Foreign Investment Protection and Environmental Governance in Nigeria: A TWAIL Analysis

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Declaration

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

Signature…….

Jude Thaddeus Uchenna Nnodum, Jnr

21st June 2021

Dedication

To Mum and Dad, my heroes.

Acknowledgements

This thesis bears my name; however, it would not have been completed without the privilege of a great support system. Thus, I owe its conclusion to a lot of people. My foremost gratitude goes to my parents, whose unending love, sacrifices, and unwavering faith in me, constantly inspired me to complete my thesis. To my siblings, Nneoma, Chike and Chukwuemeka (Mimi), thank you for putting up with me and cheering me all the way.

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In all I give thanks to God Almighty.

Abstract

The thesis examines how the international investment law regime impacts Nigeria's ability, as a Third World State, to regulate for the environment. Adopting a Third World Approaches to International Law (TWAIL) framework, it argues that the rules and mechanisms the of international investment law regime do not favour the interests of Nigeria and its people, and as a result may stifle national efforts to address environmental concerns. To provide an evidence base for the claim that Nigeria's investment obligations do not represent its interests as a potential host State, the thesis first examines the coherence of the 'fair and equitable treatment' (FET) provisions and the adequacy of environmental language in the network of Nigeria's investment treaties. The thesis finds in the network of Nigeria's investment treaties that the FET provisions lack coherence, and on aggregate, there is a general lack of treaty provisions addressing environmental concerns. This suggests that the contents of Nigeria's investment treaties are largely determined by its treaty partners that prioritise foreign investor protection, resulting in inconsistent investment treaty provisions and inadequate environmental language. Second, through the study of selected investment cases, the thesis analyses how investor-State arbitration responds to environmental concerns of the Third World. In this regard, the study finds that investor-State arbitration in adjudicating disputes involving the environment between foreign investors and Third World States are prone to interpret and apply investment rules in a manner that prioritises foreign investor interest over environmental concerns of Third World States and its people. Overall, the findings show that the international investment law regime may stifle environmental governance in Nigeria. Considering this, the thesis recommends textual reforms to Nigeria's investment

treaty provisions and pragmatic policy approaches to address environmental concerns and to accommodate Nigeria's interests as a Third World State in the international investment law regime.

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Abbreviations

AfCFTA	African Continental Free Trade Agreement
BIT	Bilateral Investment Treaties
CERDS	Charter for the Economic Rights and Duties of States
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
ECOWAS	Economic Community of West Africa States
ECOWIC	ECOWAS Common Investment Code
EIA	Environmental Impact Assessment
FET	Fair and Equitable Treatment
ICSID	International Centre for the Settlement of Investment Disputes
IDCC	Industrial Development Coordination Committee
IMF	International Monetary Fund
LFN	Laws of the Federation of Nigeria
LTNS	League of Nations Treaty Series
MIT	Model Investment Treaty
NEP	Nigeria Enterprises Promotion
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
NIPC	Nigerian Investment Promotion Commission
PAIC	Pan African Investment Code
PCA	Permanent Court of Arbitration
PSNR	Permanent Sovereignty Over Natural Resources
SADC	Southern African Development Community
SAP	Structural Adjustment Program
TWAIL	Third World Approaches to International Law
U C Davis	University of California, Davis
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law

UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
US	United States
WTO	World Trade Organisation

Chapter 1: Introduction

1. Background

One may wonder what States like Tanzania, Mexico, Peru, or Ecuador have in common. Of course, a few similarities may come to mind. They, like many non-Western Third World States, were at some point subject to Western imperialism.[1] Added to this, they are largely capital importing non-Western States, as such act as host to foreign investors and their investments.[2] Aside these areas of commonality, foreign investors have successfully challenged their environmental measures, or policies to promote sustainable development, before investor-State arbitration, alleging an infringement of investor rights protected by international law.[3]

However, foreign investor obligations are largely not central to international investment law.[4] This is because international law on the protection of foreign investment focuses predominantly on the rights and interests of foreign investors and not on their obligations. In this regard, the rules and mechanisms of international investment law provide foreign investors the tools to protect and enforce their rights, however, it fails to envisage investor obligations towards their

[1] It has been noted that many States in Africa and Latin America, as well as other parts of the world, share a common history of Western imperialism. B C Smith, *Understanding Third World Politics: Theories of Political Change and Development* (Palgrave 2003).
[2] This is not to say that developed or industrialised States are not recipients of foreign capital, in fact, they, to a large extent, receive more foreign investment (for various reasons which is beyond the scope of the present discussion). However, capital importing States is a phrase often used to refer to developing States or States in the Third World because they import (i.e., receive) capital than they export, which is largely as a result of deficiency in capital or other resources needed to engender development within the economy.
[3] In the case of Tanzania, however, liability was found for breaching investor rights, but no damages were awarded. See *Biwater Guaff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008.
[4] See Karsten Nowrot, 'Obligations of Investors' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (C.H.Beck Hart Nomos 2015) 1154, 1154-55.

host States. The effect of this lapse – that is, lack of investor obligations – is that foreign investors are rarely held accountable for the consequence of their activities.

Meanwhile, the operations of foreign-owned corporations (foreign investors) have been known to cause devastating effects on the environment of their host States.[5] In an effort to protect the environment and the interests of the local population, the host State may adopt a more stringent environmental measure to regulate the activities of the foreign investor at the national and local level. Feeling aggrieved by the policy measure, the foreign investor may institute an action against the host State, claiming damages in millions (and sometimes billions) of dollars,[6] for breaching investment rules contained in either investment treaties or investment contracts, or domestic foreign investment laws protecting investor rights.

Investment claims based on environmental regulations underscore how foreign investment protection may impact the efforts of host States to protect the environment. For context, in 2000 and 2003, Metalclad Corporation and Tecmed were awarded almost $17 million and $5 million respectively as compensation for the breach of their rights resulting from environmental measures taken by Mexico against their operations.[7] The cases above are only a few examples in a long list of successful cases instituted against host States for measures taken either to protect

[5] Environmental degradation in local communities in Nigeria resulting from petroleum exploration and production activities of multinational corporations have been well documented. For instance, see Ike Okonta and Oronto Douglas, *Where the Vulture Feast: Shell, Human Rights, and Oil* (Verso 2003); Kaniye S.A. Ebeku, *Oil and the Niger Delta People in International Law: Resource Rights, Environmental and Equity Issues* (Rüdiger Köppe Verlag Köln 2006).

[6] For instance, in 2014, the total sum of 50 billion dollars, being the highest known award in the history of investor-State arbitration, was the aggregate amount of compensation obtained by the three investor-claimants constituting the majority shareholders of former Yukos Oil Company in investment claims against the Russian Federation. See *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Award, 18 July 2014; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Award, 18 July 2014; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Award, 18 July 2014.

[7] *Metalclad Corporation v The United Mexican States*, Case No. ARB(AF)/97/1, Award, 30 August 2000 (Metalclad v Mexico, Award); *Tecnicas Medioambientales Tecmed S.A. v The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (Tecmed v Mexico, Award).

the environment or, more generally, to promote the objectives of sustainable development.

Considering this, the ability of foreign investors to challenge regulatory measures that affect their interests could have tremendous implications for host States. This is because under international investment law host States undertake investment obligations,[8] which includes protecting foreign investors and their investments. Therefore, introducing an environmental regulation or policy that disrupts foreign investor operations not only renders such measure susceptible to be disapproved but the host State may also be sanctioned.[9] Often, as highlighted in the examples above, the sanction results in financial liability for the host State.

The consequence of investment claims and their financial implication is that the host State is put in a difficult position: constrained from taking measures to protect the environment – an action that is supposed to be for public interest.[10] More importantly, by not being able to regulate for the environment, its regulatory space – the authority to act as a sovereign State – is encroached upon.[11] In other words,

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[8] Investment obligations are often assumed through signing/concluding investment treaties or contracts, or enacting domestic investment laws, all of which provide guarantees that the host State shall not act against the interests of foreign investors. It is through these guarantees that investment obligations are imposed on host States.

[9] It was, after all, on this basis that investment arbitration awards were given against Mexico and other host States that introduced foreign investment disrupting measures. For instance, see Metalclad v Mexico Award (n 7) paras 111, 113. For other awards, see *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Award, 30 November 2017 (Bear Creek v Peru, Award); *Copper Mesa Mining Corporation v Republic of Ecuador* PCA Case No. 2012-2, Award, 15 March 2015 (Copper Mesa v Ecuador, Award). These cases are discussed in detail in Chapter 4.

[10] Measures to protect the environment can be considered for public interest because concerns about the environment, for instance environmental degradation, often have an impact on the wider public. It is for this reason that most texts, including texts of international (investment) treaties, referring to matters concerning the environment interchange or replace it with, or subsume it under, public interest. See Manjaio Chi, 'The 'Greenization' of Chinese BITs: An Empirical Study of the Environmental Provisions in Chinese BITs and its Implications for China's Future BIT-Making' (2015) 18 Journal of International Economic Law 511, 517 (referring to the provisions of investment treaties, the author notes '[a]lthough these annexes do not contain the term "environment", they clearly state that certain "regulatory measures for public interest purposes" …') (emphasis added).

[11] On the subject of regulatory space in international investment law, see Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law' (2014) 36 University of

the host State is not only prevented from protecting the environment, it is, by extension, constrained from exercising its sovereign authority. Therefore, the potential implications of international investment law on host States are: the financial implication that comes with an arbitration award made against the respondent host State; and the resultant chilling effect that a potential sanction would have on the host State – 'regulatory chill'.[12]

Considering that international investment law could have considerable impact on host State, it is important to investigate what host States are more likely to be sanctioned in international investment law. This not only provides insights into those host States that are frequently subjected to investment rules but highlights underlining issues in international investment law regime – for instance, regime bias and asymmetry of investment obligations.[13] Therefore, investigating the manner in which investment protection is applied, and more importantly, the

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Pennsylvania Journal of International Law 1; Tomer Broude, Yoram Z Haftel and Alexander Thompson, 'Who Cares about Regulatory Space in BITs? A Comparative International Approach' in Anthea Roberts and others (eds), *Comparative International Law* (Oxford University Press 2018) 527.

[12] Regulatory chill generally refers to the fear in the face of potential investor-State dispute that makes host States reluctant to take appropriate regulatory measures. See Kyla Tienhaara, Regulatory Chill and the Threat of Arbitration: A View from Political Science in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 606; Eckhard Janeba, 'Regulatory Chill and the Effect of Investor State Dispute Settlement' (2019) 27 Review of International Economics 1172; Julia G Brown, 'International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?' (2013) 3 Western Ontario Journal of Legal Studies 1; Lyuba Zarsky, 'From Regulatory Chill to Deepfreeze?' (2006) 6 International Environmental Agreements: Politics, Law and Economics 395; Emily B Lydgate, 'Biofuels, Sustainability, and Trade-related Regulatory Chill' (2012) 15 Journal of International Economic Law 157; Stephen W Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change' (2007) 24 Journal of International Arbitration 469; Satwik Shekhar, '"Regulatory chill": Taking Right to Regulate for a Spin' (2016) Centre for WTO Studies, Indian Institute of Foreign Trade, Working Paper CWS/WP/200/27 available on <http://wtocentre.iift.ac.in/workingpaper/'REGULATORY%20CHILL%E2%80%99%20TAKING%20RIGHT%20TO%20REGULATE%20FOR%20A%20SPIN%20(September%202016).pdf> accessed 12 March 2021.

[13] Regime bias refers to the way in which investment rules are crafted, applied, and adjudicated often leading to unfavourable outcome for a certain group in a system. See James T Gathii, 'Third World Approaches to International Economic Governance' in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds) *International Law and the Third World: Reshaping Justice* (Routledge 2009) 255, 261-62; For other literature making passing reference to bias in investment law regime, see also Olivia Chung, 'The Lopsided International Investment Law Regime and its Effect on the Future of Investor-State Arbitration' (2007) 47 Virginia Journal of International Law 953.

category of States most likely to be requested to defend their actions towards foreign investors will help identify the States targeted by investment protection rules.

There has been a rich body of literature concerning the target of international investment law rules – that is, those that are mostly affected by the mechanism of the regime.[14] The argument in this debate is that on one hand developing States, mostly in the Third World, have predominantly borne the brunt of investment rules,[15] and on the other hand, that the mechanism of the investment law is often initiated by foreign investors from developed States in the Western World.[16] In spite of the possibility that the data or research methodology may suffer from some limitations or even biases,[17] the literature provides insight into the possible lopsided nature of investment protection mechanism.[18]

This thesis seeks to test the hypothesis that investment rules are more likely to be applied against developing States in the Third World in a manner that does not favour their interests by considering the potential impact of investment protection standards on environmental governance, using Nigeria as a case study. As a preliminary step to test this hypothesis, the present chapter will review the

[14] For instance, see Susan D Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration' (2007) 86 North Carolina Law Review 1; Chung (n 13).
[15] William S Dodge, 'Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 Vanderbilt Journal of Transnational Law 1, 3 (the author, in making reference to obligations in investment treaties, notes that '… it is generally only less developed countries that bears the risk of being sued'); Guillermo A Alvarez and William W Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11' (2003) 28 Yale Journal of International Law 365, 369 (highlighting that '[t]raditionally, American multinationals imposed arbitration as the mechanism for settling investment disputes with foreign countries, particularly in Latin America'); see also Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration' (n 14) 31-3 (from the analysis made by the author, although not expressly stated, it is easy to deduce that developing States faced a higher percentage of investment claims); See Chung (n 13) 962.
[16] Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration' (n 14) 26, 29-30; Alvarez (n 15) 369.
[17] See 'Empirically Evaluating Claims about Investment Treaty Arbitration' (n 14) 31 (highlighting methodological concerns).
[18] Chung (n 13).

most recent report from the International Centre for the Settlement of Investor-State Dispute (ICSID) to present how investment claims are distributed among States in investor-State arbitration.

According to the report, as of 31 December 2020, ICSID had registered over 800 cases.[19] The geographic distribution of all investment claims against host State at ICSID, involve a large majority of States in the developing world,[20] with just a little over 10% of the claims against developed States of Western Europe and North America combined.[21] Interestingly, cases against States from Sub-Saharan Africa, Central America and the Caribbean, South America, South and East Asia, and the Pacific predominantly made up of developing States account for over 50% of all cases at ICSID.[22] This highlights a disproportionate distribution of investment claims.

There might be factors that would help explain the reason(s) investment claims are distributed in the manner above. However, these figures indicate that developing States are more likely to have investment claims instituted against them when compared to their developed counterparts from Western Europe and North America. In other words, investment rules are more likely to be applied against developing States. This suggests that the structure of international investment law

[19] International Centre for Settlement of Investment Disputes, 'ICSID Caseload-Statistics: Issue 2021-1' (ICSID 2021) 7. Available on <https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf> accessed 12 March 2021.

[20] Ibid 12. There are often methodological issues in groupings but for the sake of simplicity, developing and least developed States will be subsumed into developing States. As such, developing States are largely located in Sub-Saharan Africa, Latin America, East Asia, West Asia and the Caribbean, see United Nations, 'World Economic Situation and Prospects 2014' (United Nations 2014) 143 <https://www.un.org/en/development/desa/policy/wesp/wesp_current/wesp2014.pdf> accessed 15 June 2021.

[21] Only 8% of all cases were against countries from Western Europe; 4% were against countries from North America. Interestingly, most of the cases in North America have been against Mexico which is the only developing State. See ICSID (n 19) 12.

[22] Ibid.

may be skewed towards host States, especially from the Third World, in the sense that the mechanism of the regime allows their actions, including environmental measures, to be challenged by foreign investors.

It is for this reason that this thesis focuses on the implication of international investment law regime on environmental governance in Nigeria. Specifically, the thesis will analyse Nigeria's foreign investment protection regimes, especially the provisions in its network of international investment treaties/agreements and will review the impact on the ability of Nigeria (as a developing Third World State) to make laws and policies that are aimed at protecting the environment for the benefit of its citizens. It will argue that the asymmetrical structure of investment obligations and the drafting of investment protection standards in favour of foreign investors has the potential to impede efforts by the Nigerian State to protect the environment, and to ultimately promote sustainable development.

Nigeria makes an important case study for how investment rules impact of environmental protection. First, according to multiple indices used by various statistics and studies, Nigeria predominantly falls within the category of developing States or economies.[23] Being a developing State makes Nigeria rely substantially on foreign investment,[24] as it is generally lacking capital resources and technical

[23] See United Nations, 'World Economic Situation and Prospects 2020' (United Nations 2020) available <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_Annex.pdf> accessed 8 May 2021. See also <https://worldpopulationreview.com/country-rankings/developing-countries> access 8 May 2021.

[24] For instance, most of the dominant players in the petroleum industry, especially the upstream sector dealing with the exploration and production of petroleum products, in Nigeria are foreign (i.e., multinational) oil companies. To take advantage of their resources, the Nigerian government often partners with these foreign oil firms in the form of joint ventures to explore and produce petroleum products. See Madaki O Ameh, 'The Nigerian Oil and Gas Industry: From Joint Ventures to Production Sharing Contracts' (2005) 6 African Renaissance; Nigeria Extractive Industries Transparency Initiative (NEITI), *Core Audit Report for Oil and Gas: 2009-2011* 37-38 <https://www.premiumtimesng.com/wp-content/files/2013/02/NEITI-EITI-Core-Audit-Report-Oil-Gas-2009-2011-310113-New(2).pdf> accessed 15 June 2021 (highlighting a list of joint venture and production sharing partners).

know-how required to harness the full potential of its natural resources to engender growth.[25] More so, Nigeria is considered a major destination of foreign investment in Africa, in the sense that it is one of the top host States in the continent.[26] On this note, therefore, Nigeria is not only a developing State but largely a capital importing State.

Second, environmental governance is often considered less stringent in developing States,[27] including in Nigeria.[28] As such, changes in the environmental regime – in the form of adopting a more stringent regulation, for instance, in response to environmental concerns – will more likely take place in developing States. In other words, a more substantial change to the environmental legal regime may occur more in a developing State like Nigeria, which in turn has the potential to negatively affect the activities of foreign investors. In this regard, the standard of the environmental regulation, which induced the foreign investor to invest, when altered, could for instance drastically increase the operation cost thereby impeding of the viability of the business.[29]

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[25] Although there are debates regarding the impact of foreign direct investment, the general widely accepted position of the literature is that it is often considered important to the economies of developing States because it serves as a vehicle of foreign capital and technology know-how required for growth and development. For some of the literature in Nigeria, see Okey O Ovat and Esu-Amba Antakikam, 'Foreign Direct Investment and Economic Growth in Developing Countries: How has Nigeria Fared?' (2018) 9 IOSR Journal of Economics and Finance 55.

[26] Although foreign investment inflow dropped due to the COVID-19 pandemic, Nigeria remained one of the top host State in Africa. See United Nations Conference for Trade and Development, *World Investment Report 2020: International Production Beyond the Pandemic* (UNCTAD 2020) 28.

[27] The reason for this is partly explained by the pollution haven theory, which argues that to attract foreign investment, developing States will often lower or at least maintain less stringent environmental regime. See David Wheeler, 'Racing to the Bottom? Foreign Investment and Air Pollution in Developing Countries' (2001) 10 Journal of Environment and Development 225.

[28] It has been noted in the literature that Nigeria operates a relatively weak environmental regulatory regime. See Joshua P Eaton, The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 Boston University International Law Journal 261.

[29] This is often referred to as 'legitimate expectation' in international investment law. For literature on this subject, see Francisco Orrego Vicuña, 'Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society' (2003) 5 International Law FORUM Du Droit International 188; Rudolf Dolzer, 'The Impact of International

Nigeria has been subject to relatively fewer investor-State arbitration.[30] However, considering the analysis above it can be susceptive to investment claims. In this regard, Nigeria predominantly playing host to foreign investors as a capital importing State, while maintaining a relatively weak environmental governance regime, which is more likely to experience substantial change, makes it prone to breach international obligations owed to foreign investors. Therefore, Nigeria as a developing State is more exposed to face investment claims because of violating rules protecting foreign investors. This makes Nigeria an important subject to study with regards to the interaction between protecting foreign investors and the environment.

2. Theoretical Framework

There is a potential conflict between investment law and the environment. The interrelationship between protecting the interests of foreign investors and the environment has been subject of substantial legal scholarship.[31] However, the approach in analysing the investment-environment interface is often legalistic: focussed primarily on how a legal text (i.e. an investment rule or obligation) applies to a given situation that concerns protecting the environment, without considering

Investment Treaties on Domestic Administrative Law' (2005) 37 New York University Journal of International Law and Politics 953, 968-69.

[30] So far, Nigeria has had four investment claims: *Shell Nigeria Ultra Deep Limited v Federal Republic of Nigeria*, ICSID Case No. ARB/07/18 (discontinued); *Interocean Oil Development Company and Interocean Oil Exploration Company v Federal Republic of* Nigeria, ICSID Case No. ARB/13/20, Award 6 October 2020; *Eni International B.V., Eni Oil Holdings B.V. and Nigerian Agip Exploration Limited v Federal Republic of Nigeria*, ICSID Case No. ARB/20/41 (pending).

[31] To account for the prominence of this area of study, aside from a plethora of journal articles, several books and edited books have been dedicated to the study of the intersection of foreign investment and the environment. For some examples of monographs, see Jorge E Vinuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012); Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press 2009); Andrea Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press 2012). For an example of edited books, see Yulia Levashova, Tineke Lambooy and Ige Dekker (eds), *Bridging the Gap between International Investment Law and the Environment* (Eleven International Publishing 2016).

the social, economic or political context within which such rule exists.[32] In other words, such approach assumes that the subject of analysis – in this case, the rules of international investment law – are neutral, objective, and universal in nature, or at least are not underpinned by socio-political or economic attributes.

This largely underscores a legal positivist approach.[33] Legal positivism is a school of thought in legal philosophy or an approach in the nature of law that concerns itself on whether the law exist (i.e. is 'posited') or not, and not whether the law in existence (or as posited) lacks merit or conforms to an assumed standard.[34] Therefore, once a law or a legal norm exists (or is posited), or its rules are in force, its legitimacy is assumed, and questions regarding the circumstances of its existence do not necessarily suffice. This is not to suggest that the scholarship in international investment law is generally positivist,[35] however, in the present

[32] See Jorge E Vinuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012) (the author notes that the work 'provides a detailed analysis of all the major legal issues on the basis of comprehensive study of the jurisprudence from investment tribunals… and other adjudicatory mechanisms'). To the extent that the focus of the study is on 'legal issues', one may argue that this serves as an example of a mainstream scholarship on investment-environment interaction that has failed to consider the social, economic or political aspects of the regime. See also Thomas Waelde and Abba Kolo, 'Environmental Regulation, Investment Protection and Regulatory Taking in International Law' (2001) 50 International and Comparative Law Quarterly 811 (the article, according to the authors, 'addresses a currently very controversial issue – the question of environmental regulation of foreign investment and the limits of such national regulation by international law…It contributes to the emerging discussion on how and where to draw the line between legitimate non-compensable national regulation aimed at protecting the environment…on one hand, and regulation which is "tantamount" to expropriation requiring compensation, on the other'). As distilled from this excerpt, the work predominantly focusses on the legal issues surrounding how to differentiate between regulatory expropriation and legitimate exercise of sovereign authority to regulate for the environment.

[33] For some foundational works on legal positivism, see H L A Hart, *The Concept of Law* (Oxford: The Clarendon Press 1961); H L A Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford: Clarendon Press 1982).

[34] See Austin J, *Austin: The Province of Jurisprudence Determined* (Wilfrid E Rumble ed Cambridge University Press 1995) 157.

[35] For instance, for a sociological perspective of international investment law, see Moshe Hirsch, 'The Sociology of International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Vinuales (eds), *The Foundations of International Investment Law: Bridging Theory into Practice* (Oxford University Press 2014) 143. For a law and economics perspective, see Olivier De Schutter, Johan Swinnen and Jan Wouters (eds), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge 2013).

context, mainstream scholarship in this area of international law is rarely critical about the origins or manner of existence of investment rules.

Meanwhile, there are issues that are generally muted in international investment law scholarship. These include: how did the rules of international investment law emerge; in what manner did they become universally applicable? Are certain interests protected in international investment law to the exclusion of others? If so, what and whose interests are excluded? What impact does the regime have on these excluded interests? These are some of the questions that mainstream scholarship, predominantly adopting a legal positivist approach, have failed to address. This, therefore, shows that there is more to the study of international investment law, and as such, it is not merely a study of a set of legal norms simply postulated – that is, suggested or assumed to be a fact or truth of something.[36]

As developing States are more susceptible to being targeted with investment claims, there is a need for an analysis that is drawn from their experiences. This refers to an analysis of international investment law from 'below': exploring the lived experiences of those that are often subjected to the rules and mechanisms of international investment law – the Third World.[37] Reference to the 'Third World' encompasses a geographical, political, historical and economic conceptualisation of a group with a shared identity of subjugation, domination, struggle and

[36] Muthucumaraswamy Sornarajah, 'Economic Neo-Liberalism and the International Law on Foreign Investment' in Antony Anghie, B S Chimni, Karen Mickelson and Obiora Okafor (eds), *The Third World and International Order: Law, Politics and Globalization* (Koninklijke Brill NV 2003) 173 (invariably, the author notes that international investment law is reminiscent of conflict of interest with regards to how legal norms and rules are made in international legal system and how these rules bring about legal change).

[37] See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003) (the title of the book inspires the use of the term 'below'. As noted by the author, 'the book [international law from below] chronicles the complex relationship between international law and the Third World…' In this sense, it explores the lived experiences of those that are often subjected to the workings of international law and international institutions).

suffering.[38] Considering this, it will be imperative to undertake a Third World perspective of international investment law to chronicle the relationship between international law and the Third World.

In light of the above, this research adopts third world approaches to international law (TWAIL),[39] and more specifically, TWAIL II strand in its analysis. TWAIL II undertakes an advanced critical analysis of international law, to show how imperialism has shaped and is intrinsically intertwined with the fundamental values of international legal regime.[40] As such, TWAIL II deploys complex tools and methodologies in analysing international law and addressing the concerns of the Third World in the discipline.[41] In addition, it seeks ways to improve the current situation through reform rather than to replace international law.[42] It is in this way – in a more reformist sense – that this thesis applies TWAIL.[43]

TWAIL II is used as a critical legal scholarship, to provide an alternative and critical analysis of the interaction between the protection of foreign investment and the environment.[44] As a critical text, its analysis tends to challenge postulations concerning the rules and principles of international investment law specifically, and

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[38] See Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography' (1999) Third World Legal Studies 1.
[39] Makau Mutua, 'What is TWAIL' (2000) 94 American Society of International Law Proceedings 31; See also James T Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 Trade Law and Development 26; Obiora C Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology or Both? (2008) 10 International Community Law Review 371; B S Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8 Melbourne Journal of International Law 499.
[40] Antony Anghie and B S Chimni, 'Third World Approaches to International Law and Individual Responsibilities in Internal Conflicts' (2003) 2 Chinese Journal of International Law 77, 84.
[41] Ibid 86.
[42] Luis Eslava and Sundhya Pahuja, 'Resistance and Reform: TWAIL and Universality of International Law' (2011) 3 Trade, Law and Development 103, 110 (noting that TWAIL is predominantly occupied in 'overcoming international law's problems').
[43] Ibid 113 (the authors note the various types of critical engagement with international law, specifically highlighting that the 'reformist' does not wish for the replacement of the current regime, as 'there is no meaningful alternative to the current system', rather seeks for its improvement).
[44] Jeanrique Fahner and Kate Miles, 'The Contested History of International Investment Law: From a Problematic Past to Current Controversies' (2015) 17 International Community Law Review 373, 377.

international law generally.[45] As such, TWAIL II is applied as a deconstructive tool.[46] It is used to deconstruct the contents of international (investment) law – by contesting its claim to universality,[47] highlighting its inconsistencies,[48] and revealing its injustices – consequently providing a nuanced understanding of the relationship between international law, domination, colonialism and the Third World.[49]

Specifically, the framework of TWAIL II is used in this research to highlight incidents of domination, power relations and politics in the making, design, and application of rules on foreign investor protection. These attributes will be manifest in the way investment rules were conceived or made. They will be evident in the way investment rules are structured in investment treaties. They will show in the manner investment rules are interpreted and applied by adjudicatory bodies when resolving investor-State disputes, and the unfavourable consequences such

[45] To challenge as used above encompasses various acts of resistance, which includes writing resistance – that is, to resist to accept the ideologies of mainstream legal scholarship. For instance, see Ruth Buchanan, 'Writing Resistance into International Law' (2008) 10 International Community Law Review 445; B S Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3, 22 (the author notes that resistance is considered an integral part of TWAIL dialectics). For other works on resistance, see Balakrishnan Rajagopal, 'From Resistance to Renewal: The Third, Social Movements, and the Expansion of International Institutions' (2000) 41 Harvard International Law Journal 529.

[46] Makau Mutua, 'What is TWAIL?' (n 39) 31.

[47] In this sense, for instance, TWAIL reveals that the origins, development, spread and application of the rules of international investment law is not only embedded in Western dominance, power relations and politics, and therefore a reflection of Western hegemony, but protects those specific interests for which it was designed for. See Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013); See also Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18 European Journal of International Law 379.

[48] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press 2005) 34; Michelle Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology' (2016) 14 Journal of International Criminal Justice 921, 933.

[49] Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens, 'Introduction' in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds) *International Law and the Third World: Reshaping Justice* (Routledge 2009) 1, 5 (noting that international law is a system that legitimises the structures used to produce injustice through domination against the disadvantaged); see also, Anghie, '*Imperialism, Sovereignty and the Making of International Law*' (n 48) 38-39.

interpretation could bear for a Third World State like Nigeria.[50] Therefore, in the present study, TWAIL II helps highlight that Nigeria, being a Third World State,[51] may experience the precedents of subjugation inherent in international (investment) law.

As an alternative text, TWAIL II articulates international law in a different context. Specifically, it presents how the Third World, often considered as 'the other',[52] perceive the mechanisms of international law,[53] by directing focus on the experiences of Third World people.[54] In this sense, TWAIL II takes on international law not simply as a system that regulates interactions,[55] but concerns itself with the impact of such relations, particularly on the lives of Third World people.[56] Specifically, TWAIL II is used to highlight how a Third World State like Nigeria can be affected by the mechanisms of international (investment) law, and to show how international investment law is influenced and shaped by the Third World.

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[50]James T Gathii, 'Third World Approaches to International Economic Governance' in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds) *International Law and the Third World: Reshaping Justice*. (Routledge 2009) 255, 255.

[51] It has been noted in TWAIL scholarship that one of the common characteristics of the Third World is the shared history of colonialism or imperialism. Nigeria in this case shares a history of British colonialism, which has shaped both its legal, political, and cultural outlook. See A O Obilade, *The Nigerian Legal System* (Spectrum 1979) (noting the influence of British colonialism on Nigeria's legal system). Again, the Third World comprises States in Africa, Asia, the Middle East, Latin America, and the Caribbean. Nigeria, also in this case, is in West Africa. See Smith (n1) 1-43.

[52] 'Other' here refers those that are often excluded from or are found outside the realm of protection of international law. These 'others' include but are not limited to 'non-Western' (Third World) peoples, who are regarded as the colonial 'other'. For study of the 'others' in international law, see Orford A (ed), *International Law and Its Others* (Cambridge University Press 2006); Frédéric Mégret, 'From "Savages" To "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Orford A (ed), *International Law and Its Others* (Cambridge University Press 2006) 265, 267; Ikechi Mgbeoji, 'The Civilised Self and the Barbaric Other: Imperial Delusions of Order and Challenges to Human Security' in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds) *International Law and the Third World: Reshaping Justice* (Routledge 2009) 151.

[53] Georges Abi-Saab, 'The Third World Intellectual in Praxis: Confrontation, Participation, or Operation Behind Enemy Lines?' (2016) 37(11) Third World Quarterly 1957, 1962 (noting that TWAIL represents 'a kind of dynamic analysis on international law in action from the perspective of the Third World').

[54] Anghie, 'Third World Approaches to International Law' (n 40) 78 (noting that 'for TWAIL scholars, international law makes sense only in the context of lived history of the peoples of the Third World').

[55] Malcolm N Shaw, *International Law* (Cambridge University Press 2003) 1-2.

[56] Upendra Baxi, 'What May the 'Third World, Expect from International Law?' in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds) *International Law and the Third World: Reshaping Justice* (Routledge 2009) 9, 16.

While revealing this, TWAIL II aims to project the expectations of the Third World from international investment law in hopes to use the existing structures of the regime to alleviate the various Third World concerns.[57]

Although the above analysis shows that TWAIL II offers suitable tools to analyse this topical subsection of international investment law in the context of Nigeria – especially the interaction between protecting foreign investors and the environment – it has its criticisms as a legal approach.[58] In this regard, one major TWAIL II issue is that it is sometimes not seen as more than a political project than it is a legal scholarship engagement.[59] In other words, it is often not recognised as one of the distinctive ways of thinking about what international law is or should be, leading to its exclusion as an international legal method.[60]

However, this proposition overlooks the rich academic scholarship,[61] covering a vast breadth of research subjects and topics,[62] signifying that TWAIL II

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[57] Ibid 17; Falk (n 49) 5.

[58] For instance, on the critique of the concept of 'Third World' as an intellectual endeavour, see Mark Berger, 'After the Third World? History, Destiny and the Fate of Third Worldism' (2004) 25 Third World Quarterly 9, 31.

[59] Although some TWAIL scholars acknowledge that TWAIL scholarship is both an intellectual and political endeavour. For instance, see Karin Mickelson, 'Taking Stock of TWAIL Histories' (2008) 10 International Community Law Review 355, 358 (highlighting that TWAIL is a scholarly enterprise, but that scholarship is political).

[60] See Anghie, 'Third World Approaches to International Law' (n 40) 77 (the authors note how TWAIL was excluded from the list of methods in international law); Burgis-Kasthala (n 48) 926.

[61] For an exposition of TWAIL's bibliography, see Gathii, 'TWAIL: A Brief History of its Origins' (n 39).

[62] TWAIL as an approach in academic scholarship has been used in various areas of international law. For TWAIL's general use in international law, see Antony Anghie, '*Imperialism, Sovereignty and the Making of International Law*' (n 51); Anghie, 'Third World Approaches to International Law and Individual Responsibilities in Internal Conflicts' (n 40). In the area of international human rights law, see Makau Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights' (2001) 42 Havard International Law Journal 201; Celestine Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender hierarchy in Developing Countries' (2000) 41 Havard International Law Journal 381. In the area of international environmental law (and climate change), see Karin Mickelson, 'South, North, International Environmental Law, and International Environmental Lawyers' (2000) 11 Yearbook of International Environmental Law 52; Julia Dehm, 'Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective' (2016) 33 Windsor Yearbook of Access to Justice 129. In international criminal law, see Obiora C Okafor and Uchechukwu Ngwaba, 'The International Criminal Court as a ''Transitional Justice'' Mechanism in Africa: Some Critical

qualifies as a 'system of ideas' of explaining or analysing international law.[63] Although TWAIL II scholarship is mostly decentralised in its expressions,[64] it orbits around a shared purposed: i.e. to 'expose [and] reform …those features of international legal system that help create or maintain the generally unequal, unfair, or unjust global order…'[65] Considering this, this thesis aims to expose how Western hegemony permeates the manner investment rules are conceived, interpreted or applied, and offer solutions, in the form of reforms to the regime, to address the concerns of Nigeria, as a Third World State, in international investment law.

3. Methodology

History is considered an important tool in TWAIL methodology to expose how the mechanism of international law has affected and shaped the experiences of the Third World and its people.[66] In this regard, the thesis undertakes a historical analysis on two fronts: first, to highlight that the rules of international investment law were conceived in line with Western legal concepts, and as such, does not consider the interest of a Third World State like Nigeria; second, with regards to Nigeria's colonial past, to highlight how both the influx of foreign interest and the

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Reflections' (2015) 9 International Journal of Transitional Justice 90; John Reynolds and Michael Kearney, 'Palestine and the Politics of International Criminal Justice', in William A Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, 2013) 407; in international investment law, see Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010) and the works of Sornarajah generally on international investment law; Ibironke T Odumosu, 'The Law and Politics of Engaging Resistance in Investment Dispute Settlement' (2007) 26 Penn State International Law Review 251; Ibironke T Odumosu, 'Locating Third World Resistance in the International Law on Foreign Investment' (2007) 9 International Community Law Review 427.

[63] Okafor, 'Critical Third World Approaches to International Law' (n 39) 376 (in highlighting that TWAIL is a theory, the author notes that 'it is definitely a "system of ideas of explaining something").

[64] James T Gathii, 'TWAIL: A Brief History of its Origins' (n 39); Obiora C Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43 Osgoode Hall Law Journal 171, 176-77.

[65] Okafor, 'Newness' (n 64) 176-77.

[66] Gathii, 'TWAIL: A Brief History of Its Origins' (n 39) 26 (noting that 'TWAIL is a historically aware methodology'); Chimni, 'The Past, Present and Future of International Law' (n 39) 500.

legal protection of the economic interests of foreign investors were influenced and shaped by the imperial agenda of the British administration.

Further, the thesis adopts a qualitative doctrinal research methodology to analyse investor-State arbitration cases and case reports, and to review provisions of BITs. The provisions of bilateral investment treaties (BITs) outline investment rules, i.e., the rules regarding the standard of treatment to be accorded foreign investors by their host States. In particular, the thesis reviews the provisions in the network of Nigeria's investment treaties. The analysis will concern two issues: first, to ascertain whether treaty provisions in the network of Nigeria's investment treaties are consistent and coherent with each other; and second, to ascertain whether the treaty provisions in the network of Nigeria's BITs contain adequate environmental language or address environmental concerns. Both findings indicate power relations that underpin the creation of Nigeria's BITs.

On the other hand, investor-State arbitration cases show the manner investment rules as contained in investment treaties or such other foreign investment protection regime are applied to individual investment disputes. In this regard, the thesis will analyse how investment tribunals resolve foreign investor claims challenging host State's environmental measures (or public policy measures generally) that involve the local communities in a Third World State like Nigeria. The analysis will ascertain, for instance, whether the interests of foreign investors are prioritised over environmental concerns of host States. The findings indicate that politics – which includes the decision to prioritise one interest over another – and Western hegemony underpin how investor-State disputes are resolved.

Reform is noted as an important aspect of TWAIL II methodology. It is adopted in the thesis to recommend proposals that will reform investment rules and how international investment law regime generally interacts with the Third World to address and accommodate the interests of Third World States like Nigeria.

4. Chapter Outline

The arguments in this thesis are made across 6 chapters. The introductory chapter introduces the subject of study and provides the foundation for arguments in subsequent parts of the thesis. The second chapter provides a historical analysis of international investment law and its evolution in Nigeria. Its key argument is that though the current form of investment rules is reminiscent of Western legal hegemony, its development was equally shaped by the Third World. To illustrate this, the chapter shows that the rules on the treatment of foreign investors originated from Western legal culture, which was largely built on Western commercial relations, and was subsequently applied to non-Western States in the wake of the expansion of trade and investment, involving a complex process of imposition on one hand, and resistance on the other hand.

The third chapter undertakes a critical analysis of the network of Nigeria's investment treaties. In this regard, it examines the consistency and coherence of fair and equitable treatment (FET) provision in the network of Nigeria's investment treaties. Further, it analyses whether the provisions in Nigeria's investment treaties adequately provide for environment concerns. This is to make two important findings: first, that Nigeria's investment treaty making is underscored by power relations, as the outcome of treaty provisions, such as the FET, are determined by the more powerful treaty partner(s); second, that inadequate environmental

language (i.e. text addressing environmental concerns) in Nigeria's investment treaties not only reflects the preferred investment rules of the more power treaty partner, but more importantly suggests lack of consideration to host State's general interests, especially on the environment.

The fourth chapter provides an insight into how investor-State arbitration addresses public policies, especially environmental measures, involving Third World States. In this regard, the chapter analyses five cases instituted against Third World States by foreign investors, following the introduction of an environmental measure or public policy. First, the cases underscore the central role Third World resistance plays in investor relations and investor-State dispute resolution. Second, the cases will show how investor-State arbitration tribunals conceptualise foreign investor rights vis-à-vis host State obligations, revealing how such appraisal undermines the environmental concerns or the general interests of a Third World host State. Overall, the cases indicate how investor-State arbitration impede efforts to protect the environment or promote sustainable development generally, but more importantly, highlights the potential impact of international investment law regime on the regulatory authority of a Third World host State like Nigeria.

In light of the disclosures in the previous chapters, the fifth chapter makes the case for a reform to Nigeria's international investment law regime. In this regard, it proposes two categories of reforms: substantive reforms and policy options. Substantive reforms, on one hand, involve changes or alterations in the language or text of the provisions of Nigeria's investment treaties. Policy options, on the other hand, represent the broad strategies – that is, practical steps or policy changes – to be adopted to bring the substantive reforms into effect. Taken together, therefore, these reforms not only point towards addressing the concerns of the Third World in

international investment law but contributes towards reforming the international investment law regime in Nigeria.

In this sense, first, the reform will ensure a more balanced appreciation of rights, obligations and interests among foreign investors and host States (as well as host communities, i.e., Third World people). In this regard, the reform will emphasise the right of host States to regulate. Also, it will increase the obligations of foreign investors towards their host State and the environment, and as such will limit, for instance, Nigeria's exposure to environmental-based investment claims. Second, and as a result of the first, the reform will help to reimagine the position of Third World States like Nigeria as contributors (i.e., rule-makers) in the regime and not mere rule-takers.

The sixth chapter concludes the research in the thesis. It summarises the key findings and arguments presented in the thesis, highlights the importance of the research and the proposed reforms, and recommends areas for future research in the topic of study. Overall, it contends that the current international investment law regime can be improved, in line with the proposed reforms highlighted in the thesis, to address and accommodate the interests and concerns of Third World host States like Nigeria.

In light of the above, this thesis makes substantial contribution to the area of international investment law. It offers a fresh perspective that highlights how power relations, Western hegemony, resistance and subjugation are deeply entrenched in how foreign investment protection applies to a Third World State like Nigeria and impacts on efforts to regulate the environment. First, in this regard, it undertakes a more focused analysis of the interaction between foreign investment protection and

environmental governance, by providing a case study of Nigeria as a Third World host State. Second, it uses the TWAIL framework to analyse how investment rules may impede on efforts by Nigeria to regulate for the environment, thereby further advancing TWAIL scholarship into the area of international investment law.

Chapter 2: The History of Foreign Investment Protection and The Third World Experience

1. Introduction

This chapter will focus on how the law of foreign investment protection developed and became universally applicable outside the Western World, its region of origin. It will sketch the history of international investment law – highlighting the events that shaped its evolution – and will narrate how foreign investment protection evolved in Nigeria, as an example to contextualise the experience of the Third World. The chapter provides a 'critical alternative text' on international investment law's history,[1] showing that its evolution is entrenched in power relations. It will re-examine predominant historical narratives, uncover areas that have been frequently excluded,[2] and reveal how the Third World is central to both the history and understanding of international investment.[3]

Instead of providing a detailed historical analysis, this chapter aggregates specific periods key to the development of international investment: the imposition of investment rules on non-Western States to protect the interests of investors from the Western World; the resistance of non-Western States to such rules; and the subsequent reassertions of the original investment rules in a reformulated structure, which to a large extent informs the architecture of modern international investment

[1] Jeanrique Fahner and Kate Miles, 'The Contested History of International Investment Law: From a Problematic Past to Current Controversies' (2015) 17 International Community Law Review 373, 377.
[2] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge 2005) 34; Michelle Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology (2016) 14 Journal of International Criminal Justice 921, 933.
[3] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge 2008) 35, 36.

law.[4] As a result, in analysing the history of international investment law, this chapter will highlight that this area of international law reflects Western hegemony.[5]

The framing of a historical background prepares the foundation upon which much of the argument in subsequent chapters will be built on. First, it provides an understanding as to why investment obligations are predominantly imposed on host States to protect the interests of foreign investors, with little or no obligations for foreign investors.[6] Second, it provides the reason why, in the course of resolving investor-State disputes, institutional investment arbitration tribunals are more likely to interpret and apply investment rules in a manner that priorities the interests of foreign investors over the public interests of host States, including when it involves environmental concerns.[7]

Considering the above, the argument in this chapter will be made in six parts, with the first part, the current section, being the introduction. The second part will

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[4] The history of foreign investment protection comprises complex and entwined subject areas and events; and more so, there are studies on each subject or event. The inspiration for much of the argument made in this chapter is drawn to some extent from the work of Kate Miles on the origins of international investment law, see Kate Miles, *The Origins of International Investment Law: Empire, Environment and Safeguarding Capital* (Cambridge 2013); For other works on the history of foreign investment protection, see also Charles Lipson, *Standing Guard: The Protection of Foreign Capital in the Nineteenth and Twentieth Centuries* (University of California 1985). On subject specific studies that relate to the treatment or protection of foreign investment, see Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997); On the role of international institutions, such as the World Bank, which relates to the development of foreign investment protection through dispute settlement mechanism, see Ibrahim F I Shihata, 'The Settlement of Disputes Regarding Foreign Investments: The Role of the World Bank, with Particular Reference to ICSID and MIGA' (1986) 1 American University Journal of International Law and Policy 97; Ibrahim F I Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 ICSID Review 1.

[5] Miles, '*The Origins of International Investment Law'* (n 4) 2 (noting that the manner in which international investment law in its current form operate is reminiscent of its origin of imperialism, 'rooted in the processes of oppressive protection of commercial interest'); on international law generally as a reflection of Western hegemony, see Anghie, '*Imperialism, Sovereignty and the Making of International Law'* (n 2).

[6] To make this argument, Chapter 3 will undertake an analysis of the provisions of the network of Nigeria's investment treaties.

[7] This argument will be further explored in Chapter 4, where an analysis of investor-State arbitration and public policy concerns will be undertaken.

show that the early rules on foreign investment protection originated from Western legal culture and were subsequently imposed on non-Western territories through complex processes of dominance. The third part will explore the various claims by non-Western (Third World) States at different periods – from the Calvo doctrine through decolonisation – challenging western conceptions of foreign investment protection. On account of the above events, the fourth part will highlight that the efforts to liberalise foreign investment, particularly in the Third World, was greatly influenced by Western-controlled financial institutions. The fifth part will examine the contours of the development of foreign investment protection in Nigeria, illustrating how Western hegemony over came Nigeria's resistance to investment rules. The chapter concludes in the sixth part.

2. Emergence of Investment Rules in International Law

2.1. Origins of Foreign Investment Protection

The concept of protecting the property rights and other interests of foreigners is not new.[8] As this chapter will argue, its origins, like most areas on international law, which has now acquired an almost universal application, emerged from a legal system already established among Western States and territories during the expansion of trade and investment.[9] Trade and investment were viewed as inherent in human nature, and therefore a foreigner trading (or carrying on business in the form of investment) in a host State should receive an equal standard of treatment as

[8] Miles, '*The Origins of International Investment Law*' (n 4) 19 (noting that the law in the field of foreign investment protection is not a new phenomenon).
[9] Ibid 19; See Anghie, '*Imperialism, Sovereignty and the Making of International Law'* (n 2) 32-3.

the locals.[10] More, due to the relatively equal bargaining power of Western States, the rules protecting foreign investment were largely applied reciprocally.[11]

In a bid to confer legal status to foreign traders and investors, the reciprocal application of investment rules became more systematised, and more importantly, was subsequently codified in treaties amongst the Western States.[12] For instance, the understanding between European and North American States, as reflected then in their economic treaties, was that there would be reciprocal protection of foreign-owned assets.[13] A perfect representation of such treaty, containing the reciprocal protection of foreign investors and their investments, is the treaty of Amity and Commerce between France and the United States of America (US) in 1778.[14]

Treaties of the kind mentioned above embodied the ideals of friendship, commerce and navigation (FCN) and were to be used extensively, especially by the US.[15] FCN treaties were comprehensive agreements dealing with a diverse commercial issues; however, they were concerned with the reciprocal protection of the assets of foreign investors,[16] and as such contained several investment protection provisions,[17] which are some of the provisions contained in present

[10] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010) 19.
[11] Miles, '*The Origins of International Investment Law*' (n 4) 21; on reciprocity – the mutual exchange of privileges – being a manifestation of state equality, see Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 1999) 89-90.
[12] John F Coyle, 'The Treaty of Friendship, Commerce and Navigation in the Modern Era' (2013) 51 Columbia Journal of Transnational Law 302, 303-4.
[13] Herman Walker, 'Modern Treaties of Friendship, Commerce and Navigation' (1958) 42 Minnesota Law Review 805, 805.
[14] Ibid 805.
[15] Coyle (n 12) 303, 307. See also Walker (n 13) 805-6 (noting that FCN treaties are one of the most familiar instruments known to diplomatic tradition and were substantially used by the US in foreign relations).
[16] Walker, 'Modern Treaties of Friendship' (n 13) 806.
[17] Kenneth J Vandevelde, 'A Brief History of International Agreements' (2005) 12 University of California 157, 158-59.

investment treaties.[18] Considering that the FCN treaties were the foremost to embody, in form of a treaty, the reciprocal standards of treatment of foreign investors,[19] they were viewed as the predecessors of modern investment treaties.[20]

Following from this, having established a foreign investment practice, the Western World subsequently codified the reciprocal treatment of foreign investors into treaty. By codifying the standards of foreign investor treatment, it enabled the legal concept of foreign investment protection to solidify into rules not only applicable to the Western World but become rules of international law.[21] Further, by virtue of its supposed international character, these Western-oriented investment rules were to extend to non-Western territories.

2.2. Expansion of Investment Rules, Trade and Investment

The survival of capitalism and the evolution of customary international law – both reflecting Western economic and legal system – are strongly rooted in imperialism.[22] In this regard, trade and investment as well as foreign investment protection rules expanded into non-Western territories through various imperialistic means: largely comprising of concessions and unequal treaties – with both often

[18] For the various provisions contained in a typical bilateral investment treaty (BIT), see United Nations Conference for Trade and Development, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (United Nations 2007) 28-51<https://unctad.org/system/files/official-document/iteiia20065_en.pdf> accessed 15 June 2021.

[19] FCN were considered as investment treaties. See Herman Walker, 'Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice' (1956) 5 American Journal of Comparative Law 229, 244.

[20] Coyle (n 12) 305 (noting that the rights contained in FCN treaties are currently present in specialised treaties, including modern investment treaties).

[21] Miles, '*The Origins of International Investment Law*' (n 4) 24.

[22] For a link between capitalism, imperialism and international law, see B S Chimni, 'Capitalism, Imperialism, and International law in the Twenty-First Century' (2012) 14 Oregon Review of International Law 17 (noting that, 'there is an intimate relationship between capitalism, imperialism, and international law'); B S Chimni, 'Customary International Law: A Third World Perspective' (2018) American Journal of International Law 1, 4 citing Resa Luxemburg, *The Accumulation of Capital* (1958); see also Utsa Patnaik and Prabhat Patnaik, *A Theory of Imperialism* (Columbia University Press 2016) 6.

leading to the annexation of non-Western territories – and the use of force.[23] More so, extending these rules successfully into non-Western territories would not have been successfully achieved without some form of coercion – considering that Western legal cultures were largely incompatible or at least different from the cultures, experiences and legal systems of non-Western States.[24]

To justify the manner of imposition, foreign investment protection rules were claimed to be rules of international law – as opposed to domestic law – and therefore universally applicable, including on non-Westerners.[25] Further to this, it was articulated that the rules that the Western World had been bound by – for instance, rules concerning the treatment of foreign investors – represented a universal international law, and as such governed any relationship between Europeans and non-Europeans, making such rules applicable to non-Europeans.[26] It is on this ground that Eurocentric investment rules were imposed on non-Western States, including present Third World States.

3. Resistance to Investment Rules in International Law

The rules concerning the treatment and protection of foreign investors and their properties largely originated from Western legal culture. These Eurocentric

[23] See Miles, '*Origins of International Investment Law'* (n 4) 25-31; Anghie, '*Imperialism, Sovereignty and the Making of International Law'* (n 2) 13-31.
[24] Anghie, '*Imperialism, Sovereignty and the Making of International Law'* (n 2) 20-29 (the author notes the existence of cultural differences between European and non-European States, though both possess universal reasoning; however, it was the duty of Europeans – in the light of the potential conflict that may arise due to the difference – to bring non-Europeans within the purview of the universal law, even if it may require the use of force). See also, Miles, '*Origins of International Investment Law'* (n 4) 23; Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law' (2007) 18 European Journal of International Law 379, 382.
[25] Miles, '*Origins of International Investment Law'* (n 4); Anghie, '*Imperialism, Sovereignty and the Making of International Law'* (n 2).
[26] Anghie, '*Imperialism, Sovereignty and the Making of International Law'* (n 2) 20-21 (noting that natural law – the law based on natural reason, which is manifest in intra-European relations as administered by sovereigns was the source of international law governing European – European relations).

rules were subsequently extended to non-Western States and territories in the wake of the expansion of trade and investment outside Europe. However, an important part of the history and evolution of this area of (international) law relates to contestations between Western and non-Western States, particularly Third World States, regarding the rule that should apply to foreign investors.

On one hand, non-Western States (predominantly capital importing States or, as used in the present study, Third World States) claimed that the internal legal system of the host State – that is, the domestic rules or the prevalent national standard – should apply to foreign investors. On the other hand, Western States (comprising largely of capital exporting States or Developed States) asserted that rules of international law, largely a reflection of Western legal culture,[27] was applicable to foreigners. However, to project the contribution of the Third World to development of international investment, this section will focus on Third World resistance to Eurocentric rules concerning foreign investment.

The main thrust of these contestations is Third World rejection of the view by the Western World that the standard set-in international law – known as 'international minimum standard' – should determine the manner host States treat their foreign investors. The result of this would be that the sovereignty of the host State, which includes the ability to regulate and determine the internal structure of its territory and by extension the activities taking place within it, will be subjected to a supranational legal framework that originated and is determined by Western hegemony.

Therefore, the aim of this section is not only to highlight the events of resistance by non-Western States, but to show that these events contributed towards

[27] As highlighted in the previous section, rules of international law, including investment rules, largely originated from Western legal culture.

the development of international investment law as it is known presently. Two broad sets of assertions by the Third World will be explored: first, the assertion of the Calvo doctrine, which laid the foundation to resist Western investment rules; and second, the declarations that took place at the United Nations during the postcolonial period, including the Permanent Sovereignty over Natural Resources (PSNR), the New International Economic Order (NIEO) and the Charter of Economic Rights and Duties of States (CERDS).

3.1. Latin America and the Calvo Doctrine

As noted in the previous section, the expansion of trade and investment outside the Western World brought with it imperialistic practices to ensure that the commercial interests of foreign traders and investors, as well as that of their home States,[28] were adequately protected within the host territory. The protection of Western economic interests was achieved to a large extent through a complex process of economic and political domination, and in some cases culminating to colonialism.[29] In other words, the expansion of trade and investment, and the extension of rules on the protection of foreign investment into non-Western territories created the room for imperialism to take place.

Subsequently, Latin American States were one of the first set of colonial territories to gain independence from European imperialism in the nineteenth century.[30] On attaining independence, these States aimed to uphold their right to regulate and determine internal affairs – including matters concerning foreigners –

[28] See Miles, '*The Origins of International Investment Law*' (n 4) 33-42 (noting that the interests of European traders and their home States often aligned).
[29] Ibid 23-33.
[30] The process of independence of Latin American states started as early as 1810. Spain, for instance, lost most of its colonial territories in the region by 1825.

without undue interference,[31] considering that they were susceptible to aggression and conquest from Western States.[32] As result, they maintained a foreign policy, as reflected in the writings of an Argentine writer, Carlos Calvo,[33] which subsequently became popularly known as the Calvo doctrine,[34] that aimed to restrict/eliminate Western mechanisms of foreign investor protection.[35]

For a better understanding, the Calvo doctrine can be summed up in two principles. First, the doctrine emphasised the principle of territorial sovereignty and State equality.[36] In the context of territorial sovereignty, it was within the prerogative of a sovereign State to govern the activities that took place within its jurisdiction, which included those of both citizens and foreigners residing within the host State. Also, considering that sovereign States are recognised as equals, no State should intervene into the internal affairs of the other. Therefore, considering that every State had authority over its own territory, no State being granted similar rights should interfere with the authority of another.

Second, considering that the rules of international law compel every State to accord to anyone within the State's jurisdiction equal treatment with regards to their

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[31] Schrijver (n 4) 177 (their policies emphasised on the principles of national sovereignty, territorial integrity and non-intervention).
[32] Manuel R Garcia-Mora, 'The Calvo Clause in Latin American Constitutions and International Law' (1949) 33 Marqette Law Review 205, 205-06; Miles. *Origins of International Investment Law* (n) 57.
[33] This was composed in a six-volume treatise, *Le Droit International Théorique*, see Miles, '*The Origins of International Investment Law*' (n) 50.
[34] For some literature on Calvo Doctrine, see Alywn V Freeman, 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law' (1946) 40 American Journal of International Law 121; Donald R Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press 1955); Bernardo M Cremades, 'Disputes Arising out of Foreign Direct Investment in Latin America: A New Look at Calvo Doctrine and Other Jurisdictional Issues' (2004) 59(2) Dispute Resolution Journal 78; Wenhua Shan, 'From "North-South Divide" to "Private-Public Debate": Revival of the Calvo Doctrine and the Changing Landscape of International Investment Law' (2007) 27(3) Northwestern Journal of International Law and Business 631.
[35] Western empires/States were known to have sent expeditions to protect the interests of their citizens in Latin American States. Therefore, the Calvo doctrine would serve as both a political and legal defence in their relationship with the Western States, especially against any interference in the regulation of domestic affairs. See Shea (n 34) 14, 17; see Manuel R Garcia-Mora, 'The Calvo Clause in Latin American Constitutions and International Law' (1949) 33 Marqette Law Review 205, 206.
[36] Shea (n 34) 17-20.

property;[37] all foreigners were entitled to be given equal treatment as enjoyed by nationals.[38] In other words, in a relationship between a foreigner and their host State, for instance, involving the foreigner's property, the law – that is, domestic law – which ordinarily would apply to nationals should be applied to foreigners. By virtue of the Calvo doctrine, therefore, it was the standard determined by the national law and not international law that would govern the rights of the foreign investor.

Considering that the Calvo doctrine prioritised national law over international law, it was used to undermine Western hegemony, which had enabled natural resource exploitation, and to restructure international economic order. [39] On one hand, the doctrine was a result of, and to a large extent, a response to the exploitation of natural resources by Western enterprises, following the expansion of trade and investment and extension of Western property rules into the region.[40] Therefore, the principles under the Calvo doctrine which gave foreign investors control over natural resources could be reorganised.

On the other hand, the Calvo doctrine was a means to rebalance economic and political power. One of the main issues the Calvo doctrine sought to address is the disregard and abuse by more powerful industrialised States imposing upon relatively weaker States rules that were different from what was observed internally in those States.[41] In other words, the doctrine abhorred the practice of Westerns States of seeking special privileges, especially based on Eurocentric rules, in favour of their investors operating in non-Western States. In summary, the Calvo doctrine

[37] Ibid 3-4.
[38] Ibid.
[39] Miles, '*The Origins of International Investment Law*' (n 4) 51.
[40] Shea (n 34) 9.
[41] Freeman (n 34) 132-33.

undermined Western hegemony and corollary rules, representing the first attempt of resistance Western economic rules.

The attempt by Calvo doctrine to replace Eurocentric visions of investment rules were unsurprisingly largely rejected by Western World,[42] because it represented a non-Western alternative assertion of investment rules.[43] Following the lack of wide acceptance, the Calvo doctrine was denied a status in international law.[44] Nevertheless, though the challenge to Western visions of investment rules yielded limited success, Calvo doctrine was to remain important in the history and development of the rules concerning the treatment of foreign investors.[45] The Calvo doctrine influenced the chain of events that occurred at the international stage in middle part of the 20th century, particularly the attitude of later independent States during the period of decolonisation.

3.2. Decolonisation and Sovereignty over Natural Resources

Decolonisation is viewed both as a moment and a process.[46] In this context, it is described as 'a specific world-historical moment', while also characterised by the 'process' that played out in the course of attaining independence from colonial

[42] See Shea (n 34) 20. For instance, some authors noted that 'all the protection furnished by the [laboriously] constructed system of international law rules could be destroyed by the act of a single state', if the treatment of foreign investors were to be determined by the internal rules of the host State, see Abraham H Feller, 'Some Observation on the Calvo Clause' (1933) 27 American Journal of International Law 461, 468. See also Edwin M Borchard, 'The Minimum Standard of Treatment of Aliens' (1940) 38 Michigan Law Review 445; Andreas Hans Roth, 'The Minimum Standard of International Law Applied to Aliens' (PhD Thesis, the Graduate Institute of Geneva 1949).

[43] Kate Miles, 'International Investment Law and Universality: Histories of Shape-Shifting' (2014) Cambridge Journal of International and Comparative Law 986, 100-02.

[44] Denise Manning-Cabrol, 'The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors (1994) 26 Law and Policy in International Business 1169, 1172.

[45] See M Sornarajah, 'Mutations of Neo-liberalism in International Investment Law' (2011) 3 Trade, Law and Development 203, 211 (noting that subsequent resolutions made by Third World State regarding the treatment of foreign investors were affirmations of the Calvo Doctrine); see also M Sornarajah, 'Disintegration and Change in the International Law on Foreign Investment' (2020) 23 Journal of International Economic Law 413, 415.

[46] Jan C Jansen and Jürgen Osterhammel, *Decolonization: A Short Story* (Translated by Jeremiah Riemer, Princeton University Press, 2017) 1-2.

rule.[47] It is the second arm – that is, decolonisation as a process – that will generally be the focus of this section, especially as it concerns the development of international investment law. In this sense, and as will be analysed subsequently, decolonisation – the process of gaining independence from Western control and dominance – ushered in a rejuvenated spirit of resistance to rules of international law on foreign investment.

The principles underlying the Calvo doctrine as highlighted in the previous section – especially territorial sovereignty – played a significant role with regards to the events that occurred around the second half of the twentieth century. This is in the sense that claims hinged on the importance of territorial sovereignty inspired some of the resolutions that shaped international investment law during decolonisation/post-colonial period. However, to appreciate these events, there is the need to provide some background to its history to understand the reason the mechanism adopted in the decolonisation/post-colonial deferred from the Calvo doctrine.

It is important to note that some of the defining moments in the first half of the 20th century were the two World Wars. The devastating effects of these wars impeded the economic growth of most States in the Western World that were deeply involved in the wars;[48] and as a result, it left most of Western empires unable to continue colonial rule. For instance, the economies of Britain and France, with the largest number of colonies in Sub-Sahara Africa, were extensively impacted that it was difficult to continue colonial administration.[49] It is largely for this reason that

[47] Ibid 2.
[48] The International Bank for Reconstruction and Development (IBRD), as the name goes, was established to resuscitate European economy as a result of the impact of the Second World War. See https://www.worldbank.org/en/who-we-are/ibrd accessed 23 January 2021.
[49] See Masao Miyoshi, 'A Borderless World? From Colonialism to Transformationalism and the Decline of the Nation-State' (1993) 19 Critical Inquiry 726, 728.

the end of the second World War coincided with the beginning of decolonisation.[50] In other words, the war contributed to the independence of many colonial territories.

Following the aftermath of Second World War, representatives of about 50 States came together in San Francisco to draw up what will be known as the United Nations Charter,[51] officially leading to the birth of the United Nations (UN) in 1945. There was little restriction to the membership of the UN,[52] and as a result, many former Western colonies became members of the UN following their independence. Over time, these former colonies together with less powerful States (and commonly referred to as Third World States) became the majority at the United Nations General Assembly (UNGA), thereby giving them dominant representation.

The UNGA would be an important vehicle for newly independent States as well as developing economies to pursue claims of economic justice,[53] especially as they sought to alter international economic relations with former colonial States. Considering the failed attempt to restructure the international economic regime, by emphasising on the primacy of national standard of treatment for foreign investors as against the international standard, Latin American States used the forum to campaign for support for their position.[54] Due to their numeric strength at UNGA, Third World States believed that issues relating to the treatment of foreign investors could be resolved – at least in their favour – through resolutions at the UNGA, starting with the declaration of permanent sovereignty over natural resources.

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[50] Ibid 728-29; See Michael J Twomey, *A Century of Foreign Investment in the Third World* (Routledge 2000) 218 (the period of decolonisation is said to have taken place between 1945, which as the end of second World War, and 1970).
[51] United Nations Charter available on https://treaties.un.org/doc/publication/ctc/uncharter.pdf. Accessed 02/10/2017.
[52] Charter of the United Nations and the Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, art. 4 (United Nations Charter).
[53] Margot E Salomon, 'From NIEO to Now and the Unfinished Story of Economic Justice' (2013) 62 International and Comparative Law Quarterly 31, 33.
[54] Schrijver (n 4) 178.

3.3. Declarations on Sovereignty over Natural Resources

The PSNR resolution was engineered largely by Third World States and touched on key aspects that concerned foreign investors in international law. In this regard, the PSNR aimed to reaffirm the power of host States to control and use their natural resources. This, by extension, would provide host States with the ability to acquire any property within its jurisdiction that pertains to the exploitation and disposition of natural resources.[55]

To elaborate, the PSNR resolution covered issues on exploration of natural resources by foreign investors and enterprises; the issue of whether and the manner host States may take control of assets of foreigners exploiting the natural resources within their territories; and the manner in which disputes arising out of host State actions is to be resolved – which includes whether or not compensation is to be paid.[56] This highlights how the PSNR touched on key aspects of foreign investment and, more importantly, the reason the declaration is recognised – as well as subsequent declarations, which shall also be considered briefly in this chapter – as marking a timeline and an integral part of the development of international law on foreign investment protection.

The PSNR principle has its roots in two interrelated concerns: economic development of developing States and, more important to the present study, self-determination of colonial territories. [57] The principle was considered integral to economic self-determination because, as argued by its proponents from the Third

[55] See Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (14 December 1962) (adopted by 87 votes to 2, 12 abstentions) paras 1-4.
[56] Karol N Gess, 'Permanent Sovereignty over Natural Resources' (n) 398.
[57] Nico Schrijver, 'Self-determination of Peoples and Sovereignty over Natural Wealth and Resources' in *Realizing the Right to Development* (United Nations 2013) available on <https://pdfs.semanticscholar.org/07af/683e6e1e2d2f8762814f9b1602d9b5fe55dc.pdf> accessed 23 January 2021.

World, a State could not fully exercise the right to political self-determination unless such State is the 'master of its own resources'.[58] Therefore, enjoyment of true political independence was largely dependent on economic self-determination – which could be achieved by exerting control over natural resources.

The Western World, on the other hand, grew concerned about the PSNR principle having regards to its potential consequence on their relationship with former colonies.[59] In particular, they feared that acceding to ideology of PSNR would be an endorsement of the right of host States to expropriate foreign investment, and more particularly without compensation.[60] As a result, the notion of sovereignty over natural resources was already generating controversy and being vigorously contested prior to its formal introduction at UNGA.[61] This, as earlier noted, underlined the contestations between the Western World and the Third World.

Nevertheless, to achieve better success than previous attempts to advance the interests of the Global South – for instance, as initiated by the Calvo doctrine – Third World States (consisting of newly independent States and developing economies) used resolutions at UNGA to pursue their agenda of securing sovereignty over natural resources. They were inspired by an earlier instrument, on a similar subject,[62] that was procured through the General Assembly's resolution

[58] James N Hyde, 'Permanent Sovereignty over Natural Wealth and Resources' (1956) 50 American Journal of International Law 855, 857.
[59] Hyde, 'Permanent Sovereignty over Natural Wealth and Resources' (n) 856-57.
[60] Hyde, 'Permanent Sovereignty over Natural Wealth and Resources' (n) 858 (noting the position of the US regarding the inclusion of the principle of PSNR in Draft Resolution of Human Rights to Self-determination).
[61] Hyde, 'Permanent Sovereignty over Natural Wealth and Resources' (n) 859-60 (noting the marked difference in opinions and votes regarding the inclusion of the article with reference to PSNR in the Draft Human Right Covenants on Self-Determination).
[62] See Right to Exploit Freely Natural Wealth and Resources, Resolution 626 (VII) 1952.

which had been referred in different domestic court decisions.[63] This would have been seen as some form of judicial acknowledgment of the resolution on the subject,[64] and therefore may have served as justification for proclaiming the PSNR principle through a resolution to make the declaration have a legally binding effect.

Further, for these States, a 'resolution would constitute a formal act of the General Assembly and, arguably, could be considered an evidence of state practice'.[65] This is in the sense that the General Assembly being the representative organ of the UN, wherein member States have equal representation and vote, resolutions emanating from the forum will be construed as a decision of the majority members. Therefore, a resolution on sovereignty over natural resources will not only convey the concerns of Third World States but can be used as constituting a formal decision by the members of UNGA. This underscored the reason Third World States pursued similar agenda later in the 1970s through resolutions.

3.4. New International Economic Order (NIEO) and Charter of Economic Rights and Duties of States (CERDS)

As noted at the beginning of this section, the issues canvassed under New International Economic Order (NIEO) and the Charter of Economic Rights and Duties of States (CERDS) mirrored the principles of PSNR – only that in these subsequent resolutions matters concerning sovereignty over natural resources appeared to be more vigorously canvassed.[66] Nevertheless, similar to the PSNR, the ultimate objective was to alter the rules of international economic order, which have

[63] For a reference to the cases, see James B Hyde, 'Permanent Sovereignty over Natural Wealth and Resources' (1956) 50 American Journal of International Law 854.
[64] Karol N Gess, 'Permanent Sovereignty over Natural Resources' (n) 408.
[65] James B Hyde, 'Permanent Sovereignty over Natural Wealth and Resources' (n) 864.
[66] Schrijver, *Sovereignty over Natural Resources* (n 4) 82.

benefitted powerful Industrialised States at the expense of less powerful States, by laying emphasis on State control of natural resources.[67]

The draft of a New International Economic Order (NIEO) resolution was introduced in 1974 at the wake of the first oil crisis to resolve, for Third World States, issues concerning development and natural resources.[68] The NIEO declaration was accompanied by a 'Programme of Action' which legitimised the disposition of foreign assets for the sake of economic development.[69] It was intended therefore to restate that Third World States had the right to regulate the activities of foreign investments within their territories including the right to expropriate the assets of foreign investors of which compensation was subject to their national laws.[70]

Unsurprisingly, NIEO did not receive support from Western World.[71] Prior to its adoption, Industrialised States submitted alternative versions of some of the provisions of NIEO which were rejected by Third World States.[72] More specifically, the disagreement by the West concerned among other things the scope of permanent sovereignty over natural resources, the manner in which foreign assets

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[67] Ibid 83, 96 (as noted by the author, the NIEO Declaration was aimed to halt the widening gap between rich and poor States and to promote a redistribution of wealth and power); See also Burns H Weston, 'The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth' (1981) 75 American Journal of International Law 437; S K Chatterjee, 'The Charter of Economic Rights and Duties of States: An Evaluation After 15 Years (1991) 40 International and Comparative Law 669; Daniel J Whelan, '"Under the Aegis of Man": The Right to Development and the Origins of the New International Economic Order' (2015) 6 Humanity: An International Journal of Human Rights, Humanitarianism and Development 93.

[68] UNGA Declaration on the Establishment of a New International Economic Order, A/RES/S-6/3201 (1 May 1974); see Schrijver, *Sovereignty over Natural Resources* (n 4) 83, 96; Chatterjee (n 67) 671-72.

[69] UNGA Programme of Action on the Establishment of a New International Economic Order, A/RES/S-6/3202, (1 May 1974); see also Schrijver, *Sovereignty over Natural Resources* (n 4) 97.

[70] Collins (n 20) 13; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012) 4. See Declaration for the Establishment of a New International Economic Order (n), Art 4(e).

[71] Chatterjee (n 67) 672-75 (highlighting the reservations of developed States to the CERDS, which was an integral part of NIEO).

[72] Schrijver, *Sovereignty over Natural Resources* (n 4) 97-99.

can be dispossessed, and the manner of compensation to be paid for such dispossession.[73] Due to these areas of concern, even at the time the NIEO resolution was adopted, the Western World refused to fully recognise it.[74]

Nevertheless, it has been argued that the aftermath of NIEO led to changes not only in the economic relations but also the political and legal order at the international stage.[75] Although its legal status and standing has attracted divergent views,[76] in the sense that the West predominantly rejected it, one of its major changes to investment rules was the pivotal shift in the regulation of foreign investments, giving host States more control over their resources and by extension over the activities of foreign investors within their territories.[77]

The declaration of Charter of Economic Rights and Duties of States was introduced through Resolution 3281 (XXIX) and adopted on 12 December 1974. Like previous resolutions initiated by Third World States, it emphasised each State's right to regulate and oversee the activities of transnational corporations within its national jurisdiction, and to take measures to ensure that such activities comply with domestic laws and conform with economic policies.[78] The CERDS was one of the most important declarations, in the sense that it was not only a centre piece of NIEO it was considered to have signalled the end of Western hegemony.

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[73] Ibid 99; Chatterjee (n 67) 674.
[74] For instance, the US labelled the resolution a political document lacking unanimity of opinion. Ibid 100.
[75] Milan Sahovic, 'International Law and the New International Economic Order' in H Köchler (ed), *The International Economic Order: Philosophical and Socio-cultural Implications* (Guilford 1980) 49.
[76] Ibid 49; Jeffery A Hart, *The New International Economic Order: Conflict and Cooperation in North-South Economic Relations, 1974-77* (Palgrave Macmillan 1983) 59.
[77] Sahovic (n 75) 57-8.
[78] Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (12 December 1974) (adopted by 115 votes to 6, 10 abstentions), art 2.2.b.

[79] However, its adoption was not without its share of contestation by Western States.[80]

In summary, exerting sovereignty over natural resources found within each State's territory was at the core of all the resolutions taken at the UNGA, including the PSNR. These resolutions were not only considered essential to ensure economic development but also to modify international economic ordering, which had failed to promote or accommodate the interests of the Third World. In turn, the concept of exercising sovereignty over natural resources was to have potential implications on foreign investment relations, and by extension affect the economic interests of Industrialised States.

However, considering that emphasis on permanent sovereignty over natural resources was going to drastically alter the nature of rights of foreign investors and change the structure of international economic order, the resolutions adopted by Third World States to pursue their aforementioned agenda were not only vigorously contested but were denied being legally binding on States. Nevertheless, this showed that the shift in the trajectory of the operation of international economic order occurred by virtue Third World opposition to Eurocentric rules on the treatment of foreign investors in international law.

4. The Dawn of Investment Liberalization

The previous section analysed the various ways the Third World challenged international economic rules. These actions by Third World States were to likely

[79] Burns H Weston, 'The Charter of Economic Rights and Duties of States and Deprivation of Foreign Owned Wealth' (1981) 75 American Journal of International Lawn 437.
[80] It was noted that Industrialised States tried to amend the contents of the resolution by submitting their own version. This move was rejected by Third World States, and eventually degenerated into confrontation between the two factions, leading to numerous votes on the resolution. See Schrijver, *Sovereignty over Natural Resources* (n 4) 101-02.

have a severe impact on foreign investors, in the sense that the regulation of foreign activities including the manner the interests of foreigners were to be treated would be determined by the domestic laws of the host States and not international. To advance the economic interests of the Western World (which relied on the liberalisation of trade and investment and protection of private property) required a change in economic ideology for the Third World: to change from State control and intervention to a more liberalised economy, largely based on the private sector.

For clarity, the argument to be made below will note how the importance of trade and investment and the need to enhance the legal protection of private property, were key to inducing (and to a large extent imposing on Third World States) the ideology of investment liberalisation. Therefore, this section argues that Industrialised States pursued foreign investment liberalisation agenda to preserve Eurocentric investment rules and protect their economic interests. The subsequent parts will show how foreign investment became liberalised in the Third World by analysing the roles played by international financial institutions and discussing the various investment instruments used.

4.1. International Financial Institutions and Investment Liberalisation

This section highlights how international financial institutions, specifically the World Bank and International Monetary Fund (IMF), were influential in liberalising foreign investment in the Third World. However, before analysing their roles in influencing the spread of capital market liberalisation ideology, which was the basis of foreign investment protection, this section will also briefly comment on the history and ownership structure of these institutions to help give a better understanding of the underlining philosophy and agenda of the institutions, and

more importantly, expose the reason their project aligned with the interests of Industrialised World.

The IMF and the World Bank were both founded at the United Nations' Monetary and Financial Conference held in Bretton Woods, New Hampshire, United States in 1944.[81] As a result, they will subsequently be referred to as the Bretton Woods Institutions.[82] More importantly, at the time these institutions were founded, they were not intended to cater for the (economic) interests of Third World States, who were at the time largely still colonial territories.[83] Instead, the goal of the Bretton Woods conference was restructure and aid development in the devasted economy of Europe after the Second World War.[84]

On one hand, the IMF was established to provide short-term aid to economies encountering economic difficulties,[85] which many European States encountered following the Second World War; and by virtue of this role, the IMF came to oversee the economic policy of the State granted such assistance.[86] On the other hand, the role of World Bank was to give long-term funds for investments in development projects.[87] Considering the role of foreign private investment in such projects, the Bank had the mandate to facilitate international investment.[88] This highlights the importance (and the potential influence) of these institutions in the

[81] See Antonio R Parra, *The History of ICSID* (Oxford University Press 2012) 2.
[82] Such reference has often been made to these international financial institutions. For instance, see Ngaire Woods, 'The Bretton Woods Institutions' in Sam Daws and Thomas G Weiss (eds), *The Oxford Handbook on the United Nations* (Oxford University Press 2008) 283.
[83] Joseph Stiglitz, *Globalization and its Discontents* (Penguin 2002) 10; Cheryl Payer, *The Debt Trap: IMF and the Third World* (Monthly Review Press 1974) 22; Tony Killick, 'Reflections on the IMF/World Bank Relationship' in Kjell J Havnevik (ed), *The IMF/World Bank in Africa: Conditionality, Impact and Alternatives*. (Nordiska Afrikainstitutet 1987) 25, 25.
[84] Stiglitz (n 83) 11; See also https://www.worldbank.org/en/who-we-are/ibrd accessed 11 January 2021.
[85] Killick (n 83) 25.
[86] Ariel Buira, 'Introduction' in Ariel Buira (ed), *Challenges to the World Bank and IMF: Developing Country Perspectives* (Anthem Press 2003) 3 (noting that it was 'incumbent on the IMF to help its member States avoid recessionary adjustments as a solution to balance of payments imbalances').
[87] Payer, *The Debt Trap: IMF and the Third World* (n 83) 22; Killick (n 86) 25.
[88] Shihata, 'The Settlement of Disputes Regarding Foreign Investment' (n 4) 97-98.

global economy, and as will be noted below, the reason they became involved in liberalising foreign investment.

In light of the above, it is imperative to ascertain how these institution with the potential to considerably influence the economic affairs of States are controlled or governed, as it highlights the manner those in control apply their authority – establishing some form of predominance. Decision making at the World Bank and the IMF is determined by a weighted voting system.[89] The voting rights is attached to the supply of capital – that is, the voting power is allocated according to respective financial contributions.[90] The system of weighted voting gives disproportionate influence to Western States like the United States, underscoring one of the major criticisms made against the constituency structure and voting system of Bretton Woods institutions: that it enhances the power of Industrialised States at the expense of less power Third World States in the decision making organs of these institutions, such as in the Boards of Governors and Executive Directors.[91]

It can be deduced, therefore, that by virtue of the governance structure of the World Bank and the IMF the interests of smaller economies and less powerful States are largely under-represented and as a result marginalised, while larger economies especially from the West are over-represented.[92] In a situation where the interest of a group is accorded a much higher regard, such group will likely exert a high degree of influence and in some cases to the detriment of other groups. For

[89] See Dennis Leech and Robert Leech, 'Voting Power in the Bretton Woods Institutions' (Warwick Economic Research Papers No 718, 2006) 1 <http://eprints.lse.ac.uk/558/1/VPP03_04.pdf> accessed 16 June 2021.
[90] Ibid 2.
[91] Ibid 3; See Buira (n 86) 4.
[92] See Ariel Buira, 'The Governance of the IMF in a Global Economy' in Ariel Buira (ed), *Challenges to the World Bank and IMF: Developing Country Perspectives* (Anthem Press 2003) 13.

instance, it has been noted that on several occasions the United States has influenced the decision of the World Bank to cease lending to States which were considered unfavourable to foreign investments.[93]

This confirms that powerful States often determine the actions of these institutions, but more importantly, may exert their influence in a self-serving manner. As such, from a more critical perspective, they – that is, the World Bank and the IMF – are often considered instruments of imperialism used to protect the interest of more powerful States from the Western World.[94] This raises scepticism over the legitimacy of decisions of the Bretton Woods institutions as well as the manner their resources are applied, in the sense that their actions may not always be well intended – in terms of benefiting Third World States.

It is on this ground that the foreign investment liberalisation agenda which was embarked by these institutions in the Third World will be explored in the subsequent parts. This is to show that not only were the Bretton Woods institutions important in aiding how foreign investment became one of the chief sources of external funds in the Third World, but that their agenda and the way it was accomplished is reminiscent of the interests of those in control of the decision-making process of those organisations – the Western States.

4.1.1. Control Mechanism

A major source of external financial advice and aid for most Third World States on development matters comes from the Bretton Woods institutions.[95] As earlier highlighted, due to the ownership structure and decision-making process of these institutions their policies are shaped by Industrialised States; this results in

[93] Cheryl Payer, *The World Bank: A Critical Analysis* (Monthly Review Press 1982) 43-44.
[94] Buira, 'The Governance of the IMF in a Global Economy' (n 92) 13; Payer, *The Debt Trap: IMF and the Third World* (n 83) x.
[95] Buira, 'Introduction' (n 86) 1.

their philosophies being anchored on Western capitalist economic system, supporting the ideas of neoliberalism and free market – and as such, they frown on any form of State interference that distorts market relations. [96] It is in light of this that the economic policies proposed to developing States emphasised on reducing barriers to free movement of trade and capital.[97]

The global influence of the Bretton Woods institutions became an important tool for Industrialised States to orchestrate an investment-friendly environment of Third World States. In this regard, the World Bank and the IMF consciously used their financial power and influence in various ways to promote the interest of private foreign capital in Third World States: either by pressuring States applying for financial aid to improve legal incentives for foreign investment; by selectively refusing loan to States who expropriate foreign property; or by promoting domestic policies that appropriate resources to multinationals at the expense of poor host States.[98]

However, the Bretton Woods institutions conditioned their financial support to Third World States on the adoption of certain policy prescriptions: macro-economic policies that a State must adopt to qualify for financial aid or support from the IMF or World Bank, formally referred to as 'conditionality'.[99] For instance, conditions for aid include among other things guaranteeing a favourable environment for foreign investments.[100] On this note, conditionality not only

[96] Payer, *The Debt Trap: IMF and the Third World* (n 83) 25.
[97] Ibid 25.
[98] Payer, *The World Bank: A Critical Analysis* (n 93) 19-20. Further details of how the World Bank and the IMF applied their influence and its resultant impact on Third World States will be analysed in the subsequent parts of this chapter, see 5.3. for further details.
[99] Frances Stewart, 'Should Conditionality Change?' in Kjell J Havnevik (ed), *The IMF/World Bank in Africa: Conditionality, Impact and Alternatives* (Nordiska Afrikainstitutet 1987) 29, 29.
[100] Payer, *The Debt Trap: IMF and the Third World* (n 83) 32-3.

became an important instrument of economic policy making, but advanced the liberalisation of foreign investment in the Third World, which will be highlighted in the later parts of the chapter.

The discussion above highlights how the Western World has often used its influence at the international level – in this case, through international financial institutions – to orchestrate a self-serving agenda: to bring out policy change in the Third World that will be conducive for the economic activities of their nationals. As will be noted below, the instruments used to liberalise foreign investment in the Third World were at each time devised by these organisations, often to serve the interests of the Western World and the capitalist class.

4.2. Investment Liberalization Instruments

As noted in the previous section, foreign investment liberalisation was engineered by Bretton Woods institutions based on neoliberalism – that is, to reduce State control and influence of the market economy, while increasing private participation.[101] This section discusses the instruments used to liberalise foreign investment in the Third World and the manner they were to be applied. Specifically, this section will briefly discuss the establishment of the Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID Convention) and the proliferation of investment treaties to show that these instruments served to restate Eurocentric investment rules, and more importantly,

[101] Neoliberalism in the context of international investment law, see Muthucumaraswamy Sornarajah, 'Disintegration and Change in the International Law on Foreign Investment' (2020) 23 Journal of International Economic Law 413, 414.

were manifestations of an international regime to preserve the 'traditional' rule of foreign investment protection.[102]

4.2.1. Establishment of International Centre for the Settlement of Investor-State Dispute (ICSID)

The initiative for the ICSID Convention, creating an international centre for the settlement of investment disputes (ICSID), arose at the height of tensions between Industrialised States and Third World States concerning the relations of host State and foreign investors;[103] and more particularly, it served as a response to Third World opposition to Western investment rules, which had started with the declaration of Permanent Sovereignty over Natural Resources – a resolution largely antithetical to increased foreign investment into host States.[104]

Also, the need to set up an international arbitral centre where foreign investors could resolve investment disputes with their host States without the intervention of their home States became apparent considering the fact that there had been instances in the past where the World Bank (as an intermediary) had been involved in resolving investment disputes between foreign investors and States in the Third World.[105] In other words, the ICSID Convention was not only to address the actions of Third World States towards foreign investors, it codified the role already played by the World Bank with regards to resolving investor-State disputes.

Irrespective of the above, interestingly, it has been noted that Third World States, especially African States, participated actively at various stages in the

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[102] Miles, 'International Investment Law and Universality' (n 43) 1004; See also Sornarajah, 'Disintegration and Change in the International Law on Foreign Investment' (n 101) 416; Miles, *Origins of International Investment Law* (n 4) 84-100.
[103] See section 3 above.
[104] See Andreas F Lowenfeld, 'The ICSID Convention: Origins and Transformation' (2009) 38 Georgia Journal of International and Comparative Law 47, 48.
[105] Shihata, 'The Settlement of Disputes Regarding Foreign Investment' (n 4) 100; Parra, *The History of ICSID* (n 81) 16-17.

making of the ICSID Convention.[106] One may argue that this appears antithetical to their general stance in opposing the rules on the treatment of foreign investment as noted earlier. In this regard, the influence international financial institutions had in the international economy as well as in the advancement of neoliberal ideology, which emphasised the role of private foreign investment, may have contributed to this contradictory position of Third World States.[107]

The negotiation of the ICSID Convention and the consequent establishment of ICSID could be said to have been pivotal to the liberalisation of foreign investment in two interlinked ways. First, it helped to dispel Third World resistance towards foreign investors and by extension to the movement of foreign capital. Second, it helped to ensure that investment disputes can be resolved between foreign investors and their host States, without enlisting the help of the investors' home States. However, the creation of ICSID served to reinstate Western investment rules by providing a forum where host States could be called upon to defend their actions that were alleged to be in breach of standards of their investment treaty.

4.2.2. Proliferation of Bilateral Investment Treaties (BITs)

An investment treaty contains various guarantees regarding the standard of treatment to be accorded a foreign investor (a national of a State party to the treaty) made by the other State party.[108] The advent of investment treaties is linked to the

[106] Makane Moïse Mbegue, 'Africa's Voice in the Formation, Shaping and Redesign of International Investment Law' (2019) 34 ICSID Review – Foreign Investment Law Journal 455, 458-59.
[107] A succinct example of the influence of neoliberal ideology in the participation of Third World States could be deduced from the comment of Nigeria's delegate to the Convention, Taslim Olawale Elias, commending that the draft of the Convention would restore the confidence of foreign investors. See Mbengue, 'Africa's Voice' (n) 459.
[108] See Kenneth J Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (1988) 21 Cornell International Law Journal 201, 202 (noting that investment treaty imposes 'relative and absolute standards on the host State's treatment of foreign investment.')

establishment of ICSID. The operation of ICSID as a centre to settle investor-State disputes was largely dependent on the existence of a prior agreement – often contained in the dispute settlement clause of an investment treaty. As such, consent to the jurisdiction of ICSID was to be provided by the host State, agreeing to submit disputes arising out of such treaty to dispute resolution under ICSID.[109] This shows the importance of investment treaties to ICSID. However, certain events led to the proliferation of investment treaties especially among Third World States.

The establishment of ICSID was an important step in the process to liberalise foreign investment – by creating an avenue for resolving investor-State issues – however, it failed to neutralise Third World opposition towards foreign investment entering into their economies.[110] Resolutions antithetical to foreign investment – typified by the NIEO and CERDS declarations – were made even after the establishment of ICSID. This suggests that ICSID did not solely precipitate the reception of foreign investment into the Third World. Rather, investment treaties proved to become a pivotal instrument to liberalise foreign investment in the Third Word. As such, concluding investment treaties guaranteed a better means to reduce disagreement on, and remove the legal uncertainty surrounding, the obligations of host States towards foreign investments.[111]

Although earlier versions of investment treaties originated from an already established commercial relations among Western States, modern investment treaties were specifically targeted at Third World States. This is in the sense that

[109] See Convention on the Settlement of Investment Disputes between States and National of Other States (adopted 18 March 1965, entered into force 1966) 575 UNTS 159 (ICSID Convention), Art 25.
[110] This will be discussed further in section 5 below. For instance, some African States, including Nigeria, introduced laws reducing foreign participation in certain parts of the economy. See also George P Macdonald, 'Recent Legislation in Nigeria and Ghana Affecting Foreign Private Direct Investment' (1972) 6(3) The International Lawyer 548, 553-54.
[111] Fahner, 'The Contested History of International Investment Law' (n 1) 378.

the contemporary investment treaties were developed by the Western World to protect their economic interests, and more importantly as response to the declarations made by the Third World concerning the manner of treatment of foreign investment.[112] It is in view of this that the first sets of modern investment treaties were largely initiated at the instance of Industrialised States and were mostly concluded with Third World States.[113]

Considering the role investment treaties serve as foreign investment protection instruments,[114] they potentially provided investors access to Third World States in much the same manner access as in the colonial era.[115] For Industrialised States, the potential effect of investment treaties would be, on one hand, to constrain host States from interfering in the economy, and, consequently, on the other hand, to facilitate the access of foreign investment (of a treaty partner's national) and create favourable conditions for foreign investment operations. [116]

From above analysis, investment treaties became pivotal to Western agenda to liberalise foreign investment and restore Western preferred investment rules, on the ground that in these treaties favourable standards of treatment were secured from host States (largely Third World States) in the form of investment treaty provisions in favour of foreign investors. Therefore, by guaranteeing favourable investment environment for foreign investors, investment treaties not only helped

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[112] See Kenneth J Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 U C Davis International Journal of Law and Policy 157, 168 (noting that Developed States created international investment treaties in response to the threat of uncompensated expropriation). See also Miles, 'The Origins of International Investment Law' (n) 73, 88-93.

[113] The first modern investment treaty was concluded between Germany and Pakistan in 1959, leading to the conclusion of subsequent investment treaties between the Western world and the Third World. See Vandevelde, 'A Brief History of International Investment Agreements' (n) 169.

[114] Often, the title of investment treaties represents their core purpose: to protect and promote foreign investors and their investments. For instance, see Nigeria-United Kingdom BIT 1990.

[115] Miles, 'The Origins of International Investment Law' (n 4) 72.

[116] Jeswald W Salacuse and Nicholas P Sullivan, 'Do BITS Really Work: An Evaluation of Bilateral Investment Treaties and their Grand Bargain' (2005) 46 Harvard International Law Journal 67, 76.

to liberalise foreign investment in the Third World but were instrumental in reinstating traditional investment rules, making investment treaties a representation of Western hegemony.

In summary, the analysis has highlighted the way in which the Western World were able to reassert their preferred investment rules on the Third World, showing that the international investment law developed through a complex process involving various assertions of preferred rules regarding the treatment of foreign investors. What this shows is that international investment law is not necessarily universal – in the sense that it is not naturally generally applicable – as often presented but is an evidence of power relations among different rules competing for legal supremacy. On this note, the current rules concerning the treatment foreign investors highlights the success of Western investment rules over competing Third World rules and would therefore reflect in the investment regime of Third World States.

5. Nigeria and a Liberalized Legal Environment for Foreign Investment

The summary of the analysis in the previous sections is that contemporary international investment law is reminiscent of Western dominance of international (legal) system. However, to further illustrate this point, there is the need to demonstrate how Western hegemony has operated in the Third World, and more importantly, how the operation of investment rules in the Third World is evidence of such Western domination. Considering this, the present section will examine the

history of foreign investment protection in Nigeria: as a case study of the development of the rules of foreign investment protection in the Third World.[117]

First, it will begin by discussing Nigeria's colonial history to show that Western domination, through colonialism, provided foreign investors adequate legal protection. The discussion in the second part will show how post-colonial Nigeria resisted foreign investment (as well as the rules governing them) by analysing some foreign investment-related laws and policies enacted in the post-colonial era (between the 1960s and 1970s). the final section will highlight how foreign investment became liberalised in Nigeria, noting the shift from resistance to investment protection. The argument in this section is that the current foreign investment protection regime in Nigeria, like in most parts of the Third World, is reminiscent of Western legal hegemony, and as a result, favours Western economic interests.

5.1. Nigeria's Colonial History

The first task in examining Nigeria's foreign investment protection legal environment is to briefly explore Nigeria's history. An insight into Nigeria's history will help explain how its legal system – and by extension, the legal protection of foreign investments – developed. As such, the (legal) history of Nigeria cannot be complete without reference to its colonial past. Therefore, this section will analyse Nigeria's colonial history to show how foreign domination influenced the development of foreign investment protection and facilitated the involvement of foreign commercial interests in Nigeria.

[117] It is important to highlight that the study does not claim to capture all experiences of Third World.

Before discussing how the colonial legal system provided the enabling environment for foreign participation in Nigeria, it will be important to investigate the events and processes that gave rise to colonial intervention in Nigeria. In other words, there is the need to understand the motive and, by extension, the strategy through which Nigeria was colonised. The aim of this preliminary discussion is to set the foundation for the analysis in this section, and by the same token, to expose why colonial rule favoured Western trading enterprises by providing access to the resources of Nigeria.

5.1.1. Pre-Colonialization

British colonial takeover in Nigeria began in the middle of the nineteenth century (around 1850), following the growing influence of British agents, in the form of religious missionaries, British trading enterprises and political officials, whose goal was to increase British dominance.[118] Of particular note is that one of the main motives for colonising Nigeria was to protect the interests of British trading companies from what was considered as unfavourable situations in Nigeria, which included monopolistic practices of indigenous people.[119] In other words, British intervention and subsequent colonisation was in part to serve the purpose of protecting the economic interests of Western enterprises, especially the British.

British involvement in the territories that would become Nigeria was achieved using various approaches, one of such being through forceful military intervention.[120] As earlier noted, this power was often exercised at the behest of

[118] Toyin Falola and Matthew M Heaton, *A History of Nigeria* (Cambridge University Press 2008) 85.
[119] Ibid 86, 89-93.
[120] The other approaches being the use of charter to grant private commercial companies the powers to administer political control and domination. See Falola (n 118) 98-99. The charters in turn permitted these private commercial companies, such as the Royal Niger Company, to conclude cession treaties with the natives. See C N Okeke, *The Theory and Practice of International Law in Nigeria* (Fourth Dimension

British trading interests. For instance, it has been noted that the interference with local politics in Lagos, which would later become the colonial base in Western Nigeria, was undertaken by John Beecroft, the then British Consul for the Bights of Benin and Biafra, using his military power to unseat Kosoko, the then reigning monarch of Lagos, in favour of his rival who was considered to be favourable to British interests.[121]

Unsurprisingly, as was in the interference of Kosoko's administration and other instances of the use of force,[122] one recurring reason for British intervention in these territories was usually to address concerns of threat or potential threat of towards the interests of British trading enterprises.[123] In other words, regions or territories that were considered to threaten British commercial relations were susceptible to military bombardment. The calls by British enterprises to the British government to intervene on their behalf not only became an important mechanism of protecting their interests but, as has been argued, laid the foundation for British colonisation of the region.[124]

Hence, the involvement of the British in the territories within Nigeria was largely motivated by economic/commercial concerns – that is, to protect the interests of British trading enterprises which in turn was to give them an advantage in the region. Considering that pre-colonial events in Nigeria had underlining commercial purposes, the subsequent part of this section will discuss the colonial

Publishers 1986) 24 (highlighting the extent the Royal Niger Company used treaties in pre-colonial Nigeria); see also E Herslet, *The Map of Africa by Treaty* (Routledge, 3rd edn, 1967).
[121] Falola (n 118) 93, 95.
[122] Ibid 93, 95-96 (it was noted that military force was used in the areas of Oyo and Calabar).
[123] Ibid 93.
[124] Ibid.

rule in Nigeria to highlight how this form of political domination served Western interests.

5.1.2. Colonization

Prior to colonial rule, the mode of ownership of production in many parts of Nigeria was characterised by subsistence and collective ownership, and as such was the staple of the economic system.[125] However, this economic system was gradually replaced by 'a modern production-for-exchange economy' introduced by British colonial rule.[126] The British colonial administration effected the change in economic system through regulations that reflected the economic practices in the Western World, especially in England. For instance, the earliest law regulating the commercial activities in Nigeria was the Companies Ordinance Act of 1912. The law was based on the company law in force in England – the Companies (Consolidation) Act, 1908.[127]

The purpose of the Companies Ordinance Act and subsequent companies' legislations was to regulate the manner commercial businesses were established.[128] In this sense, the law prescribed the various vehicles through which trading could be carried on. However, prior to its enactment, undertaking commercial activities through corporate entities was largely unknown among the indigenous people in the territories within Nigeria.[129] These laws would intrinsically enable private ownership of the means of production, thereby liberalising private enterprise.

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[125] Eghosa O Ekhator and Linimose Anyiwe, 'Foreign Direct Investment and the Law in Nigeria: A Legal Assessment' (2016) 58(1) International Journal of Law and Management 126.
[126] Bernard Blackenheimer, 'The Foreign Investment Climate in Nigeria' (1977) 10 Vanderbilt Journal of Transnational Law 589, 593; Ismaila Mohammed, 'The Nigerian Enterprises Promotion Decrees (1972 and 1977) and Indigenisation in Nigeria' (PhD Thesis, University of Warwick 1985) 31.
[127] See Ekhator (n 125) 127.
[128] See Ekhator (n 125).
[129] It has been noted that hunting, farming and animal rearing were predominant means of livelihood in pre-colonial Nigeria. These occupations would have been undertaken personally, or at best with family members, and thereby did not require the incorporation of an entity or a body corporate.

Therefore, the commercial environment created by the law more likely served Western economic interests than the predominantly agrarian endeavours of the indigenous people of Nigeria at the time.

The legal climate provided by the colonial administration enabled a surge of foreign interests in Nigeria's economy,[130] particularly its natural resources. A prime example of the influx of foreign participation as enabled by colonial rule is petroleum exploration in Nigeria. British colonial rule in Nigeria coincided with the expansion of oil exploration across the world by Western prospecting companies.[131] These companies began to gain interest in exploring oil in Nigeria following the speculation on the possibilities of oil deposits in the west coast of the African continent having regards to its proximity to the Atlantic Ocean.[132]

Given the British government's interest to secure adequate supply of oil to its Royal Navy, following the switch from coal-powered vessels to oil-powered vessels,[133] and coupled Western interest in oil prospects in Nigeria, the colonial administration designed various legal frameworks to ensure efficient natural resource exploitation. At the request of the prospecting companies, and without consulting the indigenous people and the native authorities, the colonial administration drafted and enacted the Southern Nigerian Mining Regulation (Oil) Ordinance of 1907, giving preference to British companies to prospect oil in

[130] Sabinus A Megwa, 'Foreign Direct Investment Climate in Nigeria: The Changing Law and Development Policies' (1983) 21 Columbia Journal of Transnational Law 487, 487, 491.
[131] Phia Steyn, 'Oil Exploration in Colonial Nigeria, c.1903-58' (2009) 37 Journal of Imperial and Commonwealth History 249, 250.
[132] Ibid 251-52.
[133] Ibid 251.

Nigeria.[134] The same principle was largely maintained in subsequent oil legislations.[135]

As part of the efforts to exploit Nigeria's natural resources and in line with the objectives of the oil legislations, the British colonial administration granted concessions at various times to different foreign prospecting companies; however, the majority of these companies were unsuccessful in their search for oil in Nigeria.[136] Nevertheless, the legal protection provided under the colonial rule in terms of concessionary rights over vast mass of lands in Nigeria as well as various oil legislations ensured that oil exploration was undertaken by foreign firms with minimal interference from the local communities.[137] This favourable commercial environment eventually led in the discovery of oil in 1956 and exportation in 1958.[138]

It will be noted that one of the factors that inspired colonial intervention was the need ameliorate issues affecting Western economic interests in Nigeria. In line with this, colonial rule established an economic system that allowed the surge of foreign interests, including oil prospecting companies, into Nigeria. Beyond creating a system attractive to Western interests, the colonial administration devised monopolistic legal frameworks by enacting legislations and granting exploration concessions that provided legal protection to the activities of foreign companies

[134] Ibid 256.
[135] Ibid.
[136] Ibid 252-56.
[137] Ibid 263 (highlighting that the Mineral Oils Ordinance protected oil exploration companies from any person that might interfere with their work, making such act of interference liable with either a fine or imprisonment, and in some instances, the colonial administration protected these foreign companies using force).
[138] Ibid 266.

against interference from the indigenous people, and thereby ensuring a conducive commercial environment to exploit Nigeria's natural resources.

5.2. Resistance to Foreign investment: Legal Framework

The participation of foreign interests in various sectors of Nigeria's economy increased during colonial rule. As a result, the discussion here will identify some of the legal responses by post-colonial Nigeria to resist foreign investment. Before discussing the legal environment concerning foreign investors, some of the reasons such restrictive approach was adopted towards foreign investment will be briefly explained.

Upon attaining independence in 1960, issues regarding the control of the Nigerian economy arose,[139] and this may have also been inspired by the ethos of the anti-colonial nationalist movement, which advocated for more Nigerian involvement and, in the same token, less foreign control.[140] A core reason for this was that the activities of foreign investors and corporations were primarily exploitative: Nigeria's natural resources were only seen as a haven for raw materials to be exploited for the benefit of the Western World, with little or no benefit in the form of (economic) development accruing to the Nigerian economy or people.[141]

More so, during colonial rule, the commercial environment was skewed in favour of foreign firms. Nigerian owned businesses did not have the same leverage as their foreign counterparts.[142] Foreign investors, with the help of the colonial

[139] Megwa (n 130) 487 (noting that the influx of foreign capital raised questions as to the government's ability to control the economy).
[140] For an analysis of the nationalist movement, see Falola (n 118) 136-57.
[141] Bade Onimode, 'Imperialism and Multinational Corporations: A Case Study of Nigeria' (1978) 9 Journal of Black Studies 207, 223-25; Megwa (n 130) 488-89; Falola (n 118) 111 (generally, raw materials were exploited and exported to Europe and converted to finished products, and subsequently imported into Nigeria).
[142] Mohammed (n 126) 32; Megwa (n 130) 488.

administration, had taken over all the vital sectors of the economy,[143] leaving indigenous investors with limited business opportunities even after colonial rule.[144] Therefore, the effects of the colonial commercial ordering continued to perpetuate in post-colonial Nigeria, and in consequence gave rise to opposition towards foreign investment and its governing rules.

It was noted earlier in the chapter that resistance towards rules governing foreign investment heightened during the decolonisation period. The analysis currently presented aims to provide a clearer picture of some of the reasons Western inspired colonial rules concerning foreign investment were rejected by most Third World States at the international level.[145] Consequently, along with the declarations at the international stage earlier discussed, national policies and programmes aimed at restoring territorial resources and promoting indigenous economic independence began to be established in the Third World, as a way to address the skewed commercial environment introduced by colonial rule that prioritised foreign trading interests.

One of the first moves to restrict foreign participation in Nigeria was in 1963 with the enactment of Immigration Act, which established a quota system for expatriates,[146] thereby controlling the number of foreigners coming into Nigeria. Earlier on in 1962, the Exchange Control Act was enacted,[147] and its impact on foreign investment is that it regulated the disbursement of foreign exchange within

[143] Blackenheimer (n 126) 590; George P Macdonald, 'Recent Legislation in Nigeria and Ghana Affecting Foreign Private Direct Investment' (1972) 6(3) The International Lawyer 548, 549-50. (Foreign dominance was clear from the oil sector to the banking sector). See also Onimode (n 141) 210-12.
[144] Ibid.
[145] This has been covered above in the analysis of PSNR, NIEO and CERDS.
[146] Sections 8 and 33 Immigration Act No. 6 of 1963; Megwa (n 130) 491.
[147] No 16 0f 1962.

Nigeria.[148] Again, in 1968, a new companies law required all subsidiaries of foreign investments in Nigeria to be incorporated as separate entities from their parent companies.[149] By this, the incorporation of the new company had to be in accordance with Nigerian laws, which at the time would potentially impact on foreign control of the business.

From 1972, Nigeria, like many African States, enacted highly restrictive laws for foreigners.[150] These laws and policies were in accordance with the indigenisation program.[151] The purpose of the indigenisation program, however, was not to totally exclude foreign participation,[152] but to secure greater control of the economy for indigenous people – often referred to as 'Nigerianisation'.[153] In this regard, the Nigerian government (then under military rule) enacted the Nigerian Enterprise Promotion (NEP) Decree, with the revised version in 1977 made more restrictive to foreign participation.[154] Under the NEP, certain businesses, mainly semi-skilled occupations, were exclusively reserved for Nigerians,[155] while other business areas required mandatory Nigerian participation in the business enterprise.[156]

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[148] See O K Anifowose, 'The Relevance of Exchange Control in Nigeria's Balance of Payments Adjustment Process' (1983) 25 CBN Economic and Financial Review 34, 36; P J Obaseki, 'Foreign Exchange Management in Nigeria Past, Present and the Future' (1991) 29 CBN Economic and Financial Review 57, 61.
[149] Companies Act No. 51 of 1968; Megwa (n 130) 491.
[150] For instance, Kenya enacted the Trade Licencing Act, 1967 to control foreign participation in commerce and service sector while promoting indigenous participation. Ghana undertook similar policy to restrict foreign participation with the Ghanaian Enterprises Decree of 1968. See Macdonald (n 143) 553-54.
[151] See Mohammed (n 126).
[152] Blackenheimer (n 126) 595-96; Jerome F Donovan, 'Nigeria: Still Safe for US Investors?' (1997) 10 Vanderbilt Journal of Transnational Law 601, 607 (reporting an official statement that indigenisation was to ensure that foreign investment was complementary to, rather than competing with indigenous enterprises).
[153] Macdonald (n 143) 555.
[154] Nigerian Enterprise Promotion Decree No. 4 of 1972 (NEP Decree 1972; Nigerian Enterprise Promotion Decree No. 3 of 1977 (NEP Decree 1977); See Blackenheimer (n 126) 596-97.
[155] See NEP Decree 1972, schedule 1; NEP Decree 1977, schedule 1.
[156] See NEP Decree 1977, schedule 2 and 3; Blackenheimer (n 126) 596.

These laws were aimed at regaining control from foreign investment in Nigeria by increasing indigenous Nigerian control over the economy.[157] They required foreign investors to divest their interests from the business areas exclusively left for Nigerians.[158] Although the legal regime appeared to restrict foreign investment in Nigeria, the real aim was to channel foreign investment away from sectors with little or no technology and skill, and towards sectors that needed sophisticated technology and skills to benefit Nigeria's overall development plan.[159] This meant that foreign investment was still allowed but in capital-intensive and technologically advanced sectors.[160]

From the above analysis, it has been shown that the laws and policies that were introduced in the post-colonial era (starting from the 1960s to 1970s) were inspired by the need to address the economic setting established by imperial system of rules that prioritised Western economic interests often at the detriment of indigenous Nigerians. In so doing, these legislations restricted foreign participation, while at the same time promoted indigenous entrepreneurship in the Nigerian economy. Addressing the skewed colonial economic environment underscored the goal of remedying economic injustice against the Nigerian people.

5.3. Liberalization of Foreign Investment: Legal Framework

As part of the historical exposition of foreign investment regulation in Nigeria, the discussion here, in contradiction to the previous analysis, will chronicle the changes of Nigeria's foreign investment policy. It will investigate the progressive liberalisation of foreign investment in Nigeria, highlighting how the

[157] Fiona C Beveridge, 'Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria' (1991) 40(2) International and Comparative Law Quarterly 302, 302.
[158] Megwa (n 130) 501.
[159] See Donovan (n 152) 607.
[160] Macdonald (n 143) 555-56.

World Bank and IMF influenced Nigeria's foreign investment outlook. The analysis will reveal that the shift from a restrictive investment regime, as noted above, to a more receptive or liberalised regime, took place through the enactment of foreign investment-friendly laws and some investment treaties concluded by Nigeria.

5.3.1. The World Bank/IMF Influence in Nigeria: The Structural Adjustment Program (SAP)

As argued earlier, the IMF and the World Bank were influential to the development of foreign investment protection in the Third World. The discussion here will provide context into how these international financial institutions became involved and eventually influenced the legal climate in Nigeria, engendering foreign investment protection and liberalisation. In examining the events that occasioned a more investment friendly climate in Nigeria, specific attention will be given to the Structural Adjustment Program (SAP). The analysis will briefly examine factors that led to the implementation of SAP in Nigeria, and as such how the program laid the foundation for the liberalisation in Nigeria.

The unstable economic situation in Nigeria provided the basis for economic imperialism by the World Bank and the IMF. Nigeria, between the early-late 1970s and early 1980s, benefitted from increased oil revenues, leading to increased capital expenditure, external loans, and subsequent overreliance on importation.[161] Considering the economy's exposure to increased external debt, the dramatic drop in oil revenues affected balance of payment, public finances and other aspects of the economy, leading to serious debt crisis in Nigeria.[162] The economic situation

[161] Yusuf Bangura, 'IMF/World Bank and Conditionality and Nigeria's Structural Adjustment Programme' in Kjell J. Havnevik (ed), *The IMF/World Bank in Africa: Conditionality, Impact and Alternatives* (Nordiska Afrikainstitutet 1987) 95, 95-96.
[162] Ibid 96-97.

led Nigeria to obtain loan facilities in 1980s, and made the IMF and World Bank become deeply involved in the formulation and implementation of economic policies in Nigeria.[163]

As part of the conditionality in providing loan facilities, the IMF and World Bank were instrumental to the drafting, planning and implementation of SAP in Nigeria which had as its main objective to roll back government's involvement in the economy and to allow market mechanism to allocate resources efficiently.[164] In effect, it aimed to overhaul Nigeria's economic policies to revamp the economy.[165] As part of policy change the government was to do the following: privatise public institutions; deregulate the foreign exchange market; and remove barriers to trade and investment.[166] This was to ensure progressive trade liberalisation and also to attract a net inflow of foreign investment.[167]

The analysis above provided some insight into how the World Bank and the IMF became involved in Nigeria, using their financial influence to introduce the SAP containing principles that would enable foreign investment liberalisation in Nigeria. More so, as noted earlier in the chapter, one of the conditions for providing loan facilities – and upon which the SAP would be implemented – was the adoption of investment-friendly legal regimes. This demonstrates that subsequent legal regimes aimed to protect and promote foreign investment in Nigeria were largely based on the prescriptions of the World Bank/IMF-imposed SAP, thereby fulfilling

[163] Ibid 97
[164] Ibid 110-11.
[165] John C Anyanwu, 'President Babangida's Structural Adjustment Programme and Inflation in Nigeria' (1992) 7(1) Journal of Social Development in Africa 5, 6.
[166] Bangura (n 161) 98.
[167] Anyanwu (n 165) 7.

the interests of Industrialised States having control over these international financial institutions.

5.3.2. Pre-NIPC Act: The Beginning of Investment Liberalisation

The 1980s and 1990s heralded economic liberalism, which allowed for more foreign involvement in Nigeria's economy. In line with the recommendations of the Bretton Woods institutions, and to earmark their influence in the Third World, successive legal regimes were introduced to improve the foreign investment climate in Nigeria.[168] As a result, the Industrial Development Coordination Committee (IDCC) Decree, which created IDCC as a 'one-stop agency', was enacted to ensure a more favourable environment for foreign investment activities.[169] The new legal regime, among other things, assured the protection of approved foreign investments.[170]

Although the IDCC made major strides to promote foreign investment in Nigeria, it fell short on certain aspects, which potentially constrained foreign participation in the Nigerian economy.[171] Consequently, the Nigeria Enterprises Promotion (NEP) Degree was enacted in 1989. The NEP 1989 made a significant departure from its predecessors, NEP 1972 and 1977, and other previous laws

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[168] Janet O Adelegan, 'Foreign Direct Investment and Economic Growth in Nigeria: A Seemingly Unrelated Model' [2000] African Review of Money Finance and Banking 5, 9; Adeolu B Ayanwale, 'FDI and Economic Growth: Evidence from Nigeria' (2007) African Economic Research Paper 165, 15 <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.841.1994&rep=rep1&type=pdf > accessed 24 May 2018.

[169] See the Industrial Development Coordination Committee Decree No. 36, later compiled as IDCC Act, CAP 178, 1990, S 1. See also, Chudi Ubezonu, 'Some Recent Amendments to Laws Affecting Foreign Investment in Nigeria' (1993) 8(1) ICSID Review-Foreign Investment Law Journal 123, 125-26; Richard J Faletti, 'Investing in Nigeria – the Law, Good Intentions, Illusion and Substance' (1983) 5 Northwestern Journal of International Law and Business 743, 745-46.

[170] Chudi Ubezonu, 'Doing Business in Nigeria by Foreigners: Some Aspects of Law, Policy and Practice' (1994) 28(2) The International Lawyer 345, 348 (noting that foreign investments were assured protection irrespective of socio-political change as quoted in the Industrial Policy of Nigeria 1990).

[171] Ibid 349. It was noted that the procedure and requirements for entry for foreign investment was complicated and stringent, requiring applicants to provide an enormous amount of information and an endless list of attachments which is incomplete will stall such application, thereby becoming frustrating to the prospective foreign investor.

concerning foreign investment by ensuring substantial foreign ownership of businesses, which was not obtainable in Nigeria prior to its enactment.[172] The main reason for relaxing equity participation of foreigners was the desire to attract foreign investments.[173] However, the NEP 1989 only applied to new investments made after its enactment, leaving out investments made under prior regimes.[174] Therefore, though the NEP 1989 improved the investment climate in Nigeria, like previous laws, the regime did not fully liberalise foreign investment.

The above analysis showed how various legal regimes started to liberalise foreign investment in Nigeria by providing an investment-friendly environment. However, they all fell short in some respect from ensuring total foreign participation in the Nigerian economy. This is in the sense that although these legislations allowed an increased foreign participation in the Nigerian economy, in most cases, foreign investors were required to either divest ownership or partner with Nigerian investors to carry on business in Nigeria. This led to a more liberalised foreign investment regime in Nigeria.

5.3.3. NIPC Act and Investment Liberalisation

As noted earlier, the prescriptions of the World Bank/IMF-imposed SAP inspired subsequent foreign investment legal regimes. This is in the sense that they represented efforts to fully liberalise foreign investment in Nigeria and cater for Western economic interests. These efforts materialised in the enactment of the

[172] Ibid 351.
[173] Ibid.
[174] See NEP Act, 1989, s 18(8). See also Ubezonu, 'Doing Business in Nigeria by Foreigners' (n 170) 352 (citing the Nigerian Industrial Policy 1990).

Nigerian Investment Promotion Commission (NIPC) Decree No 16 of 1995, later NIPC Act, and other notable foreign investment-friendly laws.[175]

This section will analyse the NIPC Act and how it contributed to foreign investment liberalisation in Nigeria. To explore the role of the Act, the provisions of the NIPC Act will be analysed below, particularly highlighting aspects that concern the protection and liberalisation of foreign investment. Further, to show that the liberalisation of foreign investment and the adoption of legal regimes promoting foreign investment conformed to Western hegemony, the analysis will highlight how some provisions in the NIPC Act were influenced by the Bretton Woods institutions and therefore represent Western interests.

Generally, the primary goal of these laws, as evident in the NIPC Act, was to promote foreign investment by providing foreign investors an almost unrestricted access into the Nigerian economy.[176] To ensure a truly liberalised legal environment for foreign investment, the NIPC Act repealed earlier laws that restricted the participation of foreign investment,[177] removing restrictions and conditions to ownership and control of business activities in Nigeria as was the case under the

[175] The NIPC Act Cap N117 LFN 2004. The other laws included the Foreign Exchange (Monitoring and Miscellaneous) Provisions (Decree No 17 of 1995) Act Cap F34 LFN 2004; Nigerian Export Processing Zones (Decree No 63 of 1992) Act CAP N117 LFN 2004; Oil and Gas Export Free Zone (Decree No 8 of 1996) Act CAP O5 LFN 2004. To provide better context to these laws, the FEMMP Act, for instance, repealed the Exchange Control (Anti-Sabotage) Act, 1962, Foreign Currency (Domiciliary Account) Decree No 18 1985, and Second-Tier Foreign Exchange Market Decree No 23 1986, all of which significantly restricted foreign exchange transactions in Nigeria. It also established an autonomous foreign exchange market guaranteeing unrestricted transfer of capital in any convertible currency. The provisions of the NIPC Act together with the FEMMP Act enabled a foreign investor to invest in any business in Nigeria with foreign currency or capital brought into the country. See FEMMP Act, ss 15 and 16; NIPC Act, s 21; See also Khrushchev U K Ekwueme, 'Nigeria's Principal Investment Laws in the Context of International Law and Practice' (2005) 49(2) Journal of African Law 177, 177-78, 180.

[176] Ekwueme (n 175) 177. However, it is important to note that not all sectors of the Nigerian economy were opened to foreign investments, these were sensitive sectors that largely involved the State's security, see NIPC Act, s 32. Restriction was placed on businesses involving the production of arms and ammunitions; narcotic drugs; military and paramilitary wears; and such other items that would be from time to time determined by the government.

[177] See NIPC Act, s 31(1).

previous regimes.[178] The legal outlook provided by the law was to project Nigeria as a foreign investment-friendly economy.

Further to the goal of providing an investment-friendly climate and attracting foreign investment, like the IDCC, the NIPC Act established the Nigerian Investment Promotion Commission (NIPC) as a 'one-stop-shop' to facilitate the entry of foreign investments into Nigeria.[179] By removing restriction to foreign ownership of businesses and providing the environment for easy access to the Nigerian economy, the law created a level playing field for both foreign and local investment to attract greater participation of foreign investment in the economy.[180] By doing this, the NIPC Act opened a wider range of sectors of the Nigerian economy to foreign investments.[181]

Another important aspect of the NIPC Act concerns the protection of foreign investment in Nigeria and will be analysed under three thematic headings: 'definition of investments', 'guarantees against expropriation' and 'redress for breach'. First, the language used in defining an investment and the category of items it covers determines its scope of protection. Second, the guarantee against expropriation not only underscores the basis of investment protection,[182] but considering the position of Third World States in the past, as noted above, it would serve as an important right to foreign investors. Finally, redress for breach would

[178] For instance, under the NEP of 1989, 40 business areas were reserved for exclusively for Nigerians. Also, foreign investors could only invest in any business in Nigeria with a minimum share capital of N20,000,000.
[179] Ekwueme (n 175) 185; O A Odiase-Alegimenlen, 'An Appraisal of Foreign Investment Promotion and Protection Measuring in Nigeria' (2002) 3 Journal of World Investment 345, 350.
[180] Ekwueme (n 175) 179.
[181] Ibid.
[182] One of the ultimate protections of a property or asset (including that of a foreigner) is that it is protected from being forcefully taken or acquired. To underscore the importance of the protection against expropriation of property, the Nigerian constitution generally protects against compulsory acquisition of property. See Constitution of the Federal Republic of Nigeria 1999 (as amended), s 44.

ensure that the foreign investor is not only given a right – that is, to be protected from expropriation – but that such right can be enforced.

With regards to definition of investment, under the NIPC Act, 'investment' is broadly defined – that is, extended to any asset of economic value, whether tangible or intangible property.[183] The advantage of this liberal definition of investment is that it recognises the diverse and evolving forms investments may take,[184] thereby envisaging future investments. In other words, various forms of economic transactions could qualify as an investment irrespective of the source of such investment,[185] and as such entitled be to protection under the NIPC Act. Therefore, the definition of investment is to serve as the basis for protection, in the sense that only such activities recognised as an investment will be accorded protection under the Act.

On the aspect of 'guarantee against expropriation' under the Act, foreign investments are not to be expropriated or nationalised or affected by such other measures or actions that would constitute expropriation in Nigeria.[186] Further, foreign investors are assured not be mandated to give up interest in any property or be disposed of their investment made in Nigeria.[187] This would serve as a fundamental protection considering past acts of malevolence towards foreign investment. Also, to some extent, this would appear to renege on the earlier position held by the Third World regarding the treatment of foreign investment,[188] and as

[183] See NIPC Act, s 32; Ekwueme (n 175) 181.
[184] Ekwueme (n 175) 181.
[185] Ibid (noting that investments could be financed through diversified sources including physical assets and technology).
[186] NIPC Act, s 25(1) a
[187] NIPC Act, s 25(1) b
[188] As highlighted earlier in the chapter, expropriation and nationalisation were considered by Third World States as acceptable and even necessary means of procuring economic justice and ensuring development.

such indicate the acceptance of Eurocentric investment rules and influence of Western-controlled institutions.

Also, in the context of providing protection, it is important to highlight that the Act did not define measures that may constitute expropriation.[189] This is important because, as will be noted in subsequent chapters, it gives room for a liberal interpretation, which has the potential to cover more government actions or measures (than may have been intended), and as a result offer an enhanced protection to foreign investments.[190] This therefore indicates that such omission in the Act – by not describing actions or measures that may constitute expropriation – was intentional, as it suggests an attempt to provide an attractive investment environment by expanding legal protection for foreign interests.

Further, in the Act, where the interest of a foreign investor is acquired for national interest or public purposes, there is an entitlement to a 'fair and adequate compensation' 'without undue delay' and the right to seek redress in order to determine the amount of compensation such investor is entitled to.[191] The inclusion of this rule of compensation in the Act reflects a revival of Western investment rules, in the sense that it incorporated legal norms that were once rejected by the Third World,[192] and more importantly indicates the influence of Bretton Woods institutions in the economic policies of the Third World. Therefore, not only are foreign investments protected from expropriation, in the event such expropriation

[189] Ekwueme (n 175) 188.
[190] See Chapter 3 and 4. Part of the argument in the chapter is that investment tribunals are more likely to give a liberal interpretation to investment rules, considering their mandate to protect the interests of foreign investors.
[191] NIPC Act, s 25(2) a, b, (3).
[192] See Andrew T Guzman, 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties (1998) 38 Virginia Journal of International Law 639, 641-42 (noting that despite earlier rejecting Western investment rules, Third World States subsequently adopted foreign investment protection legal regimes incorporating such investment rules, which in most cases provided an even enhanced protection).

occurs, but compensation under the Act is also to be made in line with Western legal principles.

The last aspect regarding foreign investment protection in the NIPC Act to be considered is access to redress – that is, the right of foreign investors to seek legal redress when their right has been violated. It has been argued that the security of a foreign investment depends on whether foreign investors can seek redress by having access to courts or such other forum to challenge actions or measures constituting an expropriation of their property or a breach of their rights.[193] This position therefore suggests that right of access to seek legal redress is fundamental to foreign investment protection. In exploring this position, the present discussion will cover access to court and dispute resolution procedures.

In this regard, the NIPC Act guarantees foreign investors access to domestic courts to challenge actions or measures by the Nigerian government that deprives them of their investments.[194] However, considering potential constraints that may be imposed by either the Constitution or such other law (i.e. domestic or international), as well as other socio-political factors, the right to access courts may not provide adequate protection to foreign investors, and as such may be of limited practical importance.[195] Therefore, inasmuch as having the right to seek redress before the courts is important to protect the interests of foreign investors, there may be other factors that would inhibit its practicality. This leads to the need for a dispute mechanism outside the court system to protect foreign investments.

[193] Ekwueme (n 175) 193.
[194] See NIPC Act, s 25(2) b.
[195] See analysis in Ekwueme (n 175) 193-94.

To ensure an enhanced protection to foreign investors with regards to resolving matters concerning the expropriation of their property, and possibly as a way to allay the misgivings by foreigners regarding domestic legal systems, the NIPC Act went further to provide that investment disputes resolution can be undertaken by arbitration within the dispute resolution framework provided by an investment treaty or under the auspices of ICSID.[196] The implication of this provision for foreign investment protection is that it allows foreign investors to protect their interests by instituting investment claims (invariably challenging actions or measures breaching their rights) at an international level in accordance with the provisions of the Act. By this, the Act elevates the resolution of foreign investment disputes to the international stage.

Resolving investment disputes involving foreign investors at an international level – for instance, under the auspices of ICSID – may potentially favour Western economic interests. In this regard, it has been argued that by placing investment disputes within the international domain, it provides Western States (i.e. former colonial powers) the opportunity to assert their dominance to ensure that the existing structures of international law, which enabled imperialism, protects their economic interests.[197] It will come as no surprise that the provision for investment disputes to be resolved at the international forum under the NIPC Act was made under the influence of Bretton Woods institutions to attend to the interests of Industrialised World.[198]

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[196] NIPC Act, s 26(2) b, c, (3).
[197] See Ibironke T Odumosu, 'The Law and Politics of Engaging Resistance in Investment Dispute Settlement' (2007) 26 Penn State International Law Review 251, 254.
[198] See Tarald L Berge and Taylor St John, 'Asymmetric Diffusion: World Bank 'Best Practice' and the Spread of Arbitration in National Laws (2020) Review of International Political Economy 1, 5-6; Lauge N S Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (2015) 76-81.

In summary, the analysis above highlighted some of the ways the NIPC Act enhanced the liberalisation and protection of foreign investments in Nigeria. The first key highlight was that the Act, unlike previous investment legal regimes, ensured full foreign ownership and control of investments in Nigeria, thereby liberalising access for foreign capital into the Nigerian economy. Another important highlight was that the Act gave foreign investors the right to seek redress at the domestic courts; and in addition to this, it gave access to international dispute resolution mechanism for the purpose of protecting the interests of foreign investors. More importantly, it was equally noted that these features introduced by the NIPC Act were largely influenced by Western dominance.

5.3.4. International Legal Frameworks: Bilateral Investment Treaties (BITs)

A detailed analysis on the network of Nigeria's investment treaties will be undertaken in the subsequent chapter. The present section simply identifies some of the early investment treaties concluded by Nigeria to highlight how they aligned with Western investment rules. On this note, the analysis will observe that the signing of Nigeria's investment treaties, like the domestic investment legislations, were substantially influenced by Western dominance, and more importantly were used as instruments to liberalise foreign investment while promoting Western economic interests.

Looking back at the discussion undertaken earlier, it will be noted that the first modern investment treaty between Germany, an industrialised State, and Pakistan, a developing State, in 1959 was during the heydays of decolonisation.[199] Following Germany's lead and at the heels of quandary in international economic

[199] Guzman (n 192) 667 (noting that the period the first modern BITs were signed was at the time Third World States rejected Western investment rules – in this case, the Hull Rule).

law, which was largely caused by Third World resistance to Western investment rules, some industrialised States concluded BITs with Third World States to protect the economic interests of their nationals.[200] This highlights two important issues: that investment treaties were initiated by industrialised States to protect their interests, and as such were drafted in accordance with Eurocentric rules, suggesting that these treaties were made in the shadow of Western dominance.

Although early modern investment treaties as noted above were concluded between the late 1950s and mid-1960s, it was not until the 1980s and 1990s that BITs proliferated.[201] It was in this later period that Nigeria's investment treaty practice began. Nigeria has now concluded 30 BITs with a broad spectrum of States, including those from the Western World and the Third World.[202] However, the first set of BITs concluded by Nigeria were with Industrialised States, those with France and the United Kingdom (UK) signed in 1990,[203] and the treaty with the Netherlands in 1992.[204] As will be discussed in further detail in the subsequent chapter, these investment treaties by and large represented the preferred rules of Nigeria's Industrialised treaty partners, indicating Western dominance.[205]

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[200] See Vandevelde, 'A Brief History of International Investment Agreements' (n) 169 (noting that many of subsequent investment treaties were signed in the 1960s and developed by Industrialised State to protect the investments of their nationals abroad).

[201] Zachary Elkins, Andrew T Guzman and Beth A Simmons, 'Competing for Capital: The Diffusion of Investment Treaties, 1960-2000' (2006) 60 International Organization 811, 814.

[202] Available on http://investmentpolicyhub.unctad.org/IIA/CountryBits/153#iiaInnerMenu accessed on 28/03/18. Of the investment agreements signed, 15 are in force.

[203] See Accord entre Le Gouvernement de La Republique Francaise et Le Gouvernement de La Republique Federale du Nigeria sur L'Encouragement et La Protection Reciproques des Investissements (signed 27 February 1990, entered into force 19 August 1991) (Nigeria-France BIT); Agreement between the Federal Republic of Nigeria and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments (signed 11 December 1990, entered into force 11 December 1990) (Nigeria-UK BIT).

[204] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Federal Republic of Nigeria (signed 2 November 1992, entered into force 1 February 1994) (Netherlands-Nigeria BIT).

[205] As evidence of Western dominance in the making of these investment treaties by Nigeria, BITs concluded around the same period by the UK and France, for instance, were remarkably similar in their

Earlier in the chapter it was highlighted that foreign investment was liberalised in the Third World on the account of the Western World. The World Bank/IMF policy prescriptions, like the SAP prescribed for Nigeria, emphasised the need for Third World States to liberalise trade and investment as a pre-requisite for financial support and as an important ingredient for economic development.[206] Third World States in line with this criteria began to compete for foreign investments, leading to the signing of investment treaties that would in the long run affect their interests.[207] This therefore suggests that the emergence of Nigeria's investment treaty practice, similar to the enactment of the NIPC Act, was influenced by the policy prescriptions of the World Bank and IMF.

6. Conclusion

The analysis in this chapter has examined the development of international investment law: from its origins as an established Western legal culture, which was applied on most parts of the World through various forms of imperialism; to resistance by less powerful (mostly Third World) States, proclaiming sovereignty and authority over the activities of foreign investors within their territories and as a result, displacing Western rules; to how Western investment rules were reintroduced to Third World States, including Nigeria, through a less forceful but equally altruistic and intrusive manner with the help of international financial

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textual content. In this regard, Wolfgang Alschner and Dmitriy Skougarevskiy developed a method of testing or checking for similarities between investment treaties. This could be done on their website http://mappinginvestmenttreaties.com/. On the discussion on the methodology, see Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements' (2016) 19 Journal of International Economic Law 561. A detailed analysis on this subject will be undertaken in Chapter 3.

[206] This is in the sense that the policy prescriptions of the World Bank and IMF emphasised on the liberalisation of trade and investment in the economy of Third World States. A detailed discussion was made in section 4 above. See also World Bank, *Legal Framework for the Treatment of Foreign Investment* (The World Bank 1992) 35.

[207] See Guzman (n 192).

institutions. Most importantly, it notes that though the current investment rules may largely represent Western dominance of international (legal) system, its evolution was shaped in no small measure by Third World resistance.

Further, the purpose of examining the development of international investment law is to show that its core principles will reflect its origins and more importantly will be reminiscent of the values of its originators. In other words, in light of the disclosure that international investment law originated from Western legal culture, the Western World, its originators, will not only dictate the manner its principles and rules are conceptualised, but they will also stand to benefit from its application. What this suggests is that international investment law, in the way its rules are crafted, will more likely favour the interests of the Western World than the Third World, whom were initially only made subjects of the rules.

Chapter 3: Analysing Nigeria's International Investment Law Regime

1. Introduction

One of the main arguments in the previous chapter is that investment rules evolved – as they were constantly reconceptualised and applied on the Third World – through a multi-layered process of domination and subjugation, suggesting that foreign investment protection in Nigeria constitutes Western hegemony. Considering this, the present chapter will review the network of Nigeria's investment treaties to determine whether they reflect its interests as a Third World host State.[1] In this regard, it will investigate whether Nigeria's investment treaties are coherent with one another and the extent to which they accommodate environmental concerns. The analysis will highlight that the contents of an investment treaty is largely determined by power relations – that is, the ability of a treaty party to influence the outcome of investment treaty making.

Before proceeding into the analysis of the chapter, it will be pertinent to highlight some of the limitations of the study. First, the study is only an approximate determination of how Nigeria's investment treaties are concluded, as it uses exogeneous sources to ascertain the practices of Nigeria's investment treaty negotiation. It is recognised that the analysis does not cover all the factors that influence the outcome of the conclusion of investment treaties. Irrespective of this

[1] It has been recognised that regulatory authority is one of the key interests of host States, including the ability to regulate for public interests, especially for the environment. See Giorgio Sacerdoti, Pia Acconci, Mara Valenti and Anna De Luca (eds), *General Interests of Host States in International Investment Law* (Cambridge University Press 2014); Lars Market, 'The Crucial Question for Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States' in Marc Bungenberg, Jörn Griebel and Steffen Hindelang (eds), *International Investment Law and EU Law* (Springer 2011) 145.

limitation, the study makes a contribution to Nigeria's international investment law literature, providing preliminary insight to, and support for future research on, Nigeria's investment treaty practice.

Second, in determining the consistency of Nigeria's investment treaty practice the study does not undertake an extensive analysis of the entire provisions of its network of investment treaties. The aim of the chapter, as stated earlier, is to highlight whether in general Nigeria's commitments to foreign investors are imposed on it. Considering this, the study does not require the analysis of the entire investment treaty provisions in Nigeria' network of investment treaties. Rather, the analysis will focus on the fair and equitable treatment (FET) standard. The FET performs a gap-filling role for other treaty provisions, and as such not only increases foreign investment protection but increases host State liability.[2]

Third, though the analysis in the chapter aims to ascertain the potential implication of international investment law regime, it may not determine with precision the actual outcome of any specific case that may arise in the future involving Nigeria. Nevertheless, by highlighting potential factors that might be consequential to Nigeria as a Third World State, it helps to direct focus toward improving and reforming Nigeria's investment practice and international investment law regime generally, a core goal of this thesis.[3]

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[2] For some literature on the FET standard, see Stephen Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (2000) The British Year Book of International Law 99; Rudolf Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties (2005) 39 International Lawyer 87; Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 Journal of World Investment and Trade 357; Maria Valenti, 'The Protection of General Interests of Host States in the Application of the Fair and Equitable Treatment Standard' in Giorgio Sacerdoti and others (eds), *General Interests of Host States in International Investment Law* (Cambridge University Press 2014) 26.

[3] Discussions on reforming Nigeria's international investment regime will be undertaken in Chapter 5.

Following from this, the arguments in the chapter will be made across five parts. The current section introduces the chapter's subject of research. The second section briefly reiterates the history of foreign investment protection to provide context to the discussion on the current state of Nigeria's investment treaty practice. The third and fourth section, which contain the main arguments in the chapter, analyses Nigeria's investment treaties. The third section specifically will analyse the consistency of the FET provision in Nigeria's network of investment treaties. The fourth section will analyse the adequacy of environmental provisions in Nigeria's investment treaty. The analysis in the third and fourth section will help illustrate the power dynamics that often shape the outcome of Third World state investment treaty making.[4] The fifth section concludes the chapter.

2. Nigeria's International Investment Regime

For a nuanced understanding of some of the issues concerning Nigeria's investment regime and practice in general, it is important to signpost factors that has largely contributed to its current state. Issues about inconsistency in treaty provisions and inadequate environment provisions or language (including reference to sustainable development imperatives in general) in Nigeria's investment treaties may only be understood against the backdrop of a broader neoliberal context.

As documented in Chapter 2, the World Bank and the IMF (both influential in the world economy) were instrumental in restructuring Nigeria's microeconomic policies in the 1980s,[5] and by extension influenced the evolution of foreign

[4] See J Anthony VanDuzer, 'Canadian Investment Treaties with African Countries: What They Tell Us about Investment Treaty Making in Africa? (2017) Journal of World Investment and Trade 556 (noting that investment treaty making between developed and developing states are somewhat shaped by power relations).

[5] Yusfus Bangura, 'IMF/World Bank and Conditionality and Nigeria's Structural Adjustment Programme' in Kjell J Havnevik (ed) *The IMF/World Bank in Africa: Conditionality, Impact and Alternatives* (Nordiska Afrikainstitutet 1987) 95, 97-98; Gloria Emeagwali, 'The Neo-liberal Agebda and

investment protection in Nigeria. These international financial organisations, representing transnational capitalist interests, imposed structural adjustments programs (SAP) on post-colonial Africa,[6] which was argued to be a panacea to the irrational and inefficient policies of the post-colonial government.[7] Practically, the SAP sought to reduce State control of market forces and remove all forms of trade restrictions,[8] which in turn would grant foreign capital full access into the economies of African States, as such serving as a form of neoliberalism.

As noted in earlier in the thesis, the ideology promoted by IMF/World Bank, particularly on the role of foreign capital in the economic (but not necessarily sustainable) development, became ingrained in the economies of most African countries.[9] Through this, 'development' became a status States were expected to aspire to and attain, and which for many Third World states it was believed to assure state equality at the international stage.[10] The promise of development that could arise from protecting foreign investments made investment treaties more attractive to most Third World States, leading to the proliferation of BITs – as investment treaties with Western States became sought after.[11] As a result, the first set of

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the IMF/World Bank Structural Adjustment Programs with Reference to Africa' in Dip Kapoor (ed) *Critical Perspectives on Neoliberal Globalization, Development and Education in Africa and Asia* (Sense Publishers 2011) 3.

[6] Emeagwali (n 5) 3-5.

[7] Ibid 6.

[8] Ibid 6; Bangura (n 5) 98.

[9] See discussions in Chapter 2.

[10] For discussions on the transformative logic of development and how it was used to delineate the First from the Third World, see Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011) 44-94. In fact, Third World States relied on their 'underdeveloped' status to try and bring about change in international economic law. See the detailed discussion in Chapter 2.

[11] Majority of the early BITs signed by developing countries like Nigeria with developed countries highlighted the prospects of development as an offshoot of protecting foreign investment. For instance, the preamble to United Kingdom-Nigeria BIT 1990 states, 'Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative, will contribute to *development and will increase prosperity* in both States' (emphasis added). See Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties increase Foreign Direct Investment in Developing Countries' (2005) 33 World Development 1567, 1567.

investment treaties concluded by Nigeria was predominantly with developed states, guaranteeing protection to their investors and investments within Nigeria's territory.[12]

Although Nigeria has been signing investment treaties over the past 20 years, its international investment regime has received little academic attention.[13] Specifically, Nigeria's investment treaty practice – that is, the manner and outcome of investment treaty negotiations – has not be adequately addressed, though this may largely be as a result of the nature of treaty negotiations generally.[14] Nevertheless, the purpose of the present study is not to undertake this exercise, rather to identify and analyse factors that provide a better understanding of how investment treaties were concluded between Nigeria, a Third World State, and its (more powerful) treaty partners.

Neoliberal ideologies, which helped to advance the liberalisation of foreign investments, were imposed on most States in the Third World, and as such influenced the proliferation of investment treaties with Western States. Considering the power asymmetry this may have created in investment treaty making, it is thus useful to analyse the content of Nigeria's investment treaties, to determine whether

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See also Lauge N S Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press 2015) (highlighting that in signing investment treaties developing states had overestimated their benefits – which includes fostering economic development); Zachary Elkins, Andrew T Guzman and Beth A Simmons, 'Competing for Capital: The Diffusion of Investment Treaties, 1960-2000' (2006) 60 International Organization 811 (noting that most developing states concluded investment treaties to compete for foreign direct investment, which was expected to foster economic development, though a correlation to development was doubtful).

[12] Nigeria's first BITs was with France, then the UK in 1990. See France-Nigeria BIT 1990; United Kingdom-Nigeria 1990; Netherlands-Nigeria 1992.

[13] Most of the literature has focused on the history of investment promotion and protection generally as highlight in Chapter 2, with little to no research on its investment treaty practice. Some of the literature are Khrushchev Ekwueme, *Protection of Foreign Investment in Context: Nigeria's Investment Laws, Treaties, and Petroleum Agreements* (BadenBaden: Nomos Verlagsgesellschaft 2007).

[14] The predominant position is that treaties, including investment treaties are often negotiated in secrecy, and therefore the conduct of negotiations is largely unknown to the outside world. See

they on aggregate reflect its interests. By so doing, it will help to highlight issues of concern in international investment law regime, especially for Third World States.

To do this, the chapter will identify and evaluate two issues: the consistency of treaty provisions in the network of Nigeria's investment treaties, and whether Nigeria's network of investment treaties on aggregate adequately address environmental concerns and sustainable development more generally. These issues are important because consistency in the network of investment treaties indicates the coherence of a State's investment policy (representing the State's interests). Also, it highlights the manner of international cooperation among the treaty parties on investment rules – that is, an allusion to the idea that some level of State equality exists during the treaty negotiation, and the interests of the parties are reflected in the final document.

Conversely, where inconsistency is detected, it suggests, to some extent, that investment treaties are imposed on the State by its treaty partners – indicating that there is an asymmetry in treaty negotiation.[15] Drawing on this – where the network of investment treaties is inconsistent – inadequate environmental language would serve as an indication of investment treaty imposition. In sum, the study will contribute to the debate on power relations in investment treaty making between Third World States and their (more powerful) treaty partners, while also highlighting the place of Third World States like Nigeria in international investment law regime.

[15] This takes into consideration that inconsistency may also result from evolution in norms – that is, environmental protection being seen as more important now than in the 1990s when most investment treaties were concluded. However, it is expected that when there is a paradigm shift subsequent treaties should remain consistent with one another.

3. (In)Consistency of Treaty Provisions

Since becoming engaged in investment treaty practice in 1990, with the United Kingdom and France,[16] Nigeria currently has 29 BITs.[17] To appreciate the current state of Nigeria's investment regime practice it requires an understanding of the extent to which Nigeria's investment treaties are consistent with one another. This not to state that every investment treaty concluded by a State is expected to be the same – after all, the conclusion of an investment treaty is expected to be based on distinct negotiations between the treaty parties. However, it may also be presumed that a State's national policy and interest should reflect consistently to a certain degree across the network of its investment treaties.

By this, a lack of consistency would suggest that the interest or policy of such State is not reflected in its investment treaties. Where this is not the case, the provisions in one investment treaty may be markedly different and even inconsistent with similar provisions in another investment treaty signed by the same State. Considering this, it will be desirable for a Third World State like Nigeria to maintain some level of consistency in its network of investment treaties as it, amongst other factors,[18] facilitates compliance with investment obligations.[19] In other words, it is easier for a host State to observe a set of homogeneous investment obligations, which consequently reduces the threat of breaching its investment commitment.

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[16] See UK-Nigeria BIT 1990; Nigeria-France BIT 1990.
[17] See Mapping BITs available on <http://mappinginvestmenttreaties.com/country?iso=NGA> accessed 14 June 2020.
[18] One of such is that it will enhance predictability in the outcome of treaty interpretation, at least within the scope of permissible interpretations of a provision, thereby providing a better understanding of the scope and application of a treaty provision.
[19] Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements' (2016) 19 Journal of International Economic Law 561, 566.

More so, variations in investment treaties could inspire a change in meaning, and by extension its legal interpretation. Where there is a variation in the legal interpretation of a provision, compliance with the investment obligation regarding such provision will be affected, leading to a potential breach and ultimately exposing the State to the risk of financial liability.[20] Considering this, the current section will compare Nigeria's network of investment treaties to provide a nuanced understanding about the consistency of Nigeria's investment practice, which will equally be important in the subsequent analysis in the chapter.

Investment treaties contain provisions (or standards), which as a whole serve as guarantees made by host States towards foreign investors to promote and protect investments within their territories. Investment treaties generally include the 'most favoured nation', 'national treatment', 'fair and equitable treatment', 'full protection and security' and 'expropriation' provisions. These provisions are also found in Nigeria's investment treaties.[21] However, what remains to be ascertained is whether on aggregate obligations towards foreign investors as provided for by investment treaty provisions are homogenous across Nigeria's network of investment treaties.

The analysis will be undertaken in line with a study by Alschner and Skougarevskiy that developed a method for determining consistency across investment treaties concluded by a State, by measuring a range of factors including, more importantly, textual similarity.[22] As a caveat, this does not necessarily

[20] Ibid 566.
[21] Records of Nigeria's investment treaties are available on <https://investmentpolicy.unctad.org/international-investment-agreements/countries/153/nigeria?type=bits> accessed 7 June 2020.
[22] Other factors measured are latent differences and trends between investment treaties. See Alschner (n 19) 564. The method developed is also available and can applied using their site <http://mappinginvestmenttreaties.com/country#> accessed 14 June 2020.

determine the legal significance of a text variation,[23] however, for the present study, the method helps to achieve two purposes. First, it helps to ascertain the consistency – that is, the similarity or otherwise – of the text of treaty provisions in Nigeria's network of investment treaties. Second, it can serve as a proxy to indicate the level of influence a treaty party like Nigeria has on the outcome of investment treaty negotiations, revealing aspects of power relations in investment treaty making.

The study by Alschner and Skougarevskiy employs the 'Jaccard distance', a technique used to quantify the difference (represented with 1) or similarity (represented with 0) in treaty text by dividing the treaty text into five-character components.[24] By this, the closeness of a decimal fraction to either 1 or 0 indicates the level of dissimilarity or similarity of the investment treaties evaluated. For instance, a Jaccard distance of 0.2 indicates a higher similarity between the investment treaties being compared. Alternatively, a Jaccard distance of 0.7 indicates a lower of similarity, and thus higher dissimilarity, between the compared investment treaties. To create an interactive illustration, a 'Mapping BITs' website was created applying the same method to simulate the consistency of the network of investment treaties of various States. This was used in the analysis of Nigeria's investment treaties.

Applying the 'Jaccard distance' Nigeria's network of investment treaties showed a coherence of 0.58,[25] which either means a 42% similarity or alternatively 58% dissimilarity across Nigeria's 29 BITs.[26] Also, majority of Nigeria's investment treaties, when compared to one another, exhibited a slightly higher

[23] Alschner (n 19) 564.
[24] Ibid 569.
[25] Mapping BITs <http://mappinginvestmenttreaties.com/country#> accessed 17 June 2020.
[26] See Alschner (n 19) 571 (demonstrating the percentage of overlap (i.e., similarity) between US Model BIT and its BITs with Uruguay and Rwanda).

range of dissimilarity. For instance, Canada-Nigeria BIT 2014 and Turkey-Nigeria BIT 1996 showed 0.72 Jaccard distance (the highest among Nigeria's investment treaties on the site), indicating only 28% textual similarity between both treaties, alternatively 72% dissimilarity.[27] Further, the ranking of States by the consistency of their investment treaties.[28] For context, the United Kingdom is ranked 1 out of 133 states, with 110 investment treaties. Considering the number of investment treaties – that is, 29 BITs – signed by Nigeria, its current ranking indicates a poor level of coherence in Nigeria's investment treaties.

Nigeria's network of investment treaties exhibiting a higher rate of dissimilarity exposes the level of inconsistency of its treaty provisions. As such, it indicates a lack of an investment treaty making strategy. Although the argument could be that Nigeria has, over time, updated its treaty language to take into account new developments in international investment law; it is not likely to be the case because it is only recently that Third World States began to take more active participation in investment treaty making, including updating or altering their investment treaties.[29] In all, the evidence strongly suggests that it is more unlikely that a highly dissimilar investment regime would adequately accommodation Nigeria's interests, especially regarding the policy space to regulate for the environment.

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[27] It is important to note that these treaties represent two different generations of investment treaties and the dissimilarity may be understandable. Therefore, it will be expected that there will be a level of coherence between treaties concluded within a similar period. A comparison between the Canada-Nigeria BIT 2014 and Austria-Nigeria BIT yielded 0.58 distance. See <http://mappinginvestmenttreaties.com/country?iso=NGA> accessed 7 November 2019. The site is curated in line with the empirical methodology developed by Alschner and Skougarevskiy.

[28] See <http://mappinginvestmenttreaties.com/country?iso=NGA> accessed 7 November 2019. The site is curated in line with the empirical methodology developed by Alschner and Skougarevskiy.

[29] Third World States, and particularly African States have mostly only been actively involved in the broader context of foreign investment protection and the development of investment regulation. See Makane Moïse Mbengue, 'Africa's Voice in the Formation, Shaping and Redesign of International Investment Law' (2019) 34 ICSID Review 455, 456. Further discussions will be undertaken in Chapter 5.

On the other hand, it could also be from the analysis above that Nigeria as a treaty partner may have little influence over the outcome of its investment treaties, thereby suggesting that treaty partners often imposed investment treaties on Nigeria. This therefore suggests that not only are Third World States like Nigeria more likely to be 'rule-takers' (i.e., susceptible to have investment rules imposed on them) wealthier and more powerful States, especially from the Western World, are 'rule-makers' (i.e., determine investment rules).[30] In other words, the dominance of Western States in investment treaty negotiations – each imposing its model treaty on their less powerful counterparts – may account for the incoherence amongst investment treaties concluded by Third World States.[31]

Going by the above analysis and taking into consideration other factors that determine the outcome of investment treaty negotiations – such as treaty party power structure,[32] and institutional capacity and expertise,[33] which are attributes predominantly possessed by developed states – it can be concluded that Third World states like Nigeria are potentially handicapped into acceding to investment rules dictated by others.[34] This iterates the argument on the marginal role of less powerful states in investment treaty making,[35] and accounts for the incoherence in Nigeria's network of investment treaties.

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[30] Alschner (n 19) 562.
[31] VanDuzer, 'Canadian Investment Treaties with African Countries' (n 4) 576.
[32] See Maria A Gwynn, *Power in the International Investment Framework* (Palgrave Macmillan 2016) (highlighting the outcome of investment making using power theory).
[33] Tarald L Berge and Øyvind Stiasen, 'Negotiating BITs with Models: The Power of Expertise' (2016) PluriCourts Research Paper No. 16-13< https://www.peio.me/wp-content/uploads/2016/12/PEIO10_paper_67.pdf> accessed 16 June 2021.
[34] See Wolfgang Alschner, 'Rule-Takers and Rule-Makers in BIT Universe: Empirical Evidence of a North-South Divide' (Mapping BITs Blog, 28 July 2016) <http://mappinginvestmenttreaties.com/blog/2016/07/rule-takers%20and%20rule-makers/> accessed 14 June 2020.
[35] Laura Páez, 'Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area' (2017) 18 Journal of World Investment and Trade 379, 381 (arguing that until recently African countries have played a passive role in concluding investment agreements).

The analysis above highlights that Nigeria's network of investment treaties is incoherent. However, as earlier stated, such analysis may not adequately capture the legal significance of variation in a treaty text. Considering this there is the need to ascertain whether the incoherence as revealed in Nigeria's network of investment treaties could have any legal implication. In other words, the analysis below will determine whether irrespective of treaty variations there is legal coherence – that is, whether the treaty provision of various investment treaties may still provide consistent legal obligations. This is important because an ascertainable investment obligation helps to avoid unexpected legal exposure.

The subsequent sections will review the FET standards in Nigeria's investment treaties to determine its consistency across the network of investment treaties. This is because though a vast body of literature on the FET provision exists, there remains a dearth of literature regarding the FET provision in Nigeria's investment treaties. Second, most investment treaties contain the FET provision,[36] including Nigeria's investment treaties.[37] Third, the FET provision is often regarded as one of the most important treaty provisions due to its ability to fill in for other treaty provisions by providing investment protection where such other provision is lacking.[38] Finally, due to its rather ambiguous nature, and the fact that it is often

[36] United Nations Conference on Trade and Development, 'Fair and Equitable Treatment: A Sequel UNCTAD Series on Issues in International Investment Agreements II' (United Nations 2012) 17 <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 15 June 2021.
[37] Adewale Atake, Victor C Igwe and Stanley U Nweke-Eze, 'GAR Investment Treaty Arbitration: Nigeria' (GAR, 23 October 2020) < https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/nigeria> accessed 6 June 2021.
[38] Rudolf Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties (2005) 39 International Lawyer 87, 87-91.

cited (and sometimes successfully applied) to challenge actions of host States, it is regarded as one of the most controversial treaty provisions.[39]

For the reasons highlighted above, it is pertinent to analyse the FET provision, at least on the ground that the way it is expressed in an investment treaty helps to understand its scope and content.[40] There will be a brief overview of the fair and equitable treatment (FET) provision in Nigeria's investment treaties. The formulations of the FET provisions in Nigeria's investment treaty practice will be reviewed in broad categories as highlighted by UNCTAD: unqualified or non-descriptive FET provisions; qualified FET provisions; FET provisions linked to or presented with other standards, which is subdivided into FET linked to international law and to minimum standard under customary international law.[41] The analysis of the various categories of the FET provision, as will be undertaken in turns below, is to ascertain the legal significance of each variation.

3.1. Unqualified or non-descriptive FET formulation

An unqualified FET formulation simply means that the provision does not describe or state when a treatment accorded to a foreign investor or investment is unfair or inequitable.[42] As such, it simply provides that a foreign investor will be entitled to treatment that is 'fair and equitable', or 'just and equitable'.[43] With

[39] Maria Valenti, 'The Protection of General Interests of Host States in the Application of the Fair and Equitable Treatment Standard' in Giorgio Sacerdoti and others (eds) *General Interests of Host States in International Investment Law* (Cambridge University Press 2014) 26, 26; Barnali Choudhury, ''Evolution or Devolution: Defining Fair and Equitable Treatment in International Investment Law' (2005) 6 Journal of World Investment and Trade Law 297, 297; Stephen Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (2000) The British Yearbook of International Law 99, 101.

[40] UNCTAD, 'Fair and Equitable Treatment' (n 36) 17.

[41] Ibid 17-35. For other categorizations of FET formulations, see Rumana Islam, *The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context* (Springer 2018) 55-75; Roland Kläger, *'Fair and Equitable Treatment' in International Investment Law* (Cambridge University Press 2011) 14-21.

[42] Prabhash Ranjan, 'Fair and Equitable Treatment in Indian Investment Agreements: An Overview' (2011) International Institute of Sustainable Development Working Paper 4.

[43] UNCTAD, 'Fair and Equitable Treatment' (n 36) 20.

regards to Nigeria's investment treaties out of the 17 BITs reviewed,[44] only 1 contained an unqualified FET provision in them. An example of this formulation was found in the Romania-Nigeria BIT.[45]

Unqualified FET provision are sometimes linked with another investment treaty provision such as full protection and security,[46] although this was not found in Nigeria's investments treaties reviewed. The conjunction of the FET with another provision may not modify the interpretation of the FET provision itself.[47] However, given the gap filling role of the FET provision, where it is expressed together with other provisions, it may be interpreted in lieu of those provisions. For instance, a breach of such other provision may be interpreted as a breach of FET, even where the FET provision itself was not breached.

More, since an unqualified formulation of FET provision does not prescribe the acts or situations that the provision covers, this means that investment tribunals are left with the task to determine the meaning of terms 'fair and equitable',[48] which may include, but not limited to, reference to the title of the provision that contains the FET provision, and neighbouring provisions.[49] Such hermeneutic discretion for describing what is fair and equitable may lead to an 'overbroad and surprising extension of the FET standard' with an unwanted consequence of placing a wide range of host state actions under review, which may ordinarily not be within the

[44] Of the 29 BIT BITs with text in English Language that were publicly available on
[45] Agreement between the Government of Romania and the Government of the Federal Republic of Nigeria (signed 18 December 1998, entered into force 3 June 2005), art 3(2).
[46] See Agreement between the Swiss Republic and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments (signed 27 January 2009, entered into force 13 April 2010) art 4 (China-Switzerland BIT 2009).
[47] UNCTAD, 'Fair and Equitable Treatment' (n 36) 20.
[48] *Glamis Gold Ltd v United States America*, UNCITRAL, Award, 8 June 2009, paras 540-41 (*Glamis v USA* Award) (noting that it was the task of the tribunal to ascertain what constitutes fair and equitable treatment)
[49] See Vienna Convention of the Law of Treaties 1969, art 31; Ranjan, 'Fair and Equitable Treatment in Indian Investment Agreements' (n 42) 4.

remit of the investment tribunal.[50] As a result, there is a high risk of a host State action(s) being in breach of an unqualified FET formulation.[51] This means that an unqualified FET formulation has a wide reach with regards to the host State measures, and as a result creates uncertainty of investment obligations.

3.2. FET linked to International Law

There are two FET formulations that are linked to international law.[52] The first kind, though not found in any of the Nigeria's FET provisions reviewed, is formulated in such a way to ensure that the provision is interpreted with reference to the principles of international law.[53] Although the aim of linking the FET to international law is to limit its scope,[54] an investment tribunal would have to undertake the difficult task to review the sources of international law to ascertain the scope of the provision in a particular case.[55] Given the uncertain nature of the sources of international law,[56] it may be difficult to arrive at a specific principle to ascertain the scope of the FET.

On the other hand, the second type of the FET provision linked to international law is contained only in the Spain-Nigeria BIT which in addition to providing for fair and equitable treatment reads, '[i]n no case shall a Contracting Party accord to such investments treatment less favourable than that required by international law' .[57] Unlike the first type of FET formulation that is linked to international law, this formulation sets the floor or the minimum level of protection

[50] UNCTAD, 'Fair and Equitable Treatment' (n 36) 22.
[51] Ibid 22.
[52] Ibid.
[53] Ibid. See North American Free Trade Agreement (NAFTA) 1994, art 1105.
[54] Islam (n 41) 58 (noting that FET formulated in this way call on investment tribunals to limit the scope within the sources of international law).
[55] UNCTAD, 'Fair and Equitable Treatment' (n 36) 22-23; *Glamis v USA* Award, 540-41.
[56] See Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and some of its Problems' (2004) 15 European Journal of International Law 523.
[57] Spain-Nigeria BIT 2002, art 4(1).

that can be accorded a foreign investor.[58] It means that the host State cannot go below the stipulations of international law. However, considering that there is no ceiling with regards to the protection offered, this formulation creates more interpretative latitude for investment tribunals to read beyond the requirements of international law to protect foreign investors.[59] As such, similar to the unqualified FET, this formulation could lead to inconsistent interpretations and unforeseen consequences, and could also present a high risk to the regulatory authority of a host State like Nigeria.[60]

3.3. FET linked to the Minimum Standard under Customary International Law

The FET standard may sometimes be linked to minimum standard of treatment or subsumed under a provision titled 'Minimum Standard of Treatment' in an investment treaty. Before analysing in further details the construction of this FET formulation, its scope and implications, it is important to note briefly the meaning as well as the evolution of the concept of the minimum standard of treatment under customary international law. This is to provide context into the reason the concept is sometimes included in today's investment treaties, and as such, serves the overall purpose of the chapter to ascertain whether the network of investment treaties concluded by Nigeria serve its interest as a Third World State.

As a prelude, the minimum standard of treatment simply refers to the treatment of foreigners acceptable under international law – that is, the law of nations.[61] Conversely, this precludes treatments that fall short of 'civilized'

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[58] Islam (n 41) 59.
[59] Ibid; UNCTAD, 'Fair and Equitable Treatment' (n 36) 23.
[60] Mexico was alleged to have breached Article 1105 of NAFTA, an FET linked to international law, which required parties to 'accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment…' see Metalclad v Mexico, Award, para 1.
[61] See Islam (n 41) 56, citing Andreas Hans Roth, *Minimum Standard of International Law Applied to Aliens* (A.W. Sijthoff 1949). Andreas Hans Roth, 'The Minimum Standard of International Law Applied to Aliens' (PhD Thesis, the Graduate Institute of Geneva 1949).

standard such as procedural and substantive denial of justice and bad faith.[62] In Chapter 2, it was highlighted that the Western World in the twentieth century envisaged the concept of an 'international minimum standard' to protect their nationals and properties abroad, particularly in the Third World. The concept evolved into a general and consistent practice of States followed out of a sense of legal obligation, at a time when customary international law was generally determined by the Western World.[63] Considering this, one may argue that its introduction into investment treaties, for instance, accompanying the FET standard, was to ensure a Western perspective to the interpretation of the standard, indicating Western hegemony.

An example of the FET linked to the minimum standard of treatment can be found in the Canada-Nigeria BIT. As provided under the 'Minimum Standard of Treatment' heading, the provision reads, '[E]ach Party shall accord to a covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens, including *fair and equitable treatment* and full protection and security'.[64] For interpretative purposes, the reason for explicitly linking the FET and minimum standard of treatment under customary international law is to limit its scope.[65] As such, reference to customary international law is used to determine what constitutes the FET standard. Regardless, as will be highlighted below, it does not make this FET formulation less controversial.

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[62] See Edwin M Borchard, 'The Minimum Standard of Treatment of Aliens' (1940) 38 Michigan Law Review 445.
[63] See B S Chimni, 'Customary International Law: A Third World Perspective' (2018) 112 American Society of International Law 1 (highlighting that customary international law is reminiscent of Western practices and ideologies).
[64] Canada-Nigeria BIT 2014, art 6(1) (emphasis added).
[65] UNCTAD, 'Fair and Equitable Treatment' (n 36) 28; Kläger (n 41) 18; Islam (n 41) 55-56 (this is in the sense that it refers to the standard which customary international law guarantees for foreigners).

Therefore, to ensure that the intentions of the treaty parties are properly represented, recent treaty practice sometimes attaches a qualifying provision stipulating strict reference to customary international law in determining FET. For instance, the provision in Canada-Nigeria BIT goes on to read, '[t]he concepts of "fair and equitable treatment" … in paragraph 1 *do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens*'.[66] As highlighted above, it may be argued that the text was formulated in this way to ensure that customary international law remains the only reference point when determining FET, thereby avoiding such contentions, as has been expressed in investor-State awards, that aim to extend the scope to current international law generally.[67]

Nevertheless, although the FET formulation as found in the Canada-Nigeria BIT is to prevent an interpretation that extends beyond the scope of the original intentions of the treaty party, an issue that has been raised regarding it is that there is no general consensus of what constitutes minimum standard of treatment.[68] In this regard, although it should reflect a common standard of treatment of foreigners, the scope of the minimum standard of treatment has been subject to debate – with scholars critiquing the lack of uniformity in ascertaining its fundamental concepts.[69] Added to this, investment arbitral cases have highlighted that what constitutes minimum standard of treatment under customary international law evolves

[66] Canada-Nigeria BIT 2014, art 6(2) (emphasis added).
[67] See Glamis v USA, Award, para 550; *Mondev International Ltd v United States of America,* ICSID Case No. ARB(AF)/99/2, Award, paras. 120, 125 (Mondev v USA, Award).
[68] Islam (n 41) 57, 64; UNCTAD, 'Fair and Equitable Treatment' (n 36) 28; Matthew C Porterfield, 'An International Common Law on Investors Rights (2006) 27 University of Pennsylvania Journal of International Economic Law 79, 88.
[69] Islam (n 41) 57-8.

constantly.[70] As such, ascertaining the contents of minimum standard of treatment remains a difficult task.

In summary, the above analysis highlights that connecting the FET standard to the minimum standard of treatment, which is further buffered by specific reference to customary international law, was to limit the discretion of investment tribunals while interpreting the standard. Paradoxically, though this was to prevent unintended interpretative outcome, considering the nature of the concept of minimum standard of treatment, the chances of unpredictable interpretation may persist.[71]

3.4. Qualified or Descriptive FET

Another formulation of the FET provision found in Nigeria's investment treaties is the qualified or descriptive FET. This FET formulation gives a more specific description of the criteria that would amount to a breach of the provision. By this, the FET is made more precise ensuring a clearer content.[72] Qualified FET are expressed in various ways: by prohibition of denial of justice; prohibition of arbitrary, unreasonable or discriminatory measures; irrelevance of a breach of a different treaty provision; and accounting for the level of development.[73]

FET formulations prohibiting denial of justice was found in 2 FET provisions reviewed.[74] On the other hand, majority of FET provisions reviewed prohibited

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[70] See Mondev v USA, Award, paras 114-125 (highlighting that the standard of State actions towards foreigners which would have constituted a breach of the minimum standard of treatment in the past may not be applicable in the present situation. Providing more context to this, the tribunal holds in paragraph 116 that '[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious' as was the position in the earlier part of the twentieth century). See also, *Pope & Talbot Inc v the Government of Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002, paras. 62-65.
[71] See Islam (n 41) 54-58 (noting that the scope of the standard is still unclear); UNCTAD, 'Fair and Equitable Treatment' (n 36) 29.
[72] UNCTAD, 'Fair and Equitable Treatment' (n 36) 29.
[73] Ibid.
[74] Nigeria-Singapore BIT 2016, 3(2) a; Morocco-Nigeria BIT 2016, art 7(2) a.

arbitrary, unreasonable, unjustified or discriminatory measures. 11 FET provisions from Nigeria's investment treaties reviewed bear such expression.[75] Under the 'Protection and Treatment of Investments' section in Nigeria-UAE BIT, paragraph 2 states, '[n]either contracting Party shall, impair through *arbitrary or discriminatory measures*, the management, maintenance, use, enjoyment or disposal of investment of nationals and companies of the other Contracting Party in its territory'.[76] Interestingly, paragraph 3 goes on to make a general expression of the FET provision as well: 'each Contracting Party shall endeavour to make all public laws, regulations, policies and procedures, that pertain to or directly affect investments and ensure *fair and equitable treatment* of investments in its own territory'.[77]

Prohibiting arbitrary and discriminatory measures in addition to expressing the FET standard as done in Nigeria-UAE BIT does not delimit the scope of FET, rather the FET may be interpreted to be broader than the prohibited measures.[78] The consequence of this interpretation is that an action by the host country, though not violating the specifically prohibited measures, may still violate the FET provision.[79] Different from the FET formulation prohibiting arbitrary measures, is the FET formulation that expressly delineates the breach of a different treaty provision from a breach of the FET provision. The Canada-Nigeria BIT contained the FET formulation excluding the breach of a different treaty provision from the breach of

[75] Korea-Nigeria BIT 1998, art 2(2); UK-Nigeria BIT 1990, art 2(2); Nigeria-UAE BIT 2016, art 4(2)(3); Austria-Nigeria BIT 2013, art 3(1)(2); Spain-Nigeria BIT 2002, art 4(1)(2); Finland-Nigeria 2005, art 2(2)(3); Italy-Nigeria 2000, art 2(3); Sweden-Nigeria BIT 2002, art 3(3); Turkey-Nigeria 2011, art 4; Art South Africa-Nigeria BIT 2000, art 4(1); Germany-Nigeria BIT 2000., art 3(2)(3)
[76] Nigeria-UAE BIT 2016, art 4(2) (emphasis added).
[77] Nigeria-UAE BIT 2016, art 4(3) (emphasis added).
[78] UNCTAD, 'Fair and Equitable Treatment' (n 36) 31.
[79] Ibid. See *LG&E v Argentina,* ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, para 162.

the FET provision.[80] The purpose of this formulation is to prevent investor-State arbitration tribunals from automatically finding a breach of the FET when another treaty provision is breached.[81]

A few issues from the analysis above are worthy of note. First, the analysis highlights the lack of homogeneity in the FET provisions, by revealing that the textual formulation of the provision varies across the network of Nigeria's investment treaties. Second, the various formulations produced unpredictable legal outcomes for the host State. In other words, not only are there varying formulations of the FET provision in Nigeria's network of investment treaties, but each variation could also lead to unpredictable legal consequence.

In addition to the finding of inconsistency in Nigeria's network of investment treaties, the disparity in treaty provisions further suggests that Nigeria's investment treaties are not negotiated or concluded on equal footing,[82] which accounts for the reason treaty provisions in investment treaties concluded by Third World state like Nigeria are diversely worded.[83] Therefore, the inconsistency in FET formulations discloses a high probability of 'bargaining asymmetry' between Nigeria and its treaty partners, including more powerful states, and thereby generally portrays Nigeria as a 'rule-taker'.

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[80] Art 6(3).
[81] UNCTAD, 'Fair and Equitable Treatment' (n 36) 33.
[82] There are various studies on why and how more powerful, capital exporting states have a better bargaining advantage in treaty negotiations. For some of these theories see Zachary Elkins, Andrew T. Guzman, and Beth A. Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000' (2006) 60 International Organization 811, 822; Todd Allee and Clint Peinhardt, 'Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions' (2010) 54 International Studies Quarterly 1; Todd Allee and Clint Peinhardt, 'Evaluating Three Explanations for the Design of Bilateral Investment Treaties' (2014) 66 World Politics 47; Lauge N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press 2015) (suggesting that because of knowledge asymmetries and cognitive biases developing states often sign investment treaties adapted from model treaties of developed states).
[83] Alschner (n 19) 571-577

Second, and more importantly, the analysis underscores the legal consequence of incoherent treaty provisions. By this, Nigeria's investment obligation deriving from the FET provision not only vary but remains largely unpredictable. The implication is that it diminishes efforts at compliance with treaty obligations,[84] increases the risk of violation, and consequentially, exposes the State to financial liability. This not only highlights the potential risks a Third World State like Nigeria face when subjected to rules in international investment law but more importantly shows that generally the contents of investment rules do not necessarily represent or reflect the interest of Nigeria.

In conclusion, it is doubtful whether Nigeria's network of investment treaties, reflects its interest as a host State. This is important because the extent to which its interests are represented in investment treaties may have broader implications: for instance, on the ability of Nigeria, as a host State, to regulate for matters of public interests such as the environment. In other words, since the above analysis suggests that Nigeria did not determine the outcome of treaty negotiations, its investment treaties may potentially not address concerns about the environment. To explore this further, the analysis in the next section will focus on whether the network of Nigeria's investment treaties address environmental concerns.

4. Environmental Language in Treaty Provisions

The insights from the previous section, underscoring Nigeria's peripheral role in investment treaty negotiation, will be important in understanding the outcome of the analysis in this section. The finding of Nigeria as a rule-taker, when applied to the present analysis on the adequacy or otherwise of environmental language in Nigeria's investment treaties, not only underscores the extent of consideration given

[84] VanDuzer, 'Canadian Investment Treaties with African Countries' (n 4) 577.

to environmental concerns but also indicates how bargaining asymmetry could be the reason for such outcome. Considering that the outcome of Nigeria's investment treaties is largely determined by its (more powerful) treaty partners, the outcome of the analysis concerning environmental language in Nigeria's investment treaties will reveal the attitude of Nigeria's treaty partners to environmental concerns. In other words, this section will disclose the preferred interests or concerns of Nigeria's treaty partners. This will be useful to understand the impact of investment treaties on Nigeria's environmental governance, particularly on how Nigeria's investment obligations may stifle environmental concerns.

As will be highlighted in chapter 4, there is little doubt that the interpretation of investment treaties potentially impedes on environmental measures. In fact, a recurring concern about investment treaties is that the obligations placed on host states towards foreign investors limit policy measures aimed to promote sustainable development generally.[85] This raises the issue of how investment treaties may be used to promote sustainable development to benefit host states, especially in the Third World, given that traditionally investment treaties do not establish a clear relationship with sustainable development. [86] Although the focus of the present chapter is on the environment, the study will where necessary make reference to sustainable development. This is because sustainable development is a wider concept that encompasses environmental protection.[87]

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[85] Andrew Newcombe, 'The Use of General Exceptions in IIAs: Increasing Legitimacy or Uncertainty?' in Armand de Mestral and Celine Levesque (eds), *Improving International Investment Agreements* (Routledge 2013) 267, 267.
[86] Giorgio Sacerdoti, 'Investment Protection and Sustainable Development' in Steffen Heindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified.* (Oxford University Press 2016) 19, 19, 21.
[87] See Manjiao Chi, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications* (Routledge 2017).

To give context, it is necessary to provide a brief overview of the meaning of sustainable development to highlight its importance in investment treaties, especially for Third World states like Nigeria. Sustainable development refers to such development that fosters environmentally sound and socially meaningful development.[88] Sustainable development, as a policy-based approach, requires the reconciliation of environmental protection with economic and social development.[89] On the other hand, it is argued that private investments, especially foreign investment, have the potential – in terms of finance and technology know-how – to contribute towards achieving sustainable development objectives in Third World states.[90]

In practice, however, it is sometimes the case that foreign investment activities, especially the production processes and methods, pose serious risk to the environment in the Third World,[91] thereby hindering sustainable development trajectories. This means that the flow of foreign investments into host states alone may not engender environmental sustainability. Therefore, for foreign investment activities to align with sustainable development imperatives there needs to be some external incentivising factor.

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[88] See Sharachchandra M Lele, 'Sustainable Development: A Critical Review' (1991) 19 World Development 607, 607.

[89] Jorge E Vinuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012) 27.

[90] United Nations Conference on Trade and Development, 'World Investment Report 2014: Investing in SDGs: An Action Plan' (United Nations 2014) <https://unctad.org/system/files/official-document/wir2014_en.pdf > accessed 15 June 2021.

[91] Jorge E Vinuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012) 24-25. The case of incessant oil spills and gas flaring in Nigeria has been duly captured by academic literature and mass media. For an introduction to the literature see Kaniye S A Ebeku, *Oil and the Niger Delta People in International Law: Resource Rights, Environmental and Equity Issues* (Rudger Koppe Verlag, 2006); Jedrej Georg Frynas, *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities* (Litverlag Münster-Hamburg-London 2000); Augustine O Isichei and William W Sanford, 'The Effects of Waste Gas Flares on the Surrounding Vegetation in South-Eastern Nigeria' (1976) 13 Journal of Applied Ecology 177.

Investment treaties in this regard can provide useful and practical mechanisms to ensure that foreign investments are made in a manner consistent with sustainable development objectives, including ensuring environmental protection.[92] Since investment treaties provide the legal framework for protecting foreign investors and investments, such protection could be only accorded to an investment that has been made in an environmentally consistent manner. This would therefore subject the protection of an investment – that is, the ability to invoke a treaty provision to protect an investment – to the environmental concerns of the host state. Having regards to this, it will be pertinent to ascertain the manner environmental concerns are addressed through investment treaties.

Incorporating environmental provisions in investment treaties is an important way for host States to address environmental issues in international investment law.[93] In other words, the inclusion of environmental provisions or language in investment treaties indicates that environmental issues were considered during investment treaty making. Therefore, in the context of the present study, the presence of environmental provisions in Nigeria's network of investment treaties not only highlights the level of its investment treaties' environmental friendliness but indicates that concern about the environment was a key factor in investment treaty making.

For this reason, it is necessary to undertake a taxonomy of environmental provisions – including those with reference to sustainable development and related

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[92] J Anthony VanDuzer, Penelope Simons and Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (Commonwealth Secretariat 2013) 258.

[93] Manjiao Chi, 'The 'Greenization' of Chinese Bits: An Empirical Study of Environmental Provisions in Chinese Bits and its Implication of China's Future Bits Making' (2015) 18 Journal of International Economic Law 511, 539.

concepts[94] – in Nigeria's investment treaties, and, to evaluate the frequency of such provisions. By doing so, it aims to ascertain whether and to what extent Nigeria's investment treaties allow for policy measures that protect the environment and generally promote sustainable development – in the sense that the absence of such provisions not only signals a derogation of these issues. Considering that Third World states like Nigeria are often inundated by serious environmental challenges,[95] sometimes arising from foreign investment activities, the absence of environmental or sustainable development provisions may suggest that the treaties do not reflect the interests and concerns particular to Nigeria as a Third World.

Before going into further analysis it is important to note that the common objective of investment treaties is to protect foreign investment.[96] As a result, investment treaties are considered as not primarily designed to promote issues concerning the environment or sustainable development generally.[97] This may be the case considering the overall lack of reference to environmental concerns in investment treaties.[98] For instance, a study, surveying investment treaties by OECD states (including those made with non-OECD states), showed that a very insignificant percentage of investment treaties addressed environmental concerns.[99]

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[94] Ibid 513 (arguing that environmental provisions include those provisions that use alternative terms such as 'sustainable development', 'plants and animals' 'ecological systems' or natural resources' without specifically mentioning 'environment' or environmental').
[95] E C Onwuka, 'Oil Extraction, Environmental Degradation and Poverty in the Niger Delta Region in Nigeria: A Viewpoint' (2005) 62 International Journal of Environmental Studies 655.
[96] See Karsten Nowrot, 'Obligations of Investors' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (C.H.Beck Hart Nomos 2015) 1154, 1154-55.
[97] J Anthony VanDuzer, 'Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?' in Steffen Heindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified.* (Oxford University Press 2016) 142, 143; Sacerdoti (n 86) 21.
[98] Chi, 'The 'Greenization' of Chinese Bits' (n 93) 539.
[99] Kathryn Gordon and Joachim Pohl, 'Environmental Concerns in International Investment Agreements: A Survey' OECD Working Papers on International Investment 2011/ <https://search.oecd.org/investment/internationalinvestmentagreements/WP-2011_1.pdf> accessed 28 October 2019.

Another study also recorded a general lack of environmental provisions in Chinese BITs.[100] Although recent treaty practice has witnessed an increased presence of environmental concerns in recent investment treaties, its prevalence is still limited.[101]

The tentative inference from the insights above, though subject to further empirical evaluation, is that Nigeria's investment treaties may not address environmental concerns, or that such reference to environmental concerns considering the issue of inconsistent treaty provisions maybe made haphazardly. The subsequent paragraphs will investigate how Nigeria's investment treaties address environmental concerns.

Generally, references to environmental concerns in investment treaty practice occur in a variety of ways: (i) references in investment treaty preambles addressing environmental concerns; (ii) those reserving policy space for environmental regulation for the entire treaty (often in the form of general exceptions); (iii) those reserving policy space for environmental regulation for specific subject matters (such as performance requirements or expropriation); (iv) those clarifying that non-discriminatory environmental regulation cannot be the basis for claiming an indirect expropriation; (v) those forbidding lowering of environmental standards to attract investment; (vi) those relating to investor-state dispute settlement (such as provisions for expert reports on technical matters); and (vii) those providing for general promotion of progress in environmental protection and cooperation.[102] Some authors use a different categorisation, preferring to categorise based on the

[100] Chi, 'The 'Greenization' of Chinese Bits' (n 93) 539.
[101] Ibid.
[102] Gordon and Pohl (n 99) 11; VanDuzer, 'Sustainable Development Provisions in International Trade Treaties' (n) 145-47.

appearance of an 'environmental provision' in the various parts of an investment treaty.[103]

To ensure a nuanced appreciation of the issue, the typology of references to environmental concerns will divided into four broad categories: (i) references in preambles; (ii) references in substantive provisions; (iii) references in exception provisions; and (iv) references in procedural provisions.[104] These categories broadly represent the various formulations of environmental concerns expressed in investment treaties, including Nigeria's investment treaties. This delineation is based on the part (or section) of an investment treaty the reference to environmental concerns or sustainable development appears either in the preamble or in the body of the treaty - exceptions and carve-out provisions are included in this category. This may allow for an easier identification and appreciation of the reference to environmental concern, as where such provision is located, to some extent, may indicate its impact on treaty obligations – that is, whether environmental issues may override investment obligations.

4.1. References in Preamble

The first category of environmental language in investment treaties to be analysed are those found in treaty preambles. The preamble is the express general statement at the beginning of a treaty sometimes containing the history and the intentions of treaty parties, which establishes the objects and purposes and the values underlying the treaty.[105] Considering that the object and purpose of a treaty

[103] Chi, 'The 'Greenization' of Chinese Bits' (n 93) 515.
[104] See Chi, 'The 'Greenization' of Chinese Bits' (n 93) 515-25. The classification will follow a similar pattern used in the article.
[105] See Max H Hulme, 'Preambles in Treaty Interpretation' (2016) 164 University of Pennsylvania Law Review 1281, 1288, 1300; Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 43; Gerald Fitzmaurice, 'The Law and Practice of International Court of Justice 1951-54: Treaty Interpretation and other Treaty Points' (1957) 33 British Yearbook of International Law 203, 228.

is found in the preamble, it governs the treaty as a whole.[106] As a result, treaty provisions are to be construed to give effect to the treaty's objects and purposes.[107] In light of this, one of the interpretational character and effect of the preamble is to help elucidate or clarify the meaning of treaty provisions.[108] This therefore underscores the importance of analysing this category of environmental language, considering the role it plays in treaty interpretation. [109]

Factors or issues referred to or mentioned in the preamble are important to realising the purpose of the rights and obligations contained in the body of an investment treaty. In this sense, ordinarily, reference to environmental concerns in the preamble of an investment treaty will indicate that the obligations to protect foreign investment should also be compatible with the duty to protect the environment.[110] This should mean that when determining whether a state measure has breached its investment treaty obligation regard would be had to the role of such measure toward protecting the environment or promoting sustainable development. On this note, the preamble is important to determine whether an investment treaty contains environmental language or promotes environmental concerns. The succeeding paragraphs shall investigate the manner and extent Nigeria's network of investment treaties incorporates environmental language in its preamble.

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[106] Fitzmaurice (n 105) 228.
[107] See Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331(Vienna Convention on the Law of Treaties), art 31; Francis G Jacobs, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18 International and Comparative Law Quarterly 318, 319.
[108] Fitzmaurice (n 105) 227.
[109] VanDuzer, 'Sustainable Development Provisions in International Trade Treaties' (n 97) 147-48; Hulme (n 105) 1292 (arguing that 'cases may arise where circumstances – such as ambiguity – require that they (i.e., preambles) be given interpretative weight). See also *Saluka Investment BV v The Czech Republic* UNCITRAL Partial Award 17 March 2006 paras 299-300; *LG& E Energy Corp. v The Argentine Republic* ICSID Case No. ARB/02/1 3 October 2006 Decision on Liability para 124.
[110] Gordon and Pohl (n 99) 11.

According to publicly available records, Nigeria currently has 29 BITs.[111] Given the unavailability of some treaties,[112] language barriers,[113] and to avoid misinterpreting the provisions of the treaties, only treaties available in English language were reviewed. Based on this, only 17 investment treaties in English language were identified. From the 17 treaties reviewed, only 6 treaties contained references to the environment or sustainable development.[114] In other words, these treaties included environmental language in the preamble. This reveals that majority of investment treaties concluded by Nigeria do not refer to environmental concerns or sustainable development in the preamble.

From the dataset analysed, there appeared to be a trend incorporating references to the environment or sustainable development in preambles in more recent investment treaties concluded by Nigeria between 2011 and 2016; however, the Nigeria-United Arab Emirates BIT, which was signed in 2016, did not contain such reference. This could be identified as an outlier, but more importantly, may confirm the argument in this chapter regarding the role of Nigeria as a rule-taker in investment treaty negotiations. The next paragraphs will identify examples of references to the environment or sustainable development in investment treaty preamble to highlight their various formulations and the legal significance of such formulation, if any.

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[111] This is available on the UNCTAD investment treaty database <https://investmentpolicy.unctad.org/international-investment-agreements/countries/153/nigeria> accessed 15 June 2021.

[112] The texts of some investment treaties were not available. For instance, Ethiopia-Nigeria BIT 2004; Nigeria-Uganda BIT 2003; and Jamaica-Nigeria BIT 2002.

[113] The text of some investment treaties was only available in a different language like French. For instance, France-Nigeria BIT 1990.

[114] For purposes of clarity, reference to sustainable development also includes a reference to environmental concerns. The following treaties refer to the environment or sustainable development: Morocco-Nigeria BIT 2016; Nigeria-Singapore BIT 2016; Canada-Nigeria BIT 2014; Austria-Nigeria BIT 2013; Turkey-Nigeria BIT 2011; Finland-Nigeria BIT 2005.

The Morocco-Nigeria BIT represents one type of such environment-sustainable development formulation. This investment treaty is particularly important because of its balanced approach to incorporating and addressing various interests and concerns prevalent in international investment law,[115] including the environment. The Morocco-Nigeria BIT referred to the environment and sustainable development in different paragraphs of its preamble: 'SEEKING to promote, encourage and increase investment opportunities that enhance *sustainable development* within the territories of the state parties'. It went further to explain the concept of sustainable development: 'UNDERSTANDING that *sustainable development* requires the fulfilment of *economic, social and environmental pillars* that are embedded within the concept'.[116] Alternatively, the preamble in the Finland-Nigeria BIT presents a different formulation of environmental concerns: 'AGREEING that these objectives can be achieved without relaxing health, safety and *environmental measures* of general application'.[117]

From above, on one hand, the Morocco-Nigeria BIT relates foreign investment to sustainable development – and to environmental protection – in the sense that foreign investments are expected to promote sustainable development objectives. While, on the other hand, the Finland-Nigeria BIT seems to ensure that the obligations to promote and protect foreign investments do not prevent the host state from protecting the environment. Overall, references to the environment or

[115] Tarcisio Gazzini, 'The 2016 Morocco-Nigeria BIT: An Important Contribution to the Reform of Investment Treaties' available on <https://www.iisd.org/itn/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarcisio-gazzini/> accessed 30 October 2019; See also Niccolo Zugliani, 'Human Rights in International Investment Law: The 2016 Morocco-Nigeria Bilateral Investment Treaty' (2019) 68 International and Comparative Law Quarterly 761; Markus Krajewski, 'Human Rights: Recent Trends in Arbitration and Treaty-Making Practice' (2018) <https://dx.doi.org/10.2139/ssrn.3133529> accessed 6 March 2020.

[116] See Preamble, Morocco-Nigeria BIT 2016; See also Preamble, Canada-Nigeria BIT 2014 (emphasis added).

[117] Preamble, Finland-Nigeria BIT 2005; See also Preamble, Turkey-Nigeria BIT 2011(emphasis added).

sustainable development in treaty preamble as identified in the treaty examples above would suggest an effort to make environmental protection compatible with foreign investment protection.

However, an important issue to be determined is whether inclusion of environmental language in treaty preambles adequately ensures that investment treaties address environmental concerns. In the sense that whether reference to the environment in the treaty's preamble will be adequate to shield a host state from liability under investment treaty where it is to be determined whether such state's environmental measure is compatible with its investment obligations.

Having regards to the Article 31(1) of the Vienna Convention on the Law of Treaties,[118] which requires treaties to be interpreted in line with their object and purpose, treaty preambles have become one of the most common way environmental protection is referenced to investment treaties. Though preambles are regarded as an important part of a treaty, they may still be limited in their operation. One of the main drawbacks of the preamble is that it does not contain directly operative provisions.[119] This is in the sense that preambles do not perform operational functions like substantive provisions.[120] More so, where a substantive treaty provision expressly confers a right (i.e., without any ambiguity with regards to its terms), the preamble cannot be used to restrict or cutdown the operation of such right.[121] Therefore, inasmuch as the preamble forms an integral part of a treaty

[118] 1155 UNTS 331.
[119] Fitzmaurice (n 105) 229; Villiger (n 105) 43.
[120] See *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para 230 (the tribunal held, '… it is doubtful that, in the absence of a specific provision in the BIT itself, the sole text of the preamble constitutes a sufficient basis for a self-standing fair and equitable treatment obligation under the BIT').
[121] Fitzmaurice (n 105) 229.

it may not be used to override unequivocal rights or status created by substantive provisions.

Drawing from this, it means the preamble does not stipulate binding obligations. In the sense that the binding character of a preamble is subject to the substantive or operative provisions of the treaty.[122] It is for this reason that environmental provisions incorporated in preambles are viewed as non-operative.[123] Moreover, it is yet to be determined how investment tribunals will resolve the issue when they are confronted with the question of environmental language in an investment treaty preamble. Nevertheless, in the present context it presupposes that a clear investor right contained in an investment provision may not be overridden by environmental considerations contained in the preamble.

Another limitation with regards to the adequacy of using treaty preambles to address environmental concerns borders on the overall outlook of investment tribunals. Investment tribunals have in past referred to and have been guided by the object and purpose expression of investment treaty preamble to confer protection on investments of foreign investors: highlighting that the purpose of the treaty is to create favourable conditions for foreign investors in their host states.[124] For this reason, it is argued that the reference to the object and purpose of an investment treaty will often lead to an interpretation that will be favourable to foreign investors.[125]

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[122] Fitzmaurice (n 105) 229.
[123] Chi, 'The 'Greenization' of Chinese Bits' (n 93) 515.
[124] See *Siemens A.G v The Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, para 81.
[125] Christoph Schreuer, 'Diversity and Harmonisation of Treaty Interpretation in Investment Arbitration' (2006) 3 Transnational Dispute Management 3<https://www.transnational-dispute-management.com/article.asp?key=755> accessed 17 June 2021.

Considering this, and as the analysis in Chapter 4 about the disposition of investment tribunals will highlight, it is unlikely that the incorporation of environmental language or concern in treaty preamble alone can counterbalance the overall pro-investor stance and interpretation of investment treaties by investment tribunals. The consequence therefore is that references about the environment made in the treaty preamble might not be adequate to address environmental concerns.

In summary, the aggregate of Nigeria's network of investment treaties does not incorporate environmental language in treaty preamble. Again, incorporation of environmental language in preamble alone may not adequately address environmental issues through investment treaties, considering that they do not have a binding character like substantive treaty provisions. On this note, the next section will examine how the environmental provisions (if any) are incorporated in Nigeria's network of investment treaties.

4.2. References in Substantive Provisions

Another way environmental issues are addressed in an investment treaty is through the incorporation of substantive environmental provisions. As noted in the previous section, the preamble is limited in restraining the effectiveness or scope of a right expressly stipulated by a substantive provision. This is because the substantive provision unlike the preamble is the operational part of the treaty, and more importantly, imposes obligations on the treaty parties.[126] Going by this, one may argue that incorporating provision in the operational part of an investment treaty will add more value towards addressing environmental concerns.

[126] See Villiger (n 105) 43 (noting that the reason the preamble is not in the operative part of the treaty and therefore does not impose obligations on the parties).

As such, the practical implication of incorporating a substantive environmental provision in investment treaties is to provide host States the policy space to make regulations and policies concerning the environment without incurring the risk of being found in violation of its investment obligations. In this regard, there are two categories of environmental provisions. The first is substantive investment provisions with environmental language or exception concerning the environment. Here reference to the environment is made expressly or in an implied manner. The second is a stand-alone environmental provision. The discussion of these categories shall be taken in turn. The analysis will highlight the extent each formulation allows an investment treaty to address environmental concerns.

In the first category of environmental provisions, environmental concerns are expressed by way of precluding the operation of such provision to measures aimed at protecting the environment. In doing so, the provision creates or at least preserves the host State's policy space, ensuring that environmental measures are undermined by the specific treaty obligation. Environmental language in substantive provision can be found in 'performance requirement' and '(indirect) expropriation' provisions. Conceptually, performance requirements are measures requiring foreign investors to act in a particular way to achieve certain outcomes in the host State.[127] They are of great value to developing States, as they are often used to achieve sustainable development objectives.[128]

[127] Suzy H Nikiema, 'Performance Requirements in Investment Treaties' (International Institute of Sustainable Development Best Practice Series, 2014) 1 <https://www.iisd.org/system/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf> accessed 16 June 2021.

[128] Ibid (arguing that performance requirement creates upstream and downstream economic links in a given economic sector, enables technology transfer and helps achieve better environmental and social outcomes).

However, in investment treaties the performance requirement provision is used differently. The performance requirement provision found in the Canada-Nigeria BIT (out of the 17 investment treaties reviewed) prohibits either contracting parties from imposing certain requirements on foreign investors, including the transfer of technology.[129] Therefore, foreign investors are not mandated to transfer the technology know-how used in business operations to the host state. However, it goes on to preclude the operation of the provision where the measure involves the environment by stating: '[a] measure that requires an investment to use technology to meet generally applicable health, safety and *environmental* requirements is not inconsistent with subparagraph 1(f)'.[130] In other words, a measure mandating a foreign investor to transfer technology to the host state on environmental grounds may not be inconsistent with the performance requirement provision and therefore not in violation.

Preserving policy space to regulate on the environment as seen in performance requirement provisions may not preclude foreign investors from claiming the violation of (indirect) expropriation against environmental measures taken by the host state.[131] Considering that majority of investment claims are based on the violation of the expropriation provision,[132] it will be easy to infer, including from the environmental-based cases that will be analysed in Chapter 4, that many environmental regulations have been subjected to such claim.

Therefore, to cater for environmental concerns, exceptions on the grounds of the environment are often made in expropriation provisions. It is important to note,

[129] Canada-Nigeria BIT, art 9(1).
[130] Canada-Nigeria BIT, art 9(2) (emphasis added).
[131] Gordon and Pohl (n 99) 20.
[132] See Chi, 'The 'Greenization' of Chinese Bits' (n 93).

as shall be highlighted below, that environmental language in substantive provisions may not use the term 'environment' but may refer for example to 'regulatory measures for public interest purposes' or a similar formulation.[133] Therefore, where such language is used it is taken as reference to the environment, which invariably would act to exclude such substantive provision from applying to host state's environmental measure. Out of the 17 investment treaties reviewed, 11 contained an environmental exception in the expropriation provision.[134] The subsequent paragraphs will identify the various formulations of environmental language in substantive provisions in Nigeria's investment treaties and how adequate they are in addressing environmental concerns.

The Turkey-Nigeria BIT provides: 'Non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and *environment, do not constitute indirect expropriation*.'[135] A similar

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[133] Ibid 517.

[134] Agreement between the Government of the Federal Republic of Nigeria and the Government of the Arab Republic of Egypt for the Reciprocal Promotion and Protection of Investments (signed 20 June 2000), art 3(2) (Nigeria-Egypt BIT); Agreement between the Government of the Federal Republic of Nigeria and the Government of the United Arab Emirates (signed 18 January 2016), art 6(1) a (Nigeria-United Arab Emirate BIT); Agreement between the Government of the Kingdom of Sweden and the Government of the Federal Republic of Nigeria on the Reciprocal Promotion and Protection of Investments (signed 18 April 2002, entered into force 1 December 2006), art 5(1) a (Sweden-Nigeria BIT); Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Federal Republic of Nigeria (signed 8 April 2013), art 7(1) a, (4) (Austria-Nigeria BIT); Agreement between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments (signed 27 August 2001, entered into force 18 February 2010), art 4(1) a (China-Nigeria BIT); Canada-Nigeria BIT, art 10(1); Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016), art 8(1) a (Morocco-Nigeria BIT); Investment Promotion and Protection Agreement between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore (signed 4 November 2016), art 5 (Nigeria-Singapore BIT); Agreement between the Government of the Republic of Turkey and the Government of the Republic of Nigeria concerning the Reciprocal Promotion and Protection of Investments (2 February 2011), art 7(2) (Turkey-Nigeria BIT); Agreement between the Government of the Italian Republic and the Government of the Federal Republic of Nigeria on the Reciprocal Promotion and Protection of Investments (signed 27 September 2000, entered into force 22 August 2005), art 5(2) (Italy-Nigeria BIT); Agreement between the Government of the Republic of Korea and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investment (signed 27 March 1998, entered into force 1 February 1999), art 5(1) (Korea-Nigeria BIT 1997); Romania-Nigeria BIT, art 5(1).

[135] Turkey-Nigeria BIT 2011, art 7(2) (emphasis added).

provision is contained in Canada-Nigeria BIT, 'except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-discriminatory measure of a Party that is designed and applied to protect the legitimate public welfare objectives, such as health, safety and *the environment*, *does not constitute an indirect expropriation*.'.[136] These serve as examples of how matters on the environment are expressed in the expropriation provision.

Another formulation that may be viewed as expressing environmental concern in indirect expropriation is found in investment treaties concluded in the 1990s and early 2000s.[137] The provision prohibits direct and indirect expropriation, except where the measure is taken in 'public interest', 'national interest' or 'public purpose', following due process of the law and accompanied by adequate compensation.[138] As earlier noted reference to 'public interest' or 'benefit' may be said to encompass environmental concerns, as environmental protection is often undertaken for good of the public.

Conversely, it may also be argued that the provision makes no reference to environmental concerns on the ground that environmental measures may be outside the scope of what was intended to be in the public interest. Moreover, in the study about the occurrence of environmental concerns in investment treaties, no reference was made to 'public interest' as a formulation of an environmental concern.[139] Nevertheless, even if the expression, 'measure for purpose', relates to

[136] Canada-Nigeria BIT 2014, annex B. 10(c) (emphasis added).
[137] See Sweden-Nigeria BIT 2002; Italy-Nigeria BIT 2000; Nigeria-Egypt BIT 2000; Romania-Nigeria BIT 1998; Korea-Nigeria BIT 1997; Netherland-Nigeria BIT 1992; UK-Nigeria BIT 1990.
[138] Sweden-Nigeria BIT 2002, art 5(1) a, c; Italy-Nigeria BIT 2000, art 5(2); Nigeria-Egypt BIT 2000, art 3(2) a; Romania-Nigeria BIT 1998, art 5(1); Korea-Nigeria BIT 1997, art 5(1).
[139] Gordon and Pohl (n 99) 23-24.

environmental protection, it may still be considered a breach, since it provides for compensation. This seems to be the position as investment tribunals often overlook the public purpose aspect when determining whether an environmental measure violates the expropriation provision.[140] On this note, it remains uncertain whether substantive treaty provision without express reference to the environment as contained in many earlier investment treaties would address environmental concerns.

The limitation with regards to environmental exceptions to substantive provisions is that the application of such environmental concern is only limited to such provision. This simply means that the exception will not be extended to other treaty provisions. For instance, an environmental measure by virtue of the exception provision may not violate the standard against expropriation, however, it may nevertheless violate a different treaty provision such as the FET. Drawing from investor-state arbitration practice, most investment claims against a host state measure are couched in a manner to include a wide array of investment treaty provisions, especially the FET provision.[141] This means that the exception on environmental grounds in a specific treaty provision may not be a means for investment treaties to adequately address environmental concerns.

The second category of environmental language is that found in substantive stand-alone provisions. Stand-alone means that the provision simply refers to environmental concerns – not as a derogation of a treaty obligation. Four investment

[140] Justin R Marlles, 'Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law' (2007) 16 Journal of Transnational Law and Policy 275, 283; See *Metalclad Corporation v United Mexican States* ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para 111.

[141] See Chi, 'The 'Greenization' of Chinese Bits' (n 93) 517 (noting that the FET is one of the most frequently invoked treaty provisions).

treaties of the 17 reviewed contain stand-alone environmental provisions.[142] One formulation of a stand-alone environmental provision is where environmental concerns may be expressed to ensure effectiveness of domestic environmental policies.[143] An important provision in this respect is found in the Morocco-Nigeria BIT.[144] The provision recognises the important role of environmental measures to protect the environment; it further recognises the regulatory authority of contracting parties as host States with regards to implementing environmental measures; and more importantly, precludes the application of treaty obligations to non-discriminatory measures undertaken to ensure foreign investments are conducted in a manner sensitive to environmental and social concerns.[145]

Another group of stand-alone provision refers to a commitment to ensure the enforcement of existing environmental standards in the host country. In effect, the provision expressly discourages the loosening or lowering of environmental regulation to attract foreign investment. The expression was found in the Nigeria-Singapore BIT: 'The Parties recognise that it is inappropriate to encourage investment by *relaxing* domestic health, safety or *environmental measures*.'[146] It goes further to state that where the host encourages a foreign investment by relaxing environmental regulation, the home country of the foreign investor shall request a consultation to avoid such encouragement.[147] A similar provision is contained in Canada-Nigeria BIT,[148] while the provision in Austria-Nigeria BIT does not contain

[142] See Morocco-Nigeria BIT, art 13; Austria-Nigeria BIT, art 4; Canada-Nigeria BIT, art 15; Nigeria-Singapore BIT, art 10.
[143] VanDuzer, 'Sustainable Development Provisions in International Trade Treaties' (n 97) 153-54; Gordon and Pohl (n 99) 11.
[144] Morocco-Nigeria BIT 2016, art 13.
[145] Ibid.
[146] Nigeria-Singapore BIT 2016, art 10 (emphasis added).
[147] Nigeria-Singapore BIT 2016, art 10.
[148] Canada-Nigeria BIT 2014, art 15.

the aspect for 'consultation'.[149] Although this formulation seeks to place an obligation on the host State not to relax its environmental standard with the aim to attract foreign investments, it does not necessarily place a sanction in its violation.

It is apparent that a low percentage of Nigeria's network of investment treaties contain stand-alone environmental provisions. Regardless, the few treaties containing substantive stand-alone environmental provisions appear to adequately address environmental concerns. For instance, the Morocco-Nigeria BIT not only recognises the regulatory authority of the host States, which can be extended to environmental regulation, but non-discriminatory environmental measures from been challenged under the provisions of the investment treaty. Further, the formulation in Nigeria-Singapore, Austria-Nigeria and Nigeria-Canada BITs ensure that environmental standards are not affected by either investment obligations or the quest to attract more foreign investments, thereby addressing the 'pollution haven' and 'race to the bottom' issues.[150]

Nevertheless, the effect of the environmental formulation encouraging that environmental standards are not lowered may be limited. Being a 'best efforts' undertaking, it does not appear to be legally enforceable, but rather indicates that consultations may be requested where a party is seen to lower its environmental standards.[151] This may therefore not enable environmental sustainability in Third

[149] Austria-Nigeria BIT 2014, art 4.
[150] These theories suggest that host states, particularly developing states, often lower their environmental standards or at least do not adopt stringent environmental policies in the hope of attracting foreign investments or retaining existing ones; and in turn, firms in high polluting industries would prefer to be located in jurisdictions with lax environmental policies. See Mohammed Aminu Aliyu, 'Foreign Direct Investment and the Environment: Pollution Haven Hypothesis Revisited' (Eight Annual Conference on Global Economic Analysis, Lubeck, Germany, June, 2005) 2-3 <https://www.gtap.agecon.purdue.edu/resources/download/2131.pdf> accessed 16 June 2021; See also David Wheeler, 'Racing to the Bottom? Foreign Investment and Air Pollution in Developing Countries' (2001) 10 Journal of Environment and Development 225, 225-26.
[151] VanDuzer, 'Sustainable Development Provisions in International Trade Treaties' (n 97) 163.

World states, considering that without a binding commitment towards the environment there will be no incentive to improve environmental standards. Further, the mandate against relaxing environmental regulations proceeds from a false assumption of the levels of environmental standards, in the sense that it fails to appreciate that not all states, especially Third World states, have high environmental standards. Therefore, even when a state with low environmental regulation does not derogate from its standards, this does not necessarily promote environmental sustainability.

In summary, the observation from the analysis above is that few Nigerian investment treaties refer to the environment in substantive provisions, some of which may have limited impact on upholding environmental concerns. Therefore, in general, reference to environmental concerns in substantive provisions as contained in Nigeria's investment treaties analysed may not be effective in promoting environmental concerns or sustainable development.

4.3. Exception Provisions

Under this category, references regarding the environment are found in the body of investment treaties, particularly exceptions provisions (for the present purpose this includes carve-outs and reservations). Unlike the exceptions found in substantive provision as analysed earlier, which limits its application to the specific provision, this exception has a treaty-wide application.

Typically, this typology is expressed by reserving the policy space for environmental regulation, which is often included in the exception provision(s). In reserving policy space, treaty parties seek to secure regulatory authority to make environmental regulations, so that when such regulation is introduced in line with legitimate policy objectives of the host state it will not be construed as violating any

substantive treaty provision.[152] Put differently, it permits the host state to take lawful actions which would otherwise be contrary to the treaty obligations.[153] More importantly, exceptions enable the implementation of a broad range of measures to address future concerns that may affect public welfare,[154] which includes environmental concerns.

Including general public policy exceptions has become a popular trend in recent investment treaty practice, indicating that treaty parties (potential host states) are increasingly becoming aware of the need to secure policy space in investment obligations.[155] This is because exceptions could act as a 'failsafe' against erroneous interpretation of treaty provisions.[156] This means that where a treaty provision would have been erroneously applied to a host state's environmental measure the general exception would preclude the treaty provision from applying – thereby preserving policy space to regulated for the environment.

General exception provisions are often formulated in two ways: modelling the GATT Article XX or GATS XIV, with the former being the preferred option.[157] Generally, the environmental language of the general exception makes explicit reference to the environment or impliedly, by making reference to 'human, animal or plant life or health'.[158] Some BITs, particularly those concluded by Canada, contain exceptions tailored towards GATT Article XX,[159] which makes reference to environmental protection without making specific mention of 'environment' in

[152] Caroline Henckels, 'Should Investment Treaties Contain Public Policy Exceptions?' (2018) 59 Boston College Law Review 2825, 2826.
[153] Ibid.
[154] Newcombe (n 85) 268.
[155] Henckels (n 152) 2826.
[156] Henckels (n) 2831-838, 2843-844
[157] Keene Amelia, 'Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements' (2017) 18 Journal of World Investment and Trade 62, 69, 75.
[158] See for instance, Nigeria-Singapore BIT 2016, art 28 b.
[159] See Chi, 'The 'Greenization' of Chinese BITs' (n) 520.

the provisions.[160] Only 4 BITs out of the 17 reviewed contained a general exception provision with an environmental language.[161] This can be viewed a low outcome considering the importance of general exceptions to environmental concerns, as they are deemed a preferred means of balancing investor rights and host state rights to regulate for public interest.[162]

Amongst Nigeria's investment treaties with environmental language in the general exception provision, the Canada-Nigeria BIT formulation is similar to the GATT Article XX and it reads: 'For the Purpose of this Agreement: (a) a Party may adopt or enforce a measure *necessary*: (i) *to protect human, animal, or plant life or health*, (ii) to ensure compliance with domestic law that is inconsistent with this Agreement, or (iii) for the conservation of living or non-living exhaustible natural resources…'.[163] A similar but non-identical provision is found in the Nigeria-Singapore BIT.[164] However, unlike the Canada-Nigeria BIT, the Turkey-Nigeria BIT[165] and the Morocco-Nigeria BIT[166] does not contain the term 'necessary'.

A plain reading of the exception provision in Canada-Nigeria BIT indicates that the host State reserves the authority to make measures (laws and policies) to protect the environment – which includes human, animal, plant life or health.[167]

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[160] VanDuzer, 'Sustainable Development Provisions in International Trade Treaties' (n 97) 152.
[161] Nigeria-Singapore BIT, art 28 b; Morocco-Nigeria BIT, art 13(4); Turkey-Nigeria BIT, art 6(1) a; and Canada-Nigeria BIT, art 18(1) a.
[162] See Razeen Sappideen and Ling Ling He, 'Dispute Resolution in Investment Treaties: Balancing the Rights of Investors and Host States' (2015) 49 Journal of World Trade 85.
[163] Canada-Nigeria BIT, art 18(1) a (emphasis added).
[164] Art 28(b).
[165] Art 6(1).
[166] Art 13(4).
[167] NAFTA, art 2101, of which Canada is a party, states that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, which in broader context includes sustainable development. See also Chi, 'Integrating Sustainable Development in International Investment Law' (n).

However, a more critical analysis reveals that by imposing 'necessary' as a requirement for the protection of the environment, the availability of this exception to be used by a host State is restricted.[168] In the context of a host State's regulatory authority, a measure is said to be necessary if there are no alternative measures to achieve a desired objective, and as a result, imposes 'an extremely high threshold.'[169] Therefore, by limiting the choice of regulatory discretion, it restricts the proper application of the exception provision. A consequence of this is that where a policy measure is challenged - as it is often the case against developing states – and a less intrusive alternative is found it be available, such challenged policy measure may be found to violate treaty provisions even though the host country had the right to take such measure under the treaty.

Although investment claims having a close relation to the environment have been brought before investor-state arbitration, it has been argued that there is yet to be reported cases in which environmental exceptions have been applied.[170] Nevertheless, the rate at which the exception provision, invoked to justify a measure to protect the environment, has failed in the WTO provides a useful prediction on its application investment arbitration.[171] A review of nine WTO cases, where Article XX (g) (the exception provision) was invoked to justify measures that were inconsistent with WTO rules, showed that the reliance on the exception provisions were rejected in all cases.[172]

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[168] VanDuzer, 'Sustainable Development Provisions in International Trade Treaties' (n 97) 153-54.
[169] Andrew D Mitchell and Caroline Henckels, 'Variations of a Theme: Comparing the Concept of Necessity in International Investment Law and WTO Law' (2013) 14 Chicago Journal of International Law 93, 97.
[170] Chi, 'Integrating Sustainable in International Investment Law' (n 87)
[171] Chi, 'The 'Greenization' of Chinese Bits' (n 93) 522; Newcombe (n 85) 271.
[172] Manjiao Chi, '"Exhaustible Natural Resources" in WTO Law: GATT Article XX (g) Disputes and their Implications' (2014) Journal of World Trade 939, 963-64.

To further buttress the improbable invocation of the exception clause in investment arbitration, in the avalanche of investment arbitrations against Argentina following its national economic crisis, Argentina's reliance on Article XI of the Argentina-US BIT, which precluded the application of the treaty obligations to measures necessary for protection of its own essential security interests (non-precluded measures), in justifying its actions and thereby exempted from liability were mostly rejected.[173] This highlights that exception provisions as a means to express environmental concerns may have limited effect in ensuring host States' policy space to regulate for the environment.[174]

For a nuanced understanding of the application of the exception provision and its impact on host States, it is important to highlight that Canada's recent investment treaty program has predominantly been with Third World States, particularly Sub-Saharan African States – Nigeria inclusive.[175] The manner these investment treaties were negotiated and concluded show that Canada successfully imposed their preferred treaty options on their treaty partners.[176] This is proved by the fact that the textual content of Canadian treaties with its African partners exhibit striking similarity and consistency.[177] Therefore, it is reasonable to infer that the Canada-Nigeria BIT was imposed on Nigeria, making Canada a rule maker, which to an extent has some bearing with regards to the exception provision.

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[173] *CMS Gas Transmission Company v The Argentine Republic,* ICSID Case No. ARB/01/8 Award 12 May 2005, paras 389-94; *El Paso Energy International Company v The Argentine Republic,* ICSID Case No. ARB/03/15 Award 31 October 2011, para 665.
[174] Chi (n) 522-23.
[175] VanDuzer, 'Canadian Investment Treaties with African Countries' (n 4) 557-58 (since 2013 Canada has undertaken an extensive investment treaty program with African States, with Nigeria's bilateral investment treaty signed in 2014, though not yet in force).
[176] Ibid 558.
[177] Ibid 569-70.

The Canada-Nigeria BIT, especially the exception provision, appears on its face to benefit the host State, since it supports policy space to make environmental regulations. However, on a deeper analysis as reviewed above, such regulatory space may in practice remain difficult for host states, especially for Third World States that lack the resources to review the extent of its policy decisions. Therefore, though the exception provision seems to support environmental sustainability – in the sense that it gives room for host country regulatory space – it may not, on one hand, be viewed as a concession to the interests of Third World States but reflects the preferred option of Canada; on the other hand, it may not serve as the best solution on how to balance public and private rights in investment treaties.[178]

4.4. References in Procedural Provisions

Procedural provisions layout the procedures on how disputes that arise out of the investment treaties are resolved. It is important to note that investment treaties do not usually contain comprehensive procedural provisions, because procedural issues are viewed as within the purview of arbitration rules and laws, and often at the discretion of the arbitral tribunals.[179] Regardless, it is becoming a trend with investment treaties containing certain procedural provisions that act to address environmental concerns.[180]

One formulation of environmental procedural provision is by way of expert reports.[181] Of the 17 treaties reviewed, only the Canada-Nigeria BIT contained this formulation of environmental procedural provision. Article 34(1) gives investment tribunals the discretion to appoint experts to report in writing on issues concerning

[178] Newcombe (n 85) 268-269.
[179] See Italy-Nigeria BIT, art 9(6); Germany-Nigeria BIT, art 10(5); Chi, 'Integrating Sustainable Development in International Investment Law' (n).
[180] Canadian Model BIT 2004, art 42. See Chi, 'Integrating Sustainable Development in International Investment Law' (n 87).
[181] Chi, 'The 'Greenization' of Chinese BITs' (n 93) 524.

the environment, health or safety, or any scientific matter that has been raised by a disputing party.[182] Therefore, where the respondent state party (i.e. the host state) alleges that its policy measure was taken to address an environmental issue an expert report may be used to aid the investment tribunal resolve the veracity of the claim. However, the investment tribunal's expert appointment is subject to the agreement of the disputing parties.[183]

An issue that could arise from this requirement is that it may be unlikely, though not impossible, that both disputing parties, particularly the foreign investor (i.e., the claimant), to agree on the use of a specific expert report, as it may jeopardise the success of the investor's claim. This may limit the impact of the provision to ensure efficient resolution of environmental issues in investor-state arbitration, as it curtails the availability of an independent view of such environmental issue raised in the proceedings. As a result, this environmental procedural provision, which appears to depend on the discretion of the investment tribunal and in part on the agreement of the instituting party – both of which are beyond the control of the respondent (host) state – may fall short in addressing the environmental concerns of a Third World state like Nigeria.

The study of environmental provisions in Nigeria's network of investment treaties reveals that only a limited number of its investment treaties contain environmental provisions (that is, including those that refer to sustainable development), and that the distribution of environmental language compared to investment obligations is imbalanced. The outcome of the analysis above, evidencing on aggregate the inadequacy of environmental language, reveal that

[182] Canada-Nigeria BIT 2014, art 34(1).
[183] Canada-Nigeria BIT 2014, art 34(2).

Nigeria's network of investment treaties as a whole do not address environmental concerns adequately.

Drawing on the insight from the previous section which indicates Nigeria's peripheral role in its investment treaty negotiation, the present disclosure regarding the adequacy of environmental language suggests that Nigeria's interest as a host State is not represented. At one extreme, this could mean that Nigeria has little influence in determining the outcome of its investment treaties, and at the other, it shows a lack of an investment treaty strategy. Nevertheless, this lacuna potentially creates room for the preferred investment rules of Nigeria's treaty partners (especially from the Western World) to prevail.[184]

In this regard, it could be argued that including environmental provisions would have undermined the economic interests of foreign investors, which by extension would work against the interests of transnational capitalist interests (mostly from the Western World). Therefore, the limited nature of environmental language in Nigeria's investment treaties suggests that concluding Nigeria's investment treaties focused on protecting foreign investment – the preferred interests of `Nigeria's treaty partners. This reiterates that power relations underpin Nigeria's investment treaty making. The consequence therefore being the general lack of environmental language in Nigeria's network of investment treaties.

In sum, this section reveals that a few treaties in Nigeria's network of investment treaties currently incorporate environmental language in treaty

[184] It could be argued that including environmental provisions would have undermined the economic interests of foreign investors, which by extension would work against the transnational capitalist interests (mostly of the Western World). Therefore, the limited nature of environmental language in Nigeria's investment treaties suggests that concluding Nigeria's investment treaties was focused on protecting foreign investment.

provisions. In this regard, it shows that Nigeria could be exposed to the risk of financial liability, especially where a foreign investor challenges its environmental measure, due to Nigeria's investment treaties lacking strong environmental language or provisions. This underscores the potential implication of Nigeria's investment obligations on environmental concerns, alternatively highlighting the impact of investment treaty on Nigeria.

5. Conclusion

This chapter analysed Nigeria's international investment law regime, identifying inherent issues in Nigeria's investment treaties, and highlighting the potential implications on Nigeria as a Third World State. In this regard, on one hand, it investigated the consistency of Nigeria's investment treaties, particularly of the FET provision. The analysis provides an exogenous way to understanding Nigeria's investment treaty practice, such it highlights the manner Nigeria's investment treaties are concluded. The chapter found that the FET provision in Nigeria's network of investment treaties varied in content. Also, the analysis further exposed that Nigeria's investment treaties on aggregate are largely incoherent when compared to Western States like the United Kingdom possessing higher political and economic status and with a larger network of investment treaties, which is an indication of power relations (and more precisely, power imbalance) in Nigeria's investment treaty making.

The chapter also analysed the environmental provisions in Nigeria's investment treaties. The analysis showed that on aggregate Nigeria's investment treaties failed to adequately incorporate environmental language, which could stifle environmental protection – an aspect of the regulatory authority of a host State. The finding indicates that Nigeria's interests as a host State in the Third World was not

considered or accommodated in the making of its investment treaties. As such, it suggests that Nigeria had little influence in determining the contents of treaty provisions in its investment treaties, an indication of imperialism. Therefore, the general lack of environmental concerns in Nigeria's investment treaties shows that the manner rules of international investment law are made to apply – especially to Third World States – is entrenched in power relations, and by extension imperialism.

Considering this, the inconsistency of Nigeria's investment obligation and its incompatibility with environmental concerns potentially creates substantial regulatory burden for Nigeria as a Third World State. This aligns with the position that the Third World – the States and its people – are predominantly subjects of the rules in international law, including international investment law, though not necessarily made in their interests.[185] As a result, ensuring treaty consistency – to provide a coherent set of investment obligations – and incorporating more environmental provisions – to ensure that environmental concerns are addressed by investment treaties – would help address some of the issues faced by Third World States in investor-State arbitration.[186] However, considering the neoliberal outlook of investor-State arbitration,[187] it will be important to highlight that the issues of Third World States in investor-State arbitration, such as lack of engagement with

[185] For arguments in the area of international law more generally see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005); for arguments in international investment law see Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010).
[186] The detailed discussion will be undertaken in Chapter 5.
[187] See Muthucumaraswamy Sornarajah, 'Towards Normnessless: The Ravage and Retreat of Neo-Liberalism in International Investment law' (2010) 2 Yearbook on International Investment Law 595; Muthucumaraswamy Sornarajah, 'Mutations of Neo-Liberalism in International Investment Law' (2011) 3 Trade, Law and Development 203.

environmental concerns, may go beyond immediate issues of investment treaty practice to broader issues in international investment regime in general.

Chapter 4: International Investment Law and Public Policy: The Role of Third World Resistance

1. Introduction

A key highlight from the discussions in the previous chapters is that international investment law is predominantly concerned with the rights and interests of foreign investors. In this regard, previous analysis noted that this area of international law originated from Western legal culture, which emphasised on protecting Western traders/investors and their properties abroad.[1] It was further shown investment treaties concluded with non-Western (Third World) States, for instance Nigeria, protect the interests of foreign investors, and generally pay little or no attention to the interests of host States.[2]

It is only more recently that the interests of host States, particularly with regards to the right to regulate, began to be accommodated in the regime.[3] An example of this is the provisions of the Morocco-Nigeria BIT 2016.[4] This is understandably so considering that the very essence of international investment law was mainly to guard against the adverse effects of the actions of their host States.[5]

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[1] See Chapter 2 for a detailed analysis.
[2] See the analysis in Chapter 3.
[3] See Brigitte Stern, 'The Future of International Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate', in José E. Alvarez and others (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press 2011) 174; Aikaterini Titi, *The Right to Regulate in International Investment Law* (Hart Nomos Dike 2014); Lone W Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (Routledge 2016).
[4] See Art 13(4).
[5] Nicolas M Perrone, 'International Investment Regime and Foreign Investors' Rights: Another View of a Popular Story' (2014) 11 Manchester Journal of International Economic Law 397, 400. As noted in the Chapter 2, various foreign investor protection mechanisms, such as international investment dispute settlement (in forums like ICSID and UNCITRAL) and investment treaties were established to tackle what was perceived as hostility by Third World States towards foreign investors, which started during the decolonisation period. For a third world perspective, see Ibironke T Odumosu, 'The Law and Politics of Engaging Resistance in Investment Dispute Settlement' (2007) 26 Penn State International Law Review 251, 254-55 (noting that ICSID was established 'at the height of the decolonisation era… in the heydays

However, recently, non-investment issues, such as the environment, labour and human rights, are beginning to gain more attention.[6] These non-investment issues have become relevant to foreign investor-host State debate because in some cases investment disputes arise from policy measures taken by the host State concerning either the environment or human rights. In fact, it is often at the point when the rights and interests of foreign investors are affected that such policy measure is challenged at investor-State arbitration.

Predominantly, investment dispute settlement practice approaches investor-State relations from a host State-centric perspective: analysing whether the action(s) of the host State towards the foreign investor is within the confines of the standards and rules of investment law. This rather narrow perspective often overlooks the factors, concerns and interests that drive the actions of the host State. To understand whether this might be the case, this chapter will review some investor-State arbitration cases to reveal the actors that are often involved in foreign investment relations, their forms of engagement and the core issues that underlie these engagements. The aim is to highlight that since the purpose of the regime is to protect and promote the rights and interests of foreign investors, environmental

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of Third World nationalist convergence and at a time when the vestiges of direct colonial domination were crumbling').

[6] See Mouyal (n 3); Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge 2009); Jorge E Vinuales, *Foreign Investment and the Environment in International Law* (Cambridge 2012); Edward Guntrip, 'Labour Standards, the Environment and US Model BIT Practice' (2011) 12 Journal of World Investment and Trade 101; Fola Adeleke, *International Investment Law and Policy in Africa: Exploring a Human Rights Based Approach to Investment Regulation and Dispute Settlement* (Routledge 2017); Daria Davitti, *Investment and Human Rights in Armed Conflict: Charting an Elusive Intersection* (Oxford: Hart Publishing 2019); Daria Davitti, 'Proportionality and Human Rights Protection in International Investment Arbitration: What's Left Hanging in the Balance?' (2020) 89 Nordic Journal of International Law 343.

concerns, as articulated by the local population (or host community),[7] are susceptible to be discounted.

The institutional and procedural structures of investor-State arbitration, which currently provides a limited scope for third party participation,[8] have failed to adequately engage with local community perspectives. As a result, part of the argument in the present chapter has been inspired by the works that have foregrounded the perspectives of (host) communities or local populations in international investment law literature.[9] These works are important because they not only highlight the interests of the local population, who are most likely affected by the economic activities of foreign investors within their immediate community, but emphasise the importance of their engagement with foreign investors – the outcome of which often forms the basis of investment disputes at investor-State arbitration.

Equally important to the current chapter are works that have considered community perspectives in international law from a TWAIL II.[10] In this sense, a TWAIL II perspective argues that international investment law evolved in response

[7] Since the chapter focuses on the experiences of Third World States, reference to the local population, local people or local community means the local people/population of these Third World States (much specifically, the Third World people). See further analysis below.
[8] Currently, the growing importance of third-party participation has necessitated a slightly more liberal approach towards amicus curiae briefs in investment arbitration proceedings, however, this does not necessarily mean total acceptance or unrestricted access to proceedings and processes. See Christina Knahr, 'Transparency, Third Party Participation and Access to Documents in International Investment Arbitration' (2007) 23 Arbitration International 327.
[9] Lorenzo Cotula and Mika Schröder, *Community Perspectives in Investor-State Arbitration* (International Institute for Environment and Development, 2017); Nicolas M Perrone, 'The International Investment Regime and Local Population: Are the Weakest Voices Unheard?' (2016) 7 Transnational Legal Theory 383; Marcos A Orellana, Saul Banos and Thierry Berger, *Bringing Community Perspectives to Investor-State Arbitration: The Pac Rim Case* (International Institute for Environment and Development, 2015); Katja Daniels, 'The Politics of International Investment Law: Transnational Corporations, Social Movements, and the Struggle for the Future' (PhD thesis, Aberystwyth University 2015).
[10] Ibironke T Odumosu, 'The Law and Politics of Engaging Resistance' (n 5); Ibironke T Odumosu, 'Locating Third World Resistance in the International Law on Foreign Investment' (2007) 9 International Community Law Review 427.

to (and to some extent to counteract) Third World opposition to economic relations.[11] The population of the locality of an investment project (the local population), which often includes local communities in the Third World (i.e., the Third World people),[12] as the analysis will show, are sometimes involved with foreign investors at the domestic level.[13] This therefore identifies Third World people as an important constituent of the 'local population' playing an essential role in both foreign investment relations and international investment law generally.

In this regard, the argument in this chapter reinforces the position that the local people often constitute an essential element to foreign investment relations through their engagement with foreign investors.[14] However, contributing to this body of literature, the chapter will reiterate that the failure on the part of investment tribunals to engage with the interests of the local population, while maintaining an investor-centred posture, would lead to an oversight on a range of non-investment issues, such as environmental degradation.[15]

By failing to accommodate the interests of the local population, which for the present purpose refers to Third World people, chances are that environmental issues

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[11] Odumosu, 'The Law and Politics of Engaging Resistance' (n 5) 252-58.
[12] The concepts of local population, indigenous people and local communities may connote different meanings; however, in this chapter, they will be used interchangeably because both the local population and indigenous people generally represent those that live within spaces or communities sharing the same environment and natural resources where an investment project takes place.
[13] Odumosu, 'The Law and Politics of Engaging Resistance' (n 5) 259-61. This is not to say that domestic engagement does not also involve communities in the First World, however, in most cases and having regards to the history of foreign investment relations such grassroot engagement involve Third World groups. For investment disputes involving communities in the First World, see *Glamis Gold Ltd v United States of America*, UNCITRAL Award 8 June 2009.
[14] See Odumosu, 'Locating Third World Resistance' (n 10); Perrone, 'The International Investment Regime and Local Populations' (n 9).
[15] This follows from the position that investor-state arbitration prioritises corporate and commercial interests over that of non-state actors, which reinforces the exclusion from consideration of non-commercial interests such as the environment. See Robin Broad, 'Corporate Bias in the World Bank Group's International Centre for Settlement of Investment Disputes: A Case Study of a Global Mining Corporation Suing El Salvador' (2015) 36 University of Pennsylvania Journal of International Law 851, 854.

which constitute a core part of the investment dispute will not be adequately addressed.[16] Therefore, when investment tribunals disregard the local people on the basis that they do not constitute part of the bilateral investor-State relations, or that their mode of expression is outside the confines of legal engagement with foreign investors,[17] rather than focus on the substance of their concerns, particularly on environmental degradation, it may occasion a disregard of serious threats that have negative impact on the lives and livelihood of the local population.

The argument in the chapter is divided into five sections. The current section makes an introduction to the subject of study. The second section identifies and discusses the various actors in foreign investment relations, identifying their forms of engagement within foreign investment relations and highlights how the interconnectedness of their actions forms the basis of an investment dispute. The third section goes further to describe the investment disputes involving in some manner the actions of the local population (specifically the Third World people) and the environment. The fourth section analyses how investor-State arbitration responds to the opposition posed by Third World people to foreign investors, identifying the tools and strategies used by investment tribunals. The fifth section concludes the chapter.

2. Actors and Forms of Engagement

The analysis in this section identifies the three main actors in foreign investment relations, the local population, the host State and foreign investors, and discusses their forms of engagement in foreign investment relations. In this regard, the section analyses, in turn, the following forms of engagement: first, social

[16] Odumosu, 'The Law and Politics of Engaging Resistance' (n 5) 278.
[17] See Odumosu, 'The Law and Politics of Engaging Resistance' (n 5) 263-75.

resistance of the local population – deployed through local or grassroot mobilisation – as the first form of engagement that gives rise to investment disputes; second, the host State's measure, which sometimes takes the form of an environmental measure and often in response to the concerns raised by the local population; and third, the investment claim by an affected foreign investor, challenging the host State measure.

2.1.Local Population: Social Resistance

The local population in the present context represents in a limited sense an indigenous people or group or group of communities within an indigenous people. In a much broader sense, it represents a group of people with geographic proximity to an investment project, and thereby more susceptible to the impact of such project.[18] In this sense also, and at the risk of overgeneralisation, it may refer to the 'local' population within a territory of a State.[19] Although the concept may describe a group of people it often involves diverse interests, meaning that the interests expressed by the group may not represent that of every individual or group within the local population.[20]

Nevertheless, in the present chapter, reference to the local population (or their interests) is used in its broadest sense to encompass a group or collection of people connected to a locality, whether interested in the cause or not. With respect to the establishment of an investment, the first issue to be determined is whether the local population, which includes the indigenous people, have an interest with regards to

[18] Cotula (n 9) 10-11.
[19] The key characteristics of a state amongst others are its territory and 'permanent population'. See Convention on the Rights and Duties of States (adopted 26 December 1933) 165 LNTS 19, art 1 (Montevideo Convention on the Rights and Duties of States); See Karen Knop, 'Statehood: Territory, People, Government' in James Crawford and Martti Koskenniemi (eds) *The Cambridge Companion to International Law* (Cambridge 2012) 95.
[20] Cotula (n 9) 11.

the establishment of an investment. The response to this leads to the next issue that concerns whether the interests of the local population are taken into consideration in the foreign investment relations prior to the establishment of an investment project. The evaluation of these issues would help understand and identify the flashpoints that leads to conflict of interests.

The first issue regarding the interests of the local population will be better addressed by identifying the kind of right(s) they have over their territory, where the proposed investment is to take place. Indigenous people accord much value to their territories, largely because of the economic, social and cultural connection between people and their lands.[21] This relationship to their land bestows on them some form of entitlement (rights) arising out of their sense of collective ownership over their lands and natural resources.[22] The entitlement to their lands are to a large extent proprietary in nature, and it is this they seek to use to protect and fulfil their economic, jurisdictional and cultural interests and aspirations.[23]

Considering that the local people in view of their relationship with the lands are bestowed with some form of property rights over their territory, and property being a keystone right,[24] one may assume that they would be interested in matters concerning their territory or affecting their rights and interests over it. On this note, the discussions in the subsequent paragraphs will highlight the extent to which, if at all, the interests of the local people are considered prior to the establishment of

[21] Jeremie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (Brill-Nijhoff 2016); James Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous People have in Lands and Resources' (2005) 22 Arizona Journal of International Human Right 7, 16-17.
[22] Anaya (n 21).
[23] Ibid 16-17.
[24] Carol Rose, 'Property as the Keystone Right?' (1996) 71 Notre Dame Law Review 239.

an investment project, and as such will ascertain whether they are often involved in the process leading to an investment.

To determine whether local interests are considered, there is the need to examine whether as a matter of practice the consent of the local population are sought and obtained prior to the establishment of investment projects. On this note, one of the main issues on the principle of free, prior and informed consent (FPIC) in international law is that the local people (which include indigenous people) are often excluded in the decision-making process prior to development projects.[25] This means that rather than consulting the local people regarding the possibility of investment projects taking place within their territory, the decision is often conducted between the host State and the economic actor – the foreign investor.

The decisions taken in the process would largely involve the scope of foreign investor's control of resources.[26] This may lead to information asymmetry between the host State and foreign investor on one hand, and the local population on the other hand: in the sense that the details of the agreement or contract specifying such foreign investor rights may be unknown to the local population.[27] For instance, the permit or concession to convert an area of land to a development site or the provision of a public service such as drinking water may be granted without regard

[25] The emergence of the principle of free, prior and informed consent (FPIC) in international law was to address the issues experienced by indigenous people (the local population) resulting from their lack of participation in the decision making of development projects taking place within their territory. To address this, FPIC ensures that their consent must be sought and freely obtained. For some of the literature on FPIC see Anaya (n 21) 7; Tara Ward, 'The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Right Within International Law' (2011) Northwestern Journal of International Human Rights 54; Cathal M Doyle, *Indigenous Peoples, Title to Territory and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge 2015).
[26] Perrone, 'International Investment Regime and Local Population' (n 9) 393-94 (arguing that foreign investors acquire specific entitlements, which are often a result of negotiation with the host state).
[27] Ibid 394, 397.

to the local people.[28] In this regard, although the State is assumed to represent the interest of the public (i.e., the larger population), by providing drinking water, such action may not always align with or be made in full consideration of the interests of a specific locality.[29]

The consequence of not being consulted or involved in an investment project is that the local people are made unaware in advance of the scope of rights acquired by foreign investors.[30] In such cases, they may be deprived of the opportunity to have a say on the choice of investors and investment projects, the form and extent of foreign investor entitlements, even though it is their environment that could be adversely affected by the establishment of such investment project. Therefore, where the local people are not consulted prior to the establishment of an investment project there is a great chance that their interests were either not adequately accommodated or at least considered in the decision-making process.

For this reason, investment projects when established are likely to be incompatible with traditional settings of the indigenous people in the host community, and as such may interfere with their traditional lifestyle, which includes how they collect water.[31] Considering that the use of local resources is fundamental to the livelihood of the local people,[32] they are likely to be more vulnerable when the control and use of these resources are undertaken in a manner that fails to

[28] See Patrick Anderson, 'Free, Prior, and Informed Consent? Indigenous Peoples and the Palm Oil Boom in Indonesia' *The Palm Oil Controversy in Southeast Asia: A Transnational Perspective* (ISEAS-Yusof Ishak Institute 2012) 247.
[29] This is further discussed in the paragraphs below.
[30] Perrone, 'International Investment Regime and Local Population' (n 9) 394
[31] Ibid 392.
[32] Anaya (n 21) 8 (arguing that a secure land and natural resource base is fundamental to the local people for economic viability and development).

accommodate their interests.[33] As such, when the local population do not participate in the decision-making processes leading to the establishment of an investment project not only that their interests may not be adequately accommodated there is a higher chance of friction with the acquired rights of foreign investors.[34]

In order to resist or express their concerns against the exercise of foreign investors' rights, and to get the attention of the State to act in their stead, a common strategy for the local population is to engage in social movements.[35] Social movements comprise diverse actions taken to articulate and express the interests and concerns of the local people with the hope to propel them into fruition. These diverse actions often include but limited to verbal expressions of concerns about investment projects, mobilisations of grassroot demonstrations, and legal actions including litigation and formal complaints.[36] In some cases, the social resistance actions are directed towards the sites where the alleged harmful activities take place.[37] The possibility that the demonstrations of the local population may come in contact with the property of the foreign investor, increases the chances of foreign investor property rights being affected in some way: either in the destruction of the facility or equipment of the foreign investor or where, as a result of the demonstration, the foreign investor is prevented from the use of the facility.[38]

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[33] As were the events that led to the investment dispute between Pac Rim and El Salvador, when the methods and processes of extraction or production are unsustainable – and therefore harmful to the environment – to the extent that it negatively affects the health and safety of the host community, Denis Collins, 'The Failure of a Socially Responsive Mining MNC in El Salvador: Ramifications of NGO Mistrust' (2009) 88 Journal of Business Ethics 245, 255-62; or when the rights acquired over local resources preclude the rights of the local people, which contributed to the dispute between Aguas del Tunari and Bolivia. See generally Orellana (n 8).
[34] Perrone, 'International Investment Regime and Local Population' (n 9) 388.
[35] Cotula (n 9) 25.
[36] Tecmed v Mexico, Award, para 108; Cotula (n 9) 7, 11.
[37] See Metalclad v Mexico, Award, para 46; Tecmed v Mexico, Award, paras 42, 108.
[38] Metalclad v Mexico, Award, para 46; Tecmed v Mexico, Award, paras 42, 108.

These social movements not only aim to affect the activities of the foreign investors, which is believed to cause them harm, but also to get the attention of the State. Since the governance of the society – including the introduction and implementation of policies – is within the purview of the State,[39] the local populations are left with limited options to give effect to their interests, especially where an investment project affects or threatens to impact negatively on community values. Therefore, when the local population engage in social movements, they often anticipate a reaction from the State.[40]

2.2.Host Country: State (Policy) Measures

The State undertakes a dual role with regards to foreign investment relations. On one hand, the State is responsible for attracting foreign investment that would engender development in its economy, which is intended to cater for the interests of the local population. Therefore, part of the responsibility of the State is to advance the interests of the public. For instance, in the case involving Aguas de Tunari, the intention of the State – Bolivia – was to provide water and sewage services for its citizens.[41] At a minimum, advancing the interests of the local population should be considered from the perspective that the rights acquired by foreign investors must be used (or controlled) in a manner that does not adversely affect them, or impinge on their wellbeing.

On the other hand, the State is expected to protect foreign investors, by ensuring that the rights acquired to use and control of resources within the host

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[39] Stephen Bell and Andrew Hindmoor, *Rethinking Governance: The Centrality of the State in Modern Society* (Cambridge University Press 2009) 2.
[40] Tecmed v Mexico, Award, para 109 (the tribunal highlight that 'the Municipality of Hermosillo was direct a target of "community pressure"').
[41] *Aguas del Tunari, S.A. v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 52 (Aguas del Tunari v Bolivia, Jurisdiction)

territory are not hindered arbitrarily. It is therefore expected that the State would uphold the rule of law when exercising its powers, especially as it may concern the foreign investor.[42] In such situation and having regards to its central role in the governance of the society, the State is caught between addressing the demands of the local population on one hand and its obligations towards the foreign investors on the other. The action of the State in this situation becomes crucial, and from an investment law perspective determines the legitimacy of such action.

It is important to highlight that the State does not always respond favourably to demands of the local population.[43] As earlier stated, there can be diverse interests even within the local population, for instance, those living close to an investment project, who may be more concerned about its environmental impact, and those far away, who may be more interested in the investment potential economic benefits, such as job creation.[44] Therefore, weighing the options, the State may decide to ignore the demands of the group wishing to have an investment project terminated. For instance, the State may be slow to act (or respond to the local opposition) in a bid to stave off further disputes with the foreign investor.[45] In such situation, the refusal of the State to terminate a concession on the demands of the local population could suggest the State's support for the investment project. On the other hand, the State may adopt a policy measure to address the resistance movement, which could affect the investment project (thereby infringing on the investor's rights), and

[42] Cotula (n 9) 10; See Stephan W Shill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52 Virginia Journal of International Law 57, 59 (arguing that the public function of international investment law is to endorse the rule of law standard in the treatment of foreign investors by the State).
[43] Daniels (n 9) 237.
[44] Cotula (n 9) 2.
[45] Mitra Taj, 'Peru hopes to revive Bear Creek Mine, avoid Legal Battle' (Reuters, 15 August 2014) < https://www.reuters.com/article/peru-bear-creek-minng-santaana-idUSL2N0QL00Z20140815> accessed 5 May 2020.

ultimately lead to an investment dispute. In other words, it is when the action of the host State goes against the interest of the foreign investor that an investment dispute may arise.[46]

2.3.Foreign Investors: Investment Claim

The extent to which the activities of transnational corporations – and in the context of the present chapter, foreign investors – have improved or hindered development in the economy of the Third World and the world at large has been subject of study and intense debate, spanning across various thematic literature.[47] However, the focus of the present chapter is to focus on how foreign investors became rooted in the Third World in recent times. It is argued that transnational corporations play an important role in structuring international economic relations, on the ground that their activities propel foreign direct investment (FDI) across the world.[48] Foreign direct investment on the other hand is considered the principal source of capital flows in the global economy, which makes transnational corporations important for host States.[49]

In the context of Third World States, according to development economics literature, transnational corporations are the vehicle of interaction between the Third World and international capital markets.[50] In this sense, transnational corporations possess required capital, technology, managerial skills and other

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[46] Daniels (n 9) 2.
[47] See Luiz R de Mello Jr., 'Foreign Direct Investment in Developing Countries and Growth: A Selective Survey' (1997) 34 Journal of Development Studies 1; Holger Görg and David Greenaway, 'Much Ado About Nothing? Do Domestic Firms Really Benefit from Foreign Direct Investment?' (2004) 19 World Bank Research Observer 171.
[48] United Nations, 'World Investment Report 1992: Transnational Corporations as Engines of Growth' (United Nations 1992) 54 <https://unctad.org/system/files/official-document/wir1992_en.pdf> accessed 15 June 2021.
[49] Ibid 59.
[50] G K Helleiner, 'Transnational Corporations and Direct Foreign Investment' in Hollis Chenery and T N Srinavasan (eds), *Handbook of Development Economics Vol 2* (Elsevier Science Publishers BV 1989) 1442.

resources that may not be readily available but are needed for economic development purposes in Third World States.[51] This, therefore, makes foreign investors valuable drivers of economic growth and development in the host State, especially in the Third World.[52] The status of foreign investors as potential economic drivers position them more favourably to derive enhanced protection, at least based on the link between strong rights protection and economic prosperity.[53]

As noted in Chapter 2, neoliberal ideology magnified the role of transnational private actors in the global economy, and as such established the importance of their activities – mostly through FDI – for economic development in the Third World. Therefore, based on the assumption that FDI could engender growth and development, host States, especially from the Third World, provided an array of rights protection to foreign investors with the sole aim of attracting FDI into their economies, despite it being debatable whether investment commitments encourage FDI.[54]

From the above analysis, the basis for investor rights protection is to engender growth and development – the role foreign investors are regarded to fulfil – however, this protection also enables the foreign investors realise their core purpose, which is to maximise profit.[55] This, therefore, may suggest that the rights guaranteed by the host State under investment law largely serve to further the goal

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[51] Shah M Tarzi, 'Third World Governments and Multinational Corporations: Dynamics of Host's Bargaining Power' (1991) 10 International Relations 237.
[52] See UNCTAD, 'World Investment Report 1992' (n 48).
[53] See Gerald P O'Driscoll and Lee Hoskins, 'Property Rights: The Key to Economic Development' (Policy Analysis No 482 2003) 1 <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa482.pdf> accessed 15 June 2021 (arguing that the protection of private property is the basis of economic development).
[54] See Mary Hallward-Driemeier, 'Do Investment Treaties Attract Foreign Direct Investment? Only a Bit... and They could Bite' Policy Research Paper 3121 (World Bank 2003); Yoram Z Haftel, 'Ratification Counts: US Investment Treaties and FDI Flows in Developing Countries' (2010) 17 Review of International Political Economy 348.
[55] Perrone, 'International Investment Regime and Foreign Investor's Rights' (n 5) 404; Helleiner (n 50) 1443.

of profit maximization for the foreign investor. Overall, regardless of the rationale behind or goal for foreign investor rights, they are conferred by the host State. These rights may often be acquired by foreign investors under a two-level structure: by virtue of the investment treaty concluded between the host State and the foreign investor's home State; and, through specific entitlements acquired – a result of direct negotiation – from the host State when establishing an investment project.[56]

Another issue to determine is the nature of the rights acquired by foreign investors. This is important as it helps to provide a nuanced understanding of how these rights operate with regards to competing interests of the local population. It is argued that it is largely the property rights of foreign investors that are protected by virtue of investment treaties under international investment law.[57] This is because the rights to assets (investments) of foreign investors are characterised with property connotations, which includes immovable, moveable and intangible property.[58] It is the property character of foreign investor rights which is essential to exert control over resources that makes it possible for the foreign investor to assert their right against interference.[59] In other words, international investment regime serves to strengthen the property rights of foreign investors in the local resources within their host State.[60] It is this sense of entitlement over local resources

[56] Ibid 393-94. There is a third level to be discussed in further detail in Chapter 5, which is through domestic investment law. Nevertheless, it still confirms the point that foreign investor rights are largely bestowed by the State.
[57] Amnon Lehavi and Amir N Licht, 'BITs and Pieces of Property' (2011) 36 Yale Journal of International Law 115, 130; Perrone, 'International Investment Regime and Foreign Investor's Rights' (n 4) 398-99 (arguing that international investment law operates a constitutional property system, and foreign investor rights are similar to private property rights).
[58] Lehavi (n 57).
[59] Ibid 115, 130; Perrone, 'International Investment Regime and Foreign Investor's Rights' (n 5) 397.
[60] Perrone, 'International Investment Regime and Local Populations' (n 9) 393.

(in the form of its exclusive use and enjoyment) that foreign investors that leads to competition with the local population.[61]

Although it is the State that facilitates the operation of foreign investors within its territorial jurisdiction, including providing investment protection rights, those with the closest proximity to the activities of foreign investors are the local population. Considering this nexus between the foreign investors and the local population, both parties often share areas of common and competing interests – which in most cases lead to conflict between them. As argued earlier, one of the major issues in foreign investment relations is that the bundle of rights acquired by the foreign investor is largely unknown to the local population, although they are subjected to share space and resources. As a result, the local population may view the rights of the foreign investor as encroaching into their traditional rights and depreciating community values.

Considering this, the main threat to the rights of foreign investors may lie in their shared interests with the local population.[62] While the host communities may be concerned about the threat to their community values, such as the pollution of their environment or the unsustainable use of local resources, foreign investors are predominantly concerned about their economic interests – that is, damage to property and loss in value of investment projects. When a conflict arises between

[61] Ibid 387 (noting that international investment regime 'also constitutes a site where foreign investors and local populations struggle over local resources … [as a result] what is at stake also includes … local property rights…'). Also, it is argued that the local people (especially indigenous people) possess proprietary rights over their lands, giving them the right to live, own and use their traditional territories. See Jeremie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (Brill-Nijhoff 2016); Cathal M Doyle, *Indigenous Peoples, Title to territory, Rights and Resources: The Transformative Role of Free Prior Informed Consent* (Routledge 2015). However, considering that the rules of international investment law serves to protect the acquired rights of foreign investors, it is doubtful whether the rights of the local population, made more precarious by the fact that they may be more dependent on communal resources largely due to traditional livelihoods, can compete with such fortified rights of the foreign investor.

[62] Perrone, 'International Investment Regime and Local Populations' (n 9) 386.

the local population and the foreign investor, and the State takes the side of the local population – which would occur from the foreign investor's perceptive when the State succumbs to grassroot pressures – it may be seen as a breach of the guarantee for the foreign investor.

Therefore, it is when the State, through its officials, take actions – for instance, denying an environmental permit or introducing an environmental regulation in response to domestic pressure – that the foreign investor institutes an investment claim.[63] In some cases, as will be discussed in the later part of the chapter, the investment claim, for the foreign investor, is a means to challenge not just the host State measure but to target the domestic competition they have with the local population. The next section will contend how investor-State arbitration is used to counteract resistance, either as it is seen from the host State or the local population.

3. Resisting Third World Resistance

For a nuanced understanding of investment arbitration as a response to Third World resistance, it is important to address the essence of international investment law, which is to protect foreign investment. In the same vein, it is also important to understand that the protection of foreign investment is primarily achieved by providing a mechanism for the settlement of investment disputes. This will provide a better appreciation of the why investor-State arbitration became the main mechanism for resolving investment disputes and how this mechanism has been deployed by foreign investors to challenge host State measures that are deemed to threaten their property rights and interests.

[63] See Daniels (n 9) 214.

The settlement of investment disputes, from its inception during the colonial period to the present time, has been aimed at protecting foreign capital and the special economic interests of States, especially those who were capable of expanding trade abroad.[64] During the colonial period – as a result of colonial paradigm, which gave the colonial administration political, legal and economic dominance over their colonial territories – there was little or no need for an international dispute settlement mechanism to protect foreign investors operating in these territories.[65] This facet of foreign investment protection under the colonial legal system would have been achieved by replacing the property notions of the colonies with that of the imperial administration, which favoured individual notions of property rights and benefitted foreign investors, considering that the laws applicable in the colonies were derived from the parliaments and courts of the imperial states.[66] This process of institutional change ensured that it was imperial legal norms that operated in the colonies, thereby reducing at least for foreign enterprises the risk of disruption within the colonies.

As highlighted in Chapter 2, while detailing the history of the protection of foreign investors in international law, it was noted that various phases of this area of law have evolved mostly around economic interactions between former world powers and those formerly subject to them. Without restating the argument canvassed in detail, it is important to highlight, for the purpose of implicating the use of investor-State arbitration, one of the defining eras in foreign investment

[64] Odumosu, 'The Law and Politics of Engaging Resistance' (n 5) 252; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge 2010) 19-20. For more on this, see the discussions in Chapter 2.
[65] Odumosu, 'The Law and Politics of Engaging Resistance' (n 5) 253.
[66] Sornarajah (n 64) 19-20; See Antony G Hopkins, 'Property Rights and Empire Building: Britain's Annexation of Lagos, 1861' (1980) 40 Journal of Economic History 777 (arguing that the introduction of property rights was the consequence of annexation (colonialization) of a colony).

relations. In this regard, the decolonisation and early postcolonial period remain an important facet in the evolution of foreign investment protection.

The drive and attainment of independence culminated in the ideology of economic independence – which meant, as part of political independence, taking control of the economy.[67] Newly independent States manifested this ideology by introducing economic measures that would reduce foreign domination in various parts of their economy, either by taking control of foreign assets or requiring devolution of part of foreign control.[68] The colonial relationship had allowed important sectors of the colonies, including the natural resources sector, to be controlled by foreign firms from the colonial home State.[69] Although the economic measures were mainly aimed to address the local deficit in the economy – by enhancing local participation – it suggests in some respect a push against foreign domination.[70]

The devolution of sovereignty to former colonies during the decolonisation period meant that foreign investment protection available under the colonial system was dissolved. Therefore, there was the need to counteract the impact of the economic measures emanating from the Third World on foreign investors. The actions of the then newly independent states were viewed as an obstinate problem to the advancement of foreign investments, giving rise to the need for a scheme to remove the 'uncertainties and obstacles' faced by foreign investors.[71] Therefore,

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[67] David R Mummery, *The Protection of International Private Investment: Nigerian and the World Community* (Frederick A Praeger 1968) 18-38.
[68] Fiona C Beveridge, 'Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria' (1991) 40 International and Comparative Law Quarterly 302; George P Macdonald, 'Recent Legislation in Nigeria and Ghana Affecting Foreign Private Direct Investment' (1972) 6 International Lawyer 548.
[69] Benard Blackenheimer, 'The Foreign Investment Climate in Nigeria' (1977) 10 Vanderbilt Journal of Transnational Law 589, 590; Mummery (n 66) 18-21.
[70] Mummery (n 67) 18-38; Blackenheimer (n 69) 596-97; Macdonald (n 68) 553.
[71] ICSID, *History of the ICSID Convention Volume 1* (1970) 2.

the development of an international mechanism for settling investment disputes became a means to repel unfavourable economic measures taken by newly independent states.[72]

It is argued that, 'by placing investment disputes within the international domain, through investor-State arbitration, former colonial powers could ensure that their economic interests remained within structures that were accessible to (and dominated by) them at that time.'[73] In this sense, investor-State arbitration was to serve as an avenue to protect investors of former economic powers against what appeared to be 'hostile' actions (political and economic measures) from the Third World, thereby confirming the position that 'the expansion and renewal of international institutions cannot be understood in isolation of Third World resistance.'[74] Following from this, one may argue that presently the same mechanism will be available to protect foreign investors against measures from Third World States even though this time adopted in response to domestic demands.

3.1.Social Movements and Investment Disputes

As highlighted in the earlier parts of this chapter, some of the issues in contemporary investment disputes arise from, and are influenced by, grassroot movements of the local people. It requires a detailed background analysis of each case to tease out the social movements that are underlie them. The essence of the analysis is two-pronged: first, to show that host State actions – that is, policy measures generally – are often the subject of investor-State disputes, and as a result susceptible to scrutiny by investment tribunals; second, and more importantly, to highlight that in some cases host States measures are inspired by or, at the least, in

[72] Odumosu, 'The Law and Politics of Engaging Resistance' (n 5) 254.
[73] Odumosu, 'The Law and Politics of Engaging Resistance' (n 5) 254.
[74] Balakrishnan Rajagopal, 'From Resistance to Renewal: The Third World, Social Movements and the Expansion of International Institutions' (2000) 41 Harvard International Law Journal 529, 532.

consonance with local people's resistance movements. Consequently, it demonstrates how investor-State arbitration, the mechanism for protecting foreign investments and by extension transnational capitalist interests, responds to Third World engagement.

As earlier noted, it is not in every case that State actions support or respond to popular demands. The cases that will be analysed below will illustrate the fact that investment disputes can be inspired by social movements – mass mobilizations by the local people sometimes in conjunction with other non-state actors (such as NGOs) expressing their concerns against the activities of foreign investors. In other words, the cases highlight Third World people's involvement in how international investment jurisprudence are produced. Various factors underscore the choice of the cases, therefore cases bearing similar content may be excluded. While it may be difficult to define with precision the boundaries delineating the set of cases identified, nevertheless, an attempt will be made here to state the criteria.

First, the cases analysed involve the Third World States. Second, they involve social movements – representing collective mobilizations against foreign investors and their activities. Third, though the cases involve different sectors of the economy, there is a common theme: they all in some way implicate the environment, or some other community values (tangential to the environment). In the sense that the impact on the environment was one of the core concerns articulated in the social movements, warranting an environmental measure or at least some measure based on public policy by the host State; and of course, the foreign investor, following the State measure, instituted an investment claim.

Overall, the aim, which will be further elaborated in the subsequent section, is to situate and rethink the place of Third World in international law,[75] by highlighting the involvement of the Third World in international investment law and the response given to such involvement. There are two subsets of cases below: where investment tribunals found in favour of foreign investors, highlighting the successful use of investor-State arbitration, and where the decision was in favour of the host State. Nevertheless, all the cases indicate the use of investor-State arbitration to respond to resistance actions emanating from the host State.

3.2.Disputes Involving Environmental Measures

3.2.1. Metalclad v Mexico[76]

The Metalclad case is often regarded as one of the most controversial investor-disputes.[77] It was not only the first time a foreign investor successfully instituted a claim against a host State under the Investment Chapter of the North American Free Trade Agreement (NAFTA),[78] but also one of the foremost cases where a host State was found in breach of 'the fair and equitable treatment' treaty provision.[79] The case is important in the present study not only because it involves environmental measure taken by the government, but because the background to the dispute involved, to a great extent, local resistance.

In 1993, Metalclad Corporation US through one of its subsidiaries, Ecosistemas Nacionales, S.A. de C.V. purchased a Mexican company

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[75] Rajagopal, 'From Resistance to Renewal' (n 74) 535. It is important to emphasise that some TWAIL scholars have achieved the project of situating the Third World people in international investment law, and on whose work this chapter heavily relies on. See Odumosu, 'Locating Third World Resistance' (n 10); The Law and Politics of Engaging Third World Resistance' (n 5).

[76] ICSID Case No ARB (AF)/97/1, Award, 30 August, 2000. (Metalclad v Mexico, Award)

[77] Chris Tollefson, 'Metalclad v United Mexican States Revisited: Judicial Oversight of NAFTA's Chapter Eleven Claim Process' (2002) Minnesota Journal of International Law 183, 183-84; Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge 2009) 166.

[78] Tollefson (n 77) 184

[79] Ibid 183 citing Dr Jack J. Coe, Jr, co-counsel for Metalclad Corporation.

Confinanmiento Tecnico de Residuos Industriales, S.A. de C.V. (COTERIN), which operated a hazardous waste transfer station in La Padera, a valley located in the municipality of Guadalcazar, a highly impoverished county, in the State of San Luis Potosi.[80] The local community where the site was located is made up of small scale farmers, with majority of the community lacking access to basic social amenities and infrastructure.[81]

At the time of the purchase, Coterin had applied for a construction permit for a landfill from the Municipal.[82] It is important to note that the Municipal had earlier in 1991 and 1992 denied Coterin a similar application to expand its operations.[83] Coterin's earlier expansion application was denied following accusations and complaints, and serious local opposition regarding the company's illegal toxic waste dumping activities on the site.[84] In 1991 while the waste dump site was under the operation of Coterin, due to negligent storage management of the company, a storm swept the contents of several 200 litre drums and plastic bags filled with industrial waste into the water bodies that served nearby communities.[85] It has been be shown that due to the lack of proper physical barrier between the toxic site and the local communities, water from the contaminated soils of the site was washed by the rain into the local communities, polluting the community's source of water.[86]

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[80] Metalclad v Mexico, Award (n 76) para 2, 28, 30; See *Metalclad Corporation v United Mexican States*, ICSID Case No. ARB (AF)/97/1, Memorial, 13 October 1997 46-8 (Metalclad v Mexico, Claimant's Memorial) available <https://www.italaw.com/sites/default/files/case-documents/italaw7807.pdf> accessed 1 June 2020.
[81] Tollefson (n 77) 187-8.
[82] Metalclad v Mexico, Claimant's Memorial (n 80) 6.
[83] Tollefson (n 77) 188 citing the Petitioner's Outline of Argument para 331.
[84] Ibid 188.
[85] F J Rangel, 'Toxic Waste Dumping, Water Contamination and People's Disablement in Semi-arid Rural Mexico: Local Pond Issues for the Fair Sitting of a Landfill' (2011) 153 WIT Transaction on the Ecology and the Environment 185, 186.
[86] Ibid 188.

The pollution was said to have adversely affected the local population eliminating access to water which was used for drinking, for livestock, swimming, etc.[87]

This incident therefore created discontent and outrage amongst some members of the local population, with the matter subsequently reported to the authorities at the local and federal levels.[88] There were divided opinions and interests with regards to site (as some members supported the operation of waste dump because of the potential economic benefits),[89] however, this did not stop opposition to the site. In late 1991, opposition grew to the point that the local population blocked the entrance to the facility preventing access for trucks to deposit industrial waste into the facility.[90] For this reason, the site was closed in 1991 for a period as Coterin's actions (and negligence) were viewed as contravening its operation permit.[91] Going by the above, though the local community were known to have a political history of active resistance generally,[92] one may suggest that the pollution incident further established local opposition to the operation of the waste dump facility.

Irrespective of this, there appeared to be some progress made with regards to the permit application at the federal level. Based on the progress with the federal permit application, which led Metalclad to acquire Coterin, the company went ahead to begin construction of the hazardous waste facility, without further regards to the municipal permit, though aware of the possibility that its request might be

[87] Ibid 192.
[88] Ibid 189.
[89] Rangel (n 87) 189.
[90] Arturo Borja Tamayo, 'The New Federalism in Mexico and Foreign Economic Policy: An Alternative Two-Level Games Analysis of the Metalclad Case' (2001) 43 Latin American Politics and Society 67, 74.
[91] Metalclad v Mexico, Claimant's Memorial (n 80) 33.
[92] Tamayo (n 90) 75

opposed.[93] However, after the facility had been completed, local demonstrators blocked both the entrance and exit to the facility at the opening ceremony of the facility, successfully preventing its inauguration.[94]

This act of local resistance against Metalclad on the opening of its facility was directly connected with the environmental issues of operating the hazardous facility in the area, and more importantly, regarding the fact that an earlier application had been denied by the municipal based on environmental grounds. It is in response to these acts of local resistance that the government of San Luis Potosi took an environmental measure covering the area the facility was located. An Ecological Decree was issued to protect a rare cactus found within the location of the site, with the intent and consequence of barring future operations on the waste dump site.[95]

It was following the State measure that Metalclad instituted an investment claim against Mexico citing violation of various provisions of NAFTA. The tribunal ruled in favour of Metalclad, finding that actions attributable to the host State violated investment protection provisions including the provision against expropriation,[96] and as a result awarded over $16 million against Mexico.[97] This case highlights how the involvement of Third World people in investor relations, through resistance movements, leads to investor-State disputes. More importantly, the award shows how investor-State arbitration responds to environmental concerns raised by Third World resistance.

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[93] Metalclad v Mecixo, Award (n 76) paras 30-39; See Tamayo (n 90) 76-77 (stating that 'Metalclad opted to seek stronger support from the federal government, hoping that a de facto situation would eventually have to be accepted by the local authorities').
[94] Ibid para 46.
[95] Metalclad v Mexico, Claimant's Memorial (n 80) 33-34.
[96] Ibid para 111.
[97] Metalclad v Mexico, Award (n 76) para 131.

3.2.2. Tecmed v Mexico[98]

The Tecmed case is similar in some respects to the Metalclad case: both cases were instituted against Mexico; both have elements of local resistance; and, more importantly, they both arose out of the operation of hazardous landfill. The only difference here is that unlike the Metalclad case, which was based on NAFTA,[99] the Tecmed case was based on Spain-Mexico BIT 1995. Therefore, the present case highlights another investment dispute against Mexico involving environmental issues/concerns that were canvassed through social movements.

Tecmed was a Spanish company based in Madrid, Spain.[100] In 1996, after a successful bid in a public auction, Tecmed was awarded a waste landfill located in the Municipality of Hermosillo, in the State of Sonara, Mexico.[101] Pursuant to this, Tecmed formed a company, Cytrar, with the purpose of running the operations of the landfill.[102] The landfill was built in 1988 on a property purchase by the government of the State of Sorona.[103] In 1994, an operational licence on the site was granted to Confinanmieto Controlado Parque Industrial de Hermosillo O.P.D. for an indefinite period by INE, an agency under the Mexican Federal Ministry of Environment, Natural Resources and Fisheries (SEMARNAP).

Tecmed's operations of the landfill was met with stiff opposition by residents of the locality. It is argued that residents of Hermosillo discovered the operation of the hazardous waste landfill by chance.[104] Community concern about the waste

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[98] ICSID Case No ARB (AF)/00/2, Award, 29 May 2003 (Tecmed v Mexico, Award)
[99] The North American Free Trade Agreement is an agreement signed by the United States of America, Canada and Mexico, which came into effect January 1, 1994.
[100] Tecmed v Mexico, Award (n 98) para 1.
[101] Ibid para 35.
[102] Ibid.
[103] Ibid para 36.
[104] Ama Ochoa O'Leary, *Of Information Highways and Toxic Byways: Women and Environmental Protest in Northern Mexican City* (University of Arizona, Mexican American Studies and Research 2002) 1.

dump site rose after a truck driver, who had come in contact with soil contaminated with toxic substance, developed a burn on the leg.[105] This incident caused a community led investigation of the dumpsite, where an exposed toxic dump was discovered. The investigation also led to another discovery that the dumpsite has been operated by a foreign firm, Cytrar.[106]

Following these discoveries, community opposition comprising local people and domestic environmental organisations began to raise concerns about the operations of the dump. Anti-dumping campaigns began to highlight the environmental dangers of site to the local community.[107] The social movements sought the withdrawal or non-renewal of the operation licence granted to Tecmed, and a total closure of the landfill.[108] There were several acts of resistance against the landfill leading to confrontations between the residents and Tecmed: the institution of a criminal complaint; a demonstration of about 200 people marching to the landfill with the aim to close it down; a sit-in organised at the Town Hall, amongst others.[109]

Focusing more on the social movement, the residents resisted the landfill on various grounds. One of the major concerns was that the landfill was located 8 km from the urban centre of Hermosillo, which breached the regulation requirement of a distance of at least 25 km of any settlement of more 10,000 residents.[110] This legal requirement together with local pressure influenced the decision not to renew the operation permit.[111] Aside the proximity of the landfill site, there were other

[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Tecmed v Mexico, Award (n 81) paras 42, 108.
[109] Ibid; O'Leary (n 104) 1.
[110] Ibid para 106.
[111] Ibid.

environmental infringements by Cytrar. For instance, part of the community opposition was the transportation to the landfill of hazardous waste and contaminated soil from the Alco Pacifico plant in Baja California, which on several occasions truck inspections revealed open material packaging bags.[112] These environmental breaches eventually led to fines imposed on the company on the grounds of environmental or health risks.[113]

In 1998, after several attempts at negotiations between Cytrar and the various Mexican authorities, including an agreement to relocate the landfill site, the Mexican government yielded to the pressure of social movements against the landfill. Through its environmental agency, INE, it took an environmental measure denying Cytrar, Tecmed's subsidiary, the licence to operate the landfill, and requested the closure of the landfill.[114] This led to an investment dispute between Tecmed and Mexico. At the conclusion of the investor-State arbitration, the investment tribunal awarded Tecmed the sum of $5.5 million plus interest.[115] By upholding Tecmed's case over the environmental measure, this case therefore highlights examples of how international investment law disregards the concerns of the local people (in the case, the Third World people) advocated through social movements.

3.2.3. Bear Creek v Peru[116]

The present case, like the cases discussed in previous sections, highlight the interface between investment projects and the local population, and the environmental concerns which ultimately lead to social movements. As in most

[112] Ibid para 107.
[113] Ibid.
[114] Ibid paras 43, 110.
[115] Ibid para 197.
[116] *Bear Creek Mining Corporation v Republic of Peru* ICSID Case No ARB/14/21 Award, 30 November 2017 (Bear Creek v Peru, Award).

Latin American States mining is a crucial pillar of Peru's economy, providing an important source of government tax revenue and accounting for almost 60% of Peruvian exports.[117] As this case will show, although an important source of revenue, mining activities remain controversial given their impact on local population, and as a result, often meet local resistance.

The background to the dispute is that Bear Creek Mining Corporation, a Canadian based mining and exploration firm sought to acquire mining rights in Peru. In 2007, Bear Creek acquired mining rights to Santa Ana Silver deposit. The acquisition was sanctioned by State law, Supreme Decree 083. The constitutional framework for mining rights or rights in natural resources was stringent, barring foreign ownership of mineral rights with regards to mineral resources close to the border, except in public interest.[118] To circumvent this legal impediment, Bear Creek, through its employee a Peruvian national, acquired mining rights, which were to be used to acquire exploration concessions.[119] It is maintained that the local population were not duly consulted about the mining project leading to the state order giving transferring mining rights to Bear Creek.[120]

After the acquisition and before commencement of the operation tensions arose from within the local community against the mining project. Since 2003 some members of the local community have been calling for the restoration of Ramis river within the area, which was unable to support aquatic life due adverse impact

[117] Alan F Reinoso and Esthefany Herrera, 'Canadian Mining Companies in Peru: Barrick and Bear Creek' (2016) 7 Latin American Policy 333.
[118] Bear Creek v Peru, Award (n 116) para 123-24.
[119] Ibid para 126-32.
[120] Emma McDonell, 'The Co-constitution of Neoliberalism, Extractive Industries, and Indigeneity: Anti-mining Protests in Puno, Peru' (2015) 2 Extractive Industries and Society 112.

from gold mining activities.[121] In 2011, 25,000 protesters comprising largely local people demonstrated mainly against Bear Creek's mining project – the company had planned to erect a 5,400-hectare open-pit silver mine – which eventually deteriorated into violent confrontations.[122] Due to the effect of mining activities, protesters were noted to carry banners reading, 'Water Yes, Mine No', 'Agriculture Yes, Mine No'.[123] The anti-mining campaign had two broad objective: a call for the repeal of the mining rights acquired by Bear Creek; and for the cancellation of other mining and extractive activities in the region.[124]

Although the State did not respond immediately to the calls of the social movement, rather opting to review the actions with respect to mining concessions, the consistency of the local opposition finally led to formal State measures, which included revoking mining concessions granted to Bear Creek and the decree of a 3 year moratorium on mining permits.[125] The State measure revoking the mining concessions led the foreign investor to challenge sure measure before Peruvian courts,[126] and subsequently before investor-State arbitration.[127] At the conclusion of the case the investment tribunal awarded Bear Creek the sum of $18 million plus 75% of their legal costs.[128] Although the partial dissenting opinion recognised the recognised the rights of the indigenous people,[129] the award of the majority in this

[121] Ibid 113; Venessa Baird, 'Peruvians Rise Up Against Mines' New Internationalist 1 October 2011 <https://newint.org/features/2011/10/01/peruvians-mines-protests-puno-mining-company> accessed 30 May 2020.
[122] Bear Creek v Peru, Award (n 116) paras 190; McDonell (n 120) 113.
[123] McDonell (n 120) 112; Baird (n 121).
[124] Ibid 113.
[125] Bear Creek v Peru, Award (n 116) paras 201-03; See McDonell (n 120) 114.
[126] The issue of contention concerned the constitutionality of the State action. However, the action was not decided in its finality (that is, the Peruvian appellate courts did not get decided on the merits of the case) before Bear Creek opted to pursue their claim investor-State arbitration.
[127] Bear Creek v Peru, Award, paras 207-15, 398.
[128] Bear Creek v Peru, Award, paras 666, 668, 731.
[129] *Bear Creek Mining Corporation v Republic of*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion, 12 September 2017.

case, represents investor-State arbitration as a neoliberal tool used to prioritise private/commercial interest over public interest (environmental concerns) of the vulnerable.

3.2.4. Copper Mesa Mining Corporation v Ecuador[130]

The investment dispute involving Ecuador, like the cases reviewed in this section, highlight the intersection between investment, environment and local resistance. As the facts of the case will illustrate, social movement of the local population contributed to the cause of action of the investment dispute, but more importantly, investor-State arbitration was used as a mechanism by the foreign investor to react to local resistance and, as such, to the concerns conveyed through it.

After an intensive exploration exercise conducted by Bishimetals, a subsidiary of the Japanese conglomerate Mistubishi Corporation, between 1991 to 1997 in the Junín area of north-eastern Ecuador, large deposits of copper were confirmed in the area.[131] However, after the discovery, environmental impact assessment reports noted potential social and environmental impacts of proposed mining activities. Forests, farms and water resources throughout the area would be severely impacted, considering that the copper mine laid beneath farming communities and primary forests, and was in fact located within what was regarded as a biological hotspot.[132] Following this, concerns about the environment began to rise amongst the members of the local community.[133] This led to the burning of

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[130] *Copper Mesa Mining Corporation v Republic of Ecuador* PCA Case No. 2012-2, Award, 15 March 2015 (Copper Mesa v Ecuador, Award).
[131] Carlos Zorrilla, 'A Brief History of Resistance to Mining in Intag, Ecuador' (2015) available on <https://www.academia.edu/37918635/A_BRIEF_HISTORY_OF_RESISTANCE_TO_MINING_IN_INTAG_ECUADOR_2015> accessed 31 May 2020.
[132] Ibid 2-3.
[133] Jennifer Moore, 'Canadian Mining Firm Financed Violence in Ecuador: Lawsuit TMX Group Denies Claim Win Could affect Thousands of Other Projects by Canadian Companies' The Tyee 3 March 2009 <https://thetyee.ca/News/2009/03/03/CanMining/> accessed 31 May 2020.

Bishimetals' mining camp in 1997, representing one of the first resistance acts against mining within the area, which eventually led to the exit of the company from the project.[134] Even after the exit of Bishimetals anti-mining campaign continued to intensify, coinciding with the formation of anti-mining environmental organisations.

In 2005 Copper Mesa (then Ascendant Copper), a Canadian mining company, through its Barbadian and Ecuadorian subsidiaries, acquired rights to mining concession in Junín amid tensions and conflicts that were ongoing regarding the mine. The arrival of Copper Mesa led to confrontations and resistance, sometimes turning violent.[135] In the wake of these encounters, the company instituted several lawsuits against anti-mining activists.[136] The company was in turn accused of instigating and promoting discord and violence,[137] which could suggest the lack of community support – social license – to operate as may have been required from the local communities.

The continuous opposition led the local authorities to respond by announcing their opposition to Copper Mesa's mining project.[138] In 2008, the Constituent Assembly issued Mandate No 6 (Mining Mandate) which affected most of Ecuador's mining concessions.[139] Copper Mesa's mining concession was annulled particularly for failing to obtain requisite approval from the local community.[140] Following the State's measure terminating mining concessions, Copper Mesa in 2010 instituted an investment claim against Ecuador based on the violation of

[134] Zorrilla (n 131) 3.
[135] Ibid 5-7, 9.
[136] Ibid 5.
[137] Ibid 6, 9; Moore (n 133).
[138] Ibid 8.
[139] Copper Mesa v Ecuador, Award (n 130) para 1.110.
[140] Ibid, para 1.111.

various provisions of Canada-Ecuador BIT. Agreeing with Copper Mesa's claims, the investment tribunal made an award of approximately $20 million against Ecuador.[141] Investor-State arbitration was once again shown to be an effective mechanism to repress the environmental concerns of the local population.

3.3.Disputes Involving Environmental Measures (Decided In favour of Host State)

3.3.1. Pac Rim v El Salvador[142]

This is an environmental-based investment claim brought against the El Salvador involving social movement from the local population. This case like the previous cases reviewed concern the environment – that is, measure taken by the host State to respond to the demands of the local population to protect the environment from the activities of foreign investors. However, unlike the previous cases, it was resolved in favour or the host State. Nevertheless, this case is important in the present analysis as it highlights how the environment and local resistance is central to investor-State disputes.

El Salvador is a geographically small State. However, it is considered as 'one of the most densely populated, poorest, most violent, and environmentally degraded states in the Latin American region.'[143] Over the years the environmental situation within El Salvador had deteriorated with over 20% of surface water lost and 95% of remaining surface water contaminated with industrial chemicals.[144] Cabanas, the setting of the investment dispute, had experienced a drop in water levels.[145] Nevertheless, El Salvador is geographically located in an area rich in mineral

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[141] ibid, para 11.5.
[142] *Pac Rim Cayman LLC v The Republic of El Salvador,* ICSID No ARB/09/12 Award 14 October 2016 (Pac Rim v El Salvador, Award)
[143] Richard Steiner, 'El Salvador – Gold, Guns, and Choice: The El Dorado Gold Mine, Violence in Cabanas, CAFTA, and the National Effort to Ban Mining (International Union for the Conservation of Nature-Commission on Environmental, Economic and Social Policy 2010) 4-5; Broad, 'Corporate Bias' (n 15) 858.
[144] Steiner (n 143) 5
[145] Ibid.

resources, including gold,[146] which resulted to the issuing of several licences for mining exploration projects, particularly around its largest river, Rio Lempa.[147]

Pacific Rim (Pac Rim), a mining conglomerate based in Canada, through its US subsidiary, Pac Rim LLC, which owned Pac Rim El Salvador (PRES) and Dorado Exploraciones (DOREX), held mining prospects in El Dorado.[148] Local opposition to mining commenced when the local people began to notice the environmental impacts of mining activities, including reduced access to water, polluted waters, health issues and adverse impact on agriculture – the major source of livelihood for most of the local people.[149] The suspicion of the local people was confirmed when some members of the local community visited neighbouring mines to examine the impact of the environment.[150]

As a result, community opposition to the mine intensified around the time Pac Rim requested for exploration permits. Local resistance to mining culminated into violence, resulting in assaults, kidnaps, attempted murder and deaths of some anti-mining activists.[151] The growing environmental concerns as highlighted above and the spread of anti-mining campaigns led to the formation of opposition groups, such as The National Roundtable Against Mineral Mining in El Salvador (Le Mesa) in sometime in 2005.[152] The core of the group's campaign was for the conservation of

[146] Ibid; Broad, 'Corporate Bias' (n 15) 858.
[147] Ibid 6.
[148] Ibid 7.
[149] Ibid 15, 19; Broad, 'Corporate Bias' (n 15) 858-59.
[150] Robin Broad and John Cavanagh, 'Poorer Countries and the Environment: Friends or Foes?' (2015) 72 World Development 419, 421.
[151] Steiner (n 143) 12-15, 17; Broad, 'Corporate Bias' (n 15) 860.
[152] Steiner (n 144) 15; Broad, 'Corporate Bias' (n 15) 860; Broad, 'Poorer Countries and the Environment' (n 150) 421.

water in El Salvador, considering that water was scarce and mining activities affected water resources.[153]

The strength of the social movements against mining increased to the point that the federal government, which had a pro-mining outlook, began to reconsider their position. While the events were still unfolding, Pac Rim applied for an exploitation permit. However, the strong opposition eventually led to what may be considered as the first phase to formal anti-mining measure by the government, when it announced that future mining permits would be halted.[154] One may suggest that the re-evaluation of the mining policy was to some extent influenced by socio-political circumstances following local opposition to mining, particularly in Cabanas. Therefore, the State action – the denial or refusal to issue exploitation permit – responded to the social movements.

Consequently, the refusal to issue an exploitation licence to Pac Rim led to an investment claim against El Salvador. In particular, Pac Rim alleged violations of the provisions of the Central American Free Trade Agreement (CAFTA) and El Salvadoran investment law.[155] Based on the alleged violations, Pac Rim sought compensation against El Salvador. Interestingly, Pac Rim's claims were dismissed, and costs was awarded in favour of the host State.[156] However, it is important to note that the investment tribunal declined jurisdiction under CAFTA as the claimant

[153] Ibid.
[154] Pac Rim v El Salvador, Award, paras 6.125, 6.129; Steiner (n 143) 16; Broad, 'Poorer Countries and the Environment' (n) 422.
[155] Pac Rim v El Salvador, Award (n 142) para 7.3.
[156] Ibid paras 11.18, 11.20.

could not establish to have substantial business in a CAFTA treaty party,[157] but heard the case based on El Salvador's investment law.[158]

In other words, the legality of El Salvador's measure was not determined based on the provisions of investment treaty but on domestic laws. This has led to the suggestion that the decision of the investment tribunal may have been different if the provisions of investment treaty and not domestic law of El Salvador were applied.[159] Although the decision of the investment tribunal favoured El Salvador, the case still highlights how social movement could influence host State measure and how investor-State arbitration is used to respond to such measures.

A few findings may be drawn out from the cases analysed above. First, investment disputes involve more than the actions of the parties, especially the host State, but includes elements of social resistance of the local population. Second, the background facts to the cases highlight that the local population of host States in the Third World (i.e., the Third World people) sometimes play a significant role in investor-State arbitration – their actions initiating the chain of events that lead to investment disputes. Third, when an investment dispute ensues, the property rights and interests of foreign investors override non-investment concerns, even where they represent legitimate environmental concerns of the local population in the Third World, thereby indicating investor-State arbitration's potential to overlook and even exclude Third World environmental concerns. In all, this demonstrates

[157] Pac Rim Cayman LLC v The Republic of El Salvador Decision on the Respondent's Jurisdictional Objection 12 June 2012 paras 4.68, 4.75, 4.95 (Pac Rim v El Salvador, Decision on Jurisdiction).
[158] Ibid paras 5.39, 5.48.
[159] Stefanie Schacherer, 'Pac Rim Cayman LLC v Republic of El Salvador, ICSID Case No. ARB/09/12 (Pac Rim v. El Salvador)' in Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch (eds), *International Investment Law and Sustainable Development: Key Cases from the 2010s* (International Institute of Sustainable Development 2018) 36, 37.

how investor-State arbitration is used as a response to Third World concerns as expressed through local resistance movements.

4. Third World Exclusion

An important highlight of the analysis in the above section is that the environmental concerns canvassed by Third World people, through social movements, may not be accommodated by investor-State arbitration. As a result, this section will identify the strategies and/or approaches through which investment tribunals, and by extension investor-State arbitration, exclude Third World groups' perspectives when resolving investment disputes. It will synthesise some of the decisions of the investment cases reviewed above in order to offer an insight on how these strategies of exclusion may manifest when investment treaty provisions are applied with regards to host State actions.

4.1. Technologies of Exclusion[160]

The common theme of the investment disputes described above is that the host State – a Third World State – took a measure (or action) following the pressure of local community regarding an investment activity, which was challenged for infringing a foreign investor right(s) as protected by an investment law, treaty or contract. The host State's measure predominantly altered the legal framework that enabled the foreign investor to undertake their activity in the host's territory. As noted earlier in the chapter, Third World people also play a role in foreign investment relations, meaning that social movements as mobilised by the local population – not just the host State measure – do manifest investment claims.

[160] This section owes much of its insights to the works of Ibironke T Odumosu's (now Odumosu-Ayamu) works. See Odumosu, 'Locating Third World Resistance' (n 10); Odumosu, 'The Law and Politics of Engaging Resistance' (n 5).

Consequently, the strategy often applied in investor-State arbitration, cumulatively referred to as 'technologies of exclusion', excludes various forms of interference to investment, including local resistance, from the realm of legitimate engagement in international investment law regime.[161] In other words, they were designed not to accommodate interests beyond those that serve the purpose of the regime.[162] It is through this process that the role of Third World people is not only subdued but rendered undesirable. As such, technologies of exclusion illustrate how international investment law subjugates the Third World. A detailed analysis of the technologies of exclusion have been discussed elsewhere,[163] however, these strategies shall be examined in brief below, to provide context for the analysis of how certain standards of investor protection in investment treaties have been applied by investment tribunals in some of the investment disputes highlighted above.

4.1.1. Institutionalisation

As earlier stated, international investment law focuses primarily on the relations between foreign investors and their host States. As a result, the deliberation on any dispute arising from their relations are undertaken between these two actors, especially in investor-State arbitration. However, more recently, considering that the outcome of investment disputes has a wider implication beyond the disputing parties, and in a bid to accommodate the perspectives of other stakeholders in the larger society, participation within the dispute settlement

[161] Ibid 263-75; See also Odumosu, 'Locating Third World Resistance' (n 9) 430-33.
[162] Ibid 263.
[163] Ibid.

mechanism began to be allowed through *amicus curiae* (friends of the court) or third-party briefs.[164]

Meanwhile, the actors that have been predominantly engaged as amicus curiae in the investment disputes are NGOs and civil societies.[165] It may be unsurprising that this is the case, considering that the intervening third party has to be qualified to participate in the proceedings. Investment tribunals have held, among other criteria, that the role of an intending amicus curiae is to provide 'special perspectives, arguments and expertise' which would be of assistance in resolving the dispute; and as a result, the suitability of a prospective non-disputing party will depend on whether the tribunal is satisfied that they possess such qualities.[166] Although more recently indigenous people are beginning to be granted amicus status,[167] the general criteria for participation still potentially excludes Third World groups.

Third World social resistance are predominantly domestic or local and they often take up an amorphous structure, lacking 'enduring and institutional modes of organisation', unlike NGOs that engage in transnational activism, having a rather organised structure.[168] Relative to having an organised structure, one of the distinguishing features of transnational social movements is industry knowledge

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[164] *Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, SA. and Vivendi Universdal, SA. v. The Argentine Republic*, ICSID ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus curiae, 19 May 2005, paras 19-23 (Aguas Argentinas S.A., Suez v Argentina, Order in Response to a Petition for Transparency and Participation); See Kyla Tienhaara, 'Third Party in Investment-Environment Disputes' (2007) 16 Review of European Community and International Environmental Law 230; Tomoko Ishikawa, 'Third Party Participation in Investment Treaty Arbitration' (2010) 10 International and Comparative Law Quarterly 373.

[165] Eugenia Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third Party Participation' (2011) 29 Berkeley Journal of International Law 200, 201.

[166] Aguas Argentinas S.A., Suez v Argentina, Order in Response to a Petition for Transparency and Participation (n 164) paras 8, 13, 24.

[167] See Glamis Gold Ltd v The United States of America, UNCITRAL, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005.

[168] Odumosu, 'Locating Third World Resistance' (n 10) 430-431.

and expertise, which enables them to engage meaningfully with issues within the field. Within the context of investor-State arbitration, it was noted that to be able to actively participate – and by extension be heard – such third party must show to be recognised 'credible players' and be 'able to speak the language of the law' in arbitration proceedings.[169] Therefore, to take advantage of the procedural allowance provided in investor-State arbitration, the intervening third party must possess requisite expertise.

It is the acquisition of the degree of recognition in the international order that NGOs, unlike Third World groups, are seen as institutionalised. This quality that is lacking in social movements among the Third World people make them unable to participate directly and actively in forums, such as investor-State arbitration, where disputes involving their activities and in most cases their interests are adjudicated. The technology of institutionalisation ensures that the local population, the ones with the lived experiences of the negative impact of investment activities, are excluded from decision making processes that may affect their interests.

4.1.2. Representation

The ordinary parties to the settlement of investment disputes under investor-State arbitration are foreign investors and states. The State under the conception of international law would ordinarily comprise the territory, people and government,[170] the people in this context representing the local population. Viewed as consisting of its local population, State actions – that is, policy measures – should where necessary be articulated as adopted in and responding to the interests and concerns of its population. As earlier stated in the chapter, this does not mean that

[169] Orellana (n 9) 10.
[170] See Montevideo Convention on Rights and Duties of States 1933; Knop (n 19) 95.

the State always accommodates the interests of its population. Nevertheless, the point is that when resolving investment disputes which implicates the local population it may expected that investment tribunals will engage substantially with the interests of those the State party is deemed to represent.

It is important to highlight that the conception of the State as an intersection of territory, people and government may not be universally applicable or adopted in different areas of international law.[171] In this sense, the formula for determining the concept of Statehood may depend on the goal of the regime.[172] Considering that the goal of international investment law is to protect foreign investors from the host State, the State is constructed to suit the purpose of the regime. Using the technology of exclusion, State parties (host States) in investor-State arbitration are narrowly constructed as an entity separate from its population.[173]

As a result, policy measures are only seen as actions of the State rather than a reflection of or in response to the interests or demands of the local population. By adopting a state-centric approach, the State party becomes an 'artificial entity without a population, viewed only as a government and territory'.[174] In *Bear Creek v Peru*, the majority of investment tribunal unequivocally noted in its award, applying this technology of exclusion, that irrespective of the position of the local community regarding the investment project they are not a party to the investment dispute, rather it is the action of the State (and not the interests for which it was

[171] Knop (n 19) 95.
[172] For instance, under international human rights law the state is constituted in relations to its citizens in the sense that states have international obligations towards its citizens. See Martti Koskenniemi, 'The Future of Statehood' (1991) 32 Harvard International Law Journal 397, 398 (discussing the responsibility of the state towards its citizens under International Human Rights Law).
[173] Odumosu, 'Locating Third World Resistance' (n 10) 435; Odumosu, 'The Law and Politics of Engaging Resistance' (n 5) 270.
[174] Ibid 435.

adopted) that is subject of the dispute.[175] This, therefore, ensures that Third World people become invisible in investment law.

An instance where this is aptly reflected in investor-State arbitration is the use of the 'sole effect' doctrine when determining whether the actions of the host State amount to expropriation. The sole effect doctrine simply emphasises the effect of the State measure on the foreign investor's rights.[176] In other words, the intention of the host State or the purpose for which the policy measure was adopted becomes irrelevant.[177] By discountenancing the intentions or purpose of the State measure, the doctrine has the potential to exclude Third World groups, whose interests the policy measure sought to protect.

4.1.3. Depoliticisation

Drawing from the work of Burnham, depoliticisation is 'the process of placing at one remove the political character of decision-making'.[178] The history of foreign investment protection, ranging from colonial period to the decolonisation/postcolonial period, which included Third World opposition to international economic rules, involved highly politicised foreign investment relations. Having regards to the turbulent history, there was the need for a mechanism to resolve investment disputes in a neutral forum which would not involve the interference of the foreign investor's home State in the form of diplomatic protection, thereby 'depoliticising' investment disputes.[179] As a result,

[175] Bear Creek v Peru, Award (n116) para 666.
[176] See L Yves Fortier and Stephen L Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It' (2004) 19 ICSID Review – Foreign Investment Law Journal 293, 308-09; Ben Mostafa, 'The Sole Effect Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) Australian International Law Journal 267.
[177] Fortier (n 176) 309.
[178] Peter Burnham, 'New Labour and the Politics of Depoliticisation' (2001) 3 British Journal of Politics and International Relations 127, 128.
[179] See Ibrahim F I Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA (1986) 1 ICSID Review – Foreign Investment Law Journal 1.

depoliticisation became a key foundation for the establishment of investor-State arbitration.

Paradoxically, it is argued that beyond the predominant perception of investor- State arbitration as a depoliticised institution – that excludes home State's direct participation in investment disputes – the concept of depoliticisation is used in another way when resolving investment disputes. It may be important to note that international institutions such as the World Bank, which houses the international centre for the settlement of investment disputes (ICSID), promoted depoliticisation as means through which Third World States can enhance market credibility.[180] In this sense, the legal role of host States is only to ensure the provision of credible economic market for foreign investments to thrive, and any action that distorts this economic environment is treated as political.[181]

In other words, once the action of the host State is conducive to foreign investment it is lawful, when it is not it would be deemed political and may attract sanction.[182] Depoliticisation from this perspective therefore 'entails a separation of "law" from its socio-economic, cultural and political origins', and it is this from this angle that investor-State arbitration 'rejects Third World resistance as extra-legal'.[183] Consequently, host State measures taken in response to local people's resistance against the activities of foreign investors are susceptible to be deemed in violation of investment rules, particularly foreign investor protection standards.[184]

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[180] Matthew Flinders and Jim Buller, 'Depoliticisation: Principles, Tactics and Tools' (2006) 1 British Politics 293, 296.
[181] See David Schneiderman, *Resisting Economic Globalization: Critical Theory and Investment Law* (Palgrave Macmillan 2013) 58-9.
[182] See Schneiderman, '*Resisting Economic Globalization'* (n 181) 59 (arguing that the action of the host State could attract economic liability for violating its functions towards foreign investors).
[183] Odumosu, 'The Law and Politics of Engaging Resistance' (n 5) 271.
[184] Ibid.

From above, the concept of depoliticisation denotes the removal of the political character in decision-making (especially as it concerns foreign investors); however, it is argued that in reality the 'politics' remains – the only difference is that the process or the arena in which the decisions are taken is altered.[185] In this sense, the action does not necessarily become less political by undergoing the process of depoliticisation, rather there is a shift in the arena in which the decision-making is taken.[186] This phenomenon may be ascribed to investor-State arbitration in the sense that the dispute settlement process is not devoid of political content, rather it 'spills over with politics'.[187]

By delineating politics from law, that is, describing resistance movements as constituting non-legal origins of investment disputes, one may argue that making a choice – that is, prioritising certain interests over the other – is political in itself.[188] Therefore, in choosing not to engage with or acknowledge Third World people's interests so as to protect that of foreign investors, investment tribunals engage in some form of politics. Afterall, law, including international law and its rules, derive its existence from social, economic, cultural or political encounters.[189] If laws can arise from non-legal encounters, then dismissing Third World people's social movements simply because they serve as non-legal origins to international investment law norm producing encounters could be seen as a political decision by

[185] Matthew Flinders and Jim Buller, 'Depoliticisation: Principles, Tactics and Tools' (2006) 1 British Politics 293, 296.
[186] Ibid 296.
[187] David Schneiderman, 'Revisiting the Depoliticization of Investment Disputes' in Karl P Sauvant (ed) *Yearbook of International Investment Law and Policy* (Oxford University Press 2011) 693, 694.
[188] Odumosu, 'The Law and Politics of Engaging Resistance' (n 5) 271-72, 283.
[189] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) (arguing that international arose out of the (political) encounter with non-European peoples in the form of colonialism); See also Odumosu, 'The Law and Politics of Engaging Resistance' (n 5) 273-75, 283 (arguing that law is contingent of many factors, including politics, though itself not same as politics).

investment tribunal: a decision that will benefit the interests of foreign investors at the expense of other interests.

From this, depoliticisation only shifts the decision-making process from within the host State to investor-State arbitration, while still maintaining the element of politics. Therefore, the strategy of 'depoliticising' the decision-making of the host State only warrants the exclusion of Third World people's interests that are embedded in social movements. The above, in summary, shows that these strategies and technologies were conceived not only to protect the interests of foreign investors – the very purpose for which the regime serves – but by extension to exclude all other competing interests, including those interests that may concern Third World people.

4.2.Application of Investment Rules

The analysis above identified the various approaches through which Third World interests may be excluded. This section will analyse how these strategies are applied by investment tribunals when interpreting investment treaty provisions. As a caveat, the analysis below does not claim to be exhaustive of all the possible ways the strategies of exclusion may manifest during investment dispute resolution. It only aims to highlight their occurrence, especially when investment treaty provisions are reviewed in light of host State actions.

Some investment treaty provisions represent the codification of rules in customary international law on foreign investment.[190] As one investment tribunal held, '[i]t is plain that several of the BITs standards, and the prohibition against expropriation in particular, are simply a conventional codification of standard that

[190] See also, Patrick Dumberry, 'Are BITs Representing the New International Customary law in Investment Law' (2010) 28 Pennsylvania State International Law Review 675, 695.

have long existed in customary international law'.[191] As codified rules, they establish thresholds of tolerable behaviour of the host State.[192] In this sense, investment treaty provisions as investment rules set out the parameters upon which the actions of the host State are to be determined with respect to a foreign investor.

Simply put, investment rules regulate the actions of the host State. As a result, where host State actions do not conform with the predetermined confines of the rules, it may be viewed as a violation of such provision. In other words, investment treaty provisions as investment rules construct foreign investor rights and prescribe the boundaries for which State actions are to comply with. For this reason, the application of investment rules illustrates the limited role to which State are confined, including when acting in the interests of their local population.[193]

When arriving at their decisions investment tribunals do not focus on the intention of the host State – that is, on the purpose of its policy measures – but on foreign investor expectations.[194] Therefore, it does not matter whether the policy measure was intended to respond to the environmental concerns of the local population.[195] Not only may investment tribunals disregard the interests that the State action responds to, but the very issues that form the core of those interest – for instance, environmental degradation concerns. In other words, the way investment rules are applied potentially excludes environmental concerns,

[191] See *Generation Ukraine, Inc v Ukraine,* ICSID Case No ARB/00/9, Award, 16 September 2003, para 11.3.
[192] David Schneiderman, 'Transnational Legality and the Immobilization of Local Agency' (2006) 2 Annual Review of Law and Social Science 387, 399.
[193] Ibid 399.
[194] Perrone, 'The International Investment Regime and Local Populations' (n 9) 404.
[195] For instance, the 'sole effect' theory which prescribes that it is not the intention of the host state measure but the effect of such measure on the interests of the foreign investors that determines whether there is a breach of investor right and whether compensation is to be paid. See Metalclad v Mexico, Award (n 76) paras 103, 108-09; Fortier (n 176) 308-09; Mostafa (n 176).

especially when such concerns are embedded in the social movements of Third World people.

Based on this, and in light of the possibility of the use of technologies of exclusion, the interests and concerns of Third World people – in the manner they are expressed, either through social movements or in policy measures of the host State – may be adjudged as contravening the rules of investment law, which by extension threatens the rights and interests of the foreign investor. Considering this, the subsequent sections will analyse in brief how these investment rules are applied with regards to Third World group interests. Particularly, it will describe how the strategies of exclusion may take shape when investment treaty provisions are interpreted in view of the action of the host State.

4.2.1. Non-discrimination

As an investment rule, non-discrimination ensures that activities that take place within the territorial jurisdiction of the host State are such as not to discriminate foreign investors to the point of affecting their rights and interests. Therefore, the rules against discrimination set the parameters of how foreign investors should be treated by prescribing the standards of treatment (although the prescription is done on a case-by-case basis). These predetermined standards ensure that non-conforming treatment – that is, actions attributed to the host State – are regarded as violating its rules. In investment treaties, the rules against discrimination are provided for by national treatment and most-favoured nation provisions. In investor-State arbitration, when investment disputes are adjudicated, the challenged actions or policy measures, as it is in most cases, are weighed against these rules regarding discrimination. The way these actions are prejudged determines whether they fall within the accepted confines of the rules.

Social movements of the local population have been described as having some political underpinnings;[196] such description portrays social movements as lacking objectivity. Considering that the rule against discrimination requires objectivity,[197] the political characterisation of social movements of the local people may therefore implicate any policy measure adopted in its response to be viewed as violating the non-discrimination provision. The subscription to the law-politics divide condemns social movements and any other associated activity (i.e., subsequent policy measures) as outside the realm of the legal criteria required in the rule on non-discrimination.

4.2.2. Fair and Equitable Treatment (FET)

As highlighted above, the fair and equitable treatment standard has remained one of the most controversial rules of investment law. Its scope, which is to protect foreign investors against the actions of the host State, is vast and nebulous, resulting in the difficulty to clearly articulate its boundaries.[198] As the name implies this investment rule behoves that the host State accords to foreign investors fair and equitable treatment, connoting a treatment free from bias or prejudice, and that is just or reasonable.[199] Consequently, not only that virtually all State actions are brought within the purview of this provision,[200] State measures (or considerations that led to the adoption of such measures) may be characterised in a manner that renders it incompatible with the rules on fair and equitable treatment.

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[196] Tecmed v Mexico, Award (n 81) paras 42, 128; See Odumosu, 'The Law and Politics of Engaging Resistance' (n 5) 277.
[197] Although the tests for discrimination are subjective in international investment law, in the sense that it depends on the circumstances and facts of each case, they need to be evaluated objectively.
[198] See Rudolf Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties' (2005) 39 The International Lawyer 87, 87-88. See Chapter 3 for a more detailed analysis of the FET provision.
[199] Stephen Vasciannie, 'The Free and Equitable Standard in International Investment Law and Practice' (2000) 70 British Yearbook of International Law 99, 103.
[200] Dolzer, 'Fair and Equitable Treatment' (n 198) 90 ('the standard fair and equitable treatment may address manifold types of government actions inherently investment deterring').

As a result, technology of exclusion equips the rule on fair and equitable treatment to be used to dispel the interests and concerns of Third World people for being incompatible with foreign investor rights. Considering that the rule invokes a treatment that is just, reasonable and free from bias, a policy measure that is adopted in response to community pressure may invariably be adjudged as lacking these qualities, and therefore likely violating the rule on fair and equitable treatment: for the very reason that such measure was based on socio-political considerations.[201]

The investment tribunal in the case of *Metalclad v Mexico*, after reviewing the State measure denying a construction permit on the basis of socio-political movements involving environmental concerns, concluded that the State action violated fair and equitable treatment, irrespective of the fact an investment provision subjects investments to environmental considerations.[202] This means that the investment tribunal disregarded the environmental concerns which remained one of the core issues underlining the community pressure that led to the policy measure by the host State to deny permit. In other words, by excluding the socio-political basis for the State measure (i.e., the grassroot movements), the investment tribunal disregarded environmental concerns that were embedded in them, when it declared that its decision was not contrary to environmental considerations.

Further, it is important to highlight that the one of the central elements in fair and equitable treatment is the legitimate expectations of the foreign investor with regards to the state of the law in the host State at the time of investing.[203] The tribunal had come to its decision that Metalclad had legitimate expectations with

[201] See Tecmed v Mexico, Award (n 81) paras 128-29.
[202] Metalclad v Mexico, Award (n 76) paras 97-98.
[203] See Dolzer, 'Fair and Equitable Treatment' (n 198) 103.

regards to obtaining requisite permits from the State.[204] However, had the tribunal considered local opposition and the turbulent history of the project concerning the environment, it may not have ruled that Metalclad had a reasonable and legitimate expectation to obtain construction permits.[205] In this sense, the investment tribunal avoided engaging fully with social struggles of the local population, because to do so would have gone contrary to the purpose of international investment law, which is to protect foreign investors.[206]

4.2.3. Expropriation

Expropriation is an investment rule that protects foreign investors from actions attributable to the host Sate that has the effect of interfering with the use of property, 'neutralising' the enjoyment of the investment or drastically diminishing the value of the property interests of foreign investors.[207] Foreign investment protection under this rule is provided by the expropriation provision in investment treaties. In reviewing the actions of the host State in light of this rule, socio-political considerations arising from Third World resistance are not considered good enough reasons for policy measures, and as such when they affect the rights of a foreign investor, they are likely to be in violation of the rule against expropriation.

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[204] Metalclad v Mexico, Award (n 76) paras 85, 89.
[205] Ciprian N Radavoi, 'Locating Local Community Interest Between Government's Assurances and Investor's Expectations' in Lez Rayman-Bacchus and Philip R Walsh (eds), *Corporate Responsibility and Sustainable Development: Exploring the Nexus of Private and Public Interests* (Routledge 2015) 85; See David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press 2008) 84.
[206] Radavoi (n 205) 85.
[207] Metalclad v Mexico, Award (n 76) para 103; See Tecmed v Mexico, Award (n 81) para 117; Copper Mesa v Ecuador, Award (n 130) para 6.59. For some classic literature on expropriation, see Alexander P Fachiri, 'Expropriation in International Law' (1925) 6 British Yearbook on International Law 159; John H Herz, 'Expropriation of Foreign Property' (1941) 35 American Journal of International Law 243; Samy Friedman, *Expropriation in International Law* (Stevens 1953); B A Wortley, *Expropriation in Public International Law* (Cambridge University Press 1959); G C Christie, 'What Constitutes a Taking of Property under International Law?' (1962) British Yearbook on International Law 307; Rudolf Dolzer, 'New Foundations of the Law of Expropriation of Alien Property (1981) 75 American Journal of International Law 553.

For instance, in holding that the State action constituted an unjustified deprivation of foreign investor rights, the tribunal in *Tecmed v Mexico* emphasised the political character of the community pressure, downplayed the seriousness of the social situation as well as environmental considerations of the resistance movements.[208] Also in *Bear Creek v Peru*, the tribunal rejected the host State's contention that its measure was aimed at safeguarding environmental and social conditions (referring to the social unrest), and consequently declared the measure in violation of the rule against expropriation.[209] In other words, the socio-political reasons for annulling the mining concession did not justify the breach of expropriation provision.[210]

The technology of exclusion of representation is also implicated in the application of investment rule against expropriation. The 'sole effect' doctrine, which emphasises on the effect of the host State measure rather than the intention works to exclude the contention of the interests of the local people. In other words, since investment tribunals do not necessarily engage with the intention behind the policy measure – that is, the fact that the measure was taken in response to local pressure – the concerns of the local people about the environmental impact of an investment activity, which is often the basis of social movements, will not be addressed. By this, the investment tribunal mystifies the relationship between the host State and its population, treating the State as an entity without its population, and consequently rendering the intentions behind the State's measure irrelevant even though it aimed to protect public interest. Rather, the investment tribunal

[208] Tecmed v Mexico, Award (n 81) para 145, 147.
[209] Bear Creek v Peru, Award (n 116) para 414.
[210] Ibid para 415.

focuses on the consequences or impact of the measure to determine a violation of the rule against expropriation.

5. Conclusion

This chapter argued that international investment law and investor-State arbitration particularly do not accommodate the interests of Third World people even when they are actively involved in the foreign investment relations leading to an investment dispute. Also, in disregarding the perspectives of the local population (described here as Third World people), investment tribunals are likely to fail to articulate environmental concerns that may often underlie the expressions of resistance by the local people. In making this argument, the chapter analysed the ways through which various actors engage with foreign investment within the host Sate and highlighted how investor-State arbitration is used to counter resistance against foreign investment.

The cases analysed in the chapter disclosed common themes. First, investment in natural resources, especially in the Third World, often creates some form of conflict between the local population and foreign investors, which leads to social movements against investment activities. Second, one of the major concerns articulated in grassroots mobilisation is about the environment. This arises as a result of deep-rooted socio-cultural and economic connection between the local community and their environment, which includes lands and water bodies. Third, the social mobilisations against investment activities often lead to regulatory measure(s) from the State that affect foreign investor rights. Fourth, based on the State measure responding to the (environmental) concerns of the local population, the affected foreign investor institutes a claim alleging the violation of investment protection rules.

In resolving investment disputes, the chapter identified strategies, known as ‘technologies of exclusion’, used to exclude the interests and perspectives of the local people when investment rules (treaty provisions) are applied to state measures. Particularly, it highlighted that the consequence of such exclusion is that environmental concerns articulated in Third World resistance movements are not adequately addressed. This leads to the proposition that for environmental concerns to be adequately addressed in investor-State arbitration, investment tribunals would have to accommodate and engage more with Third World perspectives as expressed through social movements, and more importantly investment treaties, on which investment claims are based, should reflect these concerns.

Chapter 5: Reforming Nigeria's International Investment Treaties

1. Introduction

The present chapter, on reforming Nigeria's investment treaties, draws from the analysis of the previous chapters. Chapter 3 highlighted that the general lack of environmental provisions in Nigeria's investment treaties may be attributed to the power imbalance in Nigeria's investment treaty negotiations, which leads to Nigeria's treaty partner – often the more powerful party – influencing the outcome or determining the contents of Nigeria's investment treaties. Further to this, Chapter 4 discussed how investor-State arbitration responds to the interests and concerns emanating from the Third World, especially environmental concerns expressed by Third World people, using strategies/technologies of exclusion to protect foreign investors' interests.

The above therefore establishes the various ways in which the international investment law regime has put Third World States, like Nigeria, as host States, as well as Third World people, at a disadvantage. As such, the findings in the previous chapters – especially with regards to the impact of investor-State arbitration on public interests matters of host States – have come to form the basis of some of the criticisms and adverse actions taken within international investment law regime, particularly by Third World States. For instance, South Africa, after its experience at investor-State arbitration,[1] overhauled its foreign investment protection regime, replacing its investment treaties with domestic investment law,[2] and limiting the

[1] See *Piero Foresti and others v the Republic of South Africa*, ICSID Case No. ARB (AF)/07/1, Award, 4 August 2010 (Foresti v South Africa, Award).
[2] See Protection of Investment Act 22 of 2015 (Protection of Investment Act).

use of investor-State arbitration,[3] on the ground that investment treaties undermined public interest objectives.[4]

As highlighted in the case of South Africa, the growing discomfort about the propriety of investor-State arbitration, to address matters of general interests of host States, especially in the Third World – for instance, in light of foreign investor bias – has been one of the leading causes of what is regarded in legal scholarship as legitimacy crisis.[5] From a Third World perspective, the legitimacy crisis draws from the perception that international investment law, by prioritising the interests of foreign investors (mostly from either the Western World or developed economies), creates an asymmetry in the way rights and interests are protected in the regime,[6] thereby subjugating the interests of Third World host States, who are generally less powerful. This, therefore, gives the impression that international investment law is used to accomplish the objectives of political and economic domination of former colonial powers.

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[3] Ibid s 14 (offering in the alternative domestic dispute resolution mechanisms).

[4] Department of Trade and Industry, *Bilateral Investment Treaty Policy Review Framework* (Government Position Paper June 2009) 19. For the literature on South Africa's foreign investment policy, see Engela C Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31 ICSID Review 167; Xavier Carim, 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa' in Kavaljit Singh and Burghard Ilge (eds) *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (Both Ends Madhyam Somo, 2016) 51; Andrew Friedman, 'Flexible Arbitration for the Developing World: Piero Foresti and the Future of Bilateral Investment Treaties in the Global South' (2010) 7 International Law Management Review 37.

[5] For some of the earlier works on legitimacy crisis, see Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistence Decisions' (2004) 73 Fordham Law Review 1521; Charles H Brower II, 'Structure, Legitimacy, and NAFTA's Investment Chapter' (2004) 36 Vanderbilt Journal of Transnational Law 37; Ari Afilalo, 'Towards a Common Law on International Investment: How NAFTA Chapter 11 Panels Should Solve their Legitimacy Crisis' (2004) 17 Georgetown International Environmental Law Review 51; Charles N Brower and Stephen W Schill, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law (2008) 9 Chicago Journal of International Law 471.

[6] See Brower (n 5) 474. See also Ivar Alvik, 'The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy' (2020) 31 European Journal of International Law 289 (the author notes that the legitimacy issue in international investment law is due to the general preferential treatment foreign investors enjoy in the regime).

As a result, in addition to the need for a reform as noted earlier, the nature of the reforms should address the potential oppressive character of international investment law. However, the discussion on reforms as will be undertaken in the present chapter will not be aimed at exploring all the reform initiatives or identifying solutions for the various issues in the regime.[7] Rather, the chapter will adopt a Statist approach to reforming investment law: focusing on identifying and exploring how Nigeria as a State can reform its international investment commitments made through investment treaties to address those concerns that seem to affect the Third World.

This is on the premise that the State is the focal point in international investment law regime. First, the rights of foreign investors as provided by legal regimes are created and guaranteed by States, either in international law – that is, customary international law and investment treaties – or domestic laws.[8] Second, the rights of foreign investors only materialise within the host States, in the sense that the bundle of rights they acquired are expressed through foreign investment operations in their host State. For instance, the right to 'full security and protection' is materialised when foreign investors carry out their activities without undue

[7] There have been a plethora of studies suggesting different solutions on the different issues that are causing the legitimacy crisis in the regime. For instance, see Afilalo (n 5); For a Third World perspective to the reform discussion, see John Nyanje, 'Hegemony in Investor State Dispute Settlement: How African States Need to Approach Reforms' (Afronomics Law, 7 September 2020) <https://www.afronomicslaw.org/2020/09/07/hegemony-in-investor-state-dispute-settlement-how-african-states-need-to-approach-reforms/> accessed 15 October 2020; for a response see, Dominic Npoanlari Dagbanja, 'Hegemony in Investor State Dispute Settlement: How African States Need to Approach Reforms: A Response' (Afronomics Law, 8 September 2020) <https://www.afronomicslaw.org/2020/09/08/hegemony-in-investor-state-dispute-settlement-how-african-states-need-to-approach-reforms-a-response/> accessed 15 October 2020.

[8] As highlighted in the analysis in Chapter 3, investment treaties are generally concluded between States, thereby showing that the States determine the rights of foreign investors. Also, considering that customary international law refers to State practices that they are generally obligated to uphold, the rights that foreign investors enjoy are derived from the practices of States.

interference or hinderance. This shows that the State should be the main *locus* of reform in international investment law regime.[9]

Though the regime's primary focus is protecting the interests of foreign investors, it is originally the State(s) that provide the content and extent of such protection. As such, the State can, through reform, extend the parameters of the regime to accommodate other interests or concerns, and address, for instance, the environmental concerns of host States and the Third World in particular. Considering this, the chapter will argue that to address the growing concerns in the regime as it relates to the Third World, and to ensure that Nigeria's investment commitments align with domestic policies and objectives, there is a need to reform Nigeria's investment treaties.

The arguments in the chapter will be made in 5 sections. The first section, which is the introduction, sets out the background of the study in the chapter. The discussion in the second section focuses on reforming Nigeria's investment protection regime, highlighting the importance of undertaking reform and the ways it could be achieved. The third section will focus on textual reforms in Nigeria's investment treaties. It will argue that integrating the right to regulate and foreign investor obligations into Nigeria's investment treaties will give more leverage to Nigeria to safeguard its regulatory space to regulate for the environment. Taking it further, the fourth part will identify and explore three policy options. These policy options represent the pragmatic approaches that will enable Nigeria to undertake

[9] Georgios Dimitropoulos, 'A Typology of "Backlash" and Lessons for Reform in International Investment Law and Arbitration' (2019) 18 Law and Practice of International Courts and Tribunals 416, 417.

the textual reform identified in previous section. The fifth section concludes the chapter.

2. Reforming Nigeria's Foreign Investment Policy

Reform has become the operative word in the midst of the legitimacy crisis and concerns in international investment law.[10] The majority of reform discussions in international investment law have been focused on investor-State dispute settlement (ISDS) – and more particularly, investor-State arbitration.[11] Expectedly, this is the case because investor-State arbitration is the main mechanism for resolving investor-State disputes, which allows foreign investors to challenge the actions of host States, and as a result the main source of concern on how the protection of foreign investors affect host States.

There have been various reform approaches proposed, which has led to a spectrum of reform alternatives: those favouring modest reforms because investor-State arbitration remains the most suitable option; those favouring substantial reforms, such as replacing investor-State arbitration with multilateral investment court; and those favouring drastic reforms, totally rejecting the option of investors instituting claims against host States at an international stage.[12] While reforming ISDS may be important, the argument in this chapter is that attention should be equally directed towards reforming the treaties themselves. However, before going further into the analysis of investment treaty reforms, it will be important to

[10] Chiara Giorgetti and others, 'Reforming International Investment Arbitration: An Introduction' (2019) 18 Law and Practice of International Courts and Tribunals 303, 307.
[11] For recent literature on reforming investor-state arbitration see Giorgetti (n 10); Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 American Journal of International Law 410.
[12] Roberts, 'Incremental, Systemic, and Paradigmatic Reform' (n 11) 410 (the author creates three categories of reform schools: 'incrementalist', those who favour modest reforms; 'systemic reformers', those who favour significant systemic reforms; and 'paradigm shifters', those in favour of a total replacement of the system).

highlight some of the reasons ISDS reforms alone may not adequately address some the Third World concerns.

The first issue deals with the venue where ISDS reform discussions is taking place and the role of the institution involved in ISDS reform. ISDS reform is currently undertake by the Working Group III under the auspices of the United Nations Commission on Trade Law (UNCITRAL), an international institution responsible for facilitating international trade and investment.[13] International institutions like UNCITRAL (as well as ICSID), due to the nature of their functions, help to promote private sector while undermining State sovereignty. They thus constitute a global governance system that promotes the interests of transnational capitalist class to the disadvantage of the Third World, giving such institutions have a neo-colonial character.[14] More, the ISDS reform only address certain procedural matters in investment arbitration and does not address substantive issues that affect the Third World. Considering this, reform proposals from such international institutions may not be adequate to address concerns of the Third World.[15]

Second, the various ISDS reform alternatives, such as replacing investor-State arbitration with domestic courts, State-to-State arbitration or multilateral

[13] See <https://uncitral.un.org/en/about> accessed 19 October 2020. Since 2017, the United Nations Commission on International Trade and Development (UNCITRAL) mandated a Working Group made up of academics, practitioners and states to deliberate on reforms to investor-state dispute settlement (ISDS): to identify and consider concerns regarding ISDS; consider whether reform is desirable and, if so; develop any relevant solutions to be recommended to the Commission. See <https://www.iisd.org/projects/uncitral-and-reform-investment-dispute-settlement> accessed 3 October 2020. For reports and related documents on ISDS reforms, see <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 19 October 2020.

[14] B S Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 European Journal of International Law 1, 1-2.

[15] Ibid 31 (noting that it is not possible to envisage a radical reform in the world of international institutions).

investment courts, are highly imperfect or inadequate.[16] Due to the flaws within each ISDS reform option, one should not be pursued or considered to the exclusion of the others.[17] More so, even those under the same camp are not united in their approach to reform ISDS.[18] For Third World States, the dynamics of participation in the reform discussions, largely caused by lack of adequate infrastructure, may limit the extent to which their concerns will be accommodated.[19] This shows that focusing solely on reforming investor-State arbitration, even along the lines of the proposed alternatives, will not only be inadequate, but might not address specific concerns of individual States and therefore cannot be an end in itself.

Another reason ISDS reform should not be considered in isolation in resolving the concerns in the regime is because investor-State arbitration does not exist in a legal vacuum. The functionality of investor-State arbitration as a mechanism for settling investment dispute is predicated on investment treaties. This is because the agreement or consent to arbitrate investment disputes are commonly contained in investment treaties.[20] Investment treaties contain treaty provisions

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[16] Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives, Institutional Choice and the Reform of Investment Law' (2018) 112 American Journal of International Law 361 (arguing that institutional alternative choices of investment reform are imperfect); See also Roberts, 'Incremental, Systemic, and Paradigmatic Reform' (n 11) 418-22.

[17] Roberts, 'Incremental, Systemic, and Paradigmatic Reform' (n 11) 414 (noting that the reform alternatives are not mutually exclusive).

[18] For instance, those that favour a drastic overhaul of investor-state arbitration – that is, removing the ability of foreign investors to institute claims at international fora – are divided in their approach, embracing a variety of alternatives such as domestic courts, state-to-state arbitration, etc. See Roberts, 'Incremental, Systemic, and Paradigmatic Reform' (n 11) 414, 417.

[19] Anthea Roberts and Taylor St. John, 'UNCITRAL and ISDS Reforms (Online): Can You Hear Me Now? (EJIL:Talk! Blog, 13 October 2020) <https://www.ejiltalk.org/uncitral-and-isds-reform-online-can-you-hear-me-now/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2> accessed 23 October 2020 (noting some of the difficulties the current structure of ISDS reform discussions may pose on participants).

[20] The ISDS provision is a common feature of modern investment treaties, and it is the basis for investment disputes to the instituted before investor-state arbitration either at ICSID, UNCITRAL or other international arbitration institution. See United Nations Conference Trade and Development, 'Dispute Settlement: Investor-State: UNCTAD Series on Issues in International Investment Agreements' (United Nations 2003) 5 <https://unctad.org/system/files/official-document/iteiit30_en.pdf> accessed 16 June 2021; United Nations Conference for Trade and Development, *Bilateral Investment Treaties 1995-*

which provide for the standards of treatment of foreign investors[21] – upon which the actions of host states are interpreted at investor-State arbitration. Therefore, the decisions at investor-state arbitration flow primarily from the application of the standards of treatments of foreign investors as contained in investment treaties.

Therefore, while the reform may be well intended, it should not be solely focused on investor-State arbitration but also on investment treaties that contain the rules that are interpreted and applied at investor-state arbitration. To buttress the point further, if investment treaties had been clear about protecting the environment or had expressly stipulated the freedom of host state to regulate, investor-state arbitrators may have been constrained to decide otherwise.[22] On this note, reforming ISDS – either by totally replacing it or otherwise – may have little effect, if the contents of investment treaties remain unchanged.

Taking this into consideration, it means that the ISDS reform approaches, coupled with the international institution involved, may not fully address issues of the regime generally, much so those that affect Third World States. Therefore, the aim of the chapter is not to ascertain the appropriate ISDS reform approach – that is, whether there should be modest, substantial or drastic reforms.[23] Rather, the analysis will identify treaty reforms that will enable Nigeria, as a Third World host State, take better control of its investment policy and propel foreign investment

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2006: Trends in Investment Rulemaking (United Nations 2007) 28-51, 100 <https://unctad.org/system/files/official-document/iteiia20065_en.pdf> accessed 15 June 2021; Susan D Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2007) 19 Global Business and Development Law Journal 337, 343-44; Calvin A Hamilton and Paula I Rochwerger, 'Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties (2005) 18 New York International Law Review 1, 49-57.

[21] Franck, 'Foreign Direct Investment' (n 20) 342.

[22] Aikaterini Titi, *The Right to Regulate in International Investment Law* (Nomos Verlagsgesellschaft 2014) 71-72

[23] For a comparative analysis of reform alternatives see Puig, 'Imperfect Alternatives' (n 16).

towards ensuring environmental sustainability. In turn, this will help to resolve the issues identified in the Chapter 4 regarding how investor-State arbitration addresses Third World concerns.

The State plays one of the most important roles in investment law reform, and therefore should constitute a key locus of reform.[24] Although the issues affecting Third World States in international investment law regime appear generally beyond the purview of individual states,[25] some of the reforms needed to alleviate Third World concerns – as will be shown in the later parts of this chapter – are within the scope of each State. In other words, States can undertake to reform their investment commitments without relying heavily on institutional reforms.[26] From a Third World perspective, this position fulfils one of the objectives of TWAIL scholarship as referred to in the present study, in the sense that it creates an avenue for Third World States like Nigeria to 'construct and present an alternative normative legal edifice for international governance'.[27]

Considering the above, undertaking a statist investment reform approach could help lay the foundation that builds towards changing the subordinate status of Third World states – that is, reimagining the outlook of Third World states from

[24] See Dimitropoulos, 'The Conditions for Reform' (n 9) 417. For an analysis of an alternative position see Roberts, 'Incremental, Systemic, and Paradigmatic Reform' (n 11) (the authors analyses UNCITRAL's role in investment law reform).
[25] One may argue that it is beyond the control or purview of an individual state to correct the manner investment rules are applied and the attendant disproportionate effect on the Third World. The analysis from the previous chapters detailing the effects of the international investment law regime on the Third World suggest some form of regime bias. For a more detailed description of regime bias, see James T Gathii, 'Third World Approaches to International Economic Governance' in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge 2008) 255, 261-625.
[26] Chimni, 'International Institutions Today' (n 14) 31.
[27] Makau Mutua, 'What is TWAIL?', (2000) 94 American Society of International Law 31.

rule-takers to rule-makers.[28] On this note, there are two broad reasons to reform Nigeria's foreign investment policy. Internally, it creates the opportunity to revise and improve the terms of how foreign investments are to be regulated; externally, it creates an outlook for future engagement with foreign investments, which emphasises environmental sustainability. In all, the goal of the reform is to have an investment regime that suits the policy and developmental objectives of Nigeria as a Third World state.

3. Substantive Reform

This section focuses on substantive reforms: textual changes or additions to investment treaty provisions. The sole aim of the substantive reforms explored in this section is to ensure that Nigeria can take measures to protect the environment without such state action being challenged before investor-State arbitration. This indicates the recognition of the right of regulate, which has been a core issue not just for host States but for the Third World. Further, it recognises that public interest matters like the environment and measures taken to protect it are not only legitimate but are important aspects in the realm of foreign investment governance. Therefore, three textual additions will be explored below: the right to regulate; foreign investor obligations and environmental provisions. To ensure that the reforms reflect Third World nuances, some African-oriented investment frameworks will serve as reference points on substantive provisions that emphasise Third World objectives.

[28] For instance, investment reforms started amongst some Latin American states, such as Bolivia, Venezuela and Ecuador, drastically changing their foreign investment policies by limiting the roles of investment treaties and investor-state arbitration – and by extension ICSID – in foreign investment governance, can be said to have inspired the current revolutionary actions taken by states like South Africa, which most scholars term as backlash. For literature detailing the backlash of Latin American states see Katia Fach Gomez, 'Latin America and ICSID: David versus Goliath' (2011) 17 Law and Business Review of the Americas 195.

3.1.Right to Regulate

The rights of States to regulate, including on matters that affect the rights of foreign investors within their jurisdiction, has been a long-held principle in customary international law.[29] Foreign investment activities take place within the territory of a State, and the ability to control and determine such activities is a key characteristic of State sovereignty in international law.[30] Following from this, the right to regulate is not only a recognised principle of customary international law, but remains one of the main components of Statehood.

During the decolonialisation/post-colonial era, newly independent States in the Third World viewed sovereignty as a prized possession because it gave them the ability to determine their domestic affairs.[31] Noting that international law (and its claim to universality) had been prejudicial to Third World interests, they espoused the New International Economic Order (NIEO), the Charter of Economic Rights and Duties of States (CERDS) and Permanent Sovereignty over Natural Resources (PSNR), which mainly sought to recognise the right of host States, especially the Third World, to regulate at the international level.[32] These various

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[29] This is known as the police powers of states, which indicate that actions that are within the authority of the state (legitimate regulatory authority) will not be viewed as a wrong capable of compensation. For literature on police powers of states in international investment law see Cathrine Titi, 'Police Powers Doctrine and International Investment Law' in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), *General Principles of Law and Investment Arbitration* (Brill-Nijhoff 2018) 323; Noam Zamir, 'The Police Powers Doctrine in International Investment Law' (2017) 14 Manchester Journal of International Economic Law 318; Ben Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 Australian International Law Journal 267.

[30] M Sonarajah, 'The Right to Regulate and Safeguards' in UNCTAD, *The Development Dimension of FDI: Policy and Rule-Making Perspectives* (New York and Geneva; United Nations 2003) 205; Howard Mann, 'The Right to Regulate and International Investment Law: A Comment' in UNCTAD, *The Development Dimension of FDI: Policy and Rule-Making Perspectives* (New York and Geneva; United Nations 2003) 211, 216. On territorial sovereignty from a public international law perspective, see Ian Brownlie, *Principles of Public International Law* (Oxford 1998) 106 (noted as the competence of states with respect to their territory).

[31] Georges M Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline' (1962) 8 Howard Law Journal 95, 103.

[32] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press 2005) 198-23. For literature on permanent sovereignty over natural resources see Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge

actions demonstrate the importance of regulatory sovereignty to the newly independent Third World States.

The right to regulate is not only important to Third World States since it is a legal expression of the fact that they are 'masters of their own house',[33] but embedded in their sovereignty and recognised in international law. Considering this, regulatory freedom should be well-anchored in the realm of various international legal systems.[34] As a result, this section will explore whether, and how, the notion of right to regulate is applied in the sphere of international investment law. It will argue that the right to regulate should be recognised in international investment law, and more importantly should be integrated into investment treaties to ensure environmental regulation. The subsequent parts of this section will explore how the right of State to regulate is important as a substantive investment reform in protecting the environment.

The right of host States to regulate has been a controversial topic in the realm of international investment law. This is not because the right does not exist. Rather, the controversy has been raised mainly due to the fact, and the manner, that the decisions from investor-State arbitration, while applying and interpreting investment treaties, stifle the regulatory space of host State. The debate this has raised regarding the regulatory space of host States gives the impression that the right of States to regulate in the context of international investment law is determined by investment treaties or investor-State arbitration.[35] Contrary to this,

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University Press 1997). For a Third World perspective see B S Chimni, 'Permanent Sovereignty over Natural Resources: Toward A Radical Interpretation' (1998) 38 Indian Journal of International Law 208.

[33] Abi-Saab, 'The Newly Independent States and the Rules of International Law' (n 31) 103.

[34] Titi, '*The Right to Regulate*' (n 22) 56-58.

[35] The discussion on the subject often proceed from the point that the regulatory expressions of host states is subject to the provisions of investment treaties or the interpretation of investor-state arbitration. See

the right to regulate being inherent in State sovereignty cannot be granted to States by investment treaties.[36]

Proceeding from this understanding, the right to regulate in international investment law should be the rule – that is, States should and always have the right to regulate – while the restriction of such right – either by investment treaties or its interpretation by investor-State arbitration – should be an exception.[37] Conversely, it may be argued that States chose to exercise their sovereignty by concluding a treaty that potentially limits their sovereignty. In other words, they chose to be bound by a treaty that curtails their ability to have full regulatory powers over foreign investors. However, this argument only goes to confirm the argument made in the previous paragraph that State sovereignty is not created or determined by investment treaties, since it was the State through its sovereignty that created the treaty.

Considering this, it will be important to highlight, in the context of investment treaties, how the right to regulate is important, especially for the Third World, to promote sustainable development, and more particularly to ensure environmental sustainability. States in the Third World (including Nigeria) are known to have weaker rules and enforcement mechanisms;[38] however, investment rules are also known to potentially constrain host State's ability to improve domestic

Rudolf Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2005) New York University Journal of International Law and Politics 953.

[36] Mann (n 30) 216.

[37] Mann (n 30) 216.

[38] For literature on Nigeria's environmental regulation, see Ambisisi Ambituuni, Jaime Amezaga, Enogobo Emeseh, 'Analysis of Safety and Environmental Regulations for Downstream Petroleum Industry Operations in Nigeria: Problems and Prospects' (2014) 9 Environmental Development 43.

environmental standards.[39] Therefore, there is the need to understand the rationale for States to have the right to regulate within investment law for the purpose of protecting matters of public interest like the environment.

It was intended that by signing investment treaties – and agreeing to be bound by the standards of treatments – Third World States would relinquish part of their sovereignty, which would include regulatory freedom, in favour of protecting the rights of foreign investors.[40] This created an asymmetry on how the rights of foreign investors and host States were recognised and protected – investor rights trumping that of host states. Considering this, and in justifying the rationale to regulate, the expression of the right of host States (like Nigeria) to regulate will help redress this structural imbalance of rights in investment treaties.[41]

Further, it is argued that for foreign investments to yield long-term benefits (including ensuring environmental sustainability by employing sustainable technology) there must be appropriate and effective domestic regulatory system in place.[42] Conversely, this implies that the long-term negative impact of foreign investment activities in the Third World, such as environmental degradation, occur due to ineffective environmental regulation.[43] In other words, to ensure, for

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[39] A change or implementation of an environmental regulation that potentially impacts the property of a foreign investor is likely to be challenged and sanctioned at investor-state arbitration. See J Martin Wagner, 'International Investment, Expropriation, Environmental Protection' (1999) 29 Golden Gate University Law Review 465.

[40] This point was highlighted in Chapters 2 and 3. See also Kenneth J Vandevelde, 'A Brief History of International Investment Agreements' (1992) 12 University of California Davis Journal of International Law and Policy 157, 166-67.

[41] Titi, *'The Right to Regulate'* (n 22) 72, 75.

[42] Mann (n 30) 216; See J Anthony VanDuzer, Penelope Simons and Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (Commonwealth Secretariat 2013) 258 (noting the importance of enacting domestic laws and regulations for environment sustainability).

[43] In Nigeria for instance, research has noted that activities in the petroleum industry, which is dominated by foreign investors and one of the most environmentally hazardous, lacks effective environmental regulation. See Ambituuni (n 38); See also Engobo Emeseh, 'Limitations of Law in Promoting Synergy

instance, minimal harm caused to the environment by foreign investment activities and thereby promoting environmental sustainability, the host State must have the regulatory space to make and implement laws and policies geared towards protecting the environment within their territorial jurisdiction.[44] Therefore, the right to regulate in international investment law will ensure that foreign investments yield maximum benefit to the host State.

The analysis above highlights that exercising the right to regulate is not only important to readjust the asymmetry in the way rights are recognised in international investment law but will confer long-term benefits on the host State. In light of this, an important issue to determine, therefore, is how this right of host States to regulate is not only recognised but prioritised in international investment law. This means ascertaining how the right to regulate can be adequately addressed in the regime that prioritises the rights of foreign investors. The answer to this issue can be found in investment treaties.

Investment treaties serve as one of the most important sources of foreign investor rights,[45] and as such, provide the basis of foreign investment protection.

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between Environmental and Development Policies in Developing Countries: A Case of the Petroleum Industry in Nigeria' (2006) 24 Journal of Energy and Natural Resources Law 574; Kaniye S.A. Ebeku, *Oil and the Niger Delta People in International Law: Resource Rights, Environmental and Equity Issues* (Rüdiger Köppe Verlag Köln 2006). Interestingly, ineffective environmental regulation in Nigeria has been attributed to regulatory capture. Regulatory capture takes place where transnational corporations exert considerable influence over regulators, thereby ensuring that regulations are implemented in manner that serves transnational capitalist interests instead of public interests. For literature discussing regulatory capture of environmental regulation in Nigeria, see Abdurafiu Olaiya Noah and others, 'Corporate Environmental Accountability in Nigeria: An Example of Regulatory Failure and Regulatory Capture in Nigeria' (2020) Journal of Accounting in Emerging Economies available on <https://www.emerald.com/insight/content/doi/10.1108/JAEE-02-2019-0038/full/pdf?title=corporate-environmental-accountability-in-nigeria-an-example-of-regulatory-failure-and-regulatory-capture> accessed 20 October 2020; Evaristus Oshionebo, 'Transantional Corporations, Civil Society Organisations and Social Accountability in Nigeria's Oil and Gas Industry' (2007) 15 African Journal of International and Comparative Law 107, 109-10.

[44] This can be achieved by the host, for instance, by stipulating among many others the appropriate air, water and land emission levels, and water consumption levels, the types of technology and production processes. See Mann (n 30) 218.

[45] Franck, 'Foreign Direct Investment' (n 20) 342.

As a corollary of foreign investor rights, it imposes investment obligations on host states, which applies to constrain their authority of the host State with regards to certain actions towards foreign investors. Considering this, an important way to prioritise the right to regulate in investment law is to adapt the provisions of investment treaties to reflect the concept. Such treaty modification will secure host State's right to regulate for the environment effectively,[46] as measures taken to protect the environment will be in accordance with the treaty.

One important aspect of prioritising the right to regulate in Nigeria's investment treaties is to ensure that it is clearly stated and is not subject to conditions – that is, without qualification.[47] On the one hand, the lack of precision of investment rules has become a serious threat to the regulatory space of host States.[48] Having regards to the propensity of investment rules to be interpreted in favour of foreign investors,[49] which often leads to unintended consequences especially for Third World host States, the right to regulate should be expressed precisely to protect the host State's ability to act in the interest of the environment. On the other hand, the expression of the right to regulate should not be qualified – that is, the right of Nigeria as a host State to regulate should not be made subject to protecting the rights of foreign investors. This is because any qualification of the right to regulate is not a recognition of Nigeria's inherent right, rather it merely

[46] VanDuzer (n 42) 259 (noting that adapting investment treaty provisions to protecting the right to regulate effectively is a means investment treaty can promote sustainable development).
[47] Mann (n 30) 219-21.
[48] Mann (n 30) 220-21 (noting that foreign investors have taken advantage of the lack of clarity of treaty provisions to threaten investor-state arbitration, leading host states to abandon regulatory measures intended for public purposes).
[49] Olivia Chung, 'The Lopsided International Investment Law Regime and Its Effects on the Future of Investor-State Arbitration' (2006) 47 Virginia Journal of International Law 953, 960.

expresses the supremacy of the provisions of the investment treaty – to protect the rights of foreign investors – over the sovereign right of Nigeria.[50]

The expression of the right to regulate can be achieved in Nigeria's investment treaties in two ways: through the preamble and substantive provisions.[51] Preambles serve an interpretative function especially in investment treaty interpretation. They contain or express the objective of the treaty.[52] The expression of the objective to protect and promote foreign investors in preambles have been relied on at investor-State arbitration to interpret a treaty provision in favour of foreign investors.[53] This means that in the absence of an expression on the right to regulate in the preamble, investment treaties are likely to be interpreted in a manner detrimental to host States.[54] Therefore, to ensure that regulatory right is given interpretative recognition, the right to regulate should be expressly included in the preamble of Nigeria's investment treaties.

However, it is important to note that the expression of the right to regulate in the preamble does not create a concrete or enforceable right, when compared to substantive provisions of investment treaties,[55] and as a result limited in its scope. On this note, though the preamble is an important means of expressing that the object of the investment treaty extends to recognise the right to regulate, a mere

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[50] Mann (n 30) 219.
[51] Mann (n 30) 219.
[52] See Max H Hulme, 'Preambles in Treaty Interpretation' (2016) 164 University of Pennsylvania Law Review 1281, 1288, 1300; Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 43; Gerald Fitzmaurice, 'The Law and Practice of International Court of Justice 1951-54: Treaty Interpretation and other Treaty Points' (1957) 33 British Yearbook of International Law 203, 228.
[53] See *Siemens AG v The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction August 3 2004 para 81 (Siemens v Argentina, Decision on Jurisdiction); *Societe Generale de Surveillance v Republic of Philippines*, ICSID Case No. ARB/02/6, Decision on Objection to Jurisdiction, January 29 2004 para 116 (Societe Generale v Philippines, Decision on Jurisdiction)..
[54] Titi, *'The Right to Regulate'* (n) 119.
[55] Fitzmaurice (n 52) 229.

inclusion of such expression in the preamble alone will only serve as an interpretative tool.

Considering that the preamble may not be adequate in ensuring that the right to regulate is not only recognised but capable of being applied, inclusion of such right in substantive provisions of investment treaties has the potential to be more effective. Substantive provisions form the operational parts of the treaty and therefore imposes obligations on the parties.[56] They also represent the terms as expressed by the treaty parties. Therefore, as substantive provisions of investment treaties are relied on to protect the rights of foreign investors, the expression of the regulatory rights in substantive provisions could also be relied on to actualise the host State's right to regulate.

One of the main approaches of inserting the expression of the right to regulate in substantive provisions in investment treaties is through an exception clause.[57] Chapter 3 elaborated on the use of exceptions in investment treaty generally and more particularly to substantive provisions to incorporate environmental language in investment treaties, and the analysis is relevant here.[58] Nevertheless, in relation to the present context of the right to regulate, exceptions to substantive provisions are drafted in a language that allows the host State to derogate from the obligation with regards to a standard of treatment owed a foreign investor contained in such provision, thereby ensuring that the host State has the policy space to regulate.

[56] See Villiger (n 52) 43 (noting that the reason the preamble is not in the operative part of the treaty and therefore does not impose obligations on the parties).
[57] Titi, *'The Right to Regulate'* (n 22) 123-24.
[58] See Chapter 3 for more details.

There are instances of the use of exception clauses in substantive provision to express the right to regulate in Nigeria's network of investment treaties. A key substantive provision to be analysed is the expropriation provision. This is because the host State's obligation not to expropriate the property, right or interest of the foreign investor is one of the bedrocks of foreign investment protection,[59] and therefore, to derogate from such right to preserve the host State's right to regulate requires some analysis.

Generally, the right to regulate is usually expressed in this manner: 'non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation.'[60] The impression from the above clause is that the treaty recognises that Nigeria can regulate on matters concerning, for instance, the environment without violating the obligation against expropriation as contained in the expropriation provision. On the other hand, however, similar expressions of the right to regulate in some of Nigeria's earlier investment treaties limit the host State's right by requiring adequate compensation to be made to foreign investors.[61]

The right to regulate expressed in the manner above raises the two issues highlighted earlier – that is, clarity of expression and without qualification. Considering the need for clarity to avoid unintended outcomes, it is contended that the manner the right to regulate is expressed above, as a derogation of the substantive provision, may not be interpreted to favour the interests of Nigeria as a

[59] See Wagner (n 39) (the author notes that, 'international law has long protected foreign property from expropriation – confiscation by the host-country government – by giving the owner of the property the right to compensation for the value of the lost property').
[60] See Turkey-Nigeria BIT 2011, art 7(2); for a similar expression see Canada-Nigeria BIT 2014, annex B. 10 c.
[61] See Sweden-Nigeria BIT 2002, art 5(1) a c; Italy-Nigeria BIT 2000, art 5(2); Nigeria-Egypt BIT 2000, art 3(2) a; Romania-Nigeria BIT 1998, art 5(1); Korea-Nigeria BIT 1997, art 5(1).

host State. This is based on the premise that investment rules are applied inconsistently and are more likely to be interpreted in favour of investors or, from a more critical perspective, in a manner inimical to the interests of Third World States.[62]

To avoid such unfavourable outcome for Nigeria, positive language should be used in expressing the right to regulate. For instance, the clause may read, 'the host State shall have the right to regulate on matters of public interest such as health, safety and environment in a legitimate manner and the expression of such right shall not be constitute (indirect) expropriation'. This would appear to be of great importance to Third World States as they are often subjected to investor-State arbitration,[63] on the basis of violation of substantive investment provisions which constrain their regulatory rights.

The second issue concerns the qualification of the right to regulate by stating that the exercise of such right will be accompanied by compensation. It should be noted that the liability for expropriation under investment law is the payment of compensation, because the compensatory sum covers the value of the property or right extinguished by virtue of the measure introduced by the host State.[64] Therefore, an exception to the obligation not to expropriate which still requires the payment of compensation does not technically preserve the right of the host State – that is, Nigeria – to regulate on the matters stated. The issue with this manner of

[62] See Chung (n 49) 960; James T Gathii, 'Third World Approaches to International Economic Governance' in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds), *International Law and the Third World* (Routledge-Cavendish 2008) 255, 261-65.
[63] International Centre for Settlement of Investment Disputes, 'ICSID Caseload-Statistics: Issue 2021-1' (ICSID 2021) 7. Available on <https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf> accessed 12 March 2021.
[64] See for instance Spain-Nigeria BIT (2002), art 6.

expression, as highlighted in the previous paragraph, is that it creates room for an interpretation that will not favour the right to regulate, invariably constraining such right.

Noting that expressing the right to regulate as an exception to the substantive provision may be prone to challenges, such notion would be better expressed in substantive provisions themselves. However, this approach is not common in investment treaty practice.[65] Such provision ensures a balance of rights and obligations between foreign investors and host States, as it specifically creates a key right of host State within investment regime. The Morocco-Nigeria BIT contains such provision, expressly stipulating the right of the host State to 'take regulatory or other measures to ensure that the development in its territory is consistent with the goals and principles of sustainable development…'[66] This provision not only protects the right of the host State (in this case, Nigeria) to regulate, making it compatible with other investment rights, it extends such right to environmental matters; and as a result, strengthens the regulatory space of Nigeria to protect the environment. This, therefore, highlights an important approach of addressing environmental concerns in Nigeria's network of investment treaties.

In summary, the right of host States to regulate is an exercise of their sovereignty and recognised in international law. As a result, it is a valued asset of any sovereign State, especially Third World States considering their colonial history. More importantly, regarding investor-State relationship, the right to regulate ensures that the host State derives optimal benefits from the activities of

[65] Only 1 out of the 17 Nigeria's investment treaties reviewed contained such provision, and that is Morocco-Nigeria BIT (2016).
[66] Morocco-Nigeria BIT (2016), art 23 (1).

foreign investors (including but not limited to environmental sustainability). It is for this reason that the right to regulate should be included in Nigeria's investment treaties, and be expressed in clear, precise and unqualified language.

3.2.Foreign Investor Obligation

Imposing obligations on foreign investors one of the ways investment treaties can be used to protect the environment. In the context of investment treaties and promoting environmental sustainability (being part of host State's sustainable development objectives), foreign investor obligations ensures that foreign investors comply with, for instance, environmental protection principles.[67] In this regard, foreign investor obligations will act to minimise the environmental harm caused by the activities of foreign investors, especially in the Third World.

While investor obligation is starting to be included in recent treaty practice,[68] it is a feature that is generally lacking in many investment treaties including those concluded by Third World States like Nigeria.[69] The lack of foreign investor obligation is not necessarily a wilful neglect, but a reflection of the central purpose of investment law – that is, for the protection of foreign investors and investments – and therefore not to impose a direct legal obligation on foreign investors.[70] Although this position may appear correct, it does not take into consideration historical factors for the lack of foreign investor obligations in investment treaties.

The reason for the uneven distribution of investment rights and obligations is better understood in the context of the imperialist history of foreign investment

[67] VanDuzer (n 42) 261-62.
[68] For instance, see ECOWAS Common Investment Code (ECOWIC) 2018. More discussion will be undertaken below.
[69] For discussions on the lack of environmental and sustainable development provisions in investment treaties see Chapter 3. See also VanDuzer (n 42) 258.
[70] See Karsten Nowrot, 'Obligations of Investors' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (C.H.Beck Hart Nomos 2015) 1154, 1154-55.

protection. Chapters 2 and 4 noted that the Third World States were the original targets of foreign investment protection. In other words, investment obligations were meant to be imposed on Third World States to protect investors from powerful States.[71] Understood from this perspective, asymmetry in investment obligations was not a structural deficiency in investment treaty, rather a deliberate attempt to subject the Third World to rules that cater only to transnational capitalist interests, without regards to public interests in the host State.

The lack of adequate foreign investor obligations in substantive investment treaty provisions has made foreign investors beneficiaries-without-obligations in investment treaties. It leaves the host State without proper recourse against foreign investors through investment treaties,[72] except through domestic approaches – that is, either by enacting domestic regulation or instituting criminal/civil actions against the foreign investor before domestic courts of the host state.[73] Therefore, the absence of foreign investor obligation limits the options of host States to challenge foreign investment activities that have negative impact of their environment.

Interestingly, when a domestic approach is taken it risks being challenged before an international forum – that is, investor-State arbitration, which host states have limited access to – for violating an investment treaty obligation owed to the foreign investor.[74] This makes it difficult for host States, and more particularly for

[71] See Vandevelde, 'A Brief History of International Investment Agreements' (n 40) 166-67.
[72] The procedural aspect of resolving investment disputes is intrinsically tied to the substantive provisions of investment treaty. The privilege to settle investment disputes at investor-State arbitration emanates from the investment obligations imposed by investment treaties, therefore host States cannot institute an action against foreign investors because foreign investors do not have substantive obligations in investment treaties.
[73] Nowrot, 'Obligations of Investors' (n 70) 1173-74.
[74] For instance, in 2009, Chevron instituted investment proceedings against Ecuador on the ground that the environmental civil action filed against Chevron before the Ecuadorian and US domestic courts for environmental degradation caused by its operations was in violation of Ecuador-US BIT 1993. See

Third World States, to hold foreign investors accountable for any wrongdoing, therefore highlighting the need to include foreign investor obligation in investment treaties. To buttress this position, three reasons will be briefly explored below.

First, beyond making profit foreign investment activities are expected to contribute to the overall welfare to the host State. Although not consistently applied, this perception has received acknowledged in investor-State arbitration jurisprudence on the meaning of investment.[75] In this regard, a criteria for an activity to be considered an investment is that it must contribute to the host State's development for it to be entitled to protection under an investment treaty.[76] This means that foreign investors should ensure their investment activities are beneficial in its broadest sense – not just economic but environmentally also. Considering this, it becomes important to include investor obligations in investment treaties to underscore the role foreign investment activity should play in the host state.

Second, including foreign investor obligation in investment treaties could serve the purpose of the right to regulate. For instance, where there is an obligation on the foreign investor to operate in a manner that promotes environmental sustainability, this obligation could serve in support of an environmental measure taken by the host State in that regard, thereby strengthening the right to regulate, and bringing such measure in conformity rather than in violation of the investment treaty. Therefore, where an investment treaty imposes an obligation on the foreign

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Chevron Corporation and Texaco Petroleum Company v The Republic Ecuador, Claimants' Notice of Arbitration, 23 September 2009. Available on <https://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf> accessed 12 October 2020.

[75] See *Fedax N.V. v The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997, para 43 (Fedax v Venezuela, Jurisdiction); *Salini Construttori S.P.A. and Italstrade S.P.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para 57 (Salini v Morocco, Jurisdiction).

[76] Fedax v Venezuela, Jurisdiction (n 75) para 43; Salini v Morocco, Jurisdiction (n 75) para 57.

investor, it may justify a host State's right to regulate with respect to such obligation. Including investor obligations in Nigeria's network of investment treaties is important because it corroborate the essence of the right to regulate, which is important to ensure environmental sustainability.

Third, as earlier noted, the duty to protect foreign investors and their investments were targeted at Third World States, this made international investment law a regime that priorities the rights and interests of foreign investors sometimes at the expense of these Third World States. Therefore, to rectify this imbalance – that is, to ensure that foreign investors are made equally responsible for their activities especially in the Third World – it is important to include investor obligations in investment treaties. On this note, having a treaty-imposed investor obligation could potentially serve the interests of Third World host States, as it realigns the dynamics of rights and obligations in investment relations.

The above analysis has highlighted the importance of including foreign investor obligations to emphasise the role of investment to contribute to the overall wellbeing of the host State, to reinforce the right to regulate and correct the dynamics of rights and obligations in investment relations. The analysis below will explore the manner investor obligations are expressed in investment treaties. Foreign investor obligations may be expressed in investment treaties in various ways,[77] however the current chapter is interested in those that address environmental sustainability specifically. Therefore, the foreign investor obligations that will be explored below are those that would ensure that foreign investors comply with environmental norms.

[77] See VanDuzer (n 42) 267-406.

3.2.1. Environmental Sustainability

Debates concerning the interactions between environmental sustainability (and more broadly sustainable development) and development have made attempts to reconcile or at least link economic (or development) activities of transnational corporations and the environment. An important part of the debate is the position that these corporations – often in the form of foreign investors in host States – with superior financial capability and technological know-how can contribute to the sustainability of the host environment or to sustainable development in general.[78] This manifest, for instance, in investments in renewable energy.[79] In other words, foreign investors have the resources to ensure environmental sustainability.

While one may argue that foreign investors could use more environmentally sustainable technologies in their operations, their lack of accountability, owing to poor environmental implementation regime in most of their host States especially in the Third World, can result in enormous environmental damage.[80] Therefore, irrespective of their ability to promote environmental sustainability, without a proper mechanism ensuring that they are held accountable for the consequences of their operations, foreign investors may cause environmental degradation.

Following from this, to ensure the right balance between the potential positive and negative effects of foreign investment – that is, minimising harm and maximising benefit – requires an appropriate investment policy.[81] On this note,

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[78] See UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* (UNCTAD: New York and Geneva 2010).
[79] Ibid 103-115.
[80] Michael Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer' (2002) 41 Washburn Law Journal 399, 403 (noting that 'their relative lack of accountability means that many of the most egregious instances of large-scale environmental damage result from [multinational corporations'] activities).
[81] UNCTAD, *Investment Policy Framework for Sustainable Development* (UNCTAD: New York and Geneva 2015) 47.

depending on the technique applied, investment treaties as earlier noted can serve to deter environmental risks of investment activities by imposing on foreign investors an obligation to ensure that their activities do not harm the environment. One of such ways is by mandating foreign investors to conduct sustainability assessment of their activities or investments projects.

Foreign investment operations can engender both positive and negative effects on the host environment. Considering that the latter is possible, it may be argued that without proper prior assessment of such negative effects of investment activities, it will be difficult to identify potential environment risks and adopt appropriate strategies to mitigate them. An environmental impact assessment (EIA) in this case is used to identify and assess potential environmental risks before an investment project is undertaken.[82] As such, it serves an important way to ensure that a proposed investment project is compatible with sustainable development – and specifically, environmental sustainability.[83] By providing the framework for the decision-making of an investment project, EIA serves as an instrument of environmental governance,[84] and by extension to regulate foreign investment.

Although an EIA could serve as a bridge linking development projects and environmental sustainability, it is largely absent in investment treaty practice, and where they feature in investment treaties, the regime for environmental assessment is often relatively weak.[85] The consequence of this general lack of EIA in

[82] Valentina S Vadi, 'Environmental Impact Assessment in Investment Disputes: Method, Governance and Jurisprudence' (2010) 30 Polish Yearbook of International Law 169.
[83] VanDuzer (n 42) 268.
[84] Graham Mayeda, 'Integrating Environmental Impact Assessments into International Investment Agreements: Global Administrative Law and Transnational Cooperation' (2017) 18 Journal of World Investment and Trade 131; VanDuzer (n 42) 271; Vadi (n 82).
[85] VanDuzer (n 42) 271; David Collins, 'Environmental Impact Statements and Public Participation in International Investment Law' (2010) 7 Manchester Journal of International Economic Law 4.

investment treaties could manifest in a situation where an investment treaty fails to compel an investor to conduct an EIA, such investor may seek to protect its rights as provided by an investment treaty, in the event where there is a dispute against the host State or community regarding an EIA.[86] Therefore, having regards to the potential impact of such situation on the host State and the environment, EIA should be a constant feature in investment treaties.

Drawing on this, and to ensure that a foreign investor complies with the obligation to conduct an EIA, Nigeria's investment treaties should make the protection of an investment under the treaty subject conducting an EIA. This could be done by limiting access to ISDS.[87] In this case, where an investor fails to comply with an EIA provision as required in the treaty, an investor cannot protect its investment using treaty-based investor-State arbitration. Therefore, investment protection will be subject to EIA compliance. This means that drafting an EIA provision to the effect that it limits access to investor-State arbitration could serve an incentive for compliance.

Used in this way, integrating an EIA into investment treaties will achieve three goals. First, it will serve as an indirect means of reforming ISDS, on the ground that it will help filter the disputes that are brought before investor-State arbitration. This is because a company that failed to carry out adequate EIA will be precluded from protection through investor-State arbitration. Second, integrating an EIA in investment treaties will help to strengthen host State's ability to protect the

[86] Though there appears to be a recent trend in investment treaty practice including EIA clauses, for instance, Morocco-Nigeria BIT (2016), having regards to their relatively small percentage when compared to the vast network of investment treaties in existence they may make little or no impact on how investment treaties to constrain the use of EIA.
[87] VanDuzer (n 42) 283-84.

environment.[88] In this regard, it will bolster the effectiveness of domestic laws on EIA as it will promote compliance. This will also serve the interests of Third World States considering how important the right to regulate is to their sovereignty. Third, it will help redress the imbalance of rights and obligations in investment treaties.[89] This underscores the importance of integrating EIA into Nigeria's network of investment treaties.

In addition to integrating EIA into investment treaties, the EIA provision should require public participation in the decision-making process of an investment project. This requirement is relevant especially where the investment project may affect the local community. Chapter 4 highlighted the need to involve the host communities, especially the Third World people, who are affected by investment activities but often overlooked in decisions relating to foreign investment regulation. Therefore, an important way to ensure that an investment project does not harm the environment and cause devastating consequences for those within the environment is seek the input of host communities.[90] To be effective, the EIA provision should require public participation, in line with the domestic EIA laws, allowing an adequate period of time and provide accessible platforms for comments and objections from public stakeholders and host communities.[91]

Through this, investment treaties give an avenue for predominantly marginalised groups to be included in foreign investment matters. Rather than being

[88] See Mayeda (n 84) 132.
[89] VanDuzer (n 42) 284.
[90] Collins, 'Environmental Impact Statements (n 85).
[91] For instance, public participation in EIA in Nigeria is provided under Environmental Impact Assessment Act, CAP E12 LFN 2004 (EIA Act), section 25.

considered invisible in investment law regime,[92] including and recognising the role of host communities in foreign investment governance will represent a form of engaging with Third World interests, and a triumph of Third World resistance and reform agenda.[93] This shows that integrating EIA in Nigeria's investment treaties accommodates its interest as a Third World State as well of its local communities – the Third World people.

3.2.2. Obligation to Host States

The obligation of foreign investors to comply with the laws of the host State can be viewed as an extension of the right of the host state to regulate. This is because failure to comply with the laws of the host State not only challenges the regulatory authority of the host State as a sovereignty entity, it undermines the regulatory goals of the host State, for instance where the aim of the regulation is to protect the environment. [94] This underscores the importance of foreign investors complying with the host State laws, especially those enacted or implemented to protect the environment, and essentially highlights its necessity. Taking this into account, the next issue is to ascertain whether the obligation to comply with host state laws exist in investment treaty practice.

Investment treaties can encourage compliance with the laws of the host State by imposing requirements on foreign investors. One way this is achieved is in the manner a covered investment is defined in an investment treaty. In most cases,

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[92] See Nicolas M Perrone, 'The Invisible Local Communities: Foreign Investor Obligations, Inclusiveness and the International Investment Regime' (2019) 113 American Journal of International Law Unbound 16.

[93] See Luis Eslava and Sundhya Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3 Trade Law and Development 103. On Third World resistance see Odumosu, 'Locating Third World Resistance' (n 9); Chinedu Obiora Okafor, 'Poverty, Agency and Resistance in the Future of International Law: An African Perspective' (2006) 27 Third World Quarterly 799.

[94] VanDuzer (n 42) 292.

investments are defined in investment treaties, amongst other characteristics, as those made in accordance with the laws of the host state.[95] The issue of complying with the laws of host State goes to the root of the legality of an investment, and therefore predicates the protection of such investment.[96] In other words, an investor will be precluded from deriving protection from under an investment treaty where it is found that the necessary requirements for making an investment in domestic laws of the host State were not complied with. Defining an investment in this manner provides an incentive for a foreign investor that wants to enjoy the protection provided by the investment treaty to make an investment in compliance with the laws of the host State.

At first glance, this might appear to provide a means for host States, particularly in the Third World, to ensure that foreign investors comply with domestic (environmental) laws and regulations.[97] However, this might have its limitations, as it is based on the presumption that it applies to post-investment events. Naturally, the environmental effects of an investment activity or project only manifest post-investment – that is, either in the process of setting up, or during the operation of, such investment – and not prior to its making. Considering that the provisions as detailed above only apply to pre-investment requirement, it means that it does not cover post-investment effects of the investment activity. As a result,

[95] See Morocco-Nigerian BIT (2016), art 1(3).
[96] Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2010) 34 Fordham International Law Journal 1473, 1474-75.
[97] Ibid 1475 (noting that it has become common practice for respondent host states to limit access to investor-state arbitration on the ground that the investment failing to comply with domestic laws does not qualify as an investment as defined under the investment treaty).

this position may fail, especially when argued against a post-investment event such as environmental degradation.[98]

Therefore, in addition to defining an investment on the basis of being in compliance with the laws of the host State, Nigeria's investment treaties can expressly stipulate an obligation on foreign investors to comply with domestic laws, including those concerning the environment, to promote environmental sustainability. This achieves two goals. First, it balances the rights and obligations of host States and foreign investors,[99] as the requirement to obey host State laws will predicate the protection of the investor's rights in the investment treaty. Second, it extends the requirement to comply with host State laws beyond the initiation of the investment to cover the life cycle of such investment. This means that the foreign investor will be under the obligation to comply with host State laws throughout the duration of the investment, including new laws and regulations are enacted or implemented.

There are few places that serve as points of reference for such provisions. Particularly, investment governance frameworks in Africa by Common Market for Eastern and Southern Africa,[100] Economic Community of West African States,[101] Southern African Development Community,[102] African Union,[103] have designed provisions to address the lack of foreign investor obligations towards the

[98] See *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para 127 (Gustav v Ghana, Award) (noting the difference in the scope of application on the legality of an investment at initiation covered by the definition provision and the legality during the performance of an investment which not covered by the definition provision).
[99] UNCTAD, *Investment Policy Framework for Sustainable Development* (United Nations: New York and Geneva 2012) 7.
[100] COMESA Common Investment Area (CCIA) 2007.
[101] ECOWAS Common Investment Code (ECOWIC) 2018.
[102] SADC Model Investment Treaty 2012.
[103] Draft Pan African Investment Code (PAIC) 2016.

environment. For the most part, the provisions reiterate the obligations of foreign investors to comply with domestic laws of the host State but go further to make specific reference to foreign investors to ensure their operations are environmentally sustainable.[104] Although these investment frameworks have been designed to address issues that are specific to Africa,[105] they could also apply to Third World States generally.

From a Third World perspective, this ensures that if the environmental regime is reformed – considering the low environmental standards of Third World States – such policy measure is not challenged by an investor for violating the provisions of an investment treaty. Added to this, incorporating investor obligation, for instance to comply with domestic laws of the host State, could provide the basis to counterclaim,[106] where applicable, against an investor before investor-State arbitration for non-compliance.[107] This serves to utilise existing structures in the regime, which have been ordinarily used to subjugate the Third World, to achieve the goals of the Third World.[108]

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[104] See ECOWIC 2018, art 27; PAIC, arts 23, 24.

[105] See Makane Moïse Mbengue and Stepanie Schacherer, 'The "Africanization" of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 Journal of World Trade and Investment 414, 415 (noting that the PAIC contains a number of African-specific and innovative features, which includes introduction of direct obligations for investors); For literature discussing how African states are reforming the landscape for investment regulation, see Odysseas G Repousis, 'Multilateral Investment Treaties in Africa and the Antagonistic Narratives of Bilateralism and Regionalism (2017) 52 Texas International Law Journal 313, 349-50, 358; See also Makane Moïse Mbengue, 'Africa's Voice in the Formation, Shaping and Redesign of International Investment Law' (2019) 34 ICSID Review 455; Eric Denters and Tarcisio Gazzini, 'The Role of African Regional Organizations in the Promotion and Protection of Foreign Investment' (2017) 18 Journal of World Investment and Trade 449; Hamed El-Kady and Mustaqeem De Gama, 'The Reform of the International Investment Regime: An African Perspective' (2019) 34 ICSID Review 482.

[106] It is important to note, however, that this is a complicated issue, in the sense that counterclaims based on domestic law provisions are usually more difficult to establish as there are often several preconditions to be met, nevertheless, they are important to recalibrate investor-State relationships. See Xuan Shao, 'Environmental and Human Rights Counterclaims in International Investment Arbitration: At the Crossroads of Domestic and International Law' (2021) 24 Journal of International Economic Law 157.

[107] VanDuzer (n 42) 293.

[108] See Eslava (n 93) 110.

3.3.Environmental Provisions

A typical investment treaty is replete with provisions containing various standards of treatment of foreign investors and investments. This is because the main objective of investment treaty is to promote and protect foreign investors and investment. Considering this, where there is a conflict between investment rights and non-investment concerns, such as the environment, the interests of foreign investors will take priority. Therefore, to ensure equal priority and consideration is given to environmental matters, the language in investment treaties should reflect environmental concerns.

In analysing the adequacy of environmental language in Nigeria's investment treaties Chapter 3 explored the various ways environmental provisions are integrated in investment treaties. To avoid repetition or reproducing the analysis here, a summarised version will be discussed in this section. The analysis identified three major ways of integrating environmental provisions in investment treaties. These approaches will be briefly described below.

To ensure that treaty provisions are interpreted in a manner that recognises environmental concerns Nigeria's investment treaty preambles should contain environmental language. Put differently, there should a positive language stating that the object and purpose of the investment treaty, while recognising the importance of foreign investments and the need to protect them, should promote environmental sustainability or sustainable development in general. This ensures that matters on the environment are given the same priority with foreign investment, and more importantly are not made incompatible with the substantive rights in Nigeria's investment treaties.

To give further strength to environmental concerns in Nigeria's investment treaties, there should be substantive treaty provisions specifically addressing environmental concerns. This to some extent has been addressed above in the section on foreign investor obligations – wherein treaty provisions impose obligations on foreign investors to ensure that their investments and operations promote environmental sustainability or sustainable development. Beyond this, substantive treaty provisions can specifically reflect environment concerns. The reason to have a substantive treaty provision address environmental concerns is that it makes the promotion of environmental sustainability an operative part of Nigeria's investment treaties and therefore binding.[109]

One approach through which environmental concerns are expressed in substantive treaty provision is by mandating the host State not to lower environmental standards in a bid to attract or maintain foreign investments.[110] For a Third World State like Nigeria, while this may appear counterproductive as it presumes that environmental standards are already high and therefore should not be lowered, it may also ensure that low environmental standards are not maintained to attract foreign investments. In other words, it encourages environmental standards at least stay the same, which would include the regulatory authority to implement or enforce them without being considered contrary to treaty provisions. This approach gives supports to the right to regulate, as the mandate not to lower environmental standards encourages the exercise of regulatory sovereignty to protect the environment through enforcement.

[109] Just as the substantive provisions containing the standard of treatment are binding on host states. It is because of the binding nature of substantive provisions that host states are held liable for violating them.
[110] See Canada-Nigeria BIT (2014), art 15.

In summary, textual reforms to the substantive provisions in the network of Nigeria's investment treaties will enable Nigeria to use investment treaties as a legal framework to drive its domestic objectives, especially in the area of environmental sustainability. In this way, investment treaties, which have been regarded as tools of economic oppression, promoting and prioritising transnational capitalist interests at the expense of public interests in the Third World, could be used to strengthen Nigeria's position as a Third World State in investment governance and environmental protection.

4. Policy Options

This section will examine the prospects and challenges of the policy options needed to put into effect textual reforms analysed above. In other words, the effectiveness of these reforms is to a large extent dependent on the implementation of the policy options. The policy options to be explored will be as follows: the making of a model investment treaty (MIT); reforming Nigeria's foreign investment law; and treaty negotiation and renegotiation. The choice of policy options was determined by the statist approach. As such, the State will be the focal point of implementing these policy options. However, it is important to note that these policy options are not exhaustive; and for this reason, they are to be viewed more in their complementary role to one another: as one policy option may not serve the general purpose of effectively reforming Nigeria's investment policies.

4.1.Model Investment Treaty (MIT)

Following the backlashes experienced in the regime, including South Africa's approach in domesticating foreign investment governance, the relevance of investment treaties in the future of the regime appears to be in question. Although there has been in recent times drastic downturn of investment treaty making, investment treaties (at a bilateral and multilateral level) are still being concluded

even by Third World states.[111] In fact, one position holds that states do not seem to be against investment treaties as such, rather, a core concern is with the expansive interpretation of investment treaties and its attendant implications,[112] especially on sovereign authority. This means that though investment treaty making has experienced drastic downturn, owing mostly to the manner investment treaty provisions are applied,[113] investment treaties will remain one of the main legal frameworks in foreign investment regulation.[114]

Considering that investment treaties will remain relevant at least in the near future, it is only appropriate and prudent – from the point of managing and determining one's investment policies – for states, especially Third World States like Nigeria, to develop its own model investment treaty. The development of a model investment treaty from the perspective of a Third World State has its potentials as well as its weaknesses, as will be explored in the subsequent paragraphs.

A key highlight of Chapter 3 is that the treaty provisions in Nigeria's network of investment treaties are inconsistent. One of the recognised ways to ensure consistency while reforming existing investment obligations in various investment frameworks is to adopt a model investment treaty (MIT).[115] As a soft instrument it is not binding in nature.[116] Its core principles only serve as an overarching guide on

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[111] Nigeria's most recent investment treaty was signed in 2016 with Morocco, see Morocco-Nigeria BIT (2016). There have also been a few multilateral investment legal frameworks among the Third World, see Pan-Atlantic Investment Code 2016.
[112] See Rodrigo Polanco, *The Return of Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* (Cambridge University Press 2019) 50.
[113] As noted earlier, States are beginning to pull out from investment treaties while opting for domestic foreign investment regulation.
[114] Polanco (n 112) 50.
[115] Laura Páez, 'Bilaterla Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area?' (2017) 18 Journal of World Investment and Trade 379, 398.
[116] Ibid 398.

what should be contained in the final binding legal instrument – that is, the investment treaty.[117] In this sense, an MIT can be adaptable to any particular situation, which means it can serve as a template for future negotiations and investment treaty making.[118]

MITs often reflect the core investment objectives of the State that develops it.[119] Considering this, Nigeria's MIT will reflect its core investment objectives. As noted in Chapter 3, Third World States are largely rule-takers – that is, they are more susceptible to have investment rules imposed on them, which to some extent is as a result of a lack of coherent investment policy. However, considering that an MIT creates room for the design of core investment objectives, it gives Third World States more control towards actualising their investment policy preference.

Interestingly, the investment programs of the US, like many developed States, with Third World States were based on model treaties.[120] Developed States were able to determine investment pathways with the Third World, as the model treaties were designed to capture their interests.[121] Also, the importance of model treaties is reflected in the fact that regional organisations in Africa have adopted investment treaty models to serve as the basis of future investment treaty making within and outside their regions, as these investment models embody their core principles

[117] See Introduction EAC Model Investment Treaty 2016.
[118] For instance, according to the EAC Model Treaty, its aim is to serve as a template for investment negotiations between the EAC or a member state and a third-party state. See EAC Model Investment Treaty 2016 <https://www.eac.int/documents/category/investment-promotion-private-sector-development> accessed 11 February 2020.
[119] For instance, the core principles behind the development of US Model treaty were to ensure prompt, adequate and effective compensation for its investments abroad. See Kenneth J Vandevelde, 'U.S. Bilateral Investment Treaties: The Second Wave' (1993) 14 Michigan Journal of International Law 621, 625.
[120] Valerie H Ruttenberg, 'The United States Bilateral Investment Treaty Program: Variations on the Model' (1987) U Pa Journal of International Business Law 121, 121; Kenneth J Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (1988) 21 Cornell International Law Journal 201, 209-12.
[121]

regarding foreign investment regulation.[122] It is for this reason that MIT are an integral part of investment treaty making.

Therefore, Nigeria as a Third World State, is presented with an existing framework in the form of an MIT to project its investment policies, which ensures that Nigeria's investment relations are in line with domestic socio-economic specificities. In other words, an MIT presents one of the ways Nigeria can utilise the existing frameworks in the international investment regime to overcome investment challenges encountered by Third World States. The major challenge with a model treaty is in its actual usage – that is, turning the soft law into a binding legal document. The complexities that abound in ensuring that the core principles are reflected in the final binding investment framework are such that they should not be overlooked.

Nigeria like most Third World States is considered a rule-taker in international investment law regime, not just because it is unable to adopt coherent investment policy but because the inability to do so is partly caused power deficiency at the international stage.[123] Considering that investment treaty making is often determined by power relations, the practicability of dictating Third World-centred interests into an investment treaty might be limited. Therefore, although developing a model treaty, which captures the peculiar interests of Nigeria as a Third World State, has its merits, translating it into a treaty practice, considering

[122] See PAIC.

[123] This is on the note that the rules of international law are largely determined by power relations, and those with the power – mostly developed States – often determine the rules. See Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 1999). See also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press 2004); Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of International Legal Order' (2005) 16 European Journal of International Law 369.

the asymmetric power relations between developed and Third World States, might prove difficult. On this note, the option of internalising Nigeria's investment objectives through domestic investment law will be explored next.

4.2.Foreign Investment Law

The discussions in most parts of this chapter and the thesis in general have focussed on investment treaties, and rightly so, considering that they provide the bedrock of foreign investment protection. However, foreign investment laws, which form part of the domestic legal system of host States, have become important in the current discourse of investment reforms. Like investment treaties they also provide protection to foreign investments. In fact, it has been noted that several States in the world have foreign investment laws that mention investor-State arbitration, and some States have gone further to provide consent to it.[124] This therefore gives foreign investors the privilege to institute action before investor-State arbitration through the host State's domestic law.[125] As a result, like investment treaties, domestic investment laws are increasingly being applied at investor-State arbitration.[126]

Following from this, for Nigeria to undertake a holistic investment reform, and to supplement efforts to be made at the international front through model investment treaties, its domestic investment law should be made part of the reform. This is because Nigeria's domestic investment law, the Nigerian Investment Promotion Commission (NIPC) Act, provides foreign investors the privilege to

[124] See Tarald L Berge and Taylor St John, 'Asymmetric Diffusion: World Bank "Best Practice" and the Spread of Arbitration in National Laws' (2020) Review of International Political Economy 1.
[125] See Michele Potesta, 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws' (2011) 27 Arbitration International 149.
[126] Jarod Hepburn, 'Domestic Statutes in International Law' (2018) 112 American Journal of International Law 658; Potesta (n 125) 150.

resolve investment disputes through investor-State arbitration.[127] Unsurprisingly, Nigeria like most of the States that became involved with the World Bank, was influenced by its officials to enact foreign investment laws containing specific provisions, especially the investor-State arbitration provision.[128] More importantly, these proposals were made on account of developed States.[129] In other words, the World Bank and its officials were working for and in favour of the more powerful economic interests. To counterbalance this, there is the need to ensure that the standards of protection accorded foreign investors align with domestic policy objectives, especially those that concern the environment. Therefore, Nigeria's investment commitments contained in its laws, as well as its investment treaties, should align with legal objectives concerning the environment.

There are few reasons Nigeria should not only revise the NIPC Act but maintain it. First, considering the potential difficulty, and legal and political complexities that may be associated with negotiating a bilateral investment treaty, it would be easier for States to establish their desired level of foreign investment protection through domestic investment laws.[130] Unlike investment treaties that are negotiated and concluded by the executive arm of government, often with little or no oversight by the legislature, domestic investment laws are made by the legislature – and in a usual democratic system, sponsored by either the executive or a member of the legislature, ensuring wider participation. This, therefore, ensures

[127] NIPC Act, s 26 (2) b (3).
[128] Berge, 'Asymmetric Diffusion' (n) 1, 5-6 (noting that in receiving technical assistance from the World Bank, developing states adopted domestic investment laws in line with the guidance of World Bank's officials); Lauge N S Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press 2015) 76-81.
[129] Ibid.
[130] Hepburn, 'Domestic Investment Statutes in International Law' (n 126) 662.

that the contents of the domestic investment law have undergone a more scrutinised process, ensuring accountability.[131]

Although the legislature becomes involved in the ratification of the investment treaty, they do not take part in the process like with domestic investment laws. Considering that the domestic investment law passes through more scrutiny, having been debated by the representatives of the citizens, it is more likely to reflect the investment policies and objectives of the host States. Flowing from this, the domestic investment law will not be focused on foreign investment protection but also regulation.[132] Many Third World States like Nigeria have fewer outward investors compared to inward investors; therefore, domestic investment laws may serve their purpose better as there will be no need for reciprocity, which investment treaties offer.[133] In this regard, there has been positive views regarding South Africa's decision to adopt to replace investment treaties with domestic investment law.[134]

Inasmuch as domestic investment laws offer benefits with regards to investment governance to host States, especially Third World States, it does not follow that investment treaties have become obsolete. As noted earlier, investment treaties at least for the foreseeable future will remain relevant in foreign investment governance; many have sunset clauses, and as such will still be relevant for decades

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[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] See Amy Farish, 'Protection of Investments Act - A balancing Act between policies and investment' (De Rebus, 25 April 2016) < http://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/> accessed 2 June 2021(noting that in spite of the Act South Africa still received foreign direct investments); Lindelwa Mhlongo, 'A Critical Analysis of the Protection of Investment Act 22 of 2015' (2019) South Africa Public Law Journal 1 (noting that, albeit some loopholes, the Protection of Investment Act has largely addressed South Africa's concerns with investment treaties). For a more critical view, see Sarah McKenzie, 'Resolving the Conflict Between the Protection of International Investments and the State's Right and Responsibility to Regulate' (LLM Dissertation, University of the Witwatersrand 2017).

after their termination.[135] Considering this, there is the need to ensure that future investment treaties are negotiated, while existing but soon-to-be expired investment treaties are renegotiated to ensure that they reflect Nigeria's current investment objectives. For this reason, the next section will discuss the termination and renegotiation of investment treaties.

4.3.Treaty Termination and Renegotiation

An important issue that may present some challenges as well as prospects in the reform process, is the appropriate method of ensuring existing investment treaties align with an investment reform agenda. Various approaches have been adopted by different States, across the North-South divide, in ensuring consistency of investment policies in their investment treaty network. As discussed earlier, some Third World States, have resorted to terminating existing investment treaties, as a way to minimise their exposure to challenges to their sovereignty – that is, their ability to regulate for the environment or social justice – and more importantly, to reassert their sovereignty.[136]

The need to improve or change investment commitments, on the heels of the failure of previous commitments to accommodate or address domestic needs, by incorporating the various textual reforms identified above, such as the right to regulate, foreign investor obligations and substantive environmental obligations, would require Nigeria to either terminate or renegotiate its investment treaties. In other words, terminating or renegotiating Nigeria's investment treaties would make

[135] Sunset clauses ensure that the terms of an investment treaty remain in force for relatively long period of time – usually between 10-20 years – after termination. See Chrispas Nyombi and Tom Mortimer, "Rights and Obligations in the Post Investment Treaty Denunciation Period' (2018) 21 International Arbitration Law Review 46; Tuuli-Anna Huikuri, 'Terminating to Renegotiate: Bargaining in the Investment Treaty Regime' <https://www.peio.me/wp-content/uploads/2019/01/PEIO12_Paper_52.pdf> accessed 24 April 2021.

[136] For instance, South Africa totally reviewed its international investment law regime, replacing previous investment treaties, including those with developed states, with its domestic investment law.

an important contribution towards the process of reforming its international investment law regime.

The termination and renegotiation investment treaties is not necessarily a new phenomenon in investment treaty practice. It has, in fact, been the practice of more powerful States even back in the 1990s to terminate and replace their investment treaties with little or no controversy.[137] The lack of controversy may be because the actors involved are predominantly considered the rule-makers,[138] or that the perception of foreign investments and investment treaties at the time was different.[139] Therefore, terminating and replacing investment treaties may not have raised concerns because it was viewed as enhancing the legal protection of foreign investments,[140] rather than an act of resistance.

However, as noted earlier, international investment law regime is currently in a state of legitimacy crisis. Given that the entire regime is undergoing a reform phase, for instance with discussions at international forums regarding the future of investor-State arbitration as noted above,[141] the issues of terminating and renegotiating investment agreements will not only be more frequent in investment treaty practice,[142] but may represent a form of backlash to the regime or resistance to the encroachment into host State sovereignty. This can be gleaned from the recent

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[137] Karsten Nowrot, 'Termination and Renegotiation of International Investment Agreements' in in Steffen Hindelang and Markus Krajewski (eds) *Shifting Paradigms in International Investment Law* (Oxford University Press, 2016) 229-30 (highlighting that Germany, Japan and Finland had in the past initiated a worldwide process of renegotiating their BITs).

[138] See Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements (2016) 19 Journal of International Economic Law 561 (noting that developed states are predominantly rule-makers in international investment law regime – that is, they determine the contents of investment rules).

[139] Following the neo-liberal conditioning propagated by the World Bank and other influential institutions there had been at the time the narrative of the positive role of foreign investments in the host state economies.

[140] Nowrot (n 137) 230.

[141] For instance, there has been discussions at UNCITRAL on reforming investor-State arbitration. See (n).

[142] Nowrot (n 137) 228.

actions of some States in the global South, like South Africa and other Latin American countries, denouncing investor-State arbitration and terminating their investment treaties.[143]

The tension between protecting foreign investments and the environment, which manifests as host States try to regulate on environmental concerns is one of the leading causes of legitimacy crisis in international investment law.[144] As disclosed in chapter 3, many investment treaties (signed between Third World States and developed States in earlier decades) did not address environmental or sustainable development concerns because they reflected the economic interests of the nationals of developed States at the time, and therefore failed to accommodate the peculiar interests of host States. Therefore, reforming these treaties may quite certainly require either their termination or at least renegotiation.

The first issue to be analysed revolves around the possibility and practicability of terminating investment treaties. The decision to terminate existing investment treaties may have some political connotation. This is because investment treaties stipulate the content of international relations between sovereign States.[145] Contemporary international relations, on the other hand, cannot be divorced from politics because 'through politics States and other actors constitute their social and material lives, determining not only "who gets what when how" but also who will be accepted as a legitimate actor and what will pass as rightful

[143] For literature on backlash of Third World states, especially Latin American States, see Asha Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' (2009) 50 Harvard International Law Journal 491.
[144] Stephen J Byres, 'Balancing Investor Rights and Environmental Protection Investor-State Dispute Settlement under CAFTA: Lessons from NAFTA Legitimacy Crisis' (2007) 8 UC Davis Business Law Journal 102.
[145] Vienna Convention 1969, art 2(1) a; Malcolm N Shaw, *International Law* (5th edn, Cambridge University Press 2003) 810-811; Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcolm D Evans (ed), *International Law* (Oxford University Press 2010) 172.

conduct.'[146] Therefore, from a political perspective, since the acts of terminating and renegotiating investment treaties are currently being spearheaded by States in the Third World, it presents a new dynamic regarding those responsible for shaping the rules in international investment law regime.

Although the overall beneficiary of such investment commitments are the investors, the severance of such commitment is with the other contracting State party. As a result, termination of an investment treaty may be politically sensitive.[147] Also bearing its potential consequences in mind – both economic and political – the termination of investment treaties has been discouraged.[148] Nevertheless, some circumstances that affect the socio-political stability of a State may warrant the termination of their investment treaties.[149] Therefore, regardless of how the act of termination is viewed, it remains an option open to a sovereign State to exercise. Following this, the next issue to be determined is the legal right to terminate an investment treaty.

An investment treaty may be terminated in two broad ways. A good understanding of this is important for Nigeria, as its network of investment treaties – lacking coherence – may benefit from a range of termination approaches. The first way is termination in accordance with the terms of the investment treaty, the second is termination not in accordance with the terms of the investment treaty.[150] In the first instance, investment treaties often expressly stipulate a minimum fixed period

[146] Christian Reus-Smit, 'Introduction' in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press 2004) 1, 3.
[147] Andrea Carska-Sheppard, 'Issues Relevant to the Termination of Bilateral Investment Treaties' (2009) 26 Journal of International Arbitration 755, 755-56.
[148] Ibid 756.
[149] For instance, an investment claim challenging a policy to counteract historical racial discrimination as in the case of South Africa.
[150] Carska-Sheppard (n 147) 761-63.

of operation (usually a period of 10 years), this provides foreign investors a high level of predictability regarding the legal environment they are conducting their business.[151] In the same vein, they provide the terms of how they may be renewed or terminated.[152]

Investment treaties often contain an 'immune system': these are provisions that ensure the tacit renewal of the treaty either indefinitely or for fixed period, after the completion of the initial stipulated period.[153] In most cases, any State party that wishes to renege their investment commitment shall give notice of their intention to terminate the investment treaty within one year prior to the expiry of the initial stipulated period or the renewed fixed period. Due to the long-term nature of foreign investments, investment treaties tend to provide extended period of protection.[154] As a result, even after an investment treaty expired or is terminated (even in accordance with the terms of the treaty), investments established while such treaty was in force may still enjoy the guaranteed protections for an extended period.[155]

Therefore, termination in accordance with the terms of the investment treaty does not extinguish the rights of protection in favour of foreign investors contained in such treaty.[156] In such case, not only that foreign investors enjoy continued protection under the investment treaty, but the time for which the terminating State party may be relieve from existing obligations is extended. The effect of this on a Third World State that wishes to replace its investment commitments is that such

[151] UNCTAD, 'Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking', UNCTAD/ITE/IIT/2006/5 <https://unctad.org/en/Docs/iteiia20065_en.pdf> accessed 19 February 2020.
[152] See Article 13 Italy-Nigeria BIT 2000.
[153] Article 13(1) Italy-Nigeria BIT 2000.
[154] Carska-Sheppard (n 147) 761.
[155] For instance, Article 13(2) Italy-Nigeria BIT 2000 gives a further period of 5 years after the expiration of the investment treaty.
[156] Federico M Lavopa, Lucas E Barreiros and M Victoria Bruno, 'How to Kill a BIT and not Die Trying: Legal and Political Challenges of Denoucing or Renegotiating Bilateral Investment Treaties' (2013) 16 Journal of International Economic Law 869, 881.

investment reform does little to ultimately change the conditions upon which prior investments were made.

On the other hand, certain situations may precipitate the host State to unilaterally terminate an investment treaty, mostly prior to its stipulated timeframe. This arbitrary action may lead to multiple disputes against the host State – one by the contracting State party and the other by an aggrieved investor.[157] Regardless of who brings a claim against the defaulting State party, the issue to be determined is the remedy available to the aggrieved party. In a case where an investment treaty has been terminated prematurely, it is argued that the more appropriate remedy available to foreign investors, considering the long-term nature of foreign investments and the need to repair the damage caused by a unilateral termination of an investment treaty, is monetary compensation.[158] This means that termination not in accordance with the terms of the investment treaty still exposes the terminating State party to investment claims, which as noted in previous chapters is often costly especially for Third World states.

Another potential drawback of a unilateral termination is the negative signal this type of decision sends to the international investment community.[159] This is based on the premise that foreign investors are likely not to invest where legal protection is uncertain. Although this position may hold true to some extent it is still open question, on the ground that it assumes that no alternative foreign investment protection framework is put in place. For instance, despite the predicted backlash from foreign investors, South Africa's investment policy of replacing

[157] Carska-Sheppard (n 147) 762-63.
[158] Ibid 765 (See the author's argument).
[159] Federico M Lavopa, Lucas E Barreiros and M Victoria Bruno, 'How to Kill a BIT and not Die Trying: Legal and Political Challenges of Denoucing or Renegotiating Bilateral Investment Treaties' (2013) 16 Journal of International Economic Law 869, 879.

investment treaties with the Protection of Investment Act 22 of 2015 has not resulted in drastic divestment from South Africa's economy.[160] This is because States that have recently terminated their investment treaties do not do so to deprive foreign investors of protection within their jurisdiction.

Even Latin American States that have exhibited backlash against the international investment regime have been restructuring, rather than foregoing, their commitment to protect foreign investors.[161] As a result, the termination of investment treaties is often followed by a promulgation of a domestic investment protection regime that protects foreign investors while accommodating domestic objectives.[162] Therefore, in most cases, the aim of terminating investment treaties is to ensure that the legal protection of foreign investors aligns with domestic objectives.[163] When viewed from this perspective, the alleged consequence of unilateral termination on the host State might not only be overstated, but such decision can be supplemented with a domestic investment law.

Further, but from a more politico-economic dimension, the potential impact of unilaterally terminating an investment treaty on the relationship of State parties could pose further challenges for a Third World State, especially considering power asymmetry that is often prevalent in investment treaty practice.[164] Power dominance in the present context may often be exhibited through economic sanctions, deployed

[160] For instance, it was noted that while the Act was proposed as a Bill before parliament, South Africa still received foreign direct investment. See Farish (n 134).
[161] Clint Peinhardt and Rachel L Wellhausen, 'Withdrawing from Investment Treaties but Protecting Investment' (2016) 7 Global Policy 571, 573.
[162] In the case of South Africa, the Protection of Investment Act 2015 replaced investment treaties.
[163] According to South African Government, the reason for terminating their investment treaties is because investment commitments contained in the treaties do not align with domestic objectives. See Department of Trade Industry, 'Bilateral Investment Treaty Policy Framework Review: Government Position Paper' (Pretoria June 2009) 5-11.
[164] See Chapter 4 on more discussion about the power asymmetry between Third World states and developed states.

with the aim to influence economic policies in the Third World – by ensuring a business-friendly environment that protects transnational capitalist interests.[165] This means that considering the power asymmetry between Third World States and the developed States in the international regime, extinguishing the rights of foreign investors in investment treaties may occasion extra-legal consequences for such Third World State. Considering this, the effectiveness of terminating investment treaties by Third World States becomes doubtful.

On the other hand, renegotiation is often viewed as the preferred solution to reform investment treaties, on the basis that negotiation or renegotiation preserves the relationship of the contracting parties.[166] Also, while the tacit and survival clauses in investment treaties become active in the case of termination, same cannot be said where the investment treaty is being renegotiated.[167] This is further based on the premise that an amendment of a treaty – which is what a renegotiation achieves – does not necessarily result in the termination of the earlier version.[168]

Although this highlights the importance of renegotiating investment treaties rather than terminating, it proceeds from the perception that there is mutual consent or understanding between the parties to renegotiate. This, unfortunately, may not be the case, especially where one party, for instance a Third World State, initiates the renegotiation process on the heels of their experience at investor-state arbitration. Further, taking into account that (re)negotiation of investment treaties

[165] The United States have been known to deploy such tactic to protect the interests of its nationals abroad, especially in less powerful states. See <https://www.independent.co.uk/news/world/americas/venezuela-us-sanctions-united-nations-oil-pdvsa-a8748201.html> accessed 20 February 2020.
[166] Carska-Sheppard (n 147) 766.
[167] Lavopa (n 159) 882.
[168] Ibid.

can be a complex process,[169] and the fact that the party whose domestic policy has suffered a setback following an investment claim has a relatively short timeframe to review their investment commitment, the idea to negotiate might appear less than ideal. As a result, renegotiation, though appearing to be the more acceptable method to undertake an investment reform, when considered in light of the socio-political circumstances of the state party affected, may fall short as a preferred solution.

Another important factor is the political will of the other contracting State party to renegotiate.[170] This may occur where the other contracting State party perceives that the existing legal framework serves the purpose of protecting its investors. As a result, the incentive to renegotiate will be diminished.[171] Therefore, the will to revise the terms of investment commitment will be largely dependent on whether the interests or concerns of parties align, and a result, may impede on the investment reform.

Terminating and/or renegotiating investment treaties presents Nigeria as a Third World State the means to review its investment commitments, while ensuring that its peculiar domestic objectives are accommodated. However, it has its limitations just as other policy options identified in the preceding parts of the chapters. Regardless, its limitations – just as that of the other options – could be overcome if they are implemented in complementary manner. The aim of this analysis is not to stipulate the appropriate line of action for Nigeria, rather it is aimed at presenting the options available, which allows for a well-considered choice depending on the circumstances of the case.

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[169] Carska-Sheppard (n 147) 766.
[170] Lavopa (n 159) 884 (highlighting that the success of renegotiation hinges on the political will of the parties).
[171] Ibid 885.

In summary, this section has explored some policy options to enable Nigeria reform its network of investment treaties. It presented practical approaches needed to achieve a holistic substantive investment reform in Nigeria. The various approaches analysed above are not mutually exclusive but complementary in nature. The interrelatedness of the approaches works to overcome the deficiencies of each policy option, thereby providing Nigeria with a wider range of options to address the issues faced by Third World States.

5. Conclusion

The analysis in this chapter revolved around reforming Nigeria's investment law regime. It addressed two issues: why and how should Nigeria undertake an investment reform. In answering the above question, it highlighted the importance of reforming Nigeria's foreign investment policy and in the same vein justified the need for the reform to be focused on investment treaties. The chapter also illustrated how Nigeria as a Third World State can reform its investment regime to serve its domestic objectives. To this end, the chapter argued that investment treaties formed the basis of foreign investor protection as it provided the standard of treatment for foreign investors as well as the mechanism for such protection – that is, investor-state arbitration.

The chapter argued in favour of adopting a statist investment reform approach and went further to identify two broad reform strategies which would enable Nigeria to undertake its reforms from a Third World perspective. The first reform approach, substantive reforms, analysed three textual improvements in treaty provision, which included the right to regulate, foreign investor obligations and environmental provisions. The chapter argued that these textual reforms would strengthen the ability of Nigeria as a host State to regulate for the environment. The

second reform approach, policy options, explored three practical approaches to bring the substantive reform to fruition, which included designing a model investment treaty, reforming the existing domestic investment law, and terminating or renegotiating existing investment treaties.

The chapter went further to highlight the prospects and challenges of these policy options emphasising the need for complementarity between them to actualise a coherent investment policy that addresses and accommodates Nigeria's domestic objectives, especially on the environment. In all, the chapter addressed the importance of an investment reform – that is, for Nigeria's investment regime to tackle some of the legitimacy concerns of the Third World bedevilling international investment law – and more importantly, revealed the way for Nigeria to be better positioned to address these concerns.

Chapter 6: Conclusion

The interface between protecting foreign investment and the environment has been subject to much academic research and debate. However, there is a dearth of literature that focuses on a Third World State like Nigeria. This chapter summarises the contribution that this research has made to understanding the negative impact that the international investment law regime may have on Nigeria's ability as a Third World State to regulate for the environment. Specifically, it highlights the findings drawn from the analysis and the reform proposals recommended and identifies the areas for future research. Overall, the chapter contends that there could still be a progressive international investment law regime that will attend to the interests and concerns of the Third World.

The analysis on the impact of the international investment law regime on Nigeria's environmental governance was presented across six chapters, with the Introduction setting out the background. The research was explored through a TWAIL II framework. In this regard, it undertook a historical analysis of international investment law regime, and qualitative research of the network of Nigeria's investment treaties and investor-State arbitration. The aim was to present a critical discourse of international investment law regime and its effects on Third World States, and more particularly, to show that the regime could stifle efforts of Nigeria, as a Third World State, to protect the environment.

To test this hypothesis, Chapter 2 explored the history of international investment law and traced how a Third World State like Nigeria came to adopt investment rules. It demonstrated that domination (i.e., Western hegemony) and resistance (from the Third World) are entrenched in the development of

contemporary investment rules. In this regard, the analysis highlighted that investment rules originated from legal and commercial practices among Western States, but as trade and investment began to expand beyond the Western World these rules were transposed into and applied to relations with non-Western States and peoples, leading to economic and political domination.

The discussion went on to show that between the late 19th century and early 20th century, Latin American States began to resist the influence of Western investment rules on domestic governance. After the political independence of many of the non-Western States, especially those in the Third World, in the mid-20th century, inspired by the previous actions of Latin American States, they began to pursue economic independence based on sovereignty over their natural resources – intended to affect the regulation and treatment of foreign investors. This led to legal and political tensions between Western States and Third World States regarding the standard of treatment of foreign investors in their host States, which will potentially shape the future of foreign investment protection in international law.

The chapter noted that the need to protect the interests of Western nationals investing abroad led to the establishment of investor-State dispute settlement mechanisms – in the form of ICSID – and investment treaties, which subsequently became applicable to Third World States like Nigeria. Thus, investment rules were not conceived to accommodate the interests of Third World States, though the Third World generally became an important aspect of the development of the international investment law regime. As such, it confirmed that investment rules have been applied on Nigeria, a Third World State, through a complex – and almost constant – process of domination and resistance.

Chapter 3 analysed the network of Nigeria's investment treaties. The aim was to ascertain whether Nigeria's investment obligations – that is, the commitment to protect and promote foreign investors – as contained in their investment treaties represented its interest as a Third World host State. In this regard, the study investigated the consistency of the FET provisions in the network of Nigeria's investment treaties. The analysis found that the FET provisions in the network of Nigeria's investment treaties were inconsistent. This highlighted the lack of coherence in Nigeria's investment treaty practice, indicating that the contents of Nigeria's investment treaties were likely determined by its (more powerful) investment treaty partners.

Next, the thesis investigated the extent to which Nigeria's investment treaties accommodated environmental concerns by providing adequate policy space for Nigeria, as a host State, to regulate for the environment. The analysis found that there was a general lack of treaty provisions that addressed environment concerns in the network of Nigeria's investment treaties. As such, Nigeria's investment treaties were mainly focused on protecting the interests of foreign investors. The findings suggest that not only does Nigeria not determine the contents of its treaties, but its treaty provisions do also not address concerns that affect Nigeria as a host State, providing further support for the argument that Nigeria's investment treaties are imposed by its treaty partners.

The analysis in Chapter 4 explored how investor-State arbitration responds to the (environmental) concerns of the Third World. In this regard, the analysis focused on investment cases between foreign investors and Third World States regarding disputes that involved the environment as well as the actions of the Third

World people. The investigation disclosed that to a large extent investor-State arbitration interprets and applies investment rules in a manner that fails to recognise or accommodate the interests of the Third World; and as such, prioritises the interests of foreign investors over that of Third World States and its people.

Overall, the thesis showed that the international investment law regime could stifle Nigeria's ability, as a Third World host State, to regulate for the environment. On aggregate Nigeria does not have adequate regulatory sovereignty in its investment treaties to protect the environment; and when a dispute arises as a result of its efforts to address environmental concerns, investor-State arbitration will likely interpret and apply investment rules in a manner that will not recognise or accommodate the interest of Nigeria to protect the environment.

In light of the findings of the previous chapters – that the conception, operation and application of investment rules and mechanisms protect Western interests over that of the Third World – Chapter 5 recommended reforms to improve Nigeria's international investment law regime generally. This includes reforming the text of Nigeria's treaty provisions: introducing environmental language in the treaty preamble; providing specific treaty provisions that emphasise on environmental protection; imposing obligations on foreign investors; and providing exemption clauses allowing policy space for environmental regulation.

The second arm of the reform strategy identified policy approaches to achieve the textual reforms in Nigeria's investment treaties. These included developing a model investment treaty, terminating and/or renegotiating older investment treaties and reforming domestic investment laws. Overall, these reforms are aimed to address (the lack of) environmental concerns in Nigeria's investment treaties, and

as such are to ensure that the interests of Nigeria, as a Third World host State, are not only recognised but accommodated in the international investment law regime.

The findings of the analysis and the reforms recommended in the research make important contributions to the discussions and debate around international investment law. The purpose of the thesis is to improve the rules and mechanisms of the international investment law regime – that is, investment treaties and investor-State arbitration – to accommodate the interests of Third World States like Nigeria, and to address concerns, such as environmental concerns, that affect host States in investor-State relations. As such, although diverse interests and political relations, including with Western States, may exist, the thesis will be generally important for any host State, particularly Third World States, wishing to improve their international investment law regime – by ensuring that their obligations towards foreign investors are tailored in line with their domestic objectives.

The thesis, by evaluating the consistency and coherence of FET provisions, and investigating the adequacy of environmental provisions in the network of Nigeria's investment treaties, provides an important step in understanding Nigeria's treaty practice. However, this area may benefit from further research. A comprehensive analysis of a broader cross-section of treaty provisions would further highlight the consistency and coherence of Nigeria's investment treaties, contributing to the literature on Nigeria's investment treaty practice. To further inform and fully develop the reform proposals highlighted in the thesis, Nigeria's international investment law practice would benefit from empirical research on investment treaty negotiations to ascertain the factors that influence the outcome of Nigeria's investment treaties.

In sum, the thesis showed that investment rules originated from Western legal culture; that investment rules were conceived, constructed and are currently applied in ways reminiscent of Western hegemony, and as such fails to accommodate the interests of Nigeria. Considering this, the international investment law regime could potentially constrain Nigeria's ability to regulate for the environment. Although the current international investment law regime may not favour Third World States like Nigeria, by implementing investment reforms, such as those recommended in the thesis, the regime could be more progressive towards the interests and concerns of the Third World. These signals hope for Third World States in international investment law regime.

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