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The Law Of Economic Sovereignty And Foreign Investment In Nigeria: The Way Forward*

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ABSTRACT
The role of foreign investment in stimulating economic growth is one of the most controversial issues in any discourse about the development of any nation. It is incontestable that foreign investment enables host countries to achieve investment that exceeds their own domestic saving and enhances capital formation. This is because the potential beneficial impact of foreign investment on output growth is not only confined to the short run but extends to the long term economic benefit of the State. It is however pertinent to observe that foreign investment seems to undermine the economic sovereignty of the host nation as most times the foreign investors are usually multinational corporations which are headquartered in the developed countries and which operate through subsidiaries in the host countries. And most of the decisions taken by these corporations are usually predicated on what is perceived to best advance the global interest of the corporations and their home countries rather than the interest of their foreign affiliates or the host country.[1] Thus, the national and individual interests of the foreign investor are foremost to him. This study had examined the interplay between the need for foreign investment and the necessity to preserve the economic sovereignty of Nigeria.
Keywords: Foreign Investment, Economic Sovereignty, Nigeria, Way Forward

1. INTRODUCTION

Since the early 1980s, the changing international economic and political environment has led to a renewed interest in the relative merits of foreign investments as a means through which developing or less developed countries can achieve a reasonable and sustainable rate of economic growth.[2] It is not in doubt that many developing countries have faced increasingly formidable economic difficulties including rising inflations, snowballing debts as well as falling growth rate which have made them inclined to the belief that more resources in form of aid and investments are needed to resume the impetus of economic growth and to eradicate poverty in their respective domains. It is pertinent to observe that, beset by their own

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[1] D A Guobadia 'Issues in Facilitating Foreign Investment for National Development in Nigeria" (1998) *2 MPJFIL,* p. 52.

[2] P Tsai, 'Determinant of Foreign Investment and its Impact on Economic Growth' (1994) *Journal of Economic Development Vol 19 (1),* p. 137; K Jansen, 'Foreign Direct Investment, Information Technology and Economic Growth In the MENA Region' (1995) *World Development*, 23(2), pp.193-210; M Agosin & R Mayer, 'Foreign Investment in Developing Countries: Does it Crowd in Domestic Investment? (2000) *UNCTAD Paper,* No.146.

economic problems, the 'aid fatigue' syndrome has grown steadily in most developed countries with the result that economic consideration became a primary feature of any finance resource transferred by such countries to the developing countries. This quest for economic gain thus became the principal motive for investment by the developed countries in the economics of developing countries. The former have thus emphasized the importance of a free market system and private capital flows as a means to facilitating these foreign investments. It is against this backdrop, that many development economists and officials of international economic agencies believe that Foreign Direct Investment (FDI) is a more reliable financial source for developing countries.[3]

It cannot be gainsaid that foreign investment has played a leading role in the development of many economies in Africa including Nigeria.[4] Foreign investors are mostly invited by transition and developing countries in the hope that through this international activity, the positive experience from developed countries will come to their domestic economies.[5] There are several studies that have been conducted on the implication of FDI for host countries especially on economic growth. The widespread belief among researchers and policymakers is that foreign investment enhances the productivity of host countries and promotes development.[6] There are however a few researchers that have highlighted the fact that foreign investment may have negative implication on the economic and political powers of the state.[7] It is not in doubt that the internationalization of economic policies across the world by the World Trade Organisation and international financial institutions like the World Bank and International Monetary Fund (IMF) have continued to shape and determine the place of developing countries in this era of globalization.[8] This has necessitated a paradigm shift from anarchism to trade liberalization, which encourages developing countries to open their borders from the obstacles and hindrances that hitherto prevented movement of goods, services and people into their territories.[9] At the heart of the said inter movement of goods, services and people between different countries, lies foreign investment with its attendant positive and negative implications.[10] This brings to the fore the necessity for the supposed beneficial impact of foreign investment especially to developing countries to be weighed against the need for the maintenance of their economic and political sovereignty by those nations.

With an increasing pace of globalization that resulted partly from liberalization of trade and exchange rate regimes, the volume of foreign investment has increased throughout the world. In the last few decades, foreign investment has been growing at a pace that far exceeds the volume of international trade. The massive increase in global foreign investment is credited with creating an unsurpassed prosperity in some parts of the world especially in developing countries. However, the level of foreign investment flows to

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[3]IMF, Private Investment in Developing Countries (Washington DC: IMF, 1985) cited in P Tsai, *Ibid*, p. 138; V N Balasubramanyam, 'Incentives and Discentives for Foreign Investment in less Developed Countries' in B Balassa & H Giersch eds, *Economic Incentives,* (UK: Macmillan Publishers Ltd, 1986) cited in P Tsai, *Ibid.*

[4]S Antwi *et al*, 'Impact of Foreign Direct Investment on Economic Growth in Empirical Evidence from Ghana' (2013) Vol 3 (1) *International Journal of Academic Research in Accounting, Finance and Managerial Sciences.* Pp18-25 at 18.

[5]V A Odozi, 'An Overview of Foreign Investment in Nigeria 1960-1995' (1995) *CBN Research Department Occasional Paper,* No.11, p. 41.

[6]V N Balasubramanyam *et al,* 'Foreign Direct Investment and Growth in EP and is Countries' (1996) *106 Economic Journal,* pp 92-105; L DeMello, 'Foreign Direct Investment Led Growth: Evidence from Time-Series and Panel Data (1999) *51 Oxford Economic Papers,* pp 133-151.

[7]J I Choe, 'Do Foreign Direct Investment and Gross Domestic Investment Promote Economic Growth?' (2003) *7(1) Review of Development Economics*, pp 44-57; K H Zhang, Does Foreign Direct Investment Promote Economic Growth? Evidence from East Asia and Latin America (2001) *19 (2) Contemporary Economic Policy,* pp 175-185.

[8]D Ologbenia, S A Ogunwa, 'Globalization and the Quest for Development in Nigeria' (2015) *American Journal of Social Science Research* Vol 1 (4), pp. 226-237 at 266.

[9]*Ibid*; S A Abba *et al,* 'Globalization and Nigeria's Quest for self Reliance and Political Sovereignty: Changing the Narratives (2015) *vil 4 (12) International Journal of Humanities and Social Science Invention,* pp. 1-8 at 1; A Akpuru-Aja, *Selected Themes in International Economic Relations: Understanding Trends of Globalization and Regionalization* (Enugu: Rhycee Kerex Publishers) p. 1.

[10]C Silvio & W Ariel, 'Foreign Direct Investment, Productivity, and Country Growth: An Overview' (2009) *Federal Reserve Bank of St. Louis Review, Vol. 91, (2).*

the developing countries has increased only moderately, despite a number of incentives being offered to foreign investors.[11] Foreign investment flow in Africa was in the past very small relative to other developing countries, even where political climate was favorable, partly because of the mismatch between development goals of the host countries and the goals of foreign investors.

It is against the foregoing background that this study sets out to critically examine the promotion of foreign investment in Nigeria as it relates to its implications on the nation's economic sovereignty. This is particular imperative given the current liberalization inclination of the nation as manifested by its privatization and commercialization policy which, according to general outcry, seems to pose a great treat to the powers of the government over economic activities in the state.

2. Statement of Problem

All law reforms involve changes. However, economic law reforms usually involve revolutionary changes in ownership and control of means of production and distribution of goods and services. Such revolutionary changes, especially when they relate to foreign intrusion into the ownership and control of investment in a State, usually have wide implications on the sovereignty of the State. Thus, it has been observed and rightly so that a necessary component of successful reforms is that the State should be armed with the necessary legal authority to bring under its control all the major players in the sector in which the reform took place.[12] Thus, in economic reform, the government should be armed with necessary legal authority to control investment especially when it involves foreigners. This is because poor economic reforms has the effect of leaving people with no way of earning a livelihood and may in the long run discourage investments whether local or foreign. Moreover, it may lead to lack of security of investments which in turn also discourages private persons, corporations and other foreign investors from investing in a State. Nigeria's economic history has witnessed numerous policies which were geared towards encouraging foreign investment and ultimately encouraging economic growth. While issues of investment did not seem to have been given any serious attention by government during the period immediately after independence, the post independent period[13] witnessed the indigenization policy which was geared towards empowering Nigerians to attain commanding height in the control and ownership of businesses in Nigeria. However, the country was forced between the late 1970s and the early 1980s to look for measures to stem the tide of economic down turn due largely to the sudden fall in the price of oil (the nation's life wire) and gross corruption and mismanagement. The mid 1980s witnessed the Structural Adjustment Programme which was followed by the era of guided liberalization or planned deregulation in the late 1980s and early 1990s.

The current policy thrust for attracting and promoting foreign investment in Nigeria is the liberalization policy which is characterized by the 'open access to investment for all'. In furtherance of this policy, government has privatized and/or commercialized most of its investments. This free market policy has no doubt encouraged and continued to encourage foreign participation in the Nigerian economy with its attendant gains. However, it is not also in doubt that an unrestricted access to the Nigerian economy by foreigners has serious implications on the nation's economic sovereignty and by extension of its political sovereignty. This is because foreign dominance of the economy of any country usually undermines the powers and authority of the State to control all that is within the state concerned and to control its resources. In order to avoid this situation, it is imperative that every State should, at all times endeavour to strike a balance between the need for foreign investment and the preservation and protection of its sovereignty. This would ensure that the economic or political powers of the State are not sacrificed at the altar of pecuniary necessities of the State. The balancing ratio, in this regard, needs to be reviewed over time and in line with the socio-economic and political realities in the state concerned. To provide this balance, an adequate legal and regulatory framework is imperative. A critical look at the current legal

[11] E Asiedu, 'Capital Controls and Foreign Direct Investment' (2003) *World Development,* 32(3), pp. 490-497.
[12] H A Amankwa, *The Legal Regime of Land in West Africa: Ghana and Nigeria* (Australia: Pacific Law Press, 1989) p. 130.
[13] 1970s to mid 1980s.

regime for foreign investment in Nigeria reveals that though it affords a convenient platform for foreign investors, it has serious negative implications on the nations' sovereignty. An investigation into the issue in question reveals that the seeming over liberalization of Nigeria's economy all in a bid to attract foreign participation in the nation's investment climate is the major factor for consideration. The extant Privatization and Commercialization policy as encapsulated in the Public Enterprise (Privatization and Commercialization) Act[14] is a key issue in this regard.

3. Meaning of Foreign Investment

Foreign investment has been defined as a transfer of funds or materials from one country (called the capital exporting country) to another (called the host country) in return for a direct or indirect participation in the earnings of that enterprise.[15] It is also said to involve the transfer of tangible assets from one country into another for the purpose of use in that country to generate wealth under the total or partial control of the owner of the assets.[16] As noted earlier, the regulation and exercise of authority over foreign investment within its national jurisdiction in accordance with its national objectives and priorities is an intrinsic component of every State's sovereignty. The concept of foreign investment has undergone a substantial extension in International Law from a specific concept of physical and financial outlay, it has come to cover all possible kinds of contribution by a foreigner or foreign entity to the economy of a home State including know-how and services and all but the most ephemeral economic relations between the State and the alien.[17] Guobadia[18] also views foreign investment as involving the transfer of a package of resources including capital, technology, management and marketing expertise; such resources usually having the effect of extending the production capabilities of the recipient country. In its contemporary structure, foreign investment consists mainly of foreign equity capital, the share of re-invested earnings of existing joint venture companies between foreign and indigenous investors, and net liabilities of these joint venture companies to their parent companies or other corporations[19].

Foreign investment is broadly categorized into two main types i.e. Foreign Direct Investment (FDI) and Portfolio Investment (PI). [20] Foreign Direct Investment may be defined as investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor, the investor's purpose being to have an effective voice in the management of the enterprise.[21] As Grahan and Krugman postulate[22], 'Foreign Direct Investment is formally defined as ownership of assets by foreign residents for purposes of controlling the use of those assets'. In contrast to FDI, portfolio investments are merely directed at earning dividends, interest, capital gains etc without participating in management.[23] In this connection section 32 of the Nigerian Investment Promotion Commission Act[24] provides that, '"Portfolio investment" means an investment in shares or other securities traded on the Nigerian Stock Exchange'. In portfolio investment, there is a divorce between management and control of the company and the share ownership in it.[25] It does not therefore involve the movement of personnel plants and

[14] Cap p. 38, LFN, 2004.

[15] *Encyclopaedia of Public International Law* (vol. 8) p. 246 quoted in M Sornarajah "The International Law on Foreign Investment (UK: Cambridge Grotius Publications, 1994) p. 4.

[16] M Sornarajah, *op cit.*

[17] See G Abi-Saab 'Permanent Sovereignty over National Resources and Economic Activities' in M Bedjaou, (ed) *International Law: Achievements and Prospects* (Nertherands: Martinus Nijhoff publishers, 1991) p. 604.

[18] D A Guobadia 'Issues in Facilitating Foreign Investment for National Development in Nigeria" (1998) *2 MPJFIL*, p. 39.

[19] See U J Ogwu, 'Foreign Investment and National Security', being the text of a paper presented at the 33rd Anniversary Conference of the Nigerian Society of International Law, Oct 2001.

[20] See Chapter 3.3 *infra*.

[21] See IMF Balance of Payments Manual (1980) para 408 cited in M Sornarajah *op cit*, p. 4.

[22] E Grahan and P Krugman, *Foreign direct investment in the United States* (US: Institute for International Economics,1991) p. 7 cited in M Sornarajah *Ibid.*

[23] Guobadia, *op cit.*

[24] Cap N47 LFN 2004 (as amended).

[25] Sornarajah, *op cit*, p. 4.

equipment of the investor. It is generally accepted that in portfolio investment, the investor takes upon himself the risk making such an investment. This is because his investment, which does not involve physical facilities can be pulled out anytime and transferred into other portfolio investment. The absence of the foreign investor's participation in the management of and control of the investment or the enterprise in which it is made, is therefore one major factor which distinguished portfolio investment from foreign direct investment.

4. Objectives of Foreign Investment

It is probably evident from the above discourse on the divergent theories, that foreign investment as a strategy for re-engineering economic development has an illustrious but controversial history. The controversy, as it were, revolves around the purpose, structure and effects of foreign investment in the economic transformation of the recipient country. The fray of contending forces notwithstanding, it is proper to acknowledge and situate foreign investment within the frame of its relevance and importance in modern day third world economy. As Ogwu asserts,[26] a growing recognition of the importance of direct foreign investment in the development process account for the considerable increase in the number of developing countries who have become receptive of it. This accounts for the increased shift in the developing countries' policies towards transnational companies (agents of direct foreign investment), away from the restraints and over regulation that characterized the early 1970s. Thus developing countries, emerging economies and countries in transition had begun to increasingly see foreign direct investment as a source of economic development, modernization and employment generation and have liberalized their foreign investment regimes to attract investment. From the preponderance of opinions and studies on the subject, the following have been specifically identified as the key objectives of foreign investment, viz the supply of foreign capital and finance, technology transfer and industrial development, access to plant and machinery as well as component parts and raw materials, employment creation, skilled personnel and human resources development, infrastructural development, access to foreign market etc.[27]

Supply of foreign capital/finance

Foreign investment has become widely recognized as an important source of private external finance for developing countries by the provision of scarce risk capital that are not domestically available or hard to come by. Thus, it leads to the generation of foreign exchange and capital not only through the funds and capital associated with the initial investment but also through the generation of foreign exchange earnings from expanded exports of foreign investment enterprises. Export oriented foreign capitalized corporations, thus earn for the host government scarce foreign exchange needed to meet the huge financial requirements for imports. The fear has, however been expressed,[28] that the capital brought in is often taken away under the guise of profit repatriation and payment for loans obtained from the international money market, while possibilities of this occurrence exist in some degree, the amount of capital repatriated cannot be too significant especially where there is an efficient regulatory regime to checkmate such occurrence.

Technology Transfer

Technology transfer and industrial development of the host country is perhaps the most important benefit of foreign investment where properly harnessed foreign investment serves as a means of transferring production technology, skills, innovative and technological capability particularly in sectors where such technology and skills are lacking domestically. The process of technology transfer can be in different forms, depending on the business or project in question, the relationship and agreement between the parties involved. Aside from the physical transfer of plants and machines, including their accessories, it could take the form of exporting already manufactured products incorporating such technology or

[26] U J Ogwu, *op cit*, p. 6.

[27] J A Aremu, 'Negotiating Foreign Direct Investment with Transnational Corporations in Nigeria' being the text of a paper delivered at the 33rd Annual Conference of the Nigerian Society of International Law held in Benin City October 4-6, 2001, p. 3-4.

[28] M Sornarajah, *op cit*, p.40.

exporting its patent through technology assistance contracts or licensing. It could also take the form of provision of opportunities to access plant, machinery, equipment and raw materials as well as component parts particularly when these resources are tied to intellectual property rights laws of the home countries of the foreign investors. Transfer of technology also involves the supply of advanced management, marketing production and organisational techniques which are very critical in the current era of globalization as well as assists in developing domestic entrepreneurial capabilities via joint-ventureship. It also leads to the dispersal industries in the host country especially to the relatively underdeveloped sections of the country as well as the strengthening of the national industrial base by developing lower levels of fabrication of essential industrial components.[29]

All these ultimately lead to enhanced industrial and enterprise development and economic growth of the host country. As noted earlier, the perception of transfer of technology as a benefit of foreign investment has been criticised especially by the proponents of the dependency theory.[30] The argument, as afore-mentioned, is that the technology that is brought in is usually out-dated or is so capital intensive and thus unsuitable for labour intensive production in developing countries. Thus, it is asserted that one major reason why a company moves out of its home state to invest in another country is because the product cycle for the goods it manufactures has been replaced by other goods incorporating newer technology.[31] While this argument may have some merit, there is no doubt that foreign investment influences growth by increasing total factor productivity and generally the efficiency of resource use in the recipient country through the technology that is usually brought in. Through the transnational network or systems, enterprises are often set up in recipient countries either as affiliated or through non equity arrangements involving the bringing in of technology which domestic firms also tap from. Technology transfers through foreign investment thus generate positive externalities in the hoist country.

Creation of Employment

One of the most essential objectives of foreign investment especially for developing countries is the creation of employment in the host country. Most developing countries are often bedevilled by the problem of unemployment due to low level technological and enterprise development as well as predominance of relatively unskilled workforce. The capacity of most developing countries to create employment for their ever increasing job seeker and young school leavers has often been very limited. Apart from lack of capital, most of these countries also lack the requisite technological know-how to create large companies or corporations with capacity to employ large number of people. The massive level of unemployment that results is itself recognised as a major contributory factor to many socio-political problems such as high crime rate, political violence and instability, poverty and overall low economic development. As foreign investment brings about increase in production facilities and the concomitant upgrading of facilities in other sectors such as transport, health, education, culture and tourism etc, huge employment opportunities are generated. Different kinds of jobs are created for both the skilled and unskilled workforce in the host country. The natural corollary of such increase in employment is the reduction of crime and other sources of societal tension and friction.

Infrastructural Development

Foreign investment is widely recognized as a major source of infrastructural development in host country. The infusion of foreign investment in any country usually brings about the development of both the human and material infrastructure in that country. The presence of foreign investment ensures that infrastructural facilities will be built as of necessity, either by the foreign investor or for the foreign investor by the host state.[32] For instance new roads are constructed water and air transport facilities are also upgraded to acceptable standards water resources are improved, electricity is also extended to areas hitherto without same especially where the foreign investment facilities are located etc schools, hospitals,

[29] J A Aremu, *op cit,* p. 4.
[30] See R Vernon, *op cit*, p. 81; M Sornarajah, *op cit*, p. 39-40.
[31] Ibid.
[32] M Sornarajah, *op cit*, p. 39.

residential and other accommodation are also provided. Although, these facilities, s some have contended,[33] are provided to serve the special needs of the foreign investors, their personnel and a few local elites who can afford to live according to the standards of the foreigners, the benefits and over-all impact of these facilities to the development of the host country cannot be debated.[34] Another component of infrastructural development relates to human resource development or human infrastructure. Foreign investment comes with the supply of advanced management, marketing, production and organisational techniques especially needed under the current globalization era.[35] Through the transfer of technology and the consequent generation of employment, the labour that is so employed will acquire new skills associated with the technology the is brought in. Skills in the management of large projects will therefore invariably be transferred to local personnel thereby upgrading their technical competence and know-how. This ensures that in the absence of foreign personnel, local substitutes could readily be available to sustain the high technology projects brought in through foreign investment.

Access to Foreign Market

Foreign investment has been described above as a means of transferring production technology, skills, innovative capacity, and organizational and managerial practices between locations. By boosting the overall domestic entrepreneurial and industrial capabilities via joint venture and other similar arrangements, foreign investment firms and enterprises act as a proxy for the hosts in accessing international markets. The major beneficiaries are domestic enterprises that are part of transnational systems (consisting of parent firms and affiliates) or that are directly linked to such systems through other equity or non-equity arrangements. The greater the supply and distribution links between the foreign affiliates and domestic firms, and the stronger the capabilities of domestic firms to capture spoilovers from the presence of and competition from foreign firms, the more access it has to international markets. Foreign investment therefore facilitates international trade integration to the benefit of the host country especially in this era of globalization.

5. Demerits of Foreign Investment

Much of the benefits of foreign investment outlined above derive from the classical economic theory on foreign investment. But as the proponents of the dependency theory have been quick to point out, foreign investment does have some potentially negative impacts especially on the host states. Indeed, proponents of the dependency theory insist that foreign investment will not bring about meaningful economic development.[36] It is said that there is not enough or any good faith on the part of the foreign investor as he simply milks the system for next to nothing while nothing commensurate is left by way of returns for the host country.[37] These criticisms therefore, need to be evaluated against the potential advantages of foreign investment discussed above. Accordingly, the major potential demerits of foreign investment have been identified as including (but not limited to) economic dependence, political intervention, loss of local capital/capital flight in distortions in the labour market, disequilibrium in balance of payments, threat to national security and socio-cultural values, etc. These features are examined briefly below:

Economic Dependence

Much of the concerns which have been expressed over the impact of foreign investment on host economies particularly in the developing countries centre on the fear of loss of economic sovereignty. As one writer observes,[38] the more dominant the proportion of such enterprises in a country's structure, of industries, the greater the tendency to feel concerned about possible loss of autonomy in the control of the economy. As the proponents of the dependency theory on foreign investment have identified most foreign

[33] *Ibid*, p. 40.
[34] Many parts of the oil-producing region in Nigeria have benefited from this type of infrastructural improvement due to the presence of the foreign companies in the region.
[35] J A Aremu, *op cit*, p.4.
[36] Sornarajah, *op. cit*, p. 43.
[37] D A Guobadia, *op cit*, p. 43.
[38] J U Ogwu, *op, cit* p, 16.

investment especially in the developing countries is made by multinational corporations which are headquartered in the developed countries and which operate through subsidiaries in the host countries.[39] The decisions of these corporations on which area to invest in a particular country, what produce in that country, where to source their inputs and who to sell their outputs to are based so much on the locational attractions of that country, vis-a-vis other countries, but mainly on what is perceived to best advance the global interest of the corporations and their home countries rather than the interest of their corporations and their home countries rather than the interest of their foreign affiliates or the host country.[40] As such, the national and individual interests of the foreign investor are foremost to him. given this pre-eminence of the profit factor, foreign investors usually concentrate to invest in major sectors and commanding heights of the economy of the host country (such as the oil industry in Nigeria) using their size to crowd out indigenous firms. In a bid to ensure the security of their investment, foreign investors also often insists o0n exercising some measure of control and management of the enterprise. As one scholar has observed,[41] Japanese investment in countries of Europe and America is marked by "the consistent objective of Japanese multinationals to own an uncontested majority of the shares in their foreign subsidiaries. Apart from conceding substantial ownership ratio and management authority over the enterprise to the foreign investor host countries also known introduce a lot of other incentives and reliefs to attract and retain these investments. Given this scenario multinational corporations exploit the situation to devise a global policy of running the multinational enterprises to their own greater interest and that of their countries. The home states therefore become the central economies of the world while the host states (especially the developing countries) become subservient or peripheral economies serving the interest of the home states. Through management control of the foreign investment, the foreign investors invariably and indirectly control the economy of the host country. Unless strict regulation and control is maintained by the host country, foreign investment tends to tie the economy of the host country the whim and caprice of the foreign investor and his home country.

However, most developing receptant countries lack the capacity to apply regulations or even execute balanced incentive measures. Most often, political pressure to relax regulations and for incentives to be higher than warranted are mounted by the foreign investor, coupled with the fact that administrative capabilities in the recipient countries are either not sufficient or too corrupt to implement and monitor regulatory and incentive policies effectively. As Ogwu opines,[42] it is a matter of public knowledge that a paramount objective of the Nigerian Enterprises Promotion Decree of 1977 is to reduce the ability of foreigners from controlling commanding heights" of the Nigerian economy, yet foreigners continued to have their ways in any projects participated in irrespective of their ownership structure. To avoid or reduce economic dependence, it becomes the responsibility of the host state to articulate and strive to execute a balanced foreign investment policy centering on ability to make appropriate interventions by government. Such policies or interventions should begin by identifying specific goals to be achieved within a given time frame and working assiduously towards attaining those goals. As Guobadia suggests,[43] if the goal, for example, is first to achieve a targeted reduction in unemployment over a specific time frame, the kind of industry to be encouraged at that point would be one that would utilize local labour. The attainment of subsequent goals can be predicated upon the success of the first. The success of America and Europe as hosts to Japanese foreign investment has been attributed to this kind of clear identification of national interests coupled with proper planning.[44] With the right kind of policy, planning and execution, a host country can derive the maximum benefit from foreign investment without losing its economic independence.

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[39] M Sornarajah, *op cit*, p. 43.
[40] D A Guobadia, *op cit*, p. 52.
[41] M Mason and D Encarnation (eds): Does Owenership Matter? Japanese Multinationals in Europe (Oxford Clarendon Press, 1994) p. xx cited in D A Guobadia *op cit*, p. 54.
[42] J U Ogwu, *op cit*. p. 19.
[43] D A Guobadia, *op cit*, p. 53.
[44] Ibid.

Political Interference

One of the strongest criticisms levelled against foreign investment is that it often renders the host State liable to political interference by the foreign investor or his home State. Because of the economic dependence of many recipient States, especially the developing countries on foreign investment, the foreign investor in a bid to protect their investment tend to exercise enormous political influence in the host States.[45] As Gilpin asserts,[46] the resulting integration of the foreign investor into the host economy makes his involvement in the internal economic and political affairs of the host State inevitable. There has been considerable literature on the alliance between the elites of developing societies and foreign investors resulting in repressive regimes and suppression of human rights to ensure the continued maintenance of regimes favourable to the foreign investors.[47] The multitude of trade and investment regulations put in place by recipient countries to promote foreign investment often result in the curbing of national sovereignty and provides the foreign investor the leeway to interfere in the political affairs of the host State. To avoid this situation, the authorities of the host state ought to balance their quest for foreign investment with the need to preserve their sovereign political authority and protect the sacrosanct values of the State and institutions from external infiltration. What is required is a patriotic and well focused leadership with necessary political will to resist any form of political interference in the domestic affairs of the host State by foreign investors. The success of the newly emerged "Asia Tigers" of China, Hong Kong, Taiwan, South Korea, Malaysia, Indonesia, India, Singapore etc and the Latin American states of Brazil, Mexico, Venezuela etc with foreign investment was achieved with little or no recorded unresisted incidents of political interference in their affairs by the foreign investors or their home countries. Indeed, most of these States have continued to maintain state controlled political systems and ideologies diametrically opposed to the libertarian democracies of the United States and Europe, the leading foreign investment bloc. Libya, for instance has also continued to assert its political sovereignty and independence in its relationship with and despite the presence of American Oil Companies operating in the country. As Sornarajah opines, there was considerable state regulation and intervention accompanying the process of industrialisation of the newly industrialised States particularly in Asia.[48] The extent to which foreign investment can bring about political inference by the foreign investor in the political affairs of the host State, therefore largely depends on the inclination of those in authority in the host State and their allegiance. It is to that extent that interference in the political affairs of the host State can be disincentive for foreign investment.

Loss of Local Capital/Capital Flight

As earlier observed in this work, one of the expectations of foreign investment is inflow of capital. On the other hand, freedom to remit profits and dividends and repatriate capital has always been recognised as an essential incentive to attract foreign investment. But as critics of foreign investment are quick to point out, there is often not enough good faith on the part of the foreign investor as he simply milks the system for next to nothing while nothing commensurate is left by way of return for the host country.[49] Accordingly, it is the belief of many that capital outflow engendered by foreign investment often exceeds the capital inflow which usually ends with the initial capital that is brought in.[50] According to some studies, capital outflows through foreign investment in developing countries were twice as much as capital inflows.[51]

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[45]The Civil War in the Central African Republic of Congo sometimes between 1998 and 1999 was allegedly caused by the French Oil Company, ELF. Aquitaine, which wanted to change a government that was hostile to it.

[46] R Gilpin: The Political Economy of International Relations (1987), cited in M Sornarajah, *op cit*, p. 8.

[47]M Sornarajah, *op cit,* p. 40; JN Rothger, 'Investment Dependence and Political Conflict' (1990) *Journal of Peace Research,* 255.

[48]M Sornarajah, *op cit,* 49 citing Y Chu, 'State Structure and Economic Adjustment of the East Asia NICs' (1989) *43 Int. Org* 647, S Naya and E D Ramstertter, 'Policy Interactions and Direct Foreign Investment in South-East Asia' (1988) *22 JWLTL,* 57.

[49] D A Guobadia, *op cit*, p. 43.

[50]J R Oneal and F H Oneal, 'Hegemony, Imperialism and the Profitability of Foreign Investment' (1988) *42 Int. Org.,* 347 cited in M Sornarajah, *op cit,* p. 39.

[51] *Ibid.*

Capital outflow occur in two ways, i.e. the soaking up of local capital by the foreign investment and the repatriation of capital by the foreign investor. With respect to the first, it is asserted that if foreign investment does lead to the release of scare domestic capital, for other necessary projects within the host state, it also results in domestic investors preferring to invest in the projects begin by foreign investors because of perceived advantages such as stability and larger payment of dividends. The existence of foreign investment thus soaks up local capital which could have been otherwise used to promote local entrepreneurial endeavours. In many cases, foreign investor, if given the opportunity often prefers to raise the capital for the project locally than risk his own capital.[52] The second means of capital outflow is even less debatable. Nigeria, for instance had in the past, enacted two laws, in quick successions, to promote and attract foreign investment with specific provisions guarantying repatriation of profits to foreign investors. Accordingly, Section 24 of the Nigerian Investment Promotion Commission Act[53]guarantees a foreign investor unconditional transferability of fund, dividends and profits attributable to the investment in freely convertible currency, transferability of payments in respect of loan servicing where a foreign loan has been obtained and remittance of proceeds and other obligations in the event of a sale or liquidation of the enterprise or any interest attributable to the investment. In the same vein, section 15(4) of the Foreign Exchange (Monitoring and Miscellaneous Provision) Act[54] also guarantees a foreign investor unconditional transferability of funds through an Authorised Dealer in freely convertible currency, of relating to the same items as mentioned above. The concern is that these incentives are easily manipulated to the detriment of the host country and the benefit of the foreign investor. Apart from the direct repatriation of dividends and profits, other forms of indirect repatriation of capital abound. For example, as Guobadia points out,[55] in exercising the right to transfer payments, in respect of loan servicing for foreign loans, a foreign investor may arrange his affairs in such a way as to reflect the existence of a foreign loan. Such loan transactions may indeed be transactions barely at arm's length between related interests. Secondly, because technological information accompanying foreign investment is highly imperfect and difficult to fix price, the foreign investors often uses this item to siphon huge resources out of the host country especially through over invoicing of plants and machinery and other imports. In like manner, the right to remit all proceeds of a sale or liquidation of the foreign investment could be exercised in such a manner as to leave a hollow shell behind. It is therefore necessary for host governments to ensure through appropriate regulatory mechanisms and interventions that what is gained as capital inflow through foreign investment is not surpassed by what is lost through the consequent capital outflow.

Distortions in the Labour Market

One feature which has been identified as an obvious weakness of foreign investment is its tendency to introduce distortions in the labour market by creating enclaves which pay high wages and salaries not always related to productivity in the economy. It is thus asserted that foreign investment is potentially deleterious to employment and workers welfare as well as the bargaining strength of trade unions as it provides a platform for divisions in the workforce engendered by wide disparity in remuneration and welfare.[56] Thus, it leads to unequal development in the labour market, benefiting only the workforce associated with the foreign investment. A good example is the oil industry in Nigeria where those working for the foreign firms enjoy salaries, remunerations and welfare packages far above their counterparts of equivalent qualifications and rank in the other employment sectors. Rather than promote equity and justice and widespread human development, particularly in the employment sector, foreign investment causes a shift in income distribution in favour of the upper income groups causing disharmony

[52] M Sornarajah, *op cit*, p. 39.
[53] Cap N47 LFN 2004 (formerly Decree No. 16 of 1995).
[54] Cap F34 LFN 2004 (formerly Decree No. 17 of 1995).
[55] D A Guobadia, *op cit*, p. 44.
[56] J A Aremu, *op cit*, p. 3.

in the employment and labour market. This harmful effect can, of course, be taken care of to a great extent, by appropriate regulatory policies within the labour and employment sector of the host State.

Disequilibrium in Balance of Payment

As noted earlier, foreign investment can potentially be manipulated by the foreign investor to alter the normal play of completion in favour of their home economies to the detriment of the host countries. For instance, by having the capacity to borrow money from third parties abroad, the foreign investor can add to the debt burden of the host country as State guarantees and confirmations are often involved in such transnational financial arrangements. Secondly, an unregulated repatriation of profit by the foreign investor creates an advantage in balance of payments in favour of the home country of the foreign investor over the host state. Thirdly, most foreign investments are concentrated in import-substituting or export industries which also portend unfavourable balance of payments implications for the host country, moreso, as prices are fixed and payments for exports are often made outside the control of the host economy. This arrangement continues to widen the gap in the balance of payments in favour of the foreign investors and their home States. Fourthly, foreign enterprises, in line with their headquarters often adopt overly capital intensive production techniques, make inappropriate and insufficient transfers of technology at too high a cost (essentially to retain technological advantage) set artificially high transfer price (to extract excessive profits).[57] These activities translating in part to over-invoicing of imports and under-invoicing of exports leave the host state mostly of the developing countries perpetually indebted to the home countries of the foreign investors mostly of the developed countries. This disequilibrium in balance of payments arising from foreign investment is one of the major contributors to the debt burden or crisis of most developing countries. As Aremu[58] observes, although host economies particularly in developing nations usually restrict remission of dividends and royalties to have a balance of payment stability, the way TNC system is networked around the world makes for easy circumvention of such barriers through transfer pricing via their affiliates.

Threat to National Security and Socio-Cultural Values

National security according to Ogwu points out,[59] as a concept and as a phenomenon suffers from a surfeit of meanings. The first analytical construct views national security as defence or survival of the State, in other words, the security of the State. This is a perception of national security primarily from its military cum strategic dimension particularly in terms of defending the territory and sovereignty of the State. The second analytical construct views national security in terms of protecting the internal values of the State from outside threat and interference.[60] In this second sense, both the State and the individual are factored into its constituents. As Imobighe aptly observes '... security has to do with freedom from danger or threat to a nation's ability to protect and develop itself, promote its cherished values and well being of its people'.[61] Thus, the various negative effects of foreign investment already discussed aggregate to an overall impact on the wellbeing of the people of the host state and the consequently, the security of the State. In the views of Imobighe,[62] the national security component must include the capacity to provide the citizens with social, economic and political conditions conducive to happiness and relative prosperity. For the developing countries in particular, the tranquillity and wellbeing of the society are recognized as necessary components of national security. Al-Mashat in turn asserts that national security also focuses on 'the physical, social and psychological quality of life of a society and its members both in domestic setting and within the large regional and global system'.[63] Given the above delimitation of national

[57] *Ibid.*
[58] *Ibid.*
[59] U J Ogwu, *op cit*, p. 19.
[60] B Buzan, *People, States and Fear: The National Security, Problems in International Relations* (Great Britain: Wheatsheet Books, 1991) p. 67.
[61] T A Imobighe 'Doctrine for and Threats to Internal Security' in A E Ekoko and M Vogts (eds), *Nigerian Defence Policy and Problems* (Lagos: Malthouse Press,1990) p. 224.
[62] *Ibid.*
[63] A Monem & Al-Mashat, *National Security in the Third World* (United States: Westview Press, 1985) p. 14.

security components, much concern is often expressed as to the possible impact of foreign investment on the sacrosanct values of the host State and its institutions. As noted above, all the negative impacts of foreign investment discussed above individually and collectively constitute serious threat to national security and socio-cultural values of the host country. Similarly, as Ogwu asserts,[64] the concern across most developing countries, particularly in Africa is that the extensive policies of deregulation and liberation initiated in a bid to attract foreign investment, seen to do little or nothing to promote equity and justice and widespread human development. Rather the visible positive impact has been a shift in income distribution in favour of the upper income groups only. Furthermore, the demand by the foreign investors for budgetary constraints on health, education, welfare measures and social programmes, tax concessions on profits, the modification of price controls and the dismantling of state owned enterprises and economic crises. The manifestations of these are in the spiral of severe internal conflicts, poverty, unemployment, ethnic, communal and religious conflicts, crimes like robbery, rape, kidnappings, terrorism etc. These crises portfolio pose serious threat to the national security and socio-cultural values of the host state.[65] To avoid this result, the national security implications arising from the curbing of national sovereignty by multi-lateral and investment agencies through trade and investment regulations must therefore be given considerable thought in any foreign investment arrangement. This is moreso as the essential trust of national security is to protect the sovereignty of the state in all ramifications.

6. Relationship between Economic Sovereignty and Foreign Investment

It is widely acknowledged that foreign investment is one of the key strategies for re-engineering economic development.[66] To this end, almost all the countries in the world have accelerated their tempo of economic opening up since the late 20th century.[67] There appears to be a consensus, at least in terms of ideology, that the new trend is a necessary means for the achievement of a more balanced, just and equitable economic and social world older; in other words, bridging the gap between the rich and the poor. This desired objective runs through the texts of the various international instrument formulated by the United Nations pertaining to economic relations between member states as earlier highlighted.[68] However, the question of a suitable international regime for foreign investment, bearing in mind the above stated objective has been a controversial subject. According to Ogwu, controversy revolves, as it were, around the purpose, structure and effects of foreign investment in the economic transformation of the recipient country.[69] The debate about the international regime for foreign investment has been intensified by the growth of the phenomenon of Transnational Corporations (TNCs) as major actors in international economic relations.[70] As Sornarajah asserts,[71] foreign investment attracts the greater attention of international law for the simple reason that it involves the movement of persons and property from one State to another and such movements have the potential for conflict between the two states. For instance, the emergence of TNCs as major instruments of international investments has raised the fundamental question as to whether traditional principles of State responsibility for injuries to alien (sometimes perceived as an apparatus for protecting human rights), should be applied indiscriminately to transnational corporations – powerful economic organizations with elusive nationality – without a

[64] U J Ogwu, *op cit*, p. 30.
[65] *Ibid,* pp. 30-31.
[66] U J Ogwu, *op cit*, p. 4.
[67] P Zhongying, *op cit.*
[68]See for instance, the Preamble to Charter of Economic Rights and Duties of State 1974, UNGA Declaration of the Establishment of a New International Economic Order 1974 and the UNGA Resolution on permanent sovereignty over National Resources 1962.
[69]U J Ogwu, *op cit.*
[70]See S K B Asante, 'International Law and Investments' in M Bedjaoui (ed), 'International Law: Achievements & Prospects', *op cit*, p. 668.
[71] M Sornarajah, *op cit*, p. 7.

corresponding body of restraints on these corporations to safeguard the public interest in host as well as home countries.[72]

Again, foreign investment, involves the securing of competitive advantages by the foreign investor over local entrepreneurs in the host state. The resulting integration of the foreign investor into the host economy, therefore, makes his involvement in the internal economic and political affairs of the host State inevitable and conflict is inherent in such situation.[73] For developing countries like Nigeria in particular, with the initiative of foreign investment, they often expect to inject new driving force into domestic economic development and to create new market opportunities. They also hope to integrate their domestic economy into the global market, and to develop 'economic muscles' that can punch a 'worldwide weight'. This initiative, as Zhangying postulates, comes at a cost; namely the weakening of the host nation's economic sovereignty and the erosion of permanent and exclusive privileges over its economic activities, wealth and natural resources. In his words:

> … for any country, opening the economy to the outside world is by no means a free launch. The policy will inevitably come to a cost…perceived to be a weakening of the nation's 'economic sovereignty', namely, the erosion of permanent and exclusive privileges over its economic activities, wealth and national resources.[74]

Another concerned writer observes that foreign investment engineers both economic development and economic dependence in that it continuously caused and catalysed a level of development that would have been impossible without such investment albeit at the cost of economic dependence. Obviously cognizant of the weak position of the recipient countries, particularly developing countries in their economic relations with the foreign investors dictated by entrenched economic disequilibrium, contemporary international law approach seeks to empower the recipient countries by vesting them with dominion, at least in principle over the foreign investment activities within their territories. In accordance with the various International Law instruments already highlighted backed by Customary International Law, each State has the right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities[75]. A derivative of the above is the right accorded to each State to supervise the activities of transnational corporations within its territory and to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Accordingly, TNCs are not to intervene in the internal affairs of a host State.[76] The above principles, inter alia, affirm the dominium of the host State over its national wealth, resources and economic activities which is inalienable and indivisible and its powers of *imperium* overall economic assets and activities within its territory which are permanent.[77] To further give meaning to the above rights, host States are further accorded the power to nationalize expropriate or transfer ownership of foreign property on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests (both domestic and foreign) subject only to payment of appropriate compensations to foreign owner.[78] The stage of Nationalization or expropriation is the breaking point in the relationship between the host State and the foreign investor or the alien in general.

As Abi-Saab writes,[79], whatever term used to designate the act – expropriation, nationalization, confiscation, requisition, indigenization, transfer etc – liquidation by the state of alien property falls

[72] *Ibid.*
[73] *Ibid,* p. 8.
[74] P Zhongying, *op cit*, p. 2.
[75] See Act 2(a) of the Charter of Economic Rights and Duties of States.
[76] Act 2(b) *Ibid.*
[77] See G Abi-Saab, 'Permanent Soverignty over Natural Resources and Economic Activities' in M Bedjaoui (ed), *op cit*, p. 606-607. "Dominium" connotes power of possession, use and disposal while "imperium" connotes jurisdiction to prescribe and enforce.
[78] See Act 2(c) Charter of Economic Rights & Duties of States and Para 4 of UNGA Res. 1803, Ibid.
[79] G Abi-Saab, *op cit.*

within the ambit of patrimonial rights. The power or capacity of the state to nationalize is axiomatic as an expression of the full permanent sovereignty of the state. It seems therefore that from the rights accorded, contemporary International Law attempts to place the host State in the driving seat in its economic relations with the foreign investor. But the exercise of this right in real situations seems to be dictated by so many constants and variables which often alter the position as to who is on the driving seat and who is on the passenger's seat. As these constants and variables are examined in the following chapters of this work, Zhongying's remark about development of 'economic muscles that can punch a worldwide weight'[80] seems to be a critical factor for any developing country like Nigeria in seeking to achieve a balanced relationship between securing the gains of foreign investment and maintenance of its economic sovereignty.

7. Balancing Foreign Investment with National Economic Sovereignty

In this section, the study considers how the need for FDI with its attendant advantages can be harmonized to ensure that the economic sovereignty is not impinged; and examines to what extent the host states might use their sovereignty in a manner that may be counterproductive to the interests of foreign investors on their territory; and the role played by international investment law in its regulation. Challenges are faced by international investment law to minimise the possible adverse effect of host state's sovereignty, in order to require states to respect investment agreements. Responsibility will be asserted by a wronged foreign investor if the state breaches customary international law when it hosts the foreign investment and if there is a violation of the specific investment agreement. Such challenges expose the limitations on how states can use their sovereign powers (whether legal, economic or political), against foreign investors and question the clarity of such boundaries. An unsuccessful litigant state will often seek to resist award enforcement, claiming sovereign immunity against its execution. International investment law and applicable national and regional bodies must find a balance between the interests of the foreign investor and the host state..[81] Balancing FDI interests and the states sovereignty require that the interests of foreign investors are protected to ensure continued interest in investing in the state. Extreme insistence on sovereign rights may make a state unattractive for investment. Public international law regulates state responsibility and immunity. Though governed by international law, when states enter into bilateral arrangements, these are modified to encourage investment. It is clear that there are limitations placed upon the exercise of state sovereignty when considering the rights of a foreign investor. Such restrictions may be incorporated into a bilateral investment treaty between the states concerned, or written into the specific investment contract itself. Customary international law also has a role to play in the constraint of unrestricted host state action, allowing sovereign authority to be negotiated in the attempt to attract foreign investment. Investors are likely to understand that the absence of limitations on formal sovereign power poses a considerable risk to their business, and host states acknowledge that without such restrictions, there will be little prospect of attracting foreign resources into the economy ; and as a consequence, regulations have been established in order to improve the protections available to a foreign investor. Nevertheless, all business transactions involve a degree of risk to secure potentially significant rewards. This is particularly true in the international commercial arena where the degree of uncertainty may be termed country risk present in alternative national economic frameworks, political administrations and philosophies, socio political cultures and institutions, even the Physical geography or currency. This concept of risk carries with it the implication that uncertainty can be easily assessed and defined. In reality, such assessment involves a complex exercise of information gathering and observation on a scale significant enough to develop a statistical basis upon which to appraise a risk reward equation that can be scrutinised under a probability analysis. An investment opportunity that is beyond the scope of such

[80] P Zhongying, *op cit*, p. 1.

[81] N Al-Adba, 'The Limitation of State Sovereignty in Hosting Foreign Investments and The Role of Investor-State Arbitration to Rebalance The Investment Relationship' being the text of PhD Thesis submitted to the University of Manchester; publication date: 2014-06-25T12:24:15 Accessed <cholar.manchester.ac.uk/uk-ac-man-scw:227876>

analysis carries with it a high degree of uncertainty[82]. A host state earmarked for possible investment will be subject to a risk assessment of its legal, economic and political stability, conducted by major companies and financial agencies, considering the investment environment and its attractiveness to foreign investors. .Non-commercial aspects of the political and socio-economic environment of a host that could affect the safety and viability of the investor project will also be explored; and they may also include, the political leadership, basic infrastructure, institutional and administrative framework, investment capital and the legal framework.

8. An Evaluation

In the preceding chapters, this work, examined the general nature of foreign investment; the historical evolution of the legal regime for foreign investment in Nigeria; foreign investment and national political and economic ideology; foreign investment and some sectors of the economy, foreign investment inclination of a few selected jurisdiction and the current legal regime for foreign investment in Nigeria especially as it relates to its impact on the nation's economic sovereignty. It was found that in view of the risks inherent in investments or businesses, the final criterion or determinant for a sound investment climate depends primarily on the political and legal stability of the region or country in which the investment is to be located. Thus, it is the special responsibility of the state, in this regard, to create a favourable political climate which guarantees an atmosphere of trust between the state and investors, whether local or foreign. In this regard, a state can only achieve such an atmosphere if it promises with reasonable credence that arbitrary measures are not to be employed that may have the effect of overreaching the interest of investors. For instance, it must make sure that its legal regime for protection of investments are such that will forestall taking unpredictable measures which may not have been foreseen by the jeopardize or prejudice investors and which have the capacity to unfairly prejudice the investors or their investments. In short, investors have to be assured that they will receive, both at present and in future, legally defined and controlled treatment, specified in the relevant legal instruments, and that consequently, they need not fear any major changes in domestic, legal, political or economic conditions that will adversely affect their interest. The optimum investment law is one that does not only take into account the interest of the state but also takes into account the interest of the investors. Thus, the essential need of the investor must always be kept in mind. The prime responsibility must be with the government, whose duty it is to maintain general economic stability, for it is only in this overall context that the intrinsic commercial soundness of the investment will not be jeopardized.[83] Long term investors, especially those investing in developing countries like Nigeria usually also require some assurances that their investment will enjoy reasonable safety and that the disagreements which will inevitably arise will be fairly resolved by an impartial tribunal or court and that their investments will not be subject to arbitrary, onerous and frequent changes in the conditions governing same. Investors gain these assurance where there are in existence in the host country, an established political and judicial system with a reputation for fairness. In this regard, a good reputation in the area of actual practice is usually a highly valuable asset, for only this can reasonably indicate the extent of the probability of changes and the situation which will probably exist in future.

This study finds that there are different ideologies that characterized the investment inclination of the government at different stages of Nigeria's development starting from the pre-colonial period to date. It was found that the country moved from the period of indigenization to the regulated deregulation or guided liberalization and finally to full liberalization. While Nigerian acquired more ownership rights to investments during the indigenization era with corresponding decrease in foreign investment, the reverse is the case under the liberalization era. Presently, the country adopts a liberalized approach to foreign investment by which a foreigner can participate in almost all the businesses in which a Nigerian citizen

[82] *Ibid.*

[83] M Ndulo, 'Protection and Attraction of Foreign Investment in Zambia' in M A Ajomo & Oluwole Akanle (eds) *Regulation of Trade and Investment in an Era of Structural Adjustment: The African Experience* (Lagos: NIALS, 1995) p. 103.

can participate. The objective of this policy is to create a climate conducive for the inflow of foreign investment into the country. But effort has not significantly increased especially in needed sectors as foreign investment continues to be hesitant. But it must be noted that foreign investment though critical in economic growth is not a substitute for domestic investment and is only necessary to jump start domestic production capacities. Thus, it is imperative for the sake of sovereignty of a nation especially a developing country like Nigeria that major part of its capital formation must come from domestic sources. To create suitable conditions for foreign investments, especially one that would benefit a host nation and not threaten its sovereignty, increased and strong domestic investment should, be a prime policy priority for any government. This will in turn attract foreign investment. This is based on the fact that the single most important factor in achieving economic growth and attracting foreign investment is dynamic domestic investment activity.

In devising policies to encourage investment and to increase the flow of the benefit to the host country, a developing country's overall economic policies are of crucial importance. A country's economic structure and stage of economic development are much more important in attracting foreign investment than are special incentives which are costly and frequently ineffectual. In order to attract investment what is needed are clear policies on the role of private investment in national development. A number of specific policy issues and problems must be resolved if the full contribution of private investments both domestic and foreign are to be realized in an economy. A handy example of a country that adopts such clear and defined policies is China. As has discussed earlier, China does not adopt a very liberal policy when it comes to foreign investment. It only allows foreign investment in those areas of the economy that are not likely to unfavourably compete with their domestic industries and in which the country or its citizens cannot effectively engage in. It is therefore necessary that a country in its foreign investment policies should have the following minimum arrangements, to wit: an efficient administrative structure to negotiate with investors and implement decision; a consistent coherent and visible set of economic, legal and investment policies; a stable economic environment; the existence of well defined and serviced industrial zones; and the country must carry out structural problems which presently make these economies unresponsive to the building up of domestic capital.

The creation of domestic capital can be courageous and assisted by regional initiative to create regional insurance agencies. This could be done under the auspices of regional economic groups like the African Union, ECOWAS, etc and in partnership with African countries. This is because, most times, home governments of potential investors do not have the capability to act alone. It is important to start to deal with this problem so that major problems facing these investors can be alleviated. It is now settled as a matter of economic principles that the objective of foreign capital may not always be compatible with national interest especially the sovereignty of a nation.[84] Thus, government, at all times ought to strive to strike a balance between the need to increase foreign investment and the need to protect its political and economic sovereignty. One of the ways of achieving the foregoing is through the investment of the host government in some basic industries so as to afford it the platform to assume commanding height in the economic sphere of its activities. This was exactly what the government tried to do in the 1970s when it introduced the indigenisation policy. The government at that time, invested in some basic industries like steel, paper, cement, machine tools etc. However, those enterprises, due to lack of adequate management had unfortunately become comatose and inoperative and were consequently privatized and/or commercialized. It is therefore submitted in this regard that an adequate legal mechanism is not enough. There must also be in place an efficient administrative and regulatory mechanism to implement the policies that are formulated by these laws. A manifest example of the implication of inadequate implementation mechanism could be seen in the recent privatisation programme.

[84]A Madupin, 'Privatisation in Nigeria: A Tentative Assessment' (2002) *Journal of Economic, Social and Cultural Rights Vol. 1 (5)*, p. 79.

In at least two glaring cases, the implementers of privatisation policy in Nigeria have committed serious administrative blunders. The very recent cases of the sale of NICON Hilton and the botched effort over NITEL are perfect examples. In the NICON sale, the declared winner of the bid was later found to have issued dud cheques as payment for the agreed value of the sale. Clearly, a more administratively proactive Bureau for Public Enterprises and National Council of Privatisation would have taken measures to ensure that issued cheques of the huge magnitude involved were guaranteed in advance by a reputable financial institution. In the case of NITEL, the preferred bidder, Investors International London Limited (ILL) paid a deposit of $131.7 million in December 2001, but was unable subsequently to raise the rest of the cash within a 90-day deadline. The Nigerian government had to approach the reserve bidder, Telnet Consortium. At the end of it all, no bidder took up the offer and NITEL's privatization remained stalled for a long time thereafter. The lesson from the NITEL sale resides in the subsequent revelation that the preferred bidder actually raised its funds locally while the impression earlier created was that there would be infusion of funds from offshore. A diligent implementer would have ascertained the true financial status of any bidder involved in the scale of transaction which the value of a big telecommunications outfit like NITEL was the subject. There is also the case of African Petroleum where huge outstanding debts were discovered to have been concealed throughout the privatisation process. The unending controversy over the wisdom in the privatisation of the country's mint is yet another case.

From the foregoing, it is obvious that it is not enough to have good legal provisions for foreign investments; there must also be transparency political will and commitment on the part of the government to actually implement the provisions and ensure that they further the purposes for which they were made. For instance in relation to privatised industries, one of the ways of creating public support for sovereignty is to ensure that the shares in the enterprises being privatised are sold by public issues to as many citizens as possible.[85] This practice is referred as 'popular capitalism', and it was developed in Britain during the privatisation of British Telecom in 1984, an exercise from which 2.5 million shareholders emerged 1 million of whom had never owned shares before.[86] The researcher is however not unmindful of the difficulty and disadvantages that may proceed from trying sell all the shares to the public by private issue, especially in specialised industries which may require 'specialised owners'. Thus, it is usually prudent to raise the chances of the survival of the enterprises after privatisation by getting a 'core investor' to acquire a significant amount of the shares in the enterprise and to take over the management. It is therefore recommended that a core investor which would usually be a company that has proven expertise in the management of similar industries could take about 40% of the shares in the enterprise and take over management of the enterprises while the remaining 60% can be sold by public issue.

9. RECOMMENDATIONS

In the light of the forgoing exposition, the researcher, in addition to other suggestions already made in the body of this work makes the following recommendations as the means to achieving a sustainable legal, regulatory and institutional framework for foreign investment that would not pose a threat to the sovereignty of Nigeria viz:

Improving the legal regime for competition in Nigeria

There is need for an elaborate legislation on investment competition in Nigeria. There is no legislation on competition in Nigeria till date. The Competition Bill which was introduced in the National Assembly since 2005 is yet to be passed into law. This is particularly imperative because guaranteeing 100 percent ownership of every investment by foreign investors may result in multinational corporations stifling the flow of business for small and medium sized firm. A competition law will ensure that some degree of

[85]E Iheme, 'The Legal Regulation of Privatisation in Nigeria' in E Onyekpere, *Readings on Privatisation* (Lagos: Social Economic Right Initiatives, 2003) p. 6.

[86] J Redwood, *Popular Capitalism* (London: Routledge, 1988) p. 124.

market fairness and equity are maintained and the market imperfections addressed.[87] Moreover, a credible liberalisation programme is bound to have a competition law as a strong pillar of its existence. As studies have shown the success of most liberalisation programmes including the 1980s/1990s European liberalisation programmes, could not have occurred without the presence of a strong and effective competition regime.[88]

Improving the Current Level of Infrastructural Development, State Security and Political Climate

As was found in this work, one major criterion for determination of sound investment climate is political stability of the host country and this primarily depends on the level of infrastructural development and state security. It is therefore necessary that any state seeking favourable investment climate will create a favourable political climate which guarantees an atmosphere of trust between the state and investors. Private investors will refuse to commit large amount of money in the polity until their perception of risks and fear for their investments are allayed. In view of the foregoing, setting up proper plan for infrastructural development and security reforms should be pursued with an unrelenting spirit.

Improving the platform for the implementation of the guidelines on incentives and guarantees available to investors

There is need to improve the mechanism for the implementation of the various provisions in the laws relating to incentives and guarantees available to investors. It is not in doubt that the laws which have been discussed earlier in this work makes provisions for various incentives to which some investors whether local or foreign are entitled. However, there is no adequate mechanism for the effective and efficient implementation of same. Thus, it is found that most times whether or not investors access those incentives is usually left at the discretion of the government officials empowered to administer the said incentives or guarantees. It is therefore suggested that the various laws and regulations that provides for these incentives and guarantees be amended to prescribe elaborate administering them. For instance, there should be an elaborate provision on the maximum period within which the transfer of funds ought to be completed in order to facilitate investment since the laws have provided for free transferability of funds for foreign investors. Such provision will help improve the clarity of the law and reduce associated ambiguities that may abound.

The chain of responsibility in the promotion of Foreign Investment should be channelled to the Presidency

Generally, investment promotion agencies with a close link to the centre of government have been noted to have a higher viability and credibility and hence a better record of attracting FDI.[89] For instance, although the NIPC was placed directly under the responsibility of the presidency during the Obasanjo administration, there was no legislative backing for the said policy. It was just a matter of a mere presidential directive. This is against what is obtainable in Ghana[90] and Sri Lanka.[91]

Improvement of the regime for the protection of property rights

It has been asserted that the success of a good investment regime is predicated on efficient institutions, adequate capital and most importantly protection of property rights.[92] Thus, it is the duty of a state to make sure that its legal regime for protection of investments is such that will forestall unpredictable measures which may scare investors away. Much as the regime for expropriation of property rights under the Constitution and the NIPC Act are sufficient and seems to be in conformity with international best practices, the legal regime for compulsory acquisition under the Land Use Act[93] is grossly inadequate and

[87]C C Nwabuzor, A Critique of the Nigeria Investment Promotion Act, (2013) NIALS Journal of Business Law Vol. 2 pp. 84 – 126 at 124.
[88] N Dimgba, *op cit*.
[89] OECD, 'Policy Framework for Investment: A Review of Good Practices (2006) 36-37.
[90] S. 10 Ghana Investment Promotion Centre Act, 1996.
[91] A Perry, *Legal System as a Determinant of FDI Lesson from Sri Lanka* (Sri Lanka: Kiluwer Law International, 2001) p. 81.
[92]K Moghalu, ' The Role of Institutions in National Development' being the text of a keynote address presented at the law week of the Nigerian Bar Association, Enugu Branch on 4th December, 2017.
[93] Cap L5, LFN, 2004.

should be reviewed to bring it in tandem with the current global trends and international best practices on the subject. Compensation should be paid to holders of revoked undeveloped lands, at least to the extent of their investment for securing the land from the state or third parties. This is based on the fact that revocation of right of occupancy under the Act is peremptory and leaves the holder of the right with no remedy once the power of revocation is validly exercised. Provisions should be made for compensating a holder of a right of occupancy revoked by the Governor, whether or not there is an unexhausted improvement on the land. It is also recommended that penal revocation of land rights under the Act should be subject to judicial review to curb executive tyranny and politically motivated revocations.[94] Furthermore, in order to assure the security of private property rights, revocation of rights of occupancy should not be based on such flimsy excuses as failure to pay rent, failure to collect or pay for certificate of occupancy and the like. Such minor infractions should be addressed by state lien and other encumbrances on the property. It is worthy of note that most investments invariably involve the use of land and a land regime that does not guarantee protection of land rights will necessarily have negative implications for investment.

Improving the Privatisation policy so as to ensure public participation

There is need to amend the provisions of Section 2 of the Public Enterprises (Privatisation and Commercialisation) Act[95] which empowers the Bureau of Public Enterprises to either sell the share of a public enterprises by public issue or private placement. The Act should be amended to provide that all shares of an enterprise for privatisation shall be offered for sale in the Nigeria capital market and shall be by public issue except if the Federal Government on the advice of the National Council on Privatisation decides that the shares should be sold by private placement. This will promote 'popular-capitalism' which ensures that shares in enterprises being privatised are sold by public issues to as many Nigerians as possible. This will in turn safeguard the sovereignty of the nation by creating public support for it. For specialised industries which may require 'specialised owners', it is recommended that a core investor which will usually be a company that has proven expertise in the management of similar industries can take about 40% of the shares in the enterprise and take over management of the enterprises while the remaining 60% can be sold by public issue.

Adequate consideration of National Security implications in trade and investment regulations

The national security implications arising from the curbing of national sovereignty by multi-lateral and investment agencies must be given adequate consideration in the making of any trade and investment regulations to avoid compromising national security in the quest for foreign investment.

Amendment of laws regulating foreign investment in Nigeria

It is suggested that Section 25(2) of the NIPC Act be amended to provide a comprehensive definition of "national interest" and "public purpose" in relation to acquisition of an enterprise by the federal government. It was found in this work that there is no subsidiary legislation or regulation prescribing the conditions for granting a licence by the EPZ Authority to an enterprise to operate within an EPZ. It is therefore suggested that such legislation or regulations should be made to fill the lacuna. S.13(1) of the EPZ Act should equally be amended to clear the ambiguity relating to whether or not a Nigerian citizen requires permission of the EPZ Authority to enter, remain or reside in a zone in view of the constitutionally guaranteed right to freedom of movement. Section 8 (k) of the Investment and Security Act should also be amended to allow the Securities Exchange Commission (SEC) to keep a register of portfolio investments whilst the Nigerian Investment Promotion Commission (NIPC) should handle all affairs relating to foreign Direct Investment. This will help to avoid duplication of and overlapping of functions and potential conflict. Section 15 of FEMMA should be amended to provide a limit to the level of investment a foreigner may have in an enterprise.

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[94] It was reported in 2013 that the authorities of the Federal Capital Territory (FCT) had marked for demolition the property housing the secretariat of PDP, a breakaway faction of the then ruling party. See: <http://www.vanguardngr.com/2013/10/fcta-marks-npdp-secretariat-demolition/> accessed 22/03/2016.

[95] Cap P38 LFN, 2004.

Operation of joint venture arrangements in the power sector

To rescue the power sector from its current state of duldrum the kind of joint venture arrangements with foreign power companies as applicable in the oil industry should be adopted.

Insertion of Human Rights Protection Clauses in Foreign Investment Agreements

In compliance with international best practices and standards, clauses relating to human rights safeguards should be inserted in all foreign investment agreements to ensure adequate protection of the human rights citizens of Nigeria in all such FDI arrangements.