Global Business & Development Law Journal

Volume 28 | Issue 2 Article 7

1-1-2005

Economic Development and the Utility of Local Content Legislation in the Oil and Gas Industry: Conflicts and Effects of Nigeria's Local Content Act in the Context of International Investment Law

Felix O. Okpe

Economic Development and the Utility of Local Content Legislation in the Oil and Gas Industry: Conflicts and Effects of Nigeria's Local Content Act in the Context of International Investment Law

*Dr. Felix O. Okpe**

TABLE OF CONTENTS

* PhD in Law, University of Aberdeen, United Kingdom; LL.M, Howard University School of Law, Washington, D.C; Attorney & Counselor at Law (Washington State, USA); Barrister and Solicitor of the Supreme Court of Nigeria. The foundation for this Article is the author's doctoral research. Any error or inaccuracies in this Article are mine alone. Email: f.o.okpe@gmail.com

ABSTRACT

Economic development is a major policy objective of the governments of developing countries that are rich in natural resources. Nigeria has promoted, through legislation, the concept of Nigerian content through domestic capacity building and preferential participation as a policy in its Oil and Gas Industry("OGI") to achieve the objective of economic development. The recent enactment of Nigeria's Local Content Act was inspired by considerations for economic development. This article analyzes the implications of this law based on the paradigm of international investment law. For this purpose, the context of international investment law is limited to the definition of "investment" and the international obligations of Nigeria within the framework of current and anticipated Bilateral Investment Treaties ("BITs") and other investment related agreements with foreign investors. From this perspective, the analysis of this article shows that, in spite of the relative success of the Local Content Law, there are significant and fundamental conflicts with Nigeria's obligations under international investment law with respect to foreign investors operating in Nigeria's OGI. Foreign investment treatment standards applicable under international investment law are implicated in the application and administration of Nigeria's Local Content Law. Thus, this article proposes that Nigeria should review existing BITs and other investment agreements to accommodate the prescriptions of the Local Content Law to sustain the underpinnings of economic development inherent in the law. Otherwise, the existing conflicts present substantial grounds for foreign investment claims and liability against Nigeria by foreign investors in the context of investment treaty arbitration.

I. INTRODUCTION

In a scathing rejoinder to Dr. Adekeye Adebajo's op-ed in Nigeria's The Guardian newspaper criticizing pertinent aspects of Nigeria's foreign policy,[1] Amedu Ode, the spokesperson of Nigeria's Ministry of Foreign Affairs, reported that Nigeria has signed Bilateral Investment Treaties ("BITs") and other foreign investment related agreements with several countries to promote and attract the inflow of Foreign Direct Investment ("FDI") to Nigeria.[2] Ode was ecstatic that Nigeria's targeted activities and "foreign campaigns" to attract FDI into the country led to about $9 billion worth of inflow of foreign investments in 2012 alone, a fact that was confirmed by the United Nations Commission on Trade and

1. Amedu Ode, *The Robust Nigeria's Foreign Policy (2)*, THE GUARDIAN (Lagos), May 16, 2013, at 84.
2. *Id.*

Development.[3] This feat by the Jonathan administration also received commendation from the World Bank and the International Monetary Fund.[4] According to Ode, FDI into Nigeria in this and other respects has positively impacted and contributed to economic development in different sectors of the Nigerian economy.[5] FDI has generated economic activities and development in constituent parts of the Nigerian State including power and energy investments in Adamawa, Bayelsa, Lagos, Oyo and Sokoto States.[6] Ode also bragged about the Bi-National Commission ("BNC") between Nigeria and the United States, designed and established to attract FDI from American investors and businesses.[7] Indeed, Ode stressed that the BNC between Nigeria and the United States is evidence of both countries' strategic partnership to work closely to promote FDI inflow for economic cooperation and development.[8] This article will return to the international investment law implications of the BNC between Nigeria and the United States in view of the latter's substantial foreign investments and inflow of FDI into Nigeria's Oil and Gas industry ("OGI") in the absence of a valid BIT.[9] Suffice it to state that Ode's analysis represents Nigeria's deliberate efforts at attracting FDI for economic development. However, what is lacking in Ode's analysis is that Nigeria incurs international legal obligations, established by treaty and case law, related to the administration of FDI in the host State.

Given that the crux of Ode's debate with Adebajo extends to other foreign policy matters, it is not the task of this article to join issues with Ode regarding the beef between the commentators. To the contrary, this article is an attempt to fill the gap inherent in Ode's analysis in view of the Nigerian Oil and Gas Industry Content Development Act ("Local Content Act" or "LCA")[10] in the context of the substantive and procedural rights of foreign investors with reference to Nigeria's OGI. Aside from Ode's innocuous approach and report of Nigeria's FDI profile, there is little or no substantial scholarly analysis of Nigeria's local content legislation as implicated in international investment law with respect to the interests of foreign investors.[11] A complete analysis of FDI in

---

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Ode, *supra* note 1, at 84.

8. *Id.*

9. *See infra* Part III.

10. Nigerian Oil and Gas Industry Content Development Act (2010 Nigeria), [hereinafter LCA]. *available at* http://www.*oandoplc.com/wp-content/uploads/Nigerian%20Content%20Act.pdf* (last visited Sep. 19, 2013).

11. *See, e.g.*, Chimezie Patrick. Uzuegbu, *The Role of University Libraries in Enhancing Local Content Availability in the Nigerian Community*, Paper 733, LIBR.PHIL. & PRAC.(2012), http://unllib.unl.edu/LPP/uzuegbu.pdf (discussing the enhancement of Nigerian local content by reviewing its objectives and making propositions on the roles to be played by Nigerian universities libraries to develop and publish the workings of the local content policy in Nigeria); Ike Oguine, *Nigerian Content in the Nigerian Petroleum Industry: Legal and Policy Issues,* 29 J. ENERGY & NAT. RESOURCES L. 405, 405-30 (2011) (focusing on the metamorphosis of the local content policy since the discovery of oil in Nigeria, the operational limitations, and the difficulty

the OGI should include Nigeria's legal obligations to foreign investors on the protection and promotion of FDI in the host State.[12] The analysis of the host State's legal obligation in the conduct of FDI is more relevant today in view of the potential adverse effects of the costs of successful investment claims on the economy of the host State of FDI. The effects on the economy are more serious and could be detrimental to economic development where the host State is a developing country like Nigeria. In the quest to achieve the objective of economic development through the exercise of legislative sovereignty, many developing countries pass legislation or take measures that conflict with the substantive rights of foreign investors in the host State.[13] More often than not, such measures or legislation may be held to be expropriation of the proprietary rights of the foreign investor in the host State.[14] For example, in the last ten years,

created for international oil companies in Nigeria's upstream sector. Oguine was silent on the implications of the law on Nigeria's obligations in the regulation of international investments in the oil and gas industry within the framework of international investment law); I. A. Omenikolo & R.O. Amadi, *Challenges Facing Nigerian Local Content in Oil and Gas Industry*, CONTINENTAL J. RENEWABLE ENERGY 1, 15-20 (2010) (bemoaning the difficulties of the administration of Nigeria's local content law and policy, arguing that the implementation of the law has been largely ineffective in Nigeria citing infrastructural development, political stability, environmental policy as some of the most significant challenges); and Ugwushi Bellema Ihua, *Local Content Policy and SMEs Sector Promotion: The Nigerian Oil Industry Experience* INT'L J. BUS. & MGMT., May 2010, at 3 (arguing that the Nigerian Local Content Act has not met the objective of enhancing local capacity building and participation).

12. *See* Francis J. Nicholson, S. J., *The Protection of Foreign Property Under Customary International Law,* 6 B.C. INDUS. & COM. L .REV. 391, 391 (1965) (observing on the protection of foreign investment that: "A necessary condition for the development of the international trade and investment so essential for the progress of underdeveloped nations and for the continuing prosperity of more advanced nations like those of the Common Market and the United States is the security of property invested in foreign hands against such noncommercial risks as discrimination and confiscation.").

13. The analysis in this article does not cover local content requirements in the context of the multilateral Agreement on Trade-Related Investment Measures ("TRIMS") that may be contrary to the General Agreement on Tariffs and Trade 1994 ("GATT 1994") to which Nigeria is a member. There are legitimate questions about the utility of local contents in application and interpretation of TRIMS and GATT. TRIMS and GATT related investment dispute relates to international trade and services as opposed to FDI. Under TRIMS and GATT, potential disputes are between governments. Such disputes arise when a violation of a pertinent agreement is alleged by a member government through submission of a "request for consultation" by the aggrieved government party. This article is devoted to the analysis of Nigeria's local content legislation with reference to FDI in the OGI in the broader context of the mechanism of international investment law and arbitration between the State Party and the foreign investor. For a more detailed examination of TRIMS and GATT under the framework of the World Trade Organization(WTO) with respect to local content requirements of developing countries. *See generally* Alvaro Santos, *Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico*, 52 VA. J. INT'L L. 551 (2012).

14. Expropriation may be considered direct and easily ascertained, where an allegation of the actual taking of the alien property or foreign investment in the territory of the host State can be sustained against the latter. This may occur in the sense of the outright seizure or the physical transfer of the title of alien property in favor of the host State by acts or omissions of the host State. An indirect expropriation may occur where the regulatory conduct or activity of the host State interferes with the value or benefits of the foreign investment. The act of expropriation by the host State may be direct and self-evident where there is the actual physical taking of alien property by or through the act or omission of the host State. *See generally* Homayoun Mafi, *Controversial Issues of Compensation in Cases of Expropriation and Nationalization: Awards of the Iran-United States Claims Tribunal*, 18 INT'L J. HUMAN. 83, 83-85 (2011).

investment treaty arbitration is replete with investment claims filed against developing countries as a result of government action or inaction over legislations or policies considered adverse to the interests of foreign investments.[15] Multiple claims filed against Argentina by foreign investors resulting from that government's policy and legislation that occasioned that country's currency crisis are worth in excess of $10 billion.[16] Investment claims are brought by aggrieved foreign investors directly against the host State through the mechanism of investment treaty arbitration where investors accept the consent to arbitrate claims by filing a request for investment arbitration.[17]

Thus, the road map of this article proceeds as follows. Part I begins by examining the genesis and scope of local content legislation and policy in the OGI from the standpoint of considerations for economic development.[18] The regulatory framework of local content policies is analyzed using the Norwegian and Brazilian models as typical examples. This part then embarks on the examination of the background and the eventual enactment of Nigeria's LCA. Parts II-III are devoted to the examination of foreign investment treatment standards that may be found in BITs and other investment agreements or contracts with the foreign investor that are implicated in the LCA against the background of the administration of the local content policy in Nigeria.[19] The article then analyzes the approach to the meaning of "investment" under Nigerian and international investment law to lay the foundation for the analysis of the critical provisions of the LCA. Part IV analyzes the pertinent provisions of the LCA.[20] The result of the analysis in this article establishes that some provisions of Nigeria's LCA are discriminatory against the interests of foreign investors in the OGI. It is argued that the discriminatory nature of some provisions of the LCA

---

15. *See* Eric Gottwald, *Leveling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?,* 22 AM. U. INT'L L. REV. 237, 239 (2007).

16. *Id.* at 250-51.

17. *Id.* (Investment treaty arbitration is a neutral process of adjudicating investment claims against the host State brought in connection with the interpretation and application of relevant BITs and other investment agreements within the framework of an international arbitration mechanism. Investment arbitration mechanism includes the Rules of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States) [hereinafter the ICSID Convention]; The ICSID Convention opened for signature Mar. 18, 1965 and entered into force on Oct. 14, 1966. Also see the United Nations Commission on International Trade Law (UNCITRAL), Stockholm Chamber of Commerce (SCC), and the International Chamber of Commerce (ICC). The ICSID Arbitration Rules and the UNCITRAL Rules are the most commonly used Rules in investment arbitration. Under the UNCITRAL Rules a definition of investment only need to satisfy the BIT definition, whereas an ICSID claim would need to satisfy both the definition in the BIT itself and the ICSID Convention. The test under an ICSID claim is often referred to as the "double barrel test." The "double barrel test" approach is often adopted by ICSID arbitral Tribunals where a BIT is determined to be applicable to the investment arbitration commenced within the framework of the ICSID Convention. On the nature of investment treaty arbitration; *See generally* Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future,* 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 53-55 (2005).

18. *See infra* Part I.

19. *See infra* Parts II-III.

20. *See infra* Part IV.

violates certain foreign investment treatment standards that Nigeria as the host State, is obligated to respect under international investment law. The article concludes by proposing a review of the LCA to bring it in line with Nigeria's existing and anticipated obligations under international investment law to avoid potential liability that may be detrimental to the Nigerian economy.

II. THE OIL AND GAS INDUSTRY: THE GENESIS OF THE CONCEPT OF LOCAL CONTENT POLICY IN A NUTSHELL

Local content policy models in the OGI may focus on oil concession, in-country fabrication, procurement and services, procurement of domestic inputs or indigenous participation, and domiciliation of oil and gas activities in the host State.[21] In spite of the variation in policy models, the objective of the local content policy in the OGI seeks to achieve capacity building to enhance and promote national security, development of domestic technological know- how and the diversification of the industrial sector through the preferential treatment of domestic businesses and investments. Thus, local content policy initiative is a conscious effort by developing countries that are rich in oil and gas resources to expand and extend what is believed to be the best opportunities and benefits in the OGI to local citizens.[22] It is a policy centered on considerations of economic development through concrete opportunities granted to domestic businesses to participate actively to create employment and eradicate poverty in the host State.

However, the premise of the local content policy has been traced to the need to relegate the prescriptions of the theories of "resource curse and paradox of the plenty." Both theories hypothesized that, over-dependence on natural resources by developing countries makes the latter to be underdeveloped, when compared with other countries with little or no natural resources.[23] At the same time, other scholars have argued that the economic wealth from natural resources, particularly in OGI, could trigger social-political crises thereby hindering economic development.[24] The commentary and the analysis of the intellectual foundation of the local content policy are that it paved the way for the metamorphosis of a 'Development Policy' to avoid what has been theorized as the negative pitfalls of OGI resources in developing countries. According to Ado, a systemic local content policy that focuses on economic development

---

21. *See* Rabiu Ado, *Local Content Policy and the WTO Rules of Trade-Related Investment Measures (TRIMS): The Pros and Cons*, INT'L J. BUS. & MGMT.. 137, 137-46 (2013).

22. *Id.* at 138-139.

23. Richard M. Auty, *Industrial Policy Reform in Six Large Newly Industrializing Countries: The Resource Curse Thesis,* 22 WORLD DEV. 11, 11-24 (1994) (theorizing on the negative implications of natural resources abundance and its impact on economic development in developing countries); *see also* TERRY L. KARL, THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES (1997).

24. *See, e.g.* Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth* (NEBER Working Paper No. 5398, National Bureau of Economic Research, 1995).

considerations was thus designed and utilized by developing countries to "avoid the resource curse" theory.[25] Local content policy may also be applied in other sectors of a given economy. But with respect to the OGI, it is mostly utilized to increase ownership and control of oil and gas resources through mechanisms aimed at encouraging direct and active participation in the upstream sector measured by the proportion of inputs from the domestic economy.[26] The local content policy is usually administered through a national and legal regulatory framework that targets a particular local content policy model in the OGI of the host State.

A. The Regulatory Framework of Local Content Policies

The regulatory mechanisms or national local content policies in the host State focuses on five major components of the OGI: Oil concession, In-country fabrication, Procurement and services, Procurement of domestic inputs, and indigenous participation and localization of oil and gas operations.[27] The most notable national local content regulatory framework in the oil and gas sector in most developing countries reflects these policy thrusts.[28] For example, Brazil's national local content policy introduced through Local Content Legislation focuses on oil concession through domestic capacity building and enhanced opportunities for domiciled Brazilian entrepreneurs in the oil and gas business.[29] On the other hand, the national local content policy objective of Trinidad & Tobago, Kazakhstan, Indonesia and Nigeria targets procurement and services, procurement of domestic inputs, and indigenous participation and localization oil and gas operations respectively.[30] The origin of these variations of national local content policies may be attributable to the Norwegian[31] and Brazilian[32] policy models.

---

25. Ado, *supra* note 21, at 138.

26. *See* Marc Ofurhie, *Fiscal Policies to Support Local Content and Indigenous Participation*, *National Workshop on Improvement of Local Content Indigenous Participation in the Upstream Sector of the Petroleum Industry* (Abuja, Nigeria 2011).

27. Aluisio de Lima-Campos, *Local Content Requirements in the Oil and Gas Sector*, *Local Content Policies in the Oil, Gas, and Mining Sector Conference*, (Vienna-Austria Sep. 30-Oct. 01, 2013), http://www.worldbank.org/en/events/2013/10/01/local-content-policies-in-oil-gas-mining-sector (last visited Feb. 6, 2014).

28. *Id.*

29. *Id.*

30. *Id.*

31. *See* Victor Galante, *Local Content in Brazil* (2013), http://www.mayerbrown.com/de/publications/detailprint.aspx?publication=9196 (last visited Feb. 6, 2013) (discussing the Brazilian Model asserting the focus of the model is oil and gas concessions through the maximization of Brazilian contents through the creation of the National Petroleum Agency (ANP) to promote bid rounds in the oil and gas concessions mechanism).

32. Norway is not a developing country. But it is a country located close to the North Sea with abundant natural resources in oil and gas. It has successfully adopted a local content policy and strategy premised on the theoretical foundation that companies operating in the oil and gas industry should utilize the natural resources to

1. The Norwegian Model

As in most developing countries whose Gross Domestic Product (GDP) mostly depends on the OGI, prospecting and exploration for oil and gas began in Norway in the 1960s.[33] However, unlike in Nigeria and some developing countries, shortly after the exploration of oil and gas became viable, the Norwegian government introduced a local content policy through legislation.[34] The Norwegian local content strategy was designed to "award contracts to Norwegian bidders when they proved to be competitive in terms of price, quality, delivery time and service".[35] According to one report, "[t]he rationale behind this was to promote the establishment of local industry and this was achieved through cooperation with international oil companies."[36] Specifically, the model created a framework for Norwegian active participation in the supply and production chain of oil and gas exploration and development in Norway.[37] One source observed that, pursuant to the objective of the Norwegian model, "The more the [foreign] operators contracted with Norwegian suppliers the greater their chances in subsequent biddings."[38] Thus, the Norwegian model was centered on technology transfer aimed at strengthening Norwegian oil and gas companies in the supply chain.

At the same time, it has been reported that the focus of the Norwegian local content strategy facilitated the establishment of substantial part of the Research and Development ("R&D") centers by some major international oil companies in the territory of Norway.[39] It seems to be critically important, that in the OGI, the domicile of the R&D activities of multi-national oil companies is a factor that should demonstrate the readiness to transfer technology and improve local capacity building in the industry.[40] In view of the emphasis and policy considerations of the Norwegian local content strategy, it is valid to state that the

---

contribute to economic development. *See generally* Farshad Tehrani, *Norwegian Petroleum "Local Content" and the Relevance to Iran*, Alfa Development and Engineering AS Global Local Content Summit for Oil and Gas (2006).

33. *Norway: A Local Content Success Story*, OIL AND GAS IQ (Nov. 10, 2014, 6:09 PM), http://www.oilandgasiq.com/strategy-management-and-information/articles/norway-a-local-content-success-story.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. De Lima-Campos, Chairman, ABCI Institute and Adjunct Professor, American University Washington College of Law, Vienna; De Lima-Campos, *supra* note 27.

39. *Norway: A Local Content Success Story*, *supra* note 33.

40. *See* Hans J. Kind, Petter Osmundsen & Ragnar Tveteras, *Critical Factors in Transnational Oil Companies Localization Decisions-Clusters and Portfolio Optimisation* 1, 2 (Foundation For Research in Economic and Business Administration, Bergen-Norway, Working Paper No. 53/01, 2014), *available at* http://www.researchgate.net/profile/Ragnar_Tveteras/publication/229048304_Critical_Factors_in_Transnational_Oil_Companies_Localisation_DecisionsClusters_and_Portfolio_Optimisation/links/0912f50b5111171dfb000000.pdf ("R&D is a stochastic process where the probability of success tends to be increasing in the number of research centers, the degree of interaction between research centers and end-users.").

overriding motivation is founded in the objective of contribution to the economic development of Norway through the instrumentality of its OGI. In recent years, the Norwegian government has agreed to export its local content experience and success to some developing countries to assist in developing a viable model and strategy that would contribute to economic development.[41] At this juncture, it is fair to ask whether the administration of the Norwegian local content obligation violates any international investment law obligation that Norway owes to foreign investors in its oil and gas industry, if not, why? This article will return to develop further on these questions as a prelude to the analysis of Nigeria's local content legislation later. For now, the Brazilian model merits some consideration.

2. *The Brazilian Model*

The objective of the Brazilian local content strategy is to regulate the mechanism for oil and gas concessions. The regulatory framework of the local content policy has been sustained through several legislations.[42] The analysis of the focus of the successive legislations showed the establishment of a system that specified and administered minimum local content requirements in the award of concession licenses in oil and gas exploration and development.[43] The system mandates the national oil company-PETROBAS to carry out research, production and development of oil and gas in Pre-Salt areas.[44] There are also regulations, pursuant to the local content policy for reporting, certification and auditing of local content requirements regulated by the ANP (National Agency of Petroleum, Natural Gas and Biofuels).[45] The ANP is the government's regulatory agency for

---

41. In Oct. 2013, a group of Parliamentarians from Ghana visited Norway to under study the underpinnings of the Norwegian oil and gas industry and the utility of the industry to the economic development of Norway. The Ghanaian delegation was presented with a detailed outline of the Norwegian experience in the latter's oil and gas industry. The visit was made as part of the cooperation between Norway and Ghana under the "Oil for Development Program." *See generally, Ghanaian Parliamentarians Visit Norway to Discuss Sustainable Politics For Oil and Gas,* NORWAY—THE OFFICIAL SITE IN Ghana (Feb. 7, 2014), www.ghana.norway.info/News_and_events/Ghanian-parliamentarians-visit-Norway-to-discuss-sustainable-politics-for-oil-and-gas/.

42. *See, e.g.*, Lei No. 9.478, de 6 de Agosto de 1997, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], Agosto 1997 (Braz.); Lei No. 12.276, de 30 de Junho de 2010, D.O.U., Junho 2010 (Braz.); Lei No. 12.304, de 2 de Agosto de 2010, D.O.U., Agosto 2010 (Braz.).

43. *See, e.g.*, Law 9.478 of August 6, 1997, D.O.U. (Braz.); Law 12.276 of June 30, 2010, D.O.U. (Braz.); Law 12.304 of August 2, 2010, D.O.U. (Braz.).

44. Pre-Salt exploration and development means prospecting for oil and gas in areas determined by geological analysis to contain oil and gas reserves underneath rock layers containing salt. It is much more difficult and expensive to explore for oil and gas in Pre-Salt areas. These areas are mostly common in Brazil, Gabon and Angola. For a more detailed examination of oil and gas exploration in Pre-Salt areas, *see* Claudia Zacour, Tatiana Z. Pereira, Angela L. R. Cristofaro & Felipe F. Francisco, *Petrobas and the Regulatory Framework for the Exploration and Production of Oil and Natural Gas in the Brazilian Pre-salt Region*, 5 J. WORLD ENERGY L. & BUS. 125, 130 (2012) (reviewing the legal and regulatory framework for the exploration of oil and gas in the Pre-Salt areas of Brazil).

45. *Id.*

oil and gas exploration in Brazil.[46] The Brazilian local content model is not without criticisms. It has been validly criticized for its lack of distinction in assigning roles and responsibilities for the various organs and institutions charged with the monitoring and administration of the local content policy.[47] Two opponents of the model argued that the Brazilian local content policy is weak and lacks the prospect to generate any meaningful change in the OGI.[48] The criticisms against the Brazilian model may be credible to a large extent. However, to the extent that its administration has not been criticized for violations of core BITs principles, there may be better opportunities to review the current system to make it more innovative in achieving the objective of economic development. Thus, the Brazilian model is a better promise for developing countries that local content policy initiatives through legislation is viable for considerations of economic development if the mechanism is properly designed and implemented, having regard to the host State obligations under international investment law.

Indeed, apart from the clear considerations of economic development, a synthesis of the Norwegian and Brazilian models demonstrates two distinct systems that are designed to accommodate international law obligations in the conduct and treatment of foreign investments in the host State. On the one hand, Norwegian international investment law regime continually project a valid "economic development exception" in the application and interpretation of its local content legislation and policy that allow the government to regulate foreign investment in the public interest.[49] This exception could limit or prevent potential investment claims founded on discrimination or measures considered adverse to the interests of foreign investors. On the other hand, Brazil has no BIT in force.[50] Brazilian local content policy is regulated by national investment agreements.[51] Most investment claims are founded in BITs and other international investment agreements that put international investment law obligations of the host State at play in the settlement of investment disputes.[52] These distinct characteristics of the Norwegian and Brazilian models will become clearer in the analysis of Nigeria's local content policy and legislation below.

---

46. *Id.* at 126.

47. *See id.* at 281-84.

48. *See id.* at 271-87.

49. *See* Luke E. Peterson, *Norway Proposes Significant Reforms to its Investment Treaty Practices,* INVESTMENT TREATY NEWS (Nov. 11, 2014, 12:06 PM), http://www.iisd.org/pdf/2008/itn_mar27_2008.pdf ("Norway's was impelled to develop a new negotiating template [of BITs] following growing concerns as to the constitutionality of concluding treaties which granted foreign investors the right to bring claims against Norway through international arbitration, and the potential that the arbitrators might impose limits on the exercise of government authorities which are granted under Norway's constitution.").

50. *See* Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law,* 19 GLOBAL BUS. & DEV. L.J, 337, 362-64 (2007).

51. *See id.* at 361-62.

52. *See id.* at 363-64.

B. The Foundation and Enactment of Nigeria's Local Content Law and Policy

The Nigerian economy is substantially driven by foreign investments in the OGI.[53] Nigeria's oil and gas reserves have attracted foreign investments into the country for more than five decades.[54] Since oil was discovered in the 1950s, successive Nigerian governments have formulated policies on how to utilize Nigeria's oil wealth for economic development through human capital development and technology transfer.[55] Some policy initiatives aimed at achieving these objectives are examined briefly below.[56]

1. The Legislative Initiatives and Policies targeting Nigerian Local Content Prior to the LCA

The Minerals Oils Act ("MOA") of 1958 was passed into law shortly after oil was discovered in commercial quantities in Nigeria.[57] The MOA established a licensing regime in the form of an enabling petroleum law to regulate the exploration and development of crude oil in Nigeria.[58] The licensing regime and regulatory framework of the MOA were fashioned after the "British Colonial Model" that was also utilized and applicable then, in Malaysia, Brunei and Egypt.[59] Pursuant to the MOA, Oil Mining Leases ("OML") were granted by the Nigerian government to licensees to prospect for oil under certain terms and conditions.[60] The MOA has an underlying initiative and policy for local capacity building through requirements for human capital development on skills critical to the OGI.[61] Under the OMLs, licensees were required to design and administer a technical training scheme to train Nigerians as "tradesmen and craftsmen" for the purpose of employment in the industry.[62] The OMLs also required the recruitment and training of Nigerians to fill jobs including and up to supervisory and management positions in the OGI.[63] However, there was no enforcement or monitoring mechanism within the framework of the MOA that ensured that the Lessees effectively carried out the mandate of human capital development under

53. *See* I. A. Omenikolo & R. O. Amadi, *Challeneges Facing Nigerian Local Content in Oil and Gas Industry*, CONTINENTAL J. RENEWABLE ENERGY 1, 15 (2010).

54. *See id.* (stating that the Nigerian economy has received returns on investments in the oil and gas industry in excess of $600 billion since 1956).

55. *See generally* Oguine, *supra* note 11, at 415; *Id.*

56. *See generally* Oguine, *supra* note 11, at 450-30.

57. Bernard G. Taverne, *A Study of the Involvement of Industry and Governments in the Production and Use of Petroleum,* in KLUWER LAW INTERNATIONAL 198 (2d ed., 2008).

58. *Id.*

59. *Id.*

60. *Id.*

61. Oguine, *supra* note 11, at 405-30.

62. *Id.* at 406.

63. *Id.*

the OMLS granted by the Nigerian government.[64] The content requirement under the MOA did not mandate any concrete threshold for the training and employment of Nigerians to achieve the human capital development policy of the MOA.[65] Probably, because of the weakness of MOA, it was repealed and replaced by the Petroleum Act ("PA") of 1969.[66]

The workings of the MOA also revealed significant challenges that became inherent in the licensing regime and extant regulations.[67] There were legitimate issues surrounding the scope of the ministerial authority to make or issue regulations pursuant to the MOA particularly on matters concerning royalties and the utility of gas.[68] Thus, the PA was principally promulgated to "modernize the previous licensing regime without affecting its concept and principles".[69] The PA contained four schedules that were accompanied by new Petroleum (Drilling and Production) Regulations ("PDPR").[70] One of the most significant features of the PA is that it gave the Minister an expanded authority to change, amend, or issue any regulation concerning critical aspects of petroleum operations in Nigeria pursuant to approved OMLs.[71] However, there was a significant departure from the Nigerian content policy requirement under the MOA that appeared to have addressed some of the weakness of the MOA. The First Schedule to the PA created a Nigerian content target for OMLs licensees.[72] The Schedule require the holder of an OML to "ensure that within ten years from the grant of his lease", the numbers of Nigerians employed by him shall be at least 75% of the total number of his workforce employed by him in approved or designated grades.[73] The employment shall be in connection with the lease granted in managerial, professional and supervisory cadres.[74] In addition, the First Schedule went on to provide that, "the number of citizens of Nigeria in any one such grade shall be not less than 60% of the total; and all skilled, semi-skilled and unskilled workers are citizens of Nigeria."[75] Unlike the MOA, the PDPR established a monitoring and enforcement mechanism for the Nigerian content relating to recruitment, training and employment of Nigerians through the office of the Minister of Petroleum Resources.[76] The creation of the Nigerian National Petroleum Corporation ("NNPC") in the 1970s through the merger of the Nigerian National

64. *Id.*
65. *Id.*
66. *Id.*
67. Taverne, *supra* note 57, at 198.
68. *Id.*
69. *Id.*
70. *Id.*
71. *See* Petroleum Act 1969, §§ 8-9 (Laws of the Federation of Nigeria Chapter P10, 2004).
72. *Id.*
73. *Id.*
74. Schedule 1, para. 38, Petroleum Act 1969 (Laws of the Federation of Nigeria Chapter P10, 2004).
75. *Id.*
76. *See supra* note 33, at pp. 26-9.

Oil Company ("NNOC") and the Ministry of Petroleum Resources further reinforced the Nigerian content policy under the PA. The NNPC was primarily established as an agency of the Nigerian government to operate and partner with International Oil Companies ("IOCs")[77] to enforce the petroleum policy of Nigeria. The oversight functions of the NNPC included matters connected with Nigerian content under the PA and the OMLs that were granted pursuant thereto.[78]

It is debatable whether or not the Nigerian content policy under the PA met its objectives as envisaged with respect to human capital development and local capacity building. Some commentators have suggested that, to satisfy the conditions attached to their OMLs, the IOCs operating in Nigeria have recruited and trained Nigerians for various skills relevant to the OGI.[79] Others have argued that the IOCs have not been faithful and effective in meeting the conditions of Nigerian content attached to their OMLs.[80] Analyzing the efficacy of the Nigerian content directives under the PA and OMLs, one source described the mandate for Nigerian content under the PA and OMLs as "pocket provisions". As a practical matter, the analogy of "pocket provisions" may be likened to provisions that were swept under the carpet with little or no consequences to the IOCs or foreign investors. It may be argued that, there are valid points on both sides of the debate. For one, there is some evidence that IOCs have recruited and trained Nigerians for skills that are critical to the oil and gas industry.[81]

On the other hand, there is significant evidence where IOCs have treated the Nigerian content requirements and local capacity building with levity. Thus, it seems more convincing that the agitation and public commentary on the need for economic development through the utility of the OGI may not be unconnected to the lackadaisical attitude of IOCs and the ineffective provisions of the PA towards Nigerian content in the OGI.

77. In the context of this article, IOCs also refers to foreign investors in the Nigerian oil and gas industry.

78. *See* Anthony C. Madichie, *The Functions, Powers and Role of NNPC in Nigeria's Oil and Gas Industry,* Presentation at the workshop organized by IIPELP in conjunction with NJI (Oct. 16-18, 2012), http://www.iipelp.org/pdfs/functions.pdf (last visited Feb. 13, 2014).

79. Oguine, *supra* note 11, at 407.

80. Even with the enforcement mechanism in the current Local Content Law there have been strong indications that some IOCs have violated pertinent provisions of the law relating to human capital development and local capacity building. See *AfricVilla, Reps Probe Major IOCs over Local Content Violation* (Oct. 28, 2013), http://africvilla.com/index.php/africa2/10-nigeria/39-reps-probe-major-iocs-over-local-content-violation #sthash.nNMRRdUx.dpbs (last visited Mar. 15, 2015).81. See M.I. Gab-Umoden, *Nigerian Local Content Development Policy*, (2011)(unpublished LL.M Dissertation, Center for Energy, Petroleum and Mineral Law and Policy CEPMLP, University of Dundee)(on file with CEPMLP library, University of Dundee), http://www.dundee.ac.uk/cepmlp/gateway/index.php? news=31833 (last visited Feb.13, 2014).

81. See M.I. Gab-Umoden, *Nigerian Local Content Development Policy*, (2011)(unpublished LL.M Dissertation, Center for Energy, Petroleum and Mineral Law and Policy CEPMLP, University of Dundee)(on file with CEPMLP library, University of Dundee), http://www.dundee.ac.uk/cepmlp/gateway/index.php? news=31833 (last visited Feb.13, 2014).

Similarly, barring the hydra-headed problem of endemic corruption, political instability and bad governance perpetuated mostly by past military juntas, Nigeria has not been competitive in attracting foreign investment in the OGI for economic development. In this regard, Balouga expressed the frustration of successive Nigerian governments this way:

For a country with over four decades' experience in oil and gas exploration and production activities and proven recoverable reserves of about 37 billion barrels, her inability to use the resource wealth as a means for national development and poverty reduction has perhaps been the greatest challenge facing successive administrations.[82]

Thus, the proper use of oil and gas resources for economic development has generated a lot of debate among stakeholders in the industry. Regardless of the monumental foreign investments in the OGI, the debate continues to focus on the best ways to optimize and utilize local competences in Nigeria to maximize benefits that could stimulate economic development through promotion of local participation.[83] Once there appeared to be a consensus on the maximization of the benefits of the OGI on economic development, the debate turned to the question of the *modus operandi* from a legal and economic perspective.[84] Bolouga went on to explain that the need to encourage local content participation in the OGI was "equally expressed in Nigeria's desire to domicile a substantial amount of the average $18 billion per annum exploration and production spending and stem the tide of capital flight which, over the years, has made Nigeria a junior partner in her joint venture arrangements with the International Oil Companies."[85]

It was hoped that a successful policy or legislative initiative by the Nigerian government to achieve this goal would encourage indigenous companies to compete favorably with foreign companies with superior financial and technological resources which would in turn contribute to economic development. It is trite that, from an international investment law perspective, any policy or legislative initiative promoted and supported by the host State for the realization of this objective may be described as a legitimate host-State regulatory objective.[86] It was against this background that the Jonathan

82. Jean Balouga, *Nigeria Local Content: Challenges and Prospects,* 3rd Q. INT'L ASSO. ENERGY ECON. 23, 23 (2012).

83. *Id.*

84. *See e.g.*, Jesse Ovadia, *Measurement and Implementation of Local Content in Nigeria-A Framework For Working With Stakeholders to Increase the Effectiveness of Local Content Monitoring,* MFP030703, Center for Public Policy Alternatives (Jan. 2013), http://cpparesearch.org/wp-content/uploads/2014/12/FOSTER-Measurement-and-Implementation-of-Local-Content.pdf (last visited Mar. 15, 2015) (suggesting that through the utility of the OGI, "local content has immense potential to transform the Nigerian economy").

85. Balouga, *supra* note 82, at 23.

86. *See* Caroline Henckels*, Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 (1) J. INT'L ECON. L. 223, 223-55 (2012) (arguing that the "proportionality analysis" in investment treaty arbitration recognizes the host State regulatory objective).

administration embarked upon an aggressive, ambitious and robust local content policy that ultimately led to the passage of Nigeria's local content law by the National Assembly.[87] However, the purpose and the text of any policy or legislative initiative in this direction may or may not be considered as a justifiable exercise of a valid host State regulatory objective in juxtaposition to the foreign investment treatment standards found in applicable BITs or investment agreements.

2. *Nigeria's Current Local Content Legislation and Policy*

The LCA was passed by the Nigerian National Assembly on March 29, 2010. The Act became law on April 22, 2010 when Nigeria's acting President, as he then was, Dr. Goodluck Ebele Jonathan signed the Bill into law.[88] Though, the law was targeted at Nigeria's OGI,[89] its provisions appeared to apply to the entirety of the Nigerian economy because the title of the Act and some provisions shows clearly that the law is an Act enacted to provide for the Nigerian content development in the Nigerian economy and for matters connected therewith.[90] The LCA established the Nigerian Content Development Agency ("NCDA") to oversee and monitor the enforcement of the provisions of the law.[91] Under the LCA, the Nigerian Content Development Management Board ("NCDMB") was established to have overall control of the NCDA in carrying out its mandate under the LCA. The mandate of the NCDA includes designing a framework for the growth of the Nigerian content in the Nigerian economy through target setting and capacity building "while ensuring international competitiveness of the materials, equipment and services provided by Nigerian companies."[92] The capacity building initiatives of the NCDA entail making "[r]egulations to establish minimum standards, facilities, personnel and technology for training in a Nigerian Training Institute, and the Regulations shall specify modalities for

---

87. *See* Mohammed S. Shehu & Hamisu Muhammad, *Jonathan Signs Local Content Bill into Law,* DAILY TRUST NEWSPAPERS (April 23, 2010).

88. *Id.*

89. At the signing ceremony of the Local Content Act, President Goodluck Ebele Jonathan stated eloquently that the NCDMB "shall make procedures to guide , monitor, coordinate and implement [the Act] to ensure and enforce measurable and continuous growth of the Nigerian content in all oil and gas operations in the country". *Id.*

90. *See, Nigerian Oil and Gas Industry Content Development Act,* § *2 (Laws of the Federation of Nigeria, 2010). A full text of the Act is available at* http://www.placng.org/new/laws/NIGERIAN%20OIL%20AND%20GAS%20INDUSTRY%20CONTENT%20DEVELOPMENT%20ACT,%202010.pdf (last visited Mar. 15, 2015).

91. *Nigerian Oil and Gas Industry Content Development Act,* § *1(1) (Laws of the Federation of Nigeria, 2010).* A full text of the Act is available at http://www.oandoplc.com/wp-content/uploads/Nigerian%20 *Content%20Act.pdf* (last visited Sep. 19, 2013).

92. *Id.* at § 2.

involving industry stakeholders as partners for development and managing of the institute".[93]

To be clear, the LCA was enacted to give preferential treatment to Nigerian companies with reference to opportunities and competition for investments in the Nigerian economy with particular emphasis on the OGI.[94] According to Adeoye Adefulu, "in seeking to actualize its objectives [of the LCA], a number of instruments have been incorporated into the provisions of the NCA. These instruments include the requirements of exclusive consideration for indigenous companies in certain circumstances, first consideration for Nigerian companies and full and fair opportunity."[95] During the signing of the LCA, Shehu and Muhammad report that President Goodluck Jonathan gave a directive that, pursuant to the LCA, Nigerian indigenous service companies in the OGI should be given "exclusive consideration."[96] In fact, Section 26 of the LCA states:

> The Agency shall make Regulations with targets to ensure full utilization
>
> and steady growth of in-country capacity of Indigenous Oil, Gas and Services Companies engaged in Seismic Data Processing, Engineering Design, Reservoir Studies, manufacturing and fabrication equipment, Agriculture, Health, Science and Information Technology, Building, Construction, Transport Maritime etc. and other facilities for the Nigerian Economy.[97]

III. FOREIGN INVESTMENT TREATMENT STANDARDS APPLICABLE IN NIGERIA'S INTERNATIONAL INVESTMENT REGIME

The notion of "international minimum standards" as it were, in the treatment of foreign investments in the territory of the host State, have metamorphosed into a compendium of foreign investment treatment standards found in most BITs.[98] This became possible because of the failure of the concept of "international minimum standards" to attain the status of customary international law.[99] Foreign investment treatment standards are now entrenched principles of international investment law through the proliferation of BITs in the last two decades. These

93. *Id.* at § 21.

94. Adeoye Adefulu, *National Treatment & Nigeria's New Local Content Legislation,* (2010), http://www.mondaq.com/x/102400/international+trade+investment/National+Treatment+Nigerias+New+Local+Content+Legislation (last visited Sep. 19, 2013).

95. *Id*.

96. Shehu & Muhammad, *supra* note 87.

97. *Nigerian Oil and Gas Industry Content Development Act*, *supra* note 90 at § 26

98. *See* Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* 191-92 (Oxford Univ. Press 2010).

99. Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice* 6 J. WORLD INVESTMENT & TRADE 357, 359-60 (2005).

treatment standards form the core elements of BITs.[100] The standards may be likened to assurances given by the State Parties for the protection of covered investments. Indeed, the evolution of investment treatment standards is consistent with the need for the protection of foreign investment in the host State.

Investment treatment standards in most BITs may be drafted in the form of Fair and Equitable Treatment ("FET") of covered investments, Most-Favored-Nation ("MFN") treatment and National Treatment ("NT") of foreign investments in the host State. There is no established meaning of an FET standard even though it has been the subject of intense commentary by several arbitral Tribunals and scholars of investment treaty arbitration.[101] It must be acknowledged that, the debate over the actual meaning of the phrase is beyond the scope of this article. However, it has been fairly established that it is one of the most common investment treatment standards found in the majority of BITs.[102] At the very least, the phrase requires that the host State accords foreign investments in its territory a non-discriminatory treatment that may be considered fair and equitable. Whether or not a particular act or omission of the host State is unfair or inequitable with reference to covered investments has been the subject of varying interpretations in investment treaty arbitration.[103]

On the precise meaning of the MFN treatment standard, Salacuse opines that the phrase means "a host country may not treat an investor or an investment from an investment treaty party less favorable than its own investors or investments from any other country".[104] Salacuse also describes the NT standard as a requirement in BITs that espouses the principle that the host State treats foreign investment and the investor "no less favorably than they treat their own nationals".[105] In whatever form the foreign investment treatment standards are drafted, the treatment standards connote or promote the principle of non-discrimination in the conduct of FDI in the territory of the host State. The treatment standards are also in close accord to what may be referred to as the "reasonableness principle". It has been suggested that the reasonableness principle "prohibits treatment [of foreign investment] that is arbitrary or motivated by political or discriminatory considerations."[106]

---

100. *See* Vandevelde, *supra* note 98.

101. *See*, Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties,* 39 INT'L LAW 87, 87-106 (2005); Schreuer, *supra* note 99, 357-86; Barnali Choudhury, *Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law* 6 J. WORLD INVESTMENT & TRADE 297, 297-320 (2005) and UNCTC, *Bilateral Investment Treaties,* UN Doc ST/CTC/65, 41-45(1988).

102. *See* Jeswald W. Salacuse, THE LAW OF INVESTMENT TREATIES 131 (Oxford Univ. Press 2010).

103. *See id*. at 131-32.

104. *Id*. at 133.

105. *Id*.

106. *See* Vandevelde, *supra* note 98, at 189.

Nigeria's BITs network is replete with varying forms of foreign investment treatment standards.[107] As drafted, the phrases found in Nigeria's BITs are also caught up in the ambiguity that may be associated with the true meaning of the treatment standards in the context of investment treaty arbitration. The most typical formulation of the foreign investment treatment standards is found in the UK-Nigeria BIT.[108] Article 3 appears to be a combination of provisions for MFN and NT treatment standards. The Article provides:

> (1) Neither Contracting Party shall in its territory subject investment or returns of nationals or companies of the other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own nationals or companies or to investment or returns of nationals or companies of any third State.
>
> (2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favorable than that which it accords to its own nationals or companies or to nationals or companies of any third State.
>
> (3) Notwithstanding the provisions of paragraphs (1) and (2) of this Article, either Contracting Party may grant to its own nationals and companies special incentives in order to stimulate the creation of local industries, provided they do not significantly affect the investment and activities of nationals and companies of the other Contracting Party in connection with an investment.[109]

The Nigeria-UK BIT did not expressly provide for the FET treatment standard for foreign investments in the territory of the host State.[110] The text of the preceding provisions in the Nigeria-UK BIT did not address any relationship nor is there any interpretative language that may be suggestive of the fact that, the FET standard may be interpreted as part of the NT or MFN clauses in the Article under reference.[111] Thus, is it possible that consideration for FET could be incorporated by arbitral Tribunals as part of the interpretation of the reasonableness principle? How is the consideration of any alleged conduct or

107. *See* Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The Netherlands and the Federal Republic of Nigeria, art. 6, Nov. 2, 1992, 2240 UNTS 341. [hereinafter Netherlands-Nigeria BIT], http://www.unctadxi.org/templates/DocSearch.aspx?id=779 (last visited Mar. 6, 2013).

108. Agreement between the Government of the United Kingdom and Northern Ireland and the Government of the Federal Republic of Nigeria for the Promotion and Protection of Investments, Dec. 11, 1990, 1658 UNTS 523. [hereinafter UK-Nigeria BIT].

109. *Id.*

110. *See id.*

111. *See id.*

omission of the host State determined, that is sought by an investor to be characterized as discriminatory, unfair or unjust to covered investments? The approaches to these questions by arbitral Tribunals have not been unanimous.[112] In some cases, the FET standard has been treated as a norm of customary international law in the process of considering the NT or MFN treatment standards. Other arbitral Tribunals have espoused the view, that it is needless to consider any relationship of FET treatment standard to other foreign investment treatment standards in the absence of any specific language to that effect in the applicable BIT or investment agreement under review.

In Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan, the investment dispute in this ICSID arbitration arose over the construction of a motorway in Pakistan.[113] The National Highway Authority ("NHA") of Pakistan, a government agency controlled by the government of Pakistan, planned the construction of a six-lane motor highway.[114] The Claimant is a Turkish company engaged in the business of construction of motor highways and other infrastructural projects within and outside Turkey.[115] The NHA and the claimant entered into an agreement for the construction of the proposed highway of the NHA.[116] The investment dispute, subject matter of the ICSID arbitration, arose over the notice of termination of contract served by NHA on the Claimant.[117] The Claimant commenced ICSID arbitration.[118] In its request for arbitration, the Claimant alleged *inter alia,* that the unlawful acts and omission of Pakistan with reference to the agreement for the construction of the highway contract adversely affected its investments in Pakistan.[119] As part of the consideration of the claims of the Claimant, the arbitral Tribunal considered the FET treatment standard obligation of Pakistan in the context of the circumstances leading to the investment dispute.[120] The arbitral Tribunal appeared to characterize the FET standard as a general obligation.[121] In an attempt to define the nature of the FET standard in this regard, the arbitral Tribunal interpreted the analysis of prior Tribunals to mean that the FET standard obligation of the host State means that the standard:

> . . . comprise the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising

---

112. *See infra* discussion of various tribunals.

113. Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, (Aug. 27, 2009).

114. *Id.* ¶ 9.

115. *Id.* ¶ 2-3.

116. *Id.* ¶ 11.

117. *Id.* ¶ 37-44.

118. *Id.* ¶ 42.

119. *Bayindir Insaat Turizm Ticaret Ve Sanayi AS,* ICSID Case No. ARB/03/29, Award, ¶ 47.

120. *Id.*at ¶ 113, 146-182.

121. *Id.* at ¶ 176.

> coercion or from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment. [122]

It is noteworthy, that in its analysis of the true import of the FET treatment standard, this arbitral Tribunal based its reasoning on the need for the host State to avoid discriminatory acts, arbitrariness and any act that will unreasonably frustrate the benefits of covered investments in the applicable BIT or investment agreement. Based on the reasoning of the *Bayindir* Tribunal, in an investment arbitration proceeding where it is alleged that the host State has treated the covered investments arbitrarily or in a manner that appears to violate the MFN or NT clause, an arbitral Tribunal may wittingly or unwittingly embark on a consideration of the FET treatment standard as general obligation intended to fill any vacuum left by provisions for other specific foreign investment treatment standards. Citing *Tecnicas Medioambientales Techmed SA v. United Mexican States,*[123] the Bayindir Tribunal went on to say that emphasis must be placed on the facts of the particular case in the consideration of the FET standard.[124] The Tribunal specifically adopted the ruling of another arbitral Tribunal that the FET treatment standard "must be adapted to the circumstances of each case."[125]

This approach may be founded in the reasonableness principle that abhors any form of discrimination or arbitrariness against covered investments. Dolzer and Schreuer explain that, the FET standard is intended "to fill gaps that may be left by the more specific standards" to guarantee the level of protection of investments anticipated by BITs.[126] On their part, McLachlan, Shore and Weiniger, argued that the FET standard is the plank upon which international law considers, "the adequacy of treatment meted out to a foreign investor by the judicial and administrative agencies of the host State. It reflects treatments which all civilized nations should accord to their citizens as well as aliens."[127]

In view of the foregoing analysis, it is submitted that, in spite of any express provisions under Article 3 of the Nigeria-UK BIT, considerations for the FET treatment standard may be incorporated in the interpretation of Article 3 of the Nigeria-UK BIT.[128] This conclusion speaks to the extent of Nigeria's likely liability in a potential investment claim under this BIT in the context of the application and administration of the LCA. Liability is likely, where a domestic

---

122. *Id.* ¶ 178.

123. Technicas Medioambientales Tecmed S.A. v. Mexico, ICSID Case No. ARB/ (AF)/00/02, Award, (May 29, 2003).

124. *Bayindir Insaat Turizm Ticaret Ve Sanayi AS*, ICSID Case No. ARB/03/29 at ¶ 182.

125. *See* Waste Management, Inc v. United Mexican States, ICSID Case No. ARB/AF/003, Award, ¶ 99 (Apr. 3, 2004).

126. *See* Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* 122-23 (Oxford Univ. Press 2012).

127. CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION ¶ 7.178 (2007).

128. *See id.* at notes 121-27 (for discussion of FET interpretation).

regulatory or legislative objective designed for the promotion of economic development conflicts with Nigeria's obligations created by the treatment standards of covered investments. Most especially, it is likely, where a breach of the foreign investment treatment standards that may be inclusive of the FET treatment standard could be considered as violated by legislative or administrative policy initiatives that adversely interfere with the rights of the foreign investor under an applicable BIT. As such, the FET treatment standard in particular could be applied to domestic legislative initiatives, administrative decision-making processes or judicial decisions to determine whether there was a fair decision making process or there was an omission to accord due process to the interests of the foreign investor. The effect would likely be that, if considered alongside with other specific treatment standards, the considerations of the FET treatment standard might offer a higher level of protection of foreign investments than other specific foreign investment treatment standards.

Conversely, in *MTD Equity Sendirian Berhad v. Republic of Chile*, the Tribunal concluded that because there was no reference to customary international law in the BIT under consideration in relation to the FET treatment standard, there was no basis for the Tribunal to specifically address that relationship.[129] According to the arbitral Tribunal, "[t]his being a Tribunal established under the BIT, it is obliged to apply the provisions of the BIT and interpret them in accordance with the norms of interpretation established by the Vienna Convention on the Law of Treaties, which is binding on the State Parties to the BIT".[130] The Claimant in this case was a Malaysian company that signed a Foreign Investment Contract ("FIC") with an agency of the government of Chile. The FIC was an agreement for the development and construction of a self-sufficient satellite city with houses, apartments for diverse socio-economic strata, schools, hospitals, and universities, commerce of all sorts, services, and all other components necessary for self-sufficiency.[131] The investment dispute arose when the investment project subject matter of the FIC was rejected through an agency of the Chilean government for conflict with existing urban development policy and was no longer supported by the local authority.[132] The rejection of the project occurred after the Claimant had made approved substantial investment towards the project.[133] The Claimant commenced ICSID arbitration pursuant to the Malaysia-Chile BIT.[134] In its request for arbitration, the Malaysian company claimed that, the Respondent violated the FIC for failure to grant the necessary

---

129. MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (May 25, 2004), 44 I.L.M. 91 (2005).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Agreement for the Promotion and Protection of Investments, Malay.-Chile, Nov. 11, 1992, WIPO Lex No. TRT/CL-MY/001 (entered into force Aug. 4, 1995) [hereinafter *Malaysia-Chile BIT].*

permits for the Claimant to carry out their investments. It is instructive to note that the Claimant based their claims in part on Article 3(1) of the Denmark-Chile BIT[135] and Article 3(3) and (4) of the Chile-Croatia BIT.[136] The Tribunal accepted the memorial of the Claimants that was based on the MFN clause in the Malaysia-Chile BIT; the pertinent Articles in the Chile-Denmark BIT and the Chile-Croatia BIT are applicable to the instant arbitration proceedings.[137] This arbitral Tribunal reached its conclusion above, by reviewing the question whether the obligations of the Chilean government under the Denmark-Chile and the Chile-Croatian BIT to award permits after the approval of covered investments can be considered a violation of the FET treatment standard.[138] The arbitral Tribunal's conclusion was the result of its examination of the meaning of FET treatment standard with reference to the text of the Malaysia-Chile BIT.[139]

Furthermore, whether or not one agrees with the conclusion that the FET treatment standard may be considered broadly in connection with other specific foreign investment treatment standards with reference to potential foreign investments in Nigeria's OGI, it is contended that the FET treatment standard may still be applicable under the UK-Nigeria BIT by virtue of Article 3(2) of the BIT. Article 3(2) of the UK-Nigeria BIT makes it possible for a Claimant to base their request for arbitration on the provisions of other BITs between Nigeria and any third State Party.[140] Thus, pertinent provisions of the BITs between Nigeria and other third State Parties become applicable by operation of the foreign investment treatment standards under the UK-Nigeria BIT with respect to potential investments disputes that may arise under the UK-Nigeria BIT.[141] In the

---

135. Agreement Concerning the Promotion and Reciprocal Protection of Investments, Chile-Den., art. 3(1), May 28, 1993, WIPO Lex No. TRT/CL-DK/001 (entered into force Nov. 30 1995) [hereinafter *Denmark-Chile BIT]* provides:

> Investments of investors of either Contracting Party shall enjoy full protection and security in the territory of the Other Contracting Party. Neither Contracting Party shall in anyway impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

136. Agreement on the Reciprocal Promotion and Protection of Investments, Chile-Croat., art. 3(3), Nov. 28, 1994, WIPO Lex No. TRT/CL-HR/001 (entered into force Nov. 28, 1994) [hereinafter *Chile-Croatia BIT*] provides: "Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and liquidation of such investments."

137. Article 3(1) of the Malaysia-Chile BIT provides inter alia: "Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall receive the treatment which is fair and equitable, and not less favorable than that accorded to investments made by investors of any third State." Malaysia-Chile BIT, *supra* note 134, at art. 3(1).

138. *See MTD Equity Sdn. Bhd.*, 44 I.L.M. 91 (2005).

139. *Id.*

140. UK-Nigeria BIT, *supra* note 108.

141. *See MTD Equity Sdn. Bhd, supra* note 138, at §100-03.

context of the UK-Nigeria BIT and by extension Nigeria's international investment regime, the connection of the FET treatment standard is further established by virtue of the provisions of the Netherlands-Nigeria BIT.[142] Article 3 of the Netherlands-Nigeria BIT provides thus:

> (1) Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.
>
> (2) More particularly, each Contracting Party shall accord to such investments full physical security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favorable to the national concerned.[143]

Consequently, Article 3(2) of the UK-Nigeria BIT incorporates the provisions of Article 3(1) and (2) of the Netherlands-Nigeria BIT in the interpretation of the foreign investment treatment standards contained in Article 3 of the UK-Nigeria BIT. Thus, the FET treatment standard can be interpreted to be part of the foreign investment treatment standards under the UK-Nigeria BIT. Arbitral practice has been fairly consistent in the incorporation of the consideration of the FET treatment standard in the determination of the scope of other specific treatment standards contained in BITs where applicable by operation of the latter. For example, in *MTD Equity Sdn. Bhd.*,[144] the Tribunal held that the provisions of the Chile-Croatia BIT and the Denmark-Chile BIT, which deal with the obligation to award permits pursuant to approved foreign investment and fulfillment of contractual obligations connected thereto, can be considered to be part of the FET standard by operation of the specific treatment standards in the Malaysia-Chile BIT subject matter of the ICSID arbitration instituted by the Claimant in that investment arbitration.[145]

It is noteworthy that the Netherlands-Nigeria BIT, unlike the Nigeria-UK BIT, also linked the FET treatment standard with the reasonableness principle prohibiting any impairment of the enjoyment of the benefit of foreign investments through unreasonable or discriminatory measures of the host State. Article 3(2) of the Netherlands-Nigeria BIT requires that the host State shall accord full protection and security to foreign investments.[146] This way, the

142. Netherlands-Nigeria BIT, *supra* note 107, at art. 3.
143. *Id.*
144. *MTD Equity Sdn. Bhd.*, *supra* note 138, at ¶ 101-04.
145. *Id.*
146. Netherlands-Nigeria BIT, *supra* note 107, at art. 3.

Nigeria-Netherlands BIT refers to the FET treatment standard in connection with what appears to be the MFN or NT treatment standards. It may be argued that, any link created between the FET treatment standard, full protection and security of foreign investments, and other specific treatment standards creates the opportunity for broad application of the FET treatment standard in investment treaty arbitration. Indeed, it has been reported that, the "[t]ribunals applying the fair and equitable treatment standard have held that the standard embraces principles of reasonableness, consistency, (in effect, the security of legitimate expectations), non-discrimination, transparency, and due process".[147] At the same time, specific foreign investment treatment standards like the NT or the MFN treatment standard may include legitimate exceptions that may include tax or other regional economic agreements of the host State with a third State Party.[148] Such exceptions are usually circumvented by the invocation of the FET standard that provides a higher level of protection under the reasonableness principle less than the NT or MFN foreign investment treatment standards. But, Vandevelde argued in contrast that, "the same result could occur under the standard prohibiting unreasonable or discriminatory measures and thus the seeming inconsistency in prohibiting under one standard the very conduct that is permitted under another is not solely attributable to the breadth of the fair and equitable standard."[149]

The debate over the scope of the FET treatment standard and its relationship with other foreign investment treatment standards has valid points on both side of the aisle. The issue may not be unconnected with the lack of any precise meaning or variations of the FET treatment standard in BITs. Over time, the precise scope, interpretation and application of the FET treatment standard are likely to be resolved by the progressive development of international investment law. However, as a salient feature of Nigeria's international investment regime, the interpretation of the FET treatment standard in isolation or in connection with other foreign investment treatment standards can create potential liability for Nigeria because of the discriminatory underpinnings embedded in the LCA.

Now let us return to the implication of the BNC for United States and other foreign investors in Nigeria's OGI whose home countries have no valid BIT with Nigeria. Consent to investment arbitration by Nigeria within the framework of multilateral investment treaties creates implication for the country vis-à-vis the application and administration of the LCA. For this reason, Nigeria's generic offer to arbitrate foreign investment claims within the framework of the ICSID Convention with any foreign investor whose home country is also a party to the ICSID Convention, is implicated in the LCA with respect to the procedural and substantive rights of foreign investors in the OGI. Section 26 (2) (b) of the NIPC

147. Vandevelde, *supra* note 98, at 202-203.

148. *See, e.g.*, Netherlands-Nigeria BIT, *supra* note 107, at art. 3(3).

149. Vandevelde, *supra* note 98, at 203.

Act,[150] provides an unconditional consent to international arbitration "within the framework of any bilateral or multilateral" treaty to which Nigeria is a party.

The ICSID Convention is a multilateral investment treaty which Nigeria has ratified.[151] Thus, Ekwueme's argument that on the basis of Section 26(2) (b) of the NIPC Act, a foreign investor whose home country is not a party to any BIT with Nigeria can arbitrate investment claims against Nigeria is legitimate, valid, and convincing.[152] The intellectual foundation of Ekwueme's persuasive argument is the ICSID arbitration case of *SPP v. Arab Republic of Egypt*.[153] As part of the arbitration proceedings, this arbitral Tribunal considered and interpreted a provision of Egyptian law[154] that is substantially similar to Section 26 (2) (b) of the NIPC Act.[155] In this regard, the Respondent in the *SPP case* contended that this aspect of its law is not self-executing but requires a separate agreement before the investor could institute ICSID arbitration.[156] The arbitral Tribunal rejected the contention of the Respondent and explained that, "[t] o interpret the phrases "within the framework of the ICSID Convention" and "where it applies" to mean that the parties to an investment dispute must execute a separate agreement to establish consent to the Center's jurisdiction . . . would render meaningless the entire phrase . . . no valid method of legal interpretation would warrant the conclusion that the express preference to the Convention is meaningless or pleonastic."[157]

---

150. Section 26(2)(b) of the Nigerian Investment Promotion Act provides:

> (2) Any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Act applies which is not amicably settled may be submitted at the option of the aggrieved party to arbitration as follows:
>
> > (b) In the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties'.

Investment Promotion Act (2004) Cap. (N117), § 26(2)(b) (Nigeria).

151. ICSID, LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION (2014), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English.

152. *See* Khrushchev U. K. Ekwueme, *Nigeria's Principal Investment Laws in the Context of International Law*, 49 (2) J. AFR. L. 193, 199-201 (2005).

153. Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction (Nov. 27, 1985), 3 ICSID Rep. 101 (1995); *see* Ekwueme, *supra* note 153, at 200.

154. Law No. 43 of 1974, art. 8 (Egypt), *as cited in* Ekwueme provides:

> Investment disputes in respect of the implementation of this Law are to be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the States and the nationals of other countries to which Egypt has adhered by virtue of Law no. 90 of 1971, where (i.e., the Convention) applies.

Ekwueme, *supra* note 153, at 200.

155. *Id.*

156. *Id.*

157. *Southern Pacific Properties (Middle East) Ltd.*, 3 ICSID Rep. at ¶ 94.

It is very likely that the obligation of the host State in the recognition of the FET standard in the conduct of foreign investments would be a reoccurring decimal in the interpretation of the foreign investment treatment standards embedded in Nigeria's international investment law regime. Mann was convincing when he submitted that " . . . the right to fair and equitable treatment goes much further than the right to most-favoured- nation and to national treatment . . . and it may well be that . . . provisions of the Agreements affording substantive protection are no more than examples or specific instances of this overriding duty".[158] More often than not, arbitral practice on the analysis of the foreign investment treatment standards is tied to the question whether or not the host-State has validly made a regulatory policy objective.[159] From the standpoint of the host-States like Nigeria, the regulatory objective is often geared towards considerations and policies that may promote economic development of the host State. [160]

There is the absence of a consensus on the parameters for the exercise of the host-State regulatory objective or on what may be tantamount to arbitrariness and discriminatory measures against foreign investments. But there appears to be a common ground in arbitral practice that the host State may be held liable if a case of discrimination could be made based on the circumstances and facts of each case.[161] In *Saluka Investments BV v. The Czech Republic*, an investment arbitration that arose under the I976 UNCITRAL Rules, the Tribunal held that "[t]he standard of "reasonableness" has no different meaning in this context than in the context of the 'fair and equitable treatment' standard with which it is associated and the same is true with the standard of "non-discrimination".[162] The *Saluka* arbitral Tribunal went on to say that "[t]he standard of "reasonableness" therefore requires, in this context as well, a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the standard of "non-discrimination" requires a rational justification of any differential treatment of a foreign investor."[163] However, in the context of the theme of this article, an assessment of the LCA would include an analysis of the meaning of "investment" in the OGI in the context of international investment law.

---

158. Francis A. Mann, *British Treaties for the Promotion and Protection of Investments,* 1981 BRIT. Y.B. INT'L L. 241, 243.

159. *See Saluka Investments BV (The Netherlands) v. The Czech Republic*, THE MATTER OF AN ARBITRATION UNDER THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW RULE S 1976 [hereinafter UNCITRAL], Partial Award, ¶ 458-461 (Mar. 17, 2006). *See also S D Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, ¶ 263-264 (Nov. 13, 2000).

160. *See supra* Part I.

161. *Salkula Investments BV v. The Czech Republic*, UNCITRAL, at ¶ 464.

162. *Id.* at ¶ 460.

163. *Id.*

IV. THE APPROACH TO THE MEANING OF "INVESTMENT" UNDER NIGERIAN AND INTERNATIONAL INVESTMENT LAW REGIMES

Nigeria's ratification of the ICSID Convention necessitates substantial reference to ICSID arbitral practice under this heading for two reasons. Firstly, foreign investors mostly prefer the ICSID Convention's investment dispute resolution mechanism through the International Center for the Settlement of Investment Disputes investment arbitration Rules (ICSID) in instances where consent to ICSID arbitration is available.[164] Secondly, there is an open offer and consent to ICSID arbitration under Nigeria's international investment regime whether or not the foreign investor's home country is a party to the ICSID Convention.[165]

The national definition of "investment" in the context of international investment law is usually found in the host State's international investment law regime. Generally, the regime may include the consent to investment arbitration through a multilateral investment treaty, BITs, or the national investment code for the conduct of international investments. In other words, the combination of the variables of consent to investment arbitration, BITs and national investment codes adds to the make-up of the host State's international investment framework. The definition of "investment" under Nigerian law is relevant because of the combined effect of Nigeria's consent to investment arbitration within the framework of the ICSID Convention and Section 25 (2) (b) of the NIPC Act mentioned above.[166] However, where there is a conflict between a national investment code and an applicable international investment agreement in the definition of "investment," the meaning of the term in the international agreement will prevail in the adjudication of the investment dispute.[167] This consideration is often influenced by the notion that the international investment agreement offers better protection of foreign investments. Damrosch *et al* notes that "international tribunals have sometimes declared municipal legislations to be subject to international obligations."[168] The authors' observation might be based on the theory that the State is bound to give effect to the principles of international law.[169] Similarly, consideration for the investment of private international capital in the host State may be influenced by the assurances in

164. Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INVESTMENTS & TRADE 231, 231(2005) (stating that "[m]ost BITs refer to ICSID").

165. Nigerian Investment Promotion Commission Act (1995) Decree No. (16) Chapter N117, § 26(2)(b) (Nigeria) Laws of the Federation of Nigeria [hereinafter The NIPC Act], *available at* http://www.nigeria-law.org/Nigerian%20Investment%20Promotion%20Commission%20Act.htm.

166. *Id.*

167. Emilio Agustin Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Objections to Jurisdiction, ¶ 66-88 (Jan. 25, 2000), 5 ICSID Reports 389; *see* Lori F. Damrosch et al, INTERNATIONAL LAW: CASES AND MATERIALS 161 (West Group, St. Paul 4d ed. 2001).

168. Damrosch et al, *supra* note 167.

169. *Id.* at 159.

place for the protection of foreign investments. The assurances for the protection of investment may be useless, ambiguous or ineffective in the absence of a definition of "investment" that incorporates the protected investment.

A. The Definition of "Investment" Under Nigerian Law

The NIPC Act established the Nigerian Investment Promotion Commission (NIPC) as a "one-stop agency" and a government liaison agency between the government and foreign investors.[170] Section 31 of the NIPC Act defines "investment" as:

> "investment" made to acquire an interest in an enterprise operating within and outside the economy of Nigeria.[171]

Investment by foreign investors in any enterprise operating outside Nigeria cannot qualify as an "investment" in the context of FDI that should be in the territory of the host State. The above definition of "investment" is amorphous because the meaning of "investment" under the NIPC Act extends to foreign investment outside the territory of Nigeria. The definition may have been drafted to capture a broad meaning of "investment" within the framework of international investment law with reference to Nigeria. It could be argued that the provision of Section 4 (c) of the NIPC Act to "promote investments in and outside Nigeria through effective promotional means" covers investment outside Nigeria,[172] but that section is a mandate to the NIPC to utilize promotional means within and outside of Nigeria to attract FDI into the Nigerian economy. Therefore, Section 4 (c) of the NIPC Act does not justify the current definition of "investment" under Nigerian law that may give credence to the suggestion that the NIPC Act protects investments outside the territory of Nigeria.

The NIPC Act established the NIPC to "encourage and promote investment *in the Nigerian economy*; and matters connected therewith" (emphasis added).[173] Furthermore, the notion of foreign investment under international investment law, at a minimum, entails the direct importation of capital into the host State.[174] This is the basis of private international investment. It is contended that a Nigerian investor who invests overseas is not guaranteed any protection under the NIPC Act with reference to ICSID arbitration under section 26 (2) (b) of the NIPC Act. The nature of a foreign investment dispute is described as "one

170. NIPC Act, *supra* note 165, at § 1 Preamble; Khrushchev U. K. Ekwueme, *Nigeria's Principal Investment Laws in the Context of International Law*, 49 (2) JAL 177, 185 (2005).

171. NIPC Act, *supra* note 165, at § 31.

172. *Id.* at § 4(c).

173. *Id.* at § 1 Preamble.

174. *See* Robert E. Lipsey, *Home-and Host-Country Effects of Foreign Direct Investment,* CHALLENGES TO GLOBALIZATION: ANALYZING THE ECONOMICS 333, 334 (Robert E. Baldwin and L Alan Winters eds., Chicago Univ. Press 2004).

between an investor from one country and a government that . . . relates to an investment in the host country".[175] In other words, under the international investment law regime, a foreign investment is envisaged to be an investment in the territory of the host State, not outside it. Garcia-Bolivar appears to address the nature of foreign investment persuasively when he declares

> . . . a range of strategies is often adopted by States to attract that capital, a key one of which is enhancing the domestic investment climate through entering into international legal instruments that provide protection to foreign investment. In concluding international investment agreement (IIAs), States agree to grant international protection to foreign investments—and, in return they expect to attract the capital needed to promote their economic development. For host States, this assumption is a central, if often unarticulated, rationale behind the conclusion of the agreement . . . This understanding could, in turn, influence the interpretation of the IIAs' provisions under international law.[176]

Furthermore, the definition of "investment" under the NIPC Act may be in conflict with the basic requirements of Article 25 (1) of the ICSID Convention with reference to the meaning of the term under Nigerian law. Article 25 (1) of the ICSID Convention defines the jurisdiction of the Center thus:

> The jurisdiction of the Center shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by the State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.[177]

The premise of Article 25 (1) of the ICSID Convention, with reference to the meaning "investment," envisages foreign investment in the territory of the host State. Thus, it may be difficult for an arbitral Tribunal to make a determination of an "investment" based on the way Section 31 of the NIPC Act is drafted, particularly where a BIT is inapplicable and the existence of an "investment" is determined by the interpretation of national law such as the NIPC Act. As a result, the definition of "investment" under Nigerian law invites reform. The

175. R. Doak Bishop, James Crawford & W. Michael Reisman, FOREIGN INVESMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 9 (Kluwer Law International 2005).

176. Omar E. Garcia-Bolivar, *Economic development at the core of the international investment law regime*, EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 586, 587 (Chester Brown and Kate Miles eds., Cambridge Univ. Press 2011).

177. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Article 25(1), Oct. 14, 1966, ICSID Convention, Regulations, and Rules.

need for reform also finds support in the case of Phoenix Action Ltd. v. Czech Republic,[178] where the Tribunal took the view that an "investment" must be in conformity with the host State's law, and there must be a deliberate inquiry by the arbitration Tribunal to make that determination.[179]

The intention of the Nigerian draftsmen might have been to provide a broader definition of "investment" that extended to any conceivable economic activity, because the same section of the NIPC Act defines "enterprise" as:

> an industry, project, undertaking or business to which this Act applies or an expansion of that industry, undertaking, project or business or any part of that industry, undertaking , project or business and, where there is foreign participation, means such an enterprise duly registered with the Commission.[180]

Either way, Ekwueme[181] was swift to embrace this definition of "investment" as being advantageous in the Nigerian context. He argues that, the amorphous definition of "investment" under the NIPC Act creates a unique flexibility that would facilitate and accommodate the excogitating nature of investment.[182] As a result, re-investment returns on foreign investment satisfy the requirement of "investment" under the NIPC Act.

A different definition of "investment" is found in BITs entered between Nigeria and other countries. For example, Article 1 () of the BIT between Turkey and Nigeria defines 'investment' as follows:

> The term "investment" means every kind of asset, connected with business activities, acquired for the purpose of establishing lasting economic relations in the territory of a Contracting Party in conformity with its laws and regulations . . .

This Agreement shall apply to investments in the territory of one Contracting Party, made in accordance with its national laws and regulations, by investors of the other Contracting Party, whether prior to, or after the entry into force of the

178. *Phoenix Action Ltd v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, (Apr. 9, 2009).

179. *Id.* at 100-105; *See also Fraport AG Frankfurt Airport Services Worldwide v. The Philippines,* ICSID Case No. ARB/03/25, Award, (Aug. 16, 2007) (following this principle, the Tribunal held as follows: "[w]ith respect to a Bilateral Investment Treaty that defines "investment," it is possible that an economic transaction that might qualify *factually and financially* as an investment (i.e. be comprised of capital imported by a foreign entity into the economy of another state which is a party to a BIT) falls, nonetheless, outside the jurisdiction of the tribunal established under the pertinent BIT, because legally it is not an investment within the meaning of the BIT. This will occur when the transaction that might otherwise qualify as an "investment" fails *ratione temporis* . . . or fails *rationae personae* . . . It will also occur when the transaction fails to qualify *rationae materiae* . . . ").

180. NIPC Act, *supra* note 165, at § 31.

181. Ekwueme, *supra* note 170, at 181.

182. *Id.*

present Agreement. However, this Agreement shall not apply to any disputes that have arisen before its entry into force.[183]

Similarly, the BIT between Nigeria and the United Kingdom defines "investment" for the purpose of this agreement as "every kind of asset and in particular, though not exclusively . . . " in the territory of the contracting parties.[184] There are legitimate arguments against the propriety of the definition of "investment" that may be applicable to Nigerian OGI. The *Salini criteria* espoused through the mechanism of ICSID appears to be the first major attempt to define "investment" in ICSID arbitral practice.

B. A Brief Analysis of the Salini Criteria

The Tribunal in the case of *Salini Construttori S.P.A and Italstrade S.P.A. v. Kingdom of Morocco*[185] was the second arbitral Tribunal to consider and apply the criteria articulated by Schreuer.[186] This Tribunal's attempt to define "investment" appears to have elevated the "typical characteristics" approach of the *Fedax* Tribunal[187] to a precise and distinct jurisdictional requirement. This might be the reason why Schreuer, upon whose thesis the decision was based, cautioned that the *Salini* "criteria should not be seen as distinct jurisdictional requirements each of which must be met separately" with reference to the definition of investment.[188] Schreuer's cautious admonition was necessitated by the frustration expressed by some arbitral Tribunals that, as a practical matter, "the criteria that they applied were interrelated and should be looked at not in isolation but in conjunction."[189]

In this case, Salini, an Italian company, entered into an agreement with the Kingdom of Morocco in August 1994 for the construction of a highway joining Rabat to Fes, which is approximately 50 kilometers long.[190] The works, subject matter of the contract, was completed in October 1998, but it took 4 months longer than stipulated in the contract (32 months).[191] The Minister of

183. Agreement between the Republic of Turkey and the Federal Republic of Nigeria Concerning the Reciprocal Promotion and Protection of Investment, signed 2 February 2011(not yet in force) [hereinafter Turkey-Nigeria BIT].

184. Agreement between the Government of the United Kingdom and Northern Ireland and the Government of the Federal Republic of Nigeria for the Promotion and Protection of Investments, (signed Dec. 11, 1990) (entered into force Dec. 11, 1990) [hereinafter UK-Nigeria BIT].

185. *Salini Construttori S.P.A and Italstrade S.P.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, (Jul. 23, 2001).

186. *Id.* at ¶ 43-49.

187. See *Fedax NV v. Venezuela*, ICSID Case No. ARB/96/03, Award on Jurisdiction, (Feb. 11, 1997); *see Salini Construttori v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, ¶ 43-49.

188. Christopher H. Schreuer with Loretta Malintoppi, August Reinisch & Anthony Sinclair, THE ICSID CONVENTION: A COMMENTARY 133 (2d ed. Cambridge Univ. Press 2009).

189. *Id.*

190. *Salini Construttori S.P.A.*, ARB/00/4 ¶ 2.

191. *Id.* ¶ 4.

Infrastructure of the Kingdom of Morocco rejected the financial claims of Salini.[192] Salini, in its request for arbitration based the jurisdiction of the Center under Article 8 of the Treaty between the Government of the Kingdom of Morocco and the Government of Italy for the reciprocal promotion and protection of investments.[193] The Kingdom of Morocco contended that the contract in question did not constitute an "investment" within the meaning of the ICSID Convention, arguing that the grounds of the claim in the ICSID arbitration did not constitute the violations of the applicable BIT.[194] The Kingdom of Morocco added that the alleged violations, the basis of the ICSID arbitration, were at best ordinary contractual breaches that do not fall within the jurisdiction of the Tribunal.[195]

According to the Kingdom of Morocco, contractual breaches ought to be dealt with by reference to the laws and regulations of the host State.[196] The Claimant also contended that the ICSID Convention is applicable to the investment dispute, alleging that the nature of the contract and its characterization brings it within the framework of the ICSID Convention based on the consent of the parties.[197] The Claimant argued that the reference to the host State law in this case was only a means to realize the "investment" and not to define it.[198] The Tribunal also considered the issue of a State entity on the ground that the question might have considerable influence on the merits of the case.[199] The Tribunal then examined the consent of the parties in the context of the ICSID Convention.[200] However, in its consideration of the definition of "investment" pursuant to the ICSID Convention, the Tribunal noted that its jurisdiction arises from the consent of the parties, which must be given in writing in accordance with the ICSID Convention. [201] Faced with limited ICSID precedents on the definition of "investment", except for the approach adopted in the *Fedax* arbitral Tribunal, this Tribunal drew inspiration from the scholarly work of Schreuer and the guidance of the commentary of Shihata and Para[202] and defined "investment" in the context of the ICSID Convention.

192. *Id.* ¶ 5.

193. *Id.* ¶ 9; *See generally,* AGREEMENT BETWEEN THE GOVERNMENT OF THE ITALIAN REPUBLIC AND THE GOVERNMENT OF THE KINGDOM OF MOROCCO ON THE PROMOTION AND PROTECTION OF INVESTMENTS, signed July 18, 1990.

194. *Salini Construttori S.P.A.*, ARB/00/4 ¶ 39.

195. *Id.* ¶ 41.

196. *Id.* ¶ 38.

197. *Id.* ¶ 40.

198. *Id.* ¶ 38.

199. *Id.* ¶ 29-35.

200. *Salini Construttori S.P.A.*, ABR/00/4 ¶ 27.

201. *Id.*

202. *Id.* ¶ 44; *see generally* Ibrahim F. I. Shihata & Antonio R. Parra, *The Experience of the International Center for Settlement of Investment Dispute*, 14 ICSID REVIEW FOREIGN INV. L.J. 299, 308-10 (1999).

In the process, the *Salini* Tribunal found that:

> There have been almost no cases where the notion of investment within the meaning of Article 25 of the Convention was raised. However, it would be inaccurate to consider that the requirement that a dispute be "in direct relation to an investment" is diluted by the consent of the Contracting States. To the contrary, ICSID case law and legal authors agree that the investment requirement must be respected as an objective condition of the jurisdiction of the Center . . . The doctrine generally considers that investment infers: Contributions, certain duration of performance of the contract and participation in the risks of the transaction. In reading the Convention's preamble, one may add the contribution to the economic development of the host State as an additional condition. In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contribution and duration of the performance of the contract. As a result these various criteria should be assessed globally, even if, for the sake of reasoning the Tribunal considers them individually here.[203]

Proponents describe the Salini Criteria as an objective approach that supports the proposition that "investment" under the ICSID Convention has a standard meaning that is discernible following the criteria.[204] This way, the criteria created what might be cumulative requirements that might establish an "investment" for the purpose of the ICSID Convention.[205] In other words, the *Salini* criteria articulate "a formal jurisdictional requirement" or a "jurisdictional approach" to the definition of "investment" for the purposes of Article 25(1) of the ICSID Convention.[206] The *Malaysian Historical Salvors* arbitral Tribunal attempted to distinguish the "typical characteristics approach" and the "jurisdictional requirements approach" espoused by the *Fedax*/*Salini* Tribunals. [207] According to this arbitral Tribunal, based on the *Salini criteria*, there are certain hallmarks in a transaction that must be present before it can be considered as an "investment".[208] In contrast, the "typical characteristics approach" of the *Fedax* Tribunal may not lead to the determination of an "investment" where one or more of the

203. *Salini Construttori S.P.A.*, ARB/00/4 ¶ 52.

204. Richard Happ & Noah Rubins, DIGEST OF ICSID AWARDS AND DECISIONS 2003–2007 341-42 (Oxford Univ. Press 2009).

205. *Id.* (The authors noted that the Salini "criteria have been used frequently during the 2003-2007 period as an indicator that an investment exists for ICSID purposes").

206. Antoine Martin, *Definition of "Investment": Could a Persistent Objector to the Salini Tests be Found in ICSID Arbitral Practice?,* 11 GLOBAL JURIST 1, 1 (2011).

207. Malaysian Historical Salvors, SBN, BHD v. Government of Malaysia, ICSID Case No. ARB/05/10, ¶ 70 (May 17, 2007).

208. *Id.* ¶ 70.

established hallmarks are absent.[209] Based on this analysis of the distinction between the *Fedax/Salini criteria*, the *Malaysian Historical Salvors* Tribunal dismissed the differences between the two approaches.[210] The Tribunal based its reasoning on the premise that "[t]he classical Salini hallmarks are not a punch list of items, which if completely checked off, will automatically lead to a conclusion that there is an investment."[211] Williams and Foote did not support the prescriptive analysis adopted by this Tribunal.[212] Instead the authors opined that, "[t]he *Malaysian Salvors* tribunal's approach arguably stopped short of the so-called jurisdictional approach . . . At least, however, it appears to elevate the *Fedax/Salini* criteria to a presumption."[213] The authors hinged their skepticism on the theory that "no one prospective investment is likely to be exactly as another."[214] The authors then wondered whether such an approach is "appropriate where the possible features of financial commitment by Claimants are as infinite as the field of human endeavor."[215]

Critics of the "jurisdictional requirements approach" made famous by the *Salini* Tribunal, advocate a subjective approach that recognizes and upholds the consent and agreement of the State party and investor in the definition of "investment" as understood under the ICSID Convention.[216] In this regard, subjectivity juxtaposed with the input of the State party and the investor evident from their consent and agreement may lead to a more predictable approach to the definition of "investment". It has been suggested that, "[a] rigid list of criteria that must be met in every case is not likely to facilitate the task of tribunals or to make decisions more predictable."[217] This article disagrees with the foundation and articulation of the proponents of the objective approach, except to the extent of requiring "investment" to contribute to the economic development of the host State. The *Salini* criteria do not give serious considerations to the consent and agreement of the State party and foreign investor to determine what constitute an "investment". Party autonomy should and ought to be the fundamental basis and the cornerstone of the process of arbitration.

Furthermore, the *Salini* criteria have been criticized by subsequent arbitral Tribunals as a formalization of the definition of "investment" that could conflict

209. *Id.*

210. *Id.* ¶ 70 & 105.

211. *Id.* ¶ 106(e).

212. *See generally* David A. R. Williams & Simon Foote, EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION, *RECENT DEVELOPMENTS IN THE APPROACH TO IDENTIFYING AN 'INVESTMENT' PURSUANT TO ARTICLE 25 (1) OF THE ICSID CONVENTION* 42 (Chester Brown & Kate Miles eds., Cambridge Univ. Press 2011).

213. *Id.* at 52.

214. *Id.*

215. *Id.*

216. Tony Cole & Anuj K. Vaksha, *Power-Conferring Treaties: The Meaning of 'Investment' in the ICSID Convention*, 24 LEIDEN J. INT'L L. 305, 315 (2011).

217. Schreuer, *supra* note 188, ¶ 172.

with the agreement of the State party and foreign investor on the meaning of 'investment'.[218] In the case of *Biwater Gauff (Tanzania) (BGT) Ltd v. Tanzania,*[219] the investment dispute arose out of a contract between Biwater and Dar es Salaam Water and Sewage Authority, an agency of the government of Tanzania, for the expansion of a Water and Sewage project in Tanzania.[220] Biwater initiated proceedings against the government of Tanzania for alleged acts of expropriation by the Tanzanian government.[221] On the definition of "investment", BGT relied on the objective approach founded on the *Salini* criteria; the government of Tanzania contended that BGT's ownership of 51% of City Water, a Tanzanian company does not constitute an "investment" within the meaning of the ICSID Convention.[222] On the definition of 'investment', the Tribunal held *inter alia* that it could not find any basis for the wholesale application of the *Salini criteria* and that to do so would be applying the criteria as a matter of law that is unsupported by the ICSID Convention.[223] It noted however, that the *travaux preparatoires* of the Convention indicates that attempts to define the term were unsuccessful.[224] Nevertheless, this Tribunal expressed the doubt whether or not arbitral Tribunals should impose a definition of "investment" in the absence of a precise definition in the ICSID Convention.[225] The arbitral Tribunal noted further, that over the years more arbitral Tribunals have determined the meaning of "investment" by reference to the intention of the State party and foreign investor.[226]

It may be argued that in the *BGT case*, the Tribunal's reference to "the parties" in paragraph 317 of the Award decision connotes the 'Contracting Parties' under the applicable BIT when paragraph 317 is read in the light of paragraph 312.[227] This argument may be supported by the Report of the Executive Directors of the World Bank which stated that:

> No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the

218. *See, e.g.*, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*,* ICSID Case No. ARB/05/22, (July 24, 2008)*;* Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*,* ICSID Case No. ARB/97/4, (May 24, 1999); Patrick Mitchell v. The Democratic Republic of Congo, ICSID Case No. ARB/99/7, (Nov. 1, 2007); Pantechniki S.A Contractors and Engineers v. The Republic of Albania, ICSID Case No. ARB/07/21, (July 30, 2009).

219. *Biwater Gauff*, ARB/05/22.

220. *Id.*

221. *Id.*

222. *Id.* ¶ 287.

223. *Id.* ¶ 314.

224. *Id.* ¶ 312.

225. Biwater Gauff (Tanzania) Ltd v. Tanzania*,* ICSID Case No. ARB/05/22, Award*,* ¶ 313 (Jul. 24, 2008).

226. *Id.* ¶ 317.

227. *Id.* ¶ 312 states inter alia that, "[i]n the end, the term was left intentionally undefined with the expectation that a definition could be the subject of agreement as between Contracting States."

> classes of disputes which they would or would not consider submitting to the Centre.[228]

It should be noted that the basis for this argument stems from the nature of international investment agreements and the ICSID Convention upon which the Tribunal made the analysis under reference. However, it is contended that in paragraph 317, the Tribunal was referring to the host State and the foreign investor as parties to the ICSID arbitration; otherwise it would have specifically referred to the "Contracting Parties." Based on the nature of ICSID arbitration, the foreign investor adopts the agreement of his home country in a BIT once investment is made in the territory of the host State party to the BIT. The BGT arbitral Tribunal was, among other issues, called upon to determine whether the subject matter of the arbitration was an "investment".[229] To answer this question, the arbitral Tribunal like many others before it, examined the legislative history of the ICSID Convention, hence the tacit reference to Article 24(4) in paragraph 312.[230] Paragraph 312 can only be read in the light of paragraph 317, to the extent that it grants opportunity to the parties to the dispute to define "investment" in view of the omission to define the term in the ICSID Convention. Pursuant to the ICSID Convention and the applicable BIT, the host State and the foreign investor can be parties to a dispute in ICSID arbitration, likewise the State parties to the BIT.[231] Either way, recourse could be made to the applicable BIT or the ICSID Convention to analyze the effect of the omission to define "investment."

In the BGT case, the Tribunal also considered the individual contract between the host State and the investor.[232] The *Salini case* that generated a lot of analysis by subsequent arbitral Tribunals also considered a concession contract in addition to the applicable BIT.[233] Therefore, it is doubtful that anytime an arbitral Tribunal references the legislative history of the ICSID Convention or a BIT concluded by State parties, the foreign investor is automatically excluded or substituted as a party to the dispute with the result that any reference to "the parties" in the analysis of the claims exclusively refers to State parties to BIT or the ICSID Convention. In the alternative, it may be argued that based on the individual contract and the BIT that was examined by the BGT Tribunal; it is unclear which "parties" the Tribunal was referring to in paragraph 317. Alternatively, the proposition in the draft under review may be applicable *mutatis mutandis* to the host State and the foreign investor.

---

228. *Id.* ¶ 312.

229. *Id.* ¶¶ 280-282.

230. *Id.* ¶ 312.

231. Biwater Gauff (Tanzania) Ltd v. Tanzania, ICSID Case No. ARB/05/22, Award, ¶¶ 352-53 (Jul. 24, 2008).

232. *Id.* ¶ 579.

233. Salini Construttori S.P.A and Italstrade S.P.A v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶2 (Jul. 23, 2001).

In contrast, the subjective approach to the definition of "investment" posits that, the lack of a concrete meaning of the term under Article 25 (1) of the ICSID Convention arises from a fundamental need for parties to determine the meaning of the term themselves.[234] Reacting to the criticism of the *Salini* criteria, Schreuer appears to note in agreement when he stated that: "[t]hese features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention."[235]

Arbitral Tribunals have demonstrated a lack of consensus on the application of the *Salini* criteria.[236] The subjective approach, which is founded on contractual freedom of the parties, has not been successful either, in establishing a generally acceptable definition of "investment" under the ICSID Convention.[237] Applying the *Salini* criteria could lead to challenging the jurisdictional requirements of the ISCID Convention as a matter of law.[238]

In *Mr. Patrick Mitchell v. Democratic Republic of Congo ("DRC"),*[239] the office of Mitchell & Associates, an American law firm operating in the Democratic Republic, was sealed up on the order of the Military Court on March 5, 1999. Valuables and documents were seized from the law firm.[240] Patrick Mitchell submitted a request for arbitration pursuant to the 1984 USA- DRC) BIT.[241] Mr. Mitchell's claim alleged that he is a victim of expropriation by the DRC in violation of Article III (1) of the BIT entitled to damages.[242] DRC had argued that the law firm is not an "investment" because the nature of a law firm does not contribute to the economic development of the host State.[243] On the issue whether or not the law firm established in the DRC by Mr. Mitchell constituted an "investment" within the framework of the applicable BIT; the award Tribunal agreed with the Claimant that the operation of the law firm was an "investment" as the term is understood in the context of the ICSID Convention.[244] Dissatisfied with the reasoning of the Award Tribunal, the DRC commenced the annulment

234. Cole, *supra* note 216, at 315.

235. *See* Schreuer, *supra* note 188, at ¶ 122.

236. *See* Biwater Gauff (Tanzania) Ltd v. Tanzania, ICSID Case No. ARB/05/22, Award (Jul. 24, 2008); *see also* Jan de Nul N.V. v. Egypt, ICSID Case No. ARB/03/11, Decision on Jurisdiction (Aug.6, 2004).

237. *See, e.g.*, CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Decision on the Application for Annulment, ¶¶ 71-2 (Sep. 25, 2007).

238. Martin, *supra* note 207, at 2.

239. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on Annulment, ¶ 1 (Nov. 1, 2007).

240. *Id.*

241. *Id.*; The Treaty Between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment, Aug. 3, 1984, S. TREATY DOC NO. 17, 99th Cong., 2d Sess. (1986) [hereinafter U.S.-Zaire BIT].

242. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on Annulment (Nov. 1, 2007).

243. *Id.*

244. *Id.*

proceeding.[245] The DRC essentially called upon the ad-hoc Committee to re-examine the definition of "investment" in line with the requirement under Article 25 (1) of the ICSID Convention. The ad-hoc Committee may have followed the precedent of the *Salini* criteria when it identified four main characteristics of "investment" including the requirement that investments contributes in some fashion, to the economic development of the host State. The ad-hoc Committee held that the award is nebulous on the definition of "investment" in the absence of any consideration of the relationship between the law and DRC.[246] The ad-hoc Committee distanced itself from the thesis of the "jurisdictional requirements approach" on the definition of "investment", when it noted further that the features of the *Salini* criteria "are not a formal requirement for the finding that a particular activity or transaction constitutes and investment."[247] In conclusion, the ad-hoc Committee annulled the original award on the "grounds of manifest excess of powers and the failure to state reasons" pursuant to Article 52(1) (b) and (e) of the ICSID Convention.[248]

In the *Patrick Mitchell* case, the ad-hoc Committee rejected the award Tribunal's methodology of the application of the *Salini* criteria in assuming jurisdiction with reference to the definition of "investment". According to the ad-hoc Committee, instead of making a determination based on the US-DRC BIT, the award Tribunal investigated the existence of an "investment" on a voyage of its own and failed to state the reasons for its decision on the definition of "investment."[249] The ad-hoc Committee suggested that an arbitral Tribunal should apply a restrictive approach in the analysis of the definition of "investment". The ad-hoc Committee noted that there must be a restriction on the party's ability to expand the jurisdiction of the ICSID to include investment that might "arbitrarily qualify" as foreign investment through investment treaties.[250] The ad-hoc Committee pointed out that:

> As a legal consulting firm is somewhat uncommon operation from the standpoint of the concept of investment, in the opinion of the *ad hoc* Committee it is necessary for the contribution to the economic development or at least the interest of the State, in this case the DRC, to be somewhat present in the operation. If this were the case, qualifying the Claimant as an investor and the services as an investment would be possible; furthermore, it would be necessary for the Award to indicate that, through his know-how the Claimant had concretely assisted DRC,

245. *Id.*

246. *Id.*

247. U.S.-Zaire BIT.

248. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on Annulment, ¶ 67 (Nov. 1, 2007).

249. *Id.*

250. *Id.*; U.S.-Zaire BIT ¶ 31.

for example by providing it with legal services in a regular manner or by specifically bringing investors.[251]

The ad-hoc Committee was also vexed by what it considered to be the obscurity of the award Tribunal's notion of "investment". [252] It went further to note that in the definition of "investment", the award Tribunal referred "to various fragments of the operation without finally indicating the reasons" but omitted to provide "the slightest explanation as to the relationship between the law firm and DRC."[253] Thus, the *Patrick Mitchell* and *Biwater* arbitral Tribunals questioned and rejected this approach particularly because; it had no legal foundation within the framework of the ICSID Convention.[254] One opponent of the *Salini* criteria suggested that a "persistent objector" to the Salami test is possible.[255] According to this commentator, a "persistent objector" is a party who reserves the right to question the *Salini* criteria as a matter of law because its jurisdictional value is not supported by the ICSID Convention.[256] This commentator suggested that the findings of the *Fedax/Salini* Tribunals were apposite, regardless of the inherent notion of contractual freedom that may be gleaned from both findings. [257] The same commentator noted that the *Fedax* Tribunal merely presented a list of features that might make "investment" recognizable pursuant to the ICSID Convention, while the Salini Tribunal "established a list of formal requirements conditioning a finding of jurisdiction" to satisfy the requirements of Article 25 (1) with reference to the definition of "investment."[258] Thus, the commentator rejected the nuances of the *Fedax/Salini* criteria and argued instead that the contractual freedom to define "investment" "as a 'strong presumption' under the ICSID Convention seems more convincing and suggests that a, 'a persistent objector to the *Salini* criteria could be found.'"[259]

In view of the preceding analysis, valid arguments could be made one way or the other against the jurisprudence of ICSID arbitral practice on the definition of "investment" and what is arguably a nebulous approach under Nigeria's international investment regime. However, the current elements of Nigeria's international investment regime are likely to warrant a broader approach to the meaning of "investment" in ICSID arbitral practice. Thus, foreign investments in

251. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on Annulment (Nov. 1, 2007); U.S.-Zaire BIT ¶ 39.

252. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on Annulment, ¶ 40 (Nov. 1, 2007).

253. *Id.* ¶ 40; U.S.-Zaire BIT ¶ 40.

254. Mitchell, ICSID Case No. ARB/99/7, at para. 40-41 (Nov. 1, 2007) (Decision on Annulment).

255. Antoine Martin, *Definition of Investment: Could a Persistent Objector to the Salini Tests be found in ICSID Arbitral Practice?* 11 Global JURIST 1, 17 (2011).

256. *Id* at 11.

257. *Id* at 3.

258. *Id* at 3-4.

259. *Id* at 17.

Nigeria's OGI are likely to be determined as covered and protected investments in the context of international investment law.

V. ANALYSIS OF THE PERTINENT PROVISIONS OF THE LCA

Since the coming into force of the LCA in Nigeria, it has been reported that because of the preferential treatment given to Nigerian indigenous companies particularly in the OGI, the LCA has been fairly successful in achieving its objectives. Amanze-Nwachukwu, reporting on the implementation of the LCA, observed that since the LCA was signed into law, there has been an increase in the participation of indigenous companies in the OGI of Nigeria with the result that indigenous contractors are now able to compete with their foreign counterparts.[260] Amanze-Nwachukwu went on to report that since the LCA received presidential assent three years ago, "[t] he Petroleum Technology Association of Nigeria ("PETAN"), the umbrella body of indigenous contractors announced recently that its membership has doubled owing to the conscientious implementation of the local content law."[261]. On his part, Atsegbua enthused that because of the enactment of the LCA, "an antidote has been found for local participation in the vibrant oil and gas sector."[262] Atsegbua concluded: "similar to Saudi Arabia, Venezuela and Kuwait, the local content law will go a long way in empowering indigenous oil and gas companies and assist Nigeria in developing the technical capacity for the industry."[263]

The enthusiasm expressed in the commentary about the outcome and effect of the LCA is understandable when viewed from the perspective of the successive Nigerian governments' efforts at improving local capacity building in the OGI. This is because this is a sector of the Nigerian economy that accounts for more than 50 percent of Nigeria's GDP. [264]The success of the LCA may be described as an achievement of the Nigerian government's objective for the promotion of economic development through the utility of an approach that supports local competences. It is arguable, that in international investment paradigms, the enactment of the LCA may be characterized as an exercise of a legitimate policy objective of the Nigerian government. However, the pertinent question to ask is whether the LCA treats foreign investors and local investors equally with reference to foreign investment in Nigeria's OGI. If not, will the LCA pass the test of reasonable justification when analyzed against pertinent

---

260. Chika Amanze-Nwachukwu, *Signing of the Nigerian Content Law*, ThisDay Newspaper (Lagos) Feb. 11, 2013, < http://www.thisdaylive.com/articles/signing-of-the-nigerian-content-law/150008/> (last visited Sep. 19, 2013).

261. *Id*.

262. *See* Lawrence A. Atsegbua, *The Nigerian Oil and Gas Industry Content Development Act 2010: An Examination of its Regulatory Framework'* 36 (4) OPEC ENERGY REV. 479, 479(2012).

263. *Id*. at 494.

264. *Id*. at 479.

provisions and features of Nigeria's BITs in the context of the substantive and procedural rights of foreign investors in Nigeria's OGI.

The definition of a Nigerian company under the LCA offers the best departure point to address some of the likely criticisms that could be made against the LCA in the context of international investment law. Pursuant to the LCA, a Nigerian company "means a company formed and registered in Nigeria in accordance with the provision of the Companies and Allied Matters Act ("CAMA") with not less than 51% equity shares by Nigerians"(emphasis added).[265] The LCA is silent on the definition of "exclusive consideration", but when Section 109 is read in the light of Section 26 of the LCA two propositions are discernible in the context of foreign investors owning majority shares in companies incorporated in Nigeria.[266] Firstly, companies incorporated in Nigeria pursuant to CAMA[267] with shares of more than 50% held by foreign investors are not considered Nigerian companies under the LCA contrary to the provisions of Sections 18 and 650 of CAMA that allows foreign investors to own majority shares in companies incorporated under CAMA.[268] In other words, the notion of "an indigenous Nigerian company" is alien to CAMA. Thus, the provision of the LCA on the definition of a company ignores the established meaning of a company under CAMA prior to the enactment of the Act. Secondly, companies incorporated under CAMA with majority shares owned by foreign investors may be considered as foreign investors under Nigeria's existing BITs. For example, under Article 1(d) of the Nigeria-UK BIT, a company for the purpose of the BIT "means with regard to either Contracting Party, corporations, firms, associations and other legal persons incorporated or constituted under the law in force in any part of each Contracting Party or in any territory to which this Agreement is extended . . ."[269]

On the one hand, it may be argued that the LCA has an inherent discriminatory policy against the interest of existing foreign investments in Nigeria's OGI. In the context of investment treaty arbitration, a case of discrimination that offends the elements of the foreign investment treatment standards examined above could be made by foreign investors against the

---

265. LCA, *supra* note 10.

266. *Id.*

267. *Companies and Allied Matters Act*, Laws of the Federation of Nigeria, Chapter 59 (1990) [hereinafter CAMA].

268. *Id.* at Sect. 18: "[a]s from the commencement, any two or more persons may form and incorporate accompany by complying with the provisions of this Act in respect of registration of such company". On the meaning of a company under CAMA, Section 650 provides that a company or an existing company "means a company formed and registered under this Decree or, as the case may be, formed and registered in Nigeria before and in existence before the commencement of this Decree."

269. Promotion and Protection of Investments, U.K.-N.Ir.-Nigeria, Dec. 11, 1990 [hereinafter UK-Nigeria BIT]; *see also*, Agreement on Encouragement and Reciprocal Protection of Investments, U.K-Neth.-Nigeria, art. 1(b)(iii), Feb. 1, 1994, http://www.unctadxi.org/templates/DocSearch.aspx?id=779 (last visited Mar. 6, 2013) (hereinafter Netherlands-Nigeria BIT).

government of Nigeria. This might be possible based on the provisions of Section 3 of the LCA. The Section states:

> (1) Nigerian independent operators shall be given first consideration in the award of oil blocks, oil field licenses, oil lifting licenses and in all projects for which contracts for which contracts is to be awarded in the Nigerian oil and gas industry to the fulfillment of such conditions as may be specified by the Minister.
>
> (2) There shall be exclusive consideration to Nigerian indigenous service companies which demonstrate ownership of equipment, Nigerian personnel and capacity to execute such work to bid on land and swamp operating areas of the Nigerian oil and gas industry for contracts and services contained in the Schedule to this Act.
>
> (3) Compliance with the provisions of this Act and promotion of Nigerian content development shall be a major criterion for award of licenses, permits and any other interest in bidding for oil exploration, production, transportation and development or any other operations in Nigerian oil and gas industry. [270]

On the other hand, apart from the "exclusive and first consideration" principles espoused by the above provisions in favor of "indigenous Nigerian companies" in the LCA, Section 15 of the LCA also mandates operators in the OGI to give "full and fair opportunity" to Nigerian indigenous contractors in the bidding process for acquiring goods and services in the OGI. [271] The LCA did not define "full and fair opportunity". However, according to Adefulu, in practice, the meaning of the phrase "would require that Nigerian companies are given adequate notice of tenders and have access to the necessary information required to bid as their foreign counterpart would."[272] Adefulu went on to argue that the "full and fair opportunity" phrase in Section 15 of the LCA "does not appear to be a discriminatory measure and only seeks to ensure that Nigerian companies are treated in an equitable manner."[273] It is contended that, if read in light of Section 3 of the LCA, Section 15 ought to be interpreted to give preferential treatment to Nigerian indigenous contractors in the bidding process for goods and services in the OGI. It is submitted that, preferential treatment against the potential interest of foreign investments in the territory of the host State could be interpreted as a discriminatory measure in the context of the NT, MFN or FET standard obligations of the host State under international investment law. Thus,

270. LCA, *supra* note 10, at Sect. 109.
271. LCA, *supra* note 10, at sect. 109.
272. Adefulu, *supra* note 94.
273. *Id*.

Adefulu's submission on the interpretation of "full and fair opportunity" in Section 15 of the LCA is less convincing.

Furthermore, it may be argued that Section 1 of the LCA cures the conflict between it and the provisions of CAMA particularly on the meaning of company under Nigerian Law.[274] At the same time, the section cannot be interpreted to make the provisions of the LCA supersede the provisions of Nigeria's BITs in the context of investment treaty arbitration. To the contrary, Sections 3 and 15 of the LCA in particular, are likely to be interpreted by an arbitral Tribunal as a violation of the foreign investment treatment standards in Nigeria's existing BITs. Some investment arbitration cases reinforce this possibility. For example in *Tecnicas Medioambientales Techmed SA v. United Mexican States*[275] the ICSID arbitration was based on the Mexico-Spain BIT that entered into force for both countries on December 18, 1996.[276] The Claimant in this case is a foreign investor organized under the laws of Mexico.[277] The Claimant commenced arbitration proceedings against the host State contending *inter alia* that, the refusal of an agency of the Respondent to renew its license to operate a landfill it had acquired with substantial investment is attributable to the Respondent under the applicable BIT.[278] The Claimant alleged that the "refusal to extend its authorization to operate the landfill is an arbitrary act" which violates the Mexico-Spain BIT, international law and Mexican law.[279] While the alleged acts of violations against the Respondent were not caused by the passing of a legislation *stricto sensu*, the investment dispute in this case arose through a series of actions by the agencies of the Respondent that introduced regulations and resolutions that effectively forced the Claimant to close its investment in the host State.[280] It was also claimed that the actions of the agencies of the Respondent violated the conditions upon which the foreign investor made its investment.[281]

For the purpose of analyzing the likely effect of the pertinent sections of the LCA under review, it is instructive to note that, in this arbitration, the Claimant specifically alleged that the actions of the agencies of the Respondent was a violation of Articles 3(1), 3(2), 4(1), 4(5), 5(1), 5(2) and 5(3) of the Mexico-

274. *LCA*, *supra* note 10, at Sect. 1 ("Notwithstanding anything to the contrary contained in the Petroleum Act or in any other enactment or law, the provisions of this Act shall apply to all matters pertaining to Nigerian content in respect of all operations or transactions carried out in or connected with the Nigerian oil and gas industry").

275. Technicas Medioambientales Tecmed SA v. Mex., ICSID Case No. ARB/ (AF)/00/02, (May 29, 2003).

276. Agreement on the Reciprocal Promotion and Protection of Investment, Spain-Mex., Jun. 22, 1995 [hereinafter Spain-Mexico BIT].

277. Technicas Medioambientales Tecmed SA v. Mex., ICSID Case No. ARB/ (AF)/00/02, at ¶ 1(May 29, 2003).

278. *Id.*, at ¶ 40. Claimant is the Spanish parent company of TECMED, TECNICAS MEDIO AMBIENTALES DE MEXICO, S.A. de C:V., a Mexican company, and holds 99% of the shares.

279. *Id.* at ¶ 43.

280. *Id.* at ¶ 35-51.

281. *Id.* at ¶ 39-40.

Spain BIT.[282] In this regard, the Claimant alleged loss of profit and business opportunities in the host State.[283] The Articles allegedly violated under the Mexico-Spain BIT provided guarantees for the general principles of foreign investment treatment standards of similar to the provisions under Nigeria's existing BITs.[284] It its memorial to the ICSID arbitration, the Respondent specifically denied that the conduct of any of its agencies constituted a violation of the Mexico-Spain BIT.[285] The Respondent denied that the Claimant suffered any form of discrimination or was denied NT in violation of the guarantees contained in the Mexico-Spain BIT.[286] Analyzing the parameters of Article 4(1) of the Spain-Mexico BIT that specifically provides for a "fair and equitable treatment standard" of foreign investment in the territory of the host State, this arbitral Tribunal found that the FET, as a *bona fide* principle recognized under international law, does not require evidence of bad faith against the host State for its violation.[287] Consequently, the Tribunal was unequivocal in its analysis of the FET treatment standard when it stated that:

> The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting States to provide to international investments treatment that does not affect basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relationship with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and the administrative practices and directives, to be able to plan its investment and comply with such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the action of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without required compensation. In fact, failure by the host State to comply with

282. *Id.* at ¶ 35-51.

283. Technicas Medioambientales Tecmed SA v. Mex., ICSID Case No. ARB/ (AF)/00/02, at ¶ 45 (May 29, 2003).

284. Spain-Mexico BIT, Jun. 22, 1995.

285. Technicas Medioambientales Tecmed SA v. Mex., ICSID Case No. ARB/ (AF)/00/02, at ¶ 50 (May 29, 2003).

286. Technicas, *supra* note 123 at ¶ 51.

287. *Id.* at ¶153.

> such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle. Therefore, compliance by the host State with such pattern of conduct is closely related to the above-mentioned principle, to the actual chances of enforcing such principle, and to excluding the possibility that state action be characterized as arbitrary; i.e. as presenting insufficiencies that would be recognized . . . [288]

A valid argument can be made that exceptions may exist under NT and MFN treatment standards in some of Nigeria's existing BITs that may justify the enactment of the LCA.[289] Still, there is authority for the proposition that the host State should still be found liable in breach, if local competitors of the foreign investor in the host State have received more favorable treatment. This proposition's premise arises from the question whether the host State has discriminated against the interest of the foreign investor through policy or legislation that might make the foreign investor less competitive in the host State.[290] Based on the underlying principles of the NT or MFN treatment standards, arbitral Tribunals are called upon to make a comparison of the host State's treatment of local investors with the treatment of foreign investors in "like circumstances" to determine a breach of the NT or MFN treatment standards of foreign investments.[291]

In *Occidental Exploration and Production Company v. The Republic of Ecuador,*[292] the investment arbitration was based on the U.S-Ecuador BIT.[293] The investment dispute arose from a service, exploration, and exploitation of a

---

288. *Id.*

289. For example, Art. 4(5) of the Treaty between the Federal Republic of Germany and the Federal Republic of Nigeria concerning the Encouragement and Reciprocal Protection of Investments provides:

> Notwithstanding the provisions of paragraphs (1) and (2) [National and Most-Favored-Nation treatment standard provisions] of this Article either Contracting Party may grant to its own investors special incentives for development purposes in order to stimulate the creation of local industries, especially small and medium-sized enterprises, provided that they do not significantly affect the investments and activities of investors of the other Contracting Party.

Treaty between the Federal Republic of Germany and the Federal Republic of Nigeria concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Nigeria, Mar. 28, 2000, 2481 U.N.T.S 343 [hereinafter Germany-Nigeria BIT].

290. *See* Nick Gallus, *The 'fair and equitable treatment standard' and the circumstances of the host State,* in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 223 (Chester Brown and Kate Miles eds. 2011).

291. *See* Ry. Dev. Corp. v. Republic of Guat., ICSID Case No. ARB/07/23 ¶ 153 (award Jun. 29, 2012).

292. Occidental Exploration and Prod. Co. v. Republic of Ecuador, LCIA Case No. UN 3467 (Final Award Jul. 1, 2004) (regarding a matter of UNCITRAL arbitration).

293. Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, signed Aug. 27, 1993 (came into force 22 Apr. 1997) [hereinafter US-Ecuador BIT].

hydrocarbon agreement executed between the Claimant and the Respondent's State-owned corporation.[294] Under the investment agreement, the Claimant made investments pursuant to its obligation and the right to carry out exploration and exploitation activities in the area assigned to it.[295] Based on the agreement in issue, the Claimant was entitled to a percentage of the oil production expressed in the form of a participation formula described in the agreements as Factor X.[296] The State-owned corporation had a mandate under the laws of Ecuador to plan, organize, and operate hydrocarbon exploration and exploitation in Ecuador.[297] The Claimant commenced arbitration against the Respondent alleging that the right to the refund of taxes pursuant to the agreements and which was secured under Formula X ought to be recognized and effected under Ecuadorian Tax Law.[298] The Claimant further contended that resolutions denying Value Added Tax refunds to it breached Ecuador's obligations of FET; treatment not less favorable than that accorded to an Ecuadorian exporter; not to impair by arbitrary or discriminatory measures the management, use and enjoyment of the Claimant's investment and not to expropriate directly or indirectly all or part of that investment in the circumstances of the case under the US-Ecuador BIT.[299] The Respondent denies the allegation of the Claimant.[300] Of particular relevance to the thesis of this article was the contention of the Claimant that the Respondent had breached the national and MFN treatment standard of the US-Ecuador BIT.[301] The Claimant hinged its argument on the fact that a number of Ecuadorian companies involved in the export of other goods were entitled to receive VAT, asserting that the meaning of "in like situations" refers to companies that are engaged in exports of goods even if operating in different sectors of the economy.[302] The Claimant referenced Ecuador's BIT with Spain and Argentina and argued that the standard of NT was not qualified by the reference to "in like situations", therefore the Claimant should be entitled to a less restrictive interpretation of the MFN clause under the US-Ecuador BIT.[303] The arbitral Tribunal agreed with the submission of the Claimant with reference to the allegation of the breach of the national and MFN clause of the US-Spain BIT.[304] According to this arbitral Tribunal, "in like situations cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of NT is to protect

294. Occidental, LCIA Case No. UN 3467 at ¶ 25.
295. *Id*. at ¶ 28.
296. *Id*.
297. *Id*. at ¶ 25-28.
298. *Id*. at ¶ 29
299. *Id*. at ¶36.
300. Occidental, LCIA Case No. UN 3467 at ¶ 37.
301. *Id*. at ¶ 5.
302. *Id*. at ¶ 168.
303. *Id*. at ¶ 167-170.
304. *Id*. at ¶ 173.

investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which the particular activity is done."[305]

The approach by the *Occidental* and *Techmed* arbitral Tribunals appears to be consistent with the need for the protection of the legitimate expectations of the foreign investor before and after starting the foreign investment journey in the host State.[306] The failure to fulfill the legitimate expectation of the foreign investor at the time of making the investment may be held to be a breach of the obligation of the fair and equitable principle standard and by extension the national and most favored nation treatment standards.[307] The legitimate expectation of the foreign investor includes the consideration that the law of the host State will remain unchanged in a manner that will not be discriminatory against the legitimate interests of the foreign investor.[308] Gallus notes that "[t]he protection of legitimate expectations [of the foreign investor] is also often described as an element of the obligation to provide fair and equitable treatment standard."[309]

Thus, it is contended that, Nigeria's LCA is a breach of the international treatment standards obligations of Nigeria under its BITs regime in the context of investment arbitration. However, the point is not lost, that the LCA speaks to considerations for economic development as Nigeria's legitimate expectation in the latter's international investment law regime.[310] Nevertheless, a balanced approach that incorporates Nigeria's BIT obligations or makes an effective economic development exception is proposed. According to the Tribunal in *Generation Ukraine Inc. v. Ukraine*[311] ". . . it is relevant to consider the vicissitudes of the economy of the State that is host to the investment in determining the investor's legitimate expectations, the protection of which is a major concern of the minimum standards of treatment contained in bilateral investment treaties . . . "[312]

305. *Id.* at ¶173.

306. Nick Gallus, supra note 291, at 234.

307. *See id.* at 235.

308. *See id.* at 234.

309. *Id.* at 234.

310. On Jun. 9, 2013, Mohammed Shosanya, quoting Mr. Ernest Nwapa, the Executive Secretary of NCDMB, reports that due to the Local Content Act, "$191 billion investment could be retained in-country adding that 300,000 new direct job opportunities are expected in such areas as engineering, sciences, technical services and manufacturing". *See* Mohammed Shosanya, *Nigeria: Three Years of Local Content Law-How Do Local Oil Firms Fare?* DAILY TRUST NEWSPAPER (Lagos) Jun. 9, 2013, http://allafrica.com/stories/201306100334.html (last visited Oct. 9, 2013).

311. *See* Generation Ukraine v. Ukraine, ICSID Case No. ARB/00/9, 10 ICSID Rep. 240-308 (award Sep. 16, 2003).

312. *Id.* 240-308 ¶ 20:37.

VI. CONCLUSION

The Nigeria-Germany BIT presents an example of a valid development exception that may accommodate the LCA if renegotiated into Nigeria's other BITs and the NIPC Act. However, it may still be difficult to establish whether or not measures under the current law do not significantly affect the interests of foreign investors in Nigeria as required under the Nigeria-Germany BIT. This consideration is more relevant in a scenario where the alleged act, measure or legislation may be characterized as discriminatory. This difficulty underscores the interpretative uncertainty over the host State's economic development expectations and the encompassing FET treatment standard obligation.[313] The need to employ a balanced approach in Nigeria's international investment regime is further reinforced by its commitment to constantly observe obligations it has assumed in connection with specific foreign investments in its territory that includes the OGI. This commitment is required by an "umbrella clause," a provision found in most of Nigeria's BITs.[314] There is no doubt that regardless of the inconsistency in the commentary and ICSID arbitral practice on the meaning of "investment," foreign investments in the OGI are protected investments because of a real possibility to define the term broadly in view of the current state of Nigeria's international investment regime. A review that would accommodate the LCA as a "development policy" exception under international investment law is urgent, necessary, and warranted. There is convincing commentary that the utility of the OGI in developing countries ought to and should contribute to meaningful and effective economic development.[315] However, there could be far-reaching and negative economic implications on the local economy, where the objective of economic development through the promotion of local content in the OGI is achieved with a mechanism that is conflicted with the substantive and procedural rights of foreign investors in the context of international investment law and investment treaty arbitration.

313. *See, e.g.*, Ioana Tudor, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 235 (Oxford Univ. Press 2008).

314. *E.g.*, Netherlands-Nigeria BIT, *supra* note 107 at Art. 3(4); UK-Nigeria BIT *supra* note 108 at Art. 2(2); *and* Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Federal Republic of Nigeria Art. 4(2), signed Jul. 9, 2002 (not yet in force) [hereinafter Spain-Nigeria BIT].

315. "Today the rules of the game have changed: Developing local economies, stimulating industrial development, increasing local capability, building a skilled workforce and creating a competitive supplier base-also referred to as local content-are minimum requirements for doing business with host countries and NOCs." Accenture Report, http://www.accenture.com/SiteCollectionDocuments/PDF/Accenture_Energy_Developing_Local_Content_Programs_EiaB5.pdf (last visited Feb. 7, 2014).