chapter Two, technical concepts that have bearing with economic self-determination right examined by this work have been highlighted and discussed starting with the Economic Self-determination itself, Resources, Economic Sovereignty, Fiscal Federalism, Resource Control, some trade principles and rules in the form of National Treatment, Most Favoured Nation, anti-dumping and Subsidies. Other terms conceptualized also include Socialism, Capitalism and Internal Economic Self-determination.

Chapter Three is a detailed analysis of the various legal regimes that guarantee and provide for the right of economic self-determination both of states and peoples. These include international, regional and domestic legal regimes upon which, all and sundry, the right is founded in all its ramifications. For starters, Articles 1 (2) and 55 of the UN Charter has set the tone for the recognition and subsequent codification of not only the general self-determination right, but the specific recognition of economic self-determination which came through the coming into effect of the twin Covenants of 1966, namely, the ICCPR and ICESCR. Specifically, their common Articles 1 uphold self-determination as a right; but the ICESCR goes further by its Article 25 to isolate, emphasize, and codify the economic self-determination right for states and peoples alike. Other international instruments of like nature have also been studied in the first segment.

The second segment of this Chapter Three is an explication of the internal dimension of the right to economic self-determination for the various people and communities within Nigeria

[3] Haugen, H.M., Op. Cit.p.70

starting with the Constitution. It has b een discussed that this internal dimension boils down to fiscal federalism and resource control. Thus a survey of the Constitution highlights provisions relating thereto especially in the legislative lists that delineate fiscal powers between the units of government. Also the Land Use Act, Revenue Mobilisation, Allocation and Fiscal Commission Act, the Petroleum Act, and Mineral Resources Act have also been considered as forming the fulcrum upon which the internal economic self-determination of Nigerian Peoples is based.

Chapter Four traces the basis of exchanges that generate wealth amongst nations in the form of, principally, trade and investment. Even minerals and other resources that underlie developing states' economic bases become economic reality only upon investments that convert them to useful valuable goods and services; which investment usually comes externally. Bearing in mind international and regional law safeguards that confer upon states unqualified control of and benefits from their trade and investments within their borders, Nigeria has not optimally benefited, nor sufficiently controlled its trade and investment fortunes. This anomaly has been traced to the substance and sometimes even the forms of the law and other instruments that govern the economic relationship making it hard to realize much economic benefit much less, self-determination.

Thus, Nigeria's various experiments with trade and investment models including the SAP have been studied. So have some key investment issues in important economic sectors like the steel and petroleum through the Ajaokuta and NNPC experiences and their impact on Nigeria's economic independence. The Chapter culminates with a detailed analysis of how international trade principles subscribed by Nigeria play a role in perpetuating the country in economic dependency and slowed progress. These rules include the, national treatment and most favoured nation's rule, and the anti-dumping and subsidy rules. Although these rules are helpful and

harmless to the industrialized economies of the developed world, their wholesale application by Nigeria retards her growth and prevents or slows the industrialization process of Nigeria's developing economy.

Chapter Five explores how Nigeria's financial independence as guaranteed by international right to economic self-determination fare in the face of globalised financial system of the world. This financial independence starts with robust domestic legislations that control money supply and public spending to the control of inflation in line with economic activities in the state.[4] Those legislations include those establishing institutions like the Central Bank of Nigeria that controls monetary matters similar to the Central Bank Act;[5] laws that control public spending like the Fiscal Responsibility Act, and Sovereign Investment Authority Act; and laws that govern foreign exchange like the Foreign Exchange (Monitoring and Miscellaneous provisions) Act.[6] It is thus presupposed, that with these and other laws Nigeria should have the control of its monetary and fiscal arrangement which defines her financial independence and affirm her economic sovereignty and self-determination. This is however not the case, as Nigeria's financial sector is tied intrinsically to global financial system and institutions which erodes much of the claim to independence or self-determination it may have. Such institutions include the IMF, World Bank and others, as well as a currency system tied to the dollar that come to define the system and makes virtually all economies appendages to the United States'.

6.2 Findings

In line with our research questions which are tied to the objectives of this work on the sufficiency of the legal regime on economic self determination, this work has the following findings:

[4] Abata, M.A. Op. . Cit.p.7
[5] Cap. C4, Volume 1, Laws of the Federation of Nigeria.
[6] Cap. F34, Volume 6, Laws of the Federation of Nigeria, 1990.

1. That in the external sense of economic self-determination between states, there indeed exist sufficient international, regional and domestic legislations that cater for all aspects of economic self-determination as provided for by law or expounded by legal scholars. From the foundational provisions of the United Nation's Charter, to the more detailed provisions of the twin covenants of 1966, the ICCPR and ICESCR, international legislation has provided for and safeguarded the right both for the benefit of states and peoples alike. Other instruments of international nature like the Charter of Economic Rights and Duties of States have also come to reiterate the right. In the same vein, instruments like the UN Declaration on the Right to Development (UNDRD), have come to highlight the impracticality of the realization of their objective of overall development through new international economic order without the realization of the economic self-determination right of all states. At regional level, the African Charter on Human and Peoples Rights is found to be a reenactment of international legislation with additional African flavor. All these have received judicial blessings by the case of *Western Sahara* of the ICJ regarding external economic self-determination between states.

   However, legal provisions are found to be inadequate in respect of internal aspects of economic self-determination between states and their peoples within. Though general provisions exist in Article 1 paragraph 2 of the ICESCR and Articles 20 of the African Charter on human and peoples right and the UN Declaration on the Permanent Sovereignty over Natural Resources.

2. In the area of internal realisation of the right to economic self-determination for peoples within the Nigerian state, it has been found that this boils down to fiscal federalism and resource control by federating units and domestic legislations do exist in Nigeria in a limited way in the constitution and elsewhere that recognize a limited version of internal economic self-determination. For instance, the 1999 Constitution of Nigeria (as amended) permits fiscal powers to constituent units within the limit of the legislative lists, while retaining central control of the economy including taxation, fiscal and monetary power. In this regard, supranational courts like ECOWAS Community Court have been found to possess the requisite power to enforce the guaranteed rights where domestic courts for some reasons are unable to.
3. Thirdly it has been found in respect of the current international trade and investment legal regime and other aspects of international economic law, that in practice much of the rules and practices are unfavourable to the realization of the full complement of the rights guaranteed by the right to economic self-determination in the external sense. Aspects of economic law takes away with left hand what economic self-determination gives with the right hand to developing states like Nigeria. The untamed colossal economic power of multinational corporations, skewed investment contracts, monopolized dispute resolution system and stifling trade rules are all pointers to that anomaly.
4. Fourthly, on financial independence it has been found that although domestic laws exist in line with the commandment of the Constitution to ensure fiscal and monetary control by the state for national wellbeing and self sufficiency, this exist

only in abstraction. In reality, the direction of the fiscal and monetary policies follow the dictates of external bodies to which Nigeria is a member, including the IMF, World Bank and their subsidiaries. Having subscribed to the IMF's direction, Nigeria agrees to allow access and external dictation on how it controls and manages its economy generally. Monetarily also, our currency is pegged to the US dollar and our reserve and foreign exchange dominated by it with the attendant economic dependency and vulnerability that comes with it. There can thus be no claim of financial or fiscal independence, *stricto sensu*. All these are however incidental to the overpowering wind of financial globalization that no country can reasonably escape.

6.3 Recommendations

In line with the above findings, the following corresponding recommendations are hereby proferred to address the issues raised:

1. On the finding that sufficient legal framework does exist that guarantees the right to economic self determination in its external sense as between states, recommendation is hereby made for the muttering of the courage and summoning of the political will by states to take advantage of the legal regime and assert same in state to state relations and economic dealings. Relative inadequacy of international legal regime on internal aspect of economic self-determination for peoples within states, can be tackled through the United Nations coming up with specific and detailed instrument guiding, delineating and governing internal economic self-determination and what it entails for peoples, keeping in mind state sovereignty.

2. Secondly on the application of the internal economic self-determination within Nigerian state for its peoples, in the face of the limitations of international law provisions, it is recommended that realization must be in tandem with the constitution and the Nigerian state's overriding sovereignty. In turn, efforts should be made to make constitutional amendments to accommodate wider fiscal federalism and greater resource control(through increased derivation share) without tampering with national unity or undermining national sovereignty. All guaranteed rights can be enforced through the domestic courts, or where impracticable, through supranational courts like the ECOWAS Community Court.

3. On the disadvantageous economic law provisions and practices in international trade, investment and other aspects that stifle developing nations' economic self-determination, it is recommended that a legally knowledgeable manpower and viable institutions should be kept with the ability to detect, counter, re-negotiate and make relevant prior reservations in economic treaties before, during and after accent. This technical knowledge also enables states to make reservation in treaties on the applications of suspicious provisions. But better still, for their weak bargaining power consequent upon their smaller, weaker economies, countries like Nigeria should consider entering economic treaties en-block of several states preferably through economic unions like ECOWAS or AfCFTA for greater impact and leverage and self-preservation.

4. Regarding the subservience of Nigeria's financial system to the dictates of international financial institutions and the latter's intrusion and prescriptions which have proved not to always be effective, it is recommended that political courage must be summoned to resist same by maintaining strong domestic monetary and fiscal fundamentals from within.

That China was able to wax strong without active equity participation in the IMF until 2016 is evidence that with strong patriotic will, such feat is achievable. In the same token, the risky effect of dollarization of Nigerian economy can also be defrayed by preserving real asset to peg our currency on and on which to fall back on in the event of a global catastrophic economic bust that cannot be ruled out.

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