

Sino-Nigeria Oil-for-Infrastructure Investment Deals:
A Proposal for a New Form of Regulation

by

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A Dissertation Submitted in Partial Fulfillment of the
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We acknowledge and respect the ɫə́kʷəŋən peoples on whose traditional territory the university stands and the Songhees, Esquimalt and W̱SÁNEĆ peoples whose historical relationships with the land continue to this day.

Supervisory Committee

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ABSTRACT

This dissertation focuses on the regulation of the Sino-Nigeria oil-for-infrastructure (OFI) arrangements. The OFI investment pacts are quid-pro-quo arrangements between China and Nigeria where the Nigerian government awards oil drilling rights to Chinese national oil companies (NOCs) in exchange for China's undertaking to build key infrastructure projects such as refineries, railways, airports, seaports, highways, and electricity-generating plants in the host state. Although the use of the OFI, which is an atypical foreign investment model by the Chinese NOCs, fits nicely with the infrastructure gap in Nigeria, it comes with the challenges of opacity and susceptibility to bribery. First, the process of granting concession rights to the Chinese NOCs itself is fraught with opacity, bribery, and unfairness. Second, the state-to-state relations of power that are embedded in the OFI arrangements make it a blurred and unique investment model and complicate its regulation. Third, all the infrastructure projects are being handled by Chinese state-owned engineering and construction firms, some of which have been debarred, at one point or another, by multilateral development banks for fraudulent and corrupt practices in procurement. Since the discovery of oil in Nigeria, bribery of Nigerian government officials by transnational oil companies and opacity in granting oil concessions have been some of the defining features of the country's oil industry. The existing state-based and uniaxial regulatory model has proved ineffective in regulating bribery and enabling transparency in oil mining licensing exercises. Thus, this dissertation asks: How and to what extent could state and non-state actors and regimes be used as integrated and effective co-regulatory mechanisms in regulating Sino-Nigeria OFI investment arrangements?

This dissertation draws on a triad of legal pluralism, transnational regulation, and Third World approaches to international law as theoretical frameworks as well as an eclectic mix of scholarship from diverse disciplines, specifically law, political economy, and development studies. It draws on a range of data sources to identify the core limitations of existing forms of regulation and then identifies the potential of other regulatory approaches to address corruption, bribery, and other

problems associated with the OFI arrangements. This policy-oriented research project posits that a decentred and co-regulatory approach that accepts and incorporates non-state actors such as anti-corruption non-governmental organizations in the regulatory arrangement of the Sino-Nigeria OFI investment deals provides a potential for improving transparency and good governance in the oil industry in Nigeria. The integrated and co-regulatory model will have the state as the pre-eminent but not the sole regulator of the Sino-Nigeria OFI investment deals. Nigeria's political economy landscape and natural resource endowments offer helpful contexts to study China as a major player in economic globalization vis-à-vis its investments in the extractive industries and financing of huge infrastructure projects in Africa. My research reveals that the legal and regulatory issues concerning the Sino-Nigeria OFI deals are noted only spasmodically and tangentially in literature. Therefore, this dissertation contributes to scholarship on regulation and China-Africa studies in that whether or not Beijing's OFI investments in Nigeria are well-intentioned, there is a strong likelihood that the adoption of the proposed new form of regulation will bring about openness, transparency, and due process in the Sino-Nigeria investment arrangements.

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Glossary

ACWG	Anti-Corruption Working Group
ADB	African Development Bank
AfCFTA	African Continental Free Trade Agreement
AKK	Ajaokuta-Kaduna-Kano
ASIL	American Society of International Law
ATS	Alien Tort Statute
BIT	Bilateral Investment Treaty
BRI	Belt and Road Initiative
CBN	Central Bank of Nigeria
CDB	China Development Bank
CELAC	Community of Latin American and Caribbean States
CICC	China International Commercial Court
CIETAC	China International Economic and Trade Arbitration Commission
CNODC	Chinese National Oil & Development Company
CNOOC	Chinese National Offshore Oil Corporation
CNPC	China National Petroleum Corporation
COSP	Conference of State Parties
CPC	Communist Party of China
CRCC	China Railway Construction Corporation
CSGs	Civil Society Groups
CSO	Civil Society Organizations
CSR	Corporate Social Responsibility
DC	District Court
DOJ	Department of Justice
DPA	Deferred Prosecution Agreement
EA	Electoral Act

EEPNL	Esso Exploration and Production Nigeria Limited
EFCC	Economic and Financial Crimes Commission
EIA	Energy Information Administration
EITI	Extractive Industries Transparency Initiative
E & P	Exploration and Production
EPC	Engineering, Procurement and Construction
EWHC	England and Wales High Court
EXIM	Export-Import
FCPA	Foreign Corrupt Practices Act
FDI	Foreign Direct Investment
FMPRC	Ministry of Foreign Affairs, People's Republic of China
FOCAC	Forum on China-Africa Cooperation
FOIA	Freedom of Information Act
FPRI	Foreign Policy Research Institute
FPSO	Floating, Production, Storage, and Offloading
GATT	General Agreement on Tariffs and Trade
GHG	Greenhouse gases
GMD	Group Managing Director
GW	Global Witness
HCDTF	Host Community Development Trust Fund
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICPC	Independent Corrupt Practices and Other Related Offences Commission
ICP	Independent Corrupt Practices
ICRC	Infrastructure Concession Regulatory Commission
IFRS	International Financial Reporting Standards

IFSWF	International Forum of Sovereign Wealth Funds
IGO	Intergovernmental Organizations
IMF	International Monetary Fund
IOC	International Oil Companies
IRM	Implementation Review Mechanism
JOA	Joint Operating Agreement
JV	Joint Venture
KBR	Kellogg Brown & Root
LFN	Laws of the Federation of Nigeria
LNG	Liquefied Natural Gas
LTD	Limited
MCA	Modified Carry Agreement
MDB	Multilateral Development Bank
MFN	Most-Favoured Nation
MNC	Multinational Companies
MNE	Multinational Enterprises
MPN	Mobil Producing Nigeria
MOFCOM	Ministry of Commerce
MPR	Minister of Petroleum Resources
MOSOP	Movement for the Survival of Ogoni People
NAIA	Nnamdi Azikiwe International Airport
NAPIMS	National Petroleum Investment Management Services
NDDC	Niger Delta Development Commission
NEITI	Nigeria Extractive Industries Transparency Initiative
NGO	Non-Governmental Organization
NLNG	Nigeria Liquefied Natural Gas
NNOC	Nigerian National Oil Company

NNPC	Nigeria National Petroleum Corporation
NNPC Limited	Nigerian National Petroleum Company Limited
NOC	National Oil Companies
NRGI	Natural Resource Governance Institute
NSWG	National Stakeholders Working Group
NUPRC	Nigerian Upstream Petroleum Regulatory Commission
NYSE	New York Stock Exchange
OECD	Organization for Economic Cooperation and Development
OEL	Oil Exploration License
OFI	Oil-for-Infrastructure
OML	Oil Mining License
OPEC	Organization of the Petroleum Exporting Countries
OPL	Oil Prospecting License
PACI	Partnering Against Corruption Initiative
PIA	Petroleum Industry Act
PPA	Public Procurement Act
PPP	Public-Private Partnership
PPT	Petroleum Profit Tax
PSC	Production Sharing Contracts
PSNR	Permanent Sovereignty over Natural Resources
PWYP	Publish What You Pay
QBD	Queen's Bench Division
RDS	Royal Dutch Shell
RFI	Resource-for-Infrastructure
SAP	Structural Adjustment Programme
SASAC	State-Owned Assets Supervision and Administration Commission
SDG	Sustainable Development Goal

SEC	Securities and Exchange Commission
SERAP	Socio-Economic Rights and Accountability Project
SFO	Serious Fraud Office
SINOPEC	China Petroleum and Chemical Corporation
SINOSURE	China Export & Credit Insurance Corporation
SOE	State-Owned Enterprises
SOFI	State-Owned Financial Institutions
SWF	Sovereign Wealth Fund
TNOC	Transnational Oil Companies
TI	Transparency International
TSE	Toronto Stock Exchange
TWAIL	Third World Approaches to International Law
UK	United Kingdom
UKSC	United Kingdom Supreme Court
UNCAC	United Nations Convention Against Corruption
UN	United Nations
UNCT	United Nations Conference on Trade
UNCTAD	United Nations Conference on Trade and Development
UNODC	United Nations Office on Drugs and Crime
UNTS	United Nations Treaty Series
USC	United States Code
US	United States
WBG	World Bank Group
WEMPCO	Western Metal Products Company
WGB	Working Group on Bribery
WTO	World Trade Organization

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Dedication

Professor Francis E. Ngwaba

(1937-2004)

Chapter 1: Regulating the Sino-Nigeria Oil-for-Infrastructure Arrangements: A Methodological Approach and Literature Review

1. The Research Problem and Context

The growing economic engagement between Chinese national oil companies (NOCs) and Nigeria, which is increasing at an exponential pace, raises a range of regulatory questions regarding the influence and challenges of such interactions in national and transnational spaces. The Chinese NOCs use an atypical foreign investment model –the oil-for-infrastructure (OFI) that, although it aligns with Nigeria's socio-economic needs, comes with the challenge of opacity and susceptibility to bribery. Whereas Western private multinational oil companies, the foremost investors in the Nigerian oil industry, use intermediaries, transnational wire transfers, and concealment of bribery payments in companies' accounting books to obtain improper business advantages, the Chinese NOCs use multiple investment strategies to win oil drilling rights in Nigeria. The Chinese provide infrastructural development and soft loans with long-term repayment periods in exchange for oil drilling rights. There are concerns in academic and policy circles that the Sino-Nigeria OFI deals is an unhealthy omen for the global efforts to address bribery of foreign government officials because there is no record of China's investigation or prosecution of its NOCs operating overseas. For the infrastructure component of the Sino-Nigeria OFI, all the infrastructure projects are being handled by Chinese state-owned engineering and construction firms and their subsidiaries. Some of the Chinese construction and engineering firms have been debarred, at one point or another, by the World Bank Group and the African Development Bank for fraudulent and corrupt practices in procurement. My work focuses on these issues and seeks to understand the Sino-Nigeria OFI

investment arrangements and propose a potentially effective regulatory approach for the atypical investment deals. My goal in this dissertation is to propose a regulatory approach for investment pacts that are comparatively sui generis. In stating that the OFI arrangement is sui generis, I mean that the investment model is novel and one of its kind in relation to the existing or prevailing concession arrangements in the Nigerian oil industry such as the joint venture arrangements. The central research question that my dissertation addresses are this: How and to what extent could state and non-state actors¹ and regimes² be used as integrated and effective co-regulatory mechanisms in regulating Sino-Nigeria oil-for-infrastructure investment arrangements?

Why is it important to regulate the Sino-Nigeria oil-for-infrastructure (OFI) arrangements? Beginning in the first decade of the 21st century, there have been various reports by the US government agencies, policy organizations, transparency and accountability advocates, and private media organizations of oil industry-related transnational bribery and corruption schemes in Nigeria. For instance, in 2014, the Nigerian Extractive Industries Transparency Initiative (NEITI) released an audit report. The NEITI report notes that

Nigeria's oil and gas industry has seen a high amount of capital inflow from foreign direct investment over the years although the impact of such ventures has been

¹ In this dissertation, I use the term “non-state actors” to mean organizations that are largely autonomous from the structure, machinery, and control of the state and intergovernmental organizations. Specifically, the non-state actors are established to promote normative principles (such as anti-corruption, human rights, and climate change) in international business. Some of the non-state actors are both national and transnational in their objectives and outlook. The non-state actors develop regulatory initiatives to address business conduct. The use of non-state actors in this dissertation includes non-governmental organizations and businesses. Examples of non-state actors include, but are not limited to, Transparency International, Publish What You Pay, Natural Resource Governance Institute, World Economic Forum, and Global Witness. See, for example, Daphné Josselin & William Wallace, eds, *Non-state Actors in World Politics* (London: Palgrave Macmillan UK, 2001).

² In this dissertation, I use the term “regime” to mean a set of principles, norms, rules, and decision-making procedures that govern or relate to an issue-area. In the context of this dissertation, the issue-area is anti-corruption. Regimes are sets of governing arrangements that include networks of rules, norms, and procedures that regulate behavior and control its effects. A regime creates a convergence of expectations, establishes standards of behaviour, and cultivates a general sense of obligation. Norms are standards of behavior defined in terms of rights and obligations. Principles and norms provide the basic defining characteristics of a regime. Regimes are traditionally thought of as being composed of states. However, this dissertation acknowledges that regimes created by non-state actors such as civil society groups and businesses can also guide and regulate the behaviour of states and non-state actors. Examples of regimes include, but are not limited to, anti-corruption regimes, environmental regimes, and human rights regimes. See, for example, Stephen D Krasner, “Structural Causes and Regime Consequences: Regimes as Intervening Variables” (1982) 36:2 *International Organization* 185.” See also Anu Bradford, “Regime Theory” In *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2007).

almost negligible on the economic development of Nigeria as a result of a lack of accountability, transparency, and widespread corruption.³

Similarly, between 2007 and 2018, Glencore, a Swiss extractive commodity trading company, made millions of US dollars in corrupt bribe payments to Nigerian government officials in exchange for the award of oil contracts and provision of more lucrative grades of crude oil.⁴ In some bribery cases, both the Nigerian government officials, Western private transnational oil companies, and Chinese national oil companies (NOCs) either participated or allegedly participated in the plots. For example, in May 2008, Willbros International, a US oil services company, was fined \$32 million in criminal and civil penalties by the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC).⁵ The fine was in connection with bribery payments made to Nigerian government officials to obtain a \$387 million contract for the construction of a gas pipeline project in the African country. In July 2010, a four-company joint venture known as TSKJ, which included Eni, an Italian oil giant, and Halliburton, a US oil services company, among others, paid a total of \$1.28 billion in fines to the DOJ and SEC for bribing various Nigerian government officials with over \$180 million.⁶ The bribe was made to obtain contracts worth over \$6 billion to build liquefied natural gas production facilities on Bonny Island, Nigeria. Also, in November 2010, Royal Dutch Shell and its Nigerian subsidiary, Shell Nigeria, were fined \$48.1 million in criminal and civil penalties by the US authorities for conspiring with Shell Nigeria's subcontractor to pay over \$2 million in bribes to Nigerian government officials.⁷ The payment was to obtain preferential

³ Oil and Gas Industry Audit Report, Audit, Audit (Abuja, Nigeria: Nigerian Extractive Industries Transparency Initiative, 2014) at 247. See also "Probe into murky ExxonMobil deal shows why strong U.S. transparency rules are needed for oil companies", (24 June 2016), online: Global Witness <<https://www.globalwitness.org/it/press-releases/probe-murky-exxonmobil-deal-shows-why-strong-us-transparency-rules-are-needed-oil-companies/>>; Inside NNPC Oil Sales: A Case for Reform in Nigeria (Natural Resource Governance Institute, 2015).

⁴ "United States v. Anthony Stimler", (5 August 2021), online: <<https://www.justice.gov/criminal/fraud/fcpa/case-s/anthony-stimler>>.

⁵ "Willbros Group Inc. Enters Deferred Prosecution Agreement and Agrees to Pay \$22 Million Penalty for FCPA Violations", (14 May 2008), online: Department of Justice <<https://www.justice.gov/archive/opa/pr/2008/May/08-crm-417.html>>. <https://perma.cc/GV83-S9HJ>.

⁶ "SEC Charges Italian Company and Dutch Subsidiary in Scheme Bribing Nigerian Officials With Carloads of Cash: ENI and Snamprogetti to Pay \$365 Million to Settle FCPA Violations", (7 July 2010), online: Securities and Exchange Commission <<https://www.sec.gov/news/press/2010/2010-119.htm>>. <https://perma.cc/26HQ-76SZ>.

⁷ "Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations

treatment in customs clearance of large amounts of equipment to be used in the Bonga deepwater offshore oil and gas project in the Niger Delta. In 2017, Addax Petroleum, a subsidiary of Chinese national oil giant Sinopec, paid \$32 million to Swiss authorities to settle charges of suspected bribery of Nigerian officials.⁸ Royal Dutch Shell and Eni were acquitted by an Italian court in March 2021 of allegedly participating in a bribery scheme that deprived the Nigerian people of up to \$1.3 billion during the acquisition of oil mining rights.⁹ These cases are important to illustrate the problem, and indicate that the Nigerian oil sector has earned industry notoriety for real and perceived unethical practices such as transnational bribery and murky contract award processes.¹⁰ In light of these trends in the industry, the entry of the Chinese NOCs, the OFI investment model, and the characteristics of the key actors in the arrangements that I will discuss in chapters 2 and 4, can exacerbate opacity and bribery in the Nigerian oil industry.

The bribery of Nigerian government officials by transnational oil companies and opacity became some of the defining features of the country's oil industry in the 1960s when the industry was in its fledgling state. Since the 1960s, there has not been a significant reduction in bribery of Nigerian government officials by foreign transnational oil companies and opacity in oil contracts and payments. In the earliest periods of the oil boom (which I will highlight in chapter 2), the Nigerian government and Western private multinational oil companies carried with them business practices that embraced elements of the opaque.¹¹ The existing state-centered regulatory model

and to Pay More Than \$156 Million in Criminal Penalties", (4 November 2010), online: The United States: Department of Justice, Office of Public Affairs <<https://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery>>. <https://perma.cc/SM68-69PR>. It is worthy of note that the US - a country where the shares of many transnational companies are traded is leading the global efforts to address cross-border bribery of foreign government officials.

⁸ Reuters Staff, "UPDATE 1-Addax to Pay 31 Mln Sfr to Settle Swiss Bribery Charges", Reuters (5 July 2017), online: <<https://www.reuters.com/article/swiss-addax-idUSL8N1JW3Y6>>. <https://perma.cc/WHQ8-9RFX>.

⁹ "Prosecutors Seek Jail Terms Over Shell and Eni Oil Deal in Nigeria", The Guardian (22 July 2020), online: <<http://www.theguardian.com/business/2020/jul/22/prosecutors-seek-jail-terms-shell-eni-executives-nigeria-oil-deal>>. <https://perma.cc/7WUH-4SKK>.

¹⁰ It is important to note that not every case that pertains to bribery in Nigeria's oil and gas industry that has been investigated and prosecuted by the DOJ and SEC is reviewed in this dissertation. The criteria for selecting the few cases in the dissertation are because of the resultant huge monetary penalties in the cases, the contract value of some of the cases, the critical need of some of the projects involved in the bribery scandal to Nigeria's economy, and the huge amounts of monies funnelled as bribery by the companies involved to some Nigerian government officials.

¹¹ Kairn A Klieman, "U.S. Oil Companies, the Nigerian Civil War, and the Origins of Opacity in the Nigerian Oil

has proved ineffective in regulating bribery and enabling transparency¹² in oil mining licensing exercises. The ineffectiveness is partly because of the failure of state institutions to incorporate anti-corruption non-governmental organizations in the regulatory arrangement. Therefore, one of the ways to address the ineffectiveness challenge is to integrate the anti-corruption NGOs into the regulatory architecture of the OFI investment arrangement. As it will be clear later, the overall argument I advance in this dissertation is that regulatory cooperation and coordination between state and non-state actors as well as a co-regulatory and decentered approach that involves the integration of both state, multi-stakeholder, and purely private regimes provide a potential for improving transparency and good governance in the Nigerian oil industry.

Bribery in transborder commercial activities is insidious and corrosive. The consequences of engaging in transnational bribery are huge for governments, business enterprises, and ordinary citizens. Government officials who solicit and accept bribes from transnational corporations betray the public trust and delegitimize the government they serve. As shown above with the example of Willbros International, oil companies found guilty of participating in or being complicit in bribery schemes, can face huge fines and negative media attention. Further, bribery robs the populace of the full benefits of foreign direct investment. Payment of bribes to win an oil drilling right or a construction contract may result in the selection of unqualified investors or contractors and a poor standard of work. Bribery also jeopardizes infrastructure development in a country. It undermines transparency and the notion of a level playing field in transnational investment.

Industry" (2012) 99:1 J Am Hist 155 at 158.

¹² As it has been recognized in scholarship, the concept of transparency has spread imperialistically out of the good governance canon and into popular parlance. In this dissertation, therefore, I adopt the definition of transparency used in the EITI Glossary compiled by the EITI International Secretariat as "openness and public disclosure of activities". In other words, transparency will be used in this research project to denote regulatory measures that publicize reliable data about a corporate actor's investment transactions especially in jurisdictions with weak regulatory fabric. Given that my dissertation is interested in how to integrate non-state actors into the regulatory processes of the Sino-Nigeria OFI arrangements and thereby enabling scrutiny of the costs and benefits of the oil and infrastructure projects and reducing the possibilities of corruption, I align with the EITI's definition of transparency. "The EITI Glossary", online: Extractive Industries Transparency Initiative <<https://eiti.org/glossary>>. See also Thomas N Hale & Anne-Marie Slaughter, "Transparency": Possibilities and Limitations" (2006) 30:1 Fletcher Forum of World Affairs 153. For the use of the term "transparency" with respect to non-state actors' access and participation in policymaking in international organizations, see Jonas Tallberg "Transparency" In Ian Hurd, Ian Johnston, and Jacob Katz (eds.) *Oxford Handbook of International Organizations* (Oxford: Oxford University Press, 2016) 1170, [arguing that research in transparency and openness has largely developed in response to real-world developments in global governance].

As chapter 3 will show, international and intergovernmental organizations¹³, civil society groups (CSGs), and some state governments are deeply concerned about transnational bribery in cross-border investment activities. The United Nations Convention Against Corruption (UNCAC) is a set of standards and rules that has been adopted by member states to strengthen their domestic legal and regulatory regimes by criminalizing public and private sector corruption. Given the cross-border nature of oil investment in Nigeria, a plethora of national and transnational regimes apply to the operations of the investors. In this context, intergovernmental organizations, non-state actors, and multistakeholder groups have increasingly developed regulatory instruments and initiatives to supplement state-centered regulations in the global investment landscape. I discuss some of the regimes and their legitimacy in chapter 3.

From my discussion of bribery and corrupt practices in Nigeria's oil industry in the preceding paragraphs, it is clear that both Western and Chinese companies are implicated in bribery and opacity in the industry. However, I posit, for reasons that will become clearer in chapter 4, that the Sino-Nigeria OFI arrangements are more susceptible to bribery and opacity than other types of oil and gas arrangements. First, the state-to-state relations of power that are embedded in the OFI arrangements make the investment model more susceptible to bribery and opacity than other types of oil and gas arrangements. The state-to-state relations of power are evident in various reciprocal visits between Chinese and Nigerian presidents as well as other top government officials of both countries where various Memorandum of Understanding are signed. These new forms of

¹³ In this dissertation, I use the terms "international organizations" and "intergovernmental organizations" interchangeably to mean organizations that are created (either by treaty or any other form of agreement) to fulfill tasks of global public interest or of global public relevance which could not be accomplished by any state alone and cannot be left to markets alone. In the context of this dissertation, the task of global public interest or relevance is bribery and other forms of corruption in international investment. In effect, this dissertation adopts a functionalist approach to conceptualizing international organizations and intergovernmental organizations. The basic functionalist idea is that the *raison d'être* of international organizations and intergovernmental organizations is the fulfilment of specific tasks (functions), needed to tackle problems that concern more than one state. Examples of international and intergovernmental organizations that are created by treaty include the UN, the WTO, and the OECD. Some examples of international organizations that are not created by treaty are Financial Action Task Force and the Basel Committee on Banking Supervision. A categorical difference between international organizations and intergovernmental organizations is their treaty status. In this dissertation, a reference to international organizations and intergovernmental organizations does not include the EITI. The EITI is a multistakeholder initiative. See Angelo Golia Jr and Anne Peters "The Concept of International Organization" In Jan Klabbers, ed, *Cambridge Companion to International Organizations Law* (Cambridge: Cambridge University Press, 2022) 25.

political alliance give the Chinese NOCs an economic advantage in the OFI arrangements. There is also an increasing level of social relations between the two countries since the turn of the 21st century. I expand on this point in chapter 4. Second, the Chinese NOCs are crucial to Beijing's policy of expanding and enhancing its influence in the international economic order. The NOCs are indispensable to securing energy supplies for China from overseas. The Chinese NOCs are subject to the control of the Chinese government and enjoy state financial support more than their Western competitors.

In addition to the susceptibility of the Sino-Nigeria OFI deals to bribery and opacity, the unique investment arrangement presents other challenges such as environmental degradation, labour and employment discrimination against host communities, and human rights concerns, among other things. These challenges are beyond the scope of this dissertation.

Whereas bribery and corruption are major problems in the Nigerian oil industry, there are other problems bedevilling the Nigerian oil industry such as oil militancy, the ineffective implementation of oil and gas-related laws, weak political and regulatory institutions (for example, lack of judicial independence), and ethnic politics, among other problems. Some of these other problems are discussed in chapter 2. Why then did I choose to focus on bribery and other forms of corruption in this dissertation? The reason is that bribery and corruption are at the root of the other intractable problems that I outlined. The other problems exist because of institutional and political corruption in the country. Thus, bribery and other forms of corruption are the main problems facing Nigeria's oil industry. For example, the processes for electing political officeholders in Nigeria are most times, far from credible.¹⁴ Vote buying and imposition of candidates for elective offices are common trends in the Nigerian polity. Similarly, the appointment of persons into various public offices (including regulatory agencies) is fraught with cronyism and nepotism, leading to mediocrity and inefficiency in public service and regulatory responsibilities. The nature and character of the electoral process reflect the governance standards and regulatory practices

¹⁴ Osita Agbu, ed, *Elections and Governance in Nigeria's Fourth Republic* (Dakar, Senegal: Council for the Development of Social Science Research in Africa [CODESRIA], 2016).

in the oil sector.

1.1 Dissertation Structure

This dissertation is divided into six chapters. This first chapter (the introduction) outlines the methodology and importance of my dissertation and presents the literature review. As will be shown, my work is situated within the extant literature on law and regulation and China-Africa studies and aims to identify and fill key gaps in this scholarship. In Chapter 2, which is an overview of the Nigerian oil industry, I position the regulatory issues that underpin my research in the context of Sino-Nigeria OFI investment arrangements. I trace the historical incidences of bribery and corruption in the industry and explore their nexus to military interregna in the country. Chapter 2 identifies some factors that are responsible for regulatory inadequacy in Nigeria's oil industry. First, military intervention weakened regulatory institutions and led to a lack of an independent oversight system. Second, the unconventional nature of China's oil investment model complicates the regulatory inadequacy in Nigeria's oil sector as there is state to state and states-internal relations of power that are embedded in the arrangements. Third, the nature of the production-sharing contract arrangements between the Chinese NOCs and Nigerian National Petroleum Company (NNPC) Limited could be susceptible to regulatory capture. In 2021, the Nigerian oil industry experienced a significant legal development with the enactment of the Petroleum Industry Act (PIA). The PIA created a new national oil company –the NNPC Limited (NNPC Ltd) to succeed the NNPC. Prior to the creation of NNPC Ltd, the NNPC engaged in the exploration, production, refining, and marketing of petroleum products. The NNPC relied on government funding for its existence. Unlike the defunct NNPC, NNPC Ltd is incorporated as a limited company under the Companies and Allied Matters Act of Nigeria with the power to trade its shares in the public market, attract private investment and boost its share capital. Prior to the signing of the PIA into law, the NNPC had a dual role as a regulator and operator in the oil industry. Chapter 2 of this dissertation also discusses how NNPC Ltd differs from the defunct NNPC and the inefficiencies that the new corporate entity is established to

address. The PIA aims to transform NNPC Ltd into a profit-oriented and competitive entity that can compete with private multinational companies and assign the regulatory role exclusively to the Nigerian Upstream Petroleum Regulatory Commission. The NNPC Ltd is expected to overcome the bureaucratic bottlenecks that characterized the NNPC with respect to decision-making and government approvals. This dissertation shows in chapter 2 the differing nature of NNPC and its successor company –NNPC Ltd. Chapter 2 also examines the infrastructure gap in Nigeria that resulted in an important paradigm shift in the investment profile in the oil industry with the entry of Chinese NOCs. It discusses the regulatory agencies, major contractual arrangements, and extent of participation of local (Nigerian) oil companies in the industry. This chapter essentially lays a foundation for understanding Nigeria's oil industry, actors, and regulatory challenges.

A common thread that runs through this dissertation is the idea that the locus of regulation in many economic sectors and issue areas at the national and transnational levels are pluralistic. The dissertation also acknowledges the importance of state and non-state regulatory instruments from various sources. Given the pivotal nature of this theme in this dissertation, it is pertinent from the outset to explore the nature, categories, and legitimacy of the relevant state and non-state regimes. That is the focus of chapter 3. In this chapter, I describe and discuss state, intergovernmental, multi-stakeholder, and private regulatory initiatives that are being used to regulate bribery and corruption in extractive industries. I assess the enforcement rate and legitimacy of the regulatory instruments. I discuss the conceptual issue of regulatory capture and how it occurs with respect to transnational bribery of foreign government officials. It is the position of chapter 3 that both state, intergovernmental, and non-state regulatory instruments may be susceptible to regulatory capture, and consequently, the legitimacy and enforcement potential of the regimes may be eroded.

One of the debates of the extant literature on China's foreign trade and investment is the burgeoning investment profiles by Beijing's state-owned enterprises in Nigeria's oil and non-oil sectors and how those investments are fraught with opacity. In other words, what is the nature and char-

acter of those investments? What processes do China and Nigeria follow to agree on the oil and infrastructure contracts? Why and how are all the infrastructure contracts awarded to Chinese companies? What type of regulatory approach could be used to address the regulatory challenges arising from the Sino-Nigeria OFI investment arrangements? These questions are the focus of chapter 4. First, a discussion of the processes and principles for obtaining oil concession rights is provided. Chapter 4 notes that there is a lack of transparency and a level playing field in granting oil rights and infrastructure contracts. The chapter contains a conceptual analysis of the winner's curse theory and interest group capture in oil industry procurement. It traces the historical origin of Sino-Nigeria investment relations. Chapter 4 engages in a discussion of China's "Going Out" strategy and petroleum policy on foreign investment as policy bases that define Chinese oil investment in Nigeria. It includes a description and discussion of the OFI deals and a comparative analysis of the regulatory challenges raised by Chinese NOCs and US private multinational oil companies. In this context, chapter 4 also shows how the close relationship and support that the Chinese NOCs enjoy from their home government and their critical positions as the agencies for the realization of Beijing's economic objectives give them some edge over the US private oil companies. The chapter posits that the OFI deals are methodical and strategic resistance by Nigeria against the hegemony and exploitation by Western private oil companies in the African country.

In chapter 5, I draw on legal pluralism, transnational regulation, and Third World Approaches to International Law (TWAAIL) to justify my proposal for a decentred and co-regulatory approach to the Sino-Nigeria OFI investment arrangements. In providing the theoretical frameworks that guide my analysis, I elaborate on the theoretical contributions that my dissertation makes. I argue that the increased creation and relatively wide acceptance of public-private and purely private regulatory regimes are increasingly becoming the touchstone against which to measure ethical and responsible business conduct in transboundary activities. Finally, Chapter 6 provides conclusions and recommendations. I show the normative and policy implications of my dissertation. I conclude by outlining directions for future research agendas.

1.2 Research Methodology

Research methods are not simply techniques that can be used in obtaining data about societal challenges but also include a theoretical perspective.¹⁵ This section, therefore, explains and justifies the methodological approaches that underlie and shape my research, and outlines the methods used to collect and analyze data used to answer my research question.

First, my research draws its methodological insights from both the socio-legal¹⁶ and critical¹⁷ approaches in international law. Whereas the socio-legal inspiration of my dissertation is on legal pluralism and transnational regulation, I anchor the critical perspective on the tenets of TWAIL. In drawing on the socio-legal disciplinary traditions of legal pluralism and transnational regulation, my dissertation proposes that in both developing and developed countries, neither the legal landscape nor the art of regulation is a uniaxial enterprise, hence, private and public commercial transactions are subject to more than one regulatory order in a given context. The sometimes converging and contending locus of regulation and normativity are pluralistic. In terms of regulating the extractive industries, the non-state normative orders that I discuss in chapters 3 and 5 are increasingly shaping the normative conduct of TNOCs and other extractive companies. Merry has argued that adopting a socio-legal approach in research enables us to address power relations among legal actors and legal regimes and the impact of various structures of social relationships on informal social processes such as shaming and social pressure.¹⁸ In this context,

¹⁵ Reza Banakar Max Travers, "Law, Sociology and Method" in Reza Banakar Max Travers, eds, *Theory and Method in Socio-Legal Research* (Oxford: Hart Publishing, 2005) 1 at 19.

¹⁶ Socio-legal methodology is broad and displays elements of eclecticism in subject matter, disciplinary, and methodological approaches. However, I use the word "socio-legal" in this dissertation to mean an interface with a context within which law exists, including but not limited to, the domestic, global, societal, economic, and political state of affairs. See S Wheeler & PA Thomas, "Socio-Legal Studies" in David Hayton, ed, *Law's Future(s): British Legal Developments in the 21st Century* (Oxford: Hart Publishing, 2000) 267 at 271; and Fiona Cownie & Anthony Bradney, "Socio-Legal Studies: A Challenge to the Doctrinal Approach" in Dawn Watkins & Mandy Burton, eds, *Research Methods in Law*, 1st ed (London, England: Routledge, 2013) 40 at 42.

¹⁷ As I will show in my discussion about TWAIL in chapter 5, the critical perspective in legal research conceives of law as a mechanism for exercising power and dominance, and a means for promoting ideological concepts. One of the core theses of critical approach to research is that dominant groups exercise power and dominance over subordinate groups, and that these accept their subordination through the influence of ideological conception of their place in society. See Max Travers, *Understanding Law and Society* (Abingdon, England: Routledge, 2010) at 75.

¹⁸ Sally Engle Merry, "International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism" in Michael A Helfand, ed, *Negotiating State and Non-State Law: The Challenge of Global and Local Legal*

chapters 2 and 5 will highlight how the financial and technological powers and interest alignments of the Chinese NOCs and the socioeconomic needs of Nigeria in the regulatory process limit the enforcement of regulatory regimes.

My dissertation draws on the work of John Griffiths, Brian Tamanaha, Boaventura De Sousa Santos, Julia Black, Sally Engle Merry, Peer Zumbansen, A. Claire Cutler, Victor V. Ramraj, Fabrizio Cafaggi, and Colin Scott to argue that non-state based regulatory regimes involving co-regulation provide a potential for achieving regulatory integration, coordination, transparency, and better governance in the Sino-Nigeria OFI deals. The plethora of non-state regulations that I will discuss in chapters 3 and 5, and the principles and standards they set forth have begun to serve as fundamental metrics for public assessment of corporate conduct in transnational commercial activities. The non-state regulatory regimes are yielding positive regulatory outcomes. Although the state, in most cases, remains the “relational constant”¹⁹ in terms of the enforcement or implementation of laws, non-state regulatory regimes have shown promising possibilities to contribute to crucial policy and legal springboards that may lead to reactive and proactive regulation of the Sino-Nigeria OFI arrangements.²⁰ Crucially, the US gives non-state actors such as private citizens and NGOs the right to enforce environmental laws in circumstances where regulatory authorities are unwilling or unable to enforce such laws.²¹ Writing about socio-legal approaches to international economic law, Amanda Perry-Kessaris notes that “those who take a socio-legal approach always set out to explore the actors, actions, and interactions that form the

Pluralism (Cambridge: Cambridge University Press, 2015) 59 at 61.

¹⁹ I have borrowed this phrase from Peter J. Spiro who used it in relation to how transnational NGO activity cements intergovernmental regimes at the national level. Peter J Spiro, “Nongovernmental Organizations in International Relations (Theory)” in Jeffrey L Dunoff Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2012) 223 at 231. See also Celine Tan, “Navigating New Landscapes: Socio-Legal Mapping of Plurality and Power in International Economic Law” in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Oxon, UK: Routledge, 2013) 19 at 25 (noting that a legally pluralist approach to international economic law does not delegitimize the state but allows for a changing conception of the state and recognizes that, despite globalization, the inter-state system remains central to the constitution of international economic law).

²⁰ Cynthia A Williams, “Civil Society Initiatives and Soft Law in the Oil and Gas Industry” (2003) 36 NYU J Int’l L Pol 457–502.

²¹ Will Reisinger, Trent A Dougherty Nolan Moser, “Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick up the Slack” (2010) 20:1 Duke Envtl L Pol’y F 1.

context of the issues they study”.²² This requires more than a legal analysis.²³ Therefore, my analysis draws from scholarly literature in law, political economy, policy studies, and development studies.

My TWAIL critical approach on the international law of foreign investment leans on the works of scholars such as Antony Anghie, M. Sornarajah, B.S. Chimni, Obiora Okafor, Balakrishnan Rajagopal, James Gathii, and Makau Mutua. The TWAIL critical approach offers appropriate tools and analytical frameworks for describing a set of socio-legal phenomena in the international economic order.²⁴ Considering TWAIL’s claim that transnational regulation serves the interests of Western corporate capital and enables the exploitation of the Third World, I draw on the TWAIL scholarship to evaluate how its epistemological assumptions both support and oppose the regulatory model that my dissertation advances. Given that TWAIL scholarship opposes “hegemonic power”²⁵ and is also a proactive project that seeks the internal transformation of conditions in the Third World,²⁶ I open another strand of dialogic space between TWAIL and mainstream international law scholarship by positing that the former is not yet alert to the massive power asymmetry between China and countries in Africa and Asia with much smaller economies. To this end, I suggest that TWAIL needs to reconfigure and recalibrate its critique of asymmetrical economic relations and exploitation by recognizing that it is not only Western private MNCs that engage in oppressive and exploitative corporate practices in the Third World and that the Chinese SOEs and their home state have the potential to become hegemons.

I use US private oil companies operating in Nigeria as the basis for comparison with the Sino-Nigeria OFI arrangements because the US and China are two major economic powerhouses in

²² Amanda Perry-Kessaris, “What Does It Mean to Take a Socio-Legal Approach to International Economic Law?” in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Oxon, UK: Routledge, 2013) 3 at 8.

²³ Ibid.

²⁴ Obiora Chinedu Okafor, “Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both” (2008) 10:4 Int’l Comm L Rev 371 [Okafor, “Critical Third World”].

²⁵ Balakrishnan Rajagopal, “Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy” (2006) 27:5 Third World Quarterly 767 [Rajagopal, “Counter-Hegemonic International Law”].

²⁶ Makau Mutua, “What Is TWAIL?” (2000) 94 ASIL Proceedings 31.

the international economic order that is constantly in geopolitical and ideological tension over trade and investment practices and policies of each other's country. As it will become more evident in chapter 4, US private oil companies and the Chinese NOCs are atypical investors and their business operations in Nigeria raise distinct regulatory challenges. The creation, ownership, control, and business objects of the US oil companies and the Chinese NOCs differ significantly. The use of the US companies and the Chinese NOCs will therefore enhance our understanding of how the Chinese NOCs are different from their US competitors.

In responding to my research question, I defend the heterogeneity of regulatory regimes and actors and therefore acknowledge the relevance, usefulness, and influence of normative orders derived from both state and non-state sources. Given the law and policy-oriented nature of my research question, I draw empirical data from case law, regulatory institutions, academic and policy literature, news media, and technical reports from companies, NGOs, and research institutions. Thus, I examine regulatory instruments and case law to identify, describe, and analyze the normative frameworks of regulation that apply to the Sino-Nigeria OFI arrangements. This method illuminates the ways that normative frameworks and case law are shaping transnational anti-bribery norms in the extractive industries. The main materials I use in this dissertation include regulatory instruments such as legislation emanating from the state, intergovernmental organizations, and multi-stakeholder regimes, as well as private regulatory standards. Additionally, I analyze relevant case law and government speeches. In terms of secondary materials, I analyze various scholarly sources, as well as reports and policy documents from research institutions and non-governmental organizations. The materials such as state and non-state regimes as well as case law lay the foundation for understanding the anti-corruption regimes that apply to the Sino-Nigeria OFI investment arrangements. My engagement with the state and non-state regimes not only enables me to evaluate their legitimacy and efficacy but also to be alert to their inherent dangers of susceptibility to regulatory capture. In carrying out this research, I engage in, as this chapter and chapter 5 show, a review and analysis of a range of literature on transnational and non-state regulation and China's investment strategy in Nigeria's extractive industries. The

literature offers illuminating insights into some of the regulatory challenges of the Sino-Nigeria OFI deals and China's NOCs as catalysts of a paradigm shift in the foreign investment model in the oil industry.

In particular, I use case law to assess the implementation statistics of the state and multi-stakeholder regimes by using the subject navigator and case name search columns of the US Department of Justice (DOJ),²⁷ the Security and Exchange Commission (SEC),²⁸ and the Organization for Economic Cooperation and Development (OECD).²⁹ The DOJ and SEC databases contain prosecutorial and litigation data on court decisions, out-of-court settlements, Deferred Prosecution Agreements, and fines. The OECD database on enforcement of the Anti-Bribery Convention contains data from state parties dating back to 2009. Scholarly literature on the regulation of transnational bribery provides me with a compass on how to locate the case law. I analyze government speeches to understand investment policy trajectory and the impacts of Sino-Nigeria OFI arrangements on infrastructure. I engage in the analysis of the case law, government speeches, and scholarly materials through an examination of their contents or textual sources. Together with the illustrative cases of oil-related bribery cases that I outlined in the introduction section of this chapter, these sources offer a pool of materials that are useful in understanding and analyzing the Sino-Nigeria OFI deals.

The socio-legal and critical approaches are apt in the conceptual and normative analyses of state and non-state regulatory regimes that I discuss in this dissertation. I use the two methodological approaches to evaluate the legitimacy of state, multi-stakeholder, and non-state regimes as well as their levels of compliance and enforcement. The socio-legal perspective offers appropriate tools to conceptualize the phenomena of legal pluralism and transnational regulation in multiple regulatory spaces. Socio-legal scholarship places power at the heart of law and legal institutions, paying

²⁷ "Foreign Corrupt Practices Act: Enforcement Actions", online: The United States Department of Justice <<https://www.justice.gov/criminal-fraud/enforcement-actions>>. <https://perma.cc/4WTH-6SHE>.

²⁸ "SEC Enforcement Actions: FCPA Cases", online: US Securities and Exchange Commission <<https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>>. <https://perma.cc/9NMH-DCVA>.

²⁹ "Data on Enforcement of the Anti-Bribery Convention - OECD", online: <<http://www.oecd.org/daf/anti-bribery/data-on-enforcement-of-the-anti-bribery-convention.htm>>. <https://perma.cc/6787-S4DF>.

close attention to the mechanisms by which power structures social and economic relations.³⁰

The use of socio-legal and critical methods helps shed light on how the implementation of the regulatory frameworks may be attenuated by power imbalances and regulatory capture. A critical TMAIL approach offers a normative critique and an alternative to the dominant Anglo-American methodological narrative about transnational regulation of foreign direct investment.

Having set out my research problem, context, and methodology, my next task is to situate my study in the existing literature and to identify some of the key themes in this scholarship that specifically link to my research questions. To these ends, I will identify and evaluate the relevant debates on the transnational regulation of the Sino-Nigeria OFI arrangements. I will shed light on how knowledge has evolved in this area, the points of agreement and disagreement, and the current state of knowledge. I will use this section to articulate how my dissertation advances the academic debate.

2. Reviewing Debates in Relevant Literature

Historically, foreign investment in Africa's oilfields has been dominated by Western oil multinationals. Given this, it is no surprise that scholars focused on understanding trends and developments in the Nigerian oil industry have done so by examining the role of foreign direct investment (FDI) by Western private transnational companies (e.g., Royal Dutch Shell, Chevron, ExxonMobil, Total, and Eni), and the domestic political economy of hydrocarbons.³¹ However, as it will be evident

³⁰ Tan, *supra* note 18 at 29.

³¹ For example, see Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto: University of Toronto Press, 2009). Evaristus Oshionebo, "Transnational Corporations, Civil Society Organisations and Social Accountability in Nigeria's Oil and Gas Industry" (2007) 15:1 *Afr J Int'l Comp L* 107 [Oshionebo "Nigeria's Oil and Gas Industry"]. Omolade Adunbi, *Oil Wealth and Insurgency in Nigeria* (Bloomington: Indianapolis: Indiana University Press, 2015). Jdrzej George Frynas, "Corporate and State Responses to Anti-Oil Protests in the Niger Delta" (2001) 100:398 *African Affairs* 27 [Frynas "Corporate and State Responses"]. Jêdrzej George Frynas, Matthias P Beck Kamel Mellahi, "Maintaining Corporate Dominance after Decolonization: The 'First Mover Advantage' of Shell-BP in Nigeria" (2000) 27:85 *Review of African Political Economy* 407. Tijen Demirel-Pegg Scott Pegg, "Razed, Repressed and Bought Off: The Demobilization of the Ogoni Protest Campaign in the Niger Delta" (2015) 2:4 *The Extractive Industries and Society* 654. Rivers and Blood: Guns, Oil and Power in Nigeria's Rivers State (Nigeria: Human Rights Watch, 2005). Uwafiokun Idemudia, "Corporate-Community Engagement Strategies in the Niger Delta: Some Critical Reflections" (2014) 1:2 *The Extractive Industries and Society* 154. Kenneth Omeje, *High Stakes and Stakeholders: Oil Conflict and Security in Nigeria*, 1st ed (London: Routledge, 2006) [Omeje, *High Stakes and Stakeholders*]. Alexandra Gillies, *Crude Intentions: How Oil Corruption Contaminates the World* (New York: Oxford University Press, 2020) [Gillies, *Crude Intentions*].

in chapters 2 and 4, since 2004, the petroleum investment landscape in Nigeria has experienced a tectonic shift with the entry of Chinese NOCs through the OFI investment arrangements.³² Therefore, it is imperative to have literature on how to regulate the new investors. Furthermore, as my review of the literature on the Sino-Nigeria investment relations will show, the essential desideratum and configuration of a new form of regulation for the Sino-Nigeria OFI arrangements are yet to be proposed in legal scholarship.

China's emergence as an economic and geopolitical powerhouse, an investor to reckon with in Nigeria's oil sector (and those of some other African countries), and a prominent infrastructure financier has generated a burgeoning literature in the areas of international political economy, development studies, and international relations.³³ Despite the academic debates in these disciplines, discussions about the legal and regulatory issues of the Sino-Nigeria OFI deals are noted only spasmodically and tangentially.³⁴ Although Omorogbe has examined the application of a decentered regulation in the Nigerian oil industry for the mutual benefit of the state, the citizenry, and foreign investors,³⁵ her study was not carried out in the context of the Sino-Nigeria OFI. Further, except on transparency issues,³⁶ studies of the Sino-Nigeria OFI arrangements are usually

³² China's OFI investment model which I will discuss in chapter 4 is a part of its "Going Out" (走出去战略) policy toolkit.

³³ Ian Taylor, "The Pathology of Dependency: Sino-Nigerian Relations as a Case Study" in Carl Levan Patrick Ukata, eds, *The Oxford Handbook of Nigerian Politics* (Oxford University Press, 2018). Ian Taylor, "Chinese Interest in Nigeria's Oil and the American Context" (2014) 48:3 *Canadian Journal of African Studies / Revue canadienne des études africaines* 391. Ian Taylor, "China's Relations with Nigeria" (2007) 96:392 *The Commonwealth Journal of International Affairs* 631-645. Cyril Obi, "The Changing Dynamics of Chinese Oil and Gas Engagements in Africa" in Arkebe Oqubay Yifu Justin Lin, eds, *China-Africa and An Economic Transformation* (Oxford, United Kingdom: Oxford University Press, 2009) 173. Cyril I Obi, "Enter the Dragon? Chinese Oil Companies Resistance in the Niger Delta" (2008) 35:117 *Review of African Political Economy* 417 [Obi "Enter the Dragon"]. Cyril Obi, "China in Nigeria: Is Oil a Catalyst for Armed Violence?" (2009) 1:2 *Africa Review* 93 [Obi "China in Nigeria"]. Omolade Adunbi Howard Stein, "Political Economy of China's Investment in Nigeria: Prometheus or Leviathan?" in Arkebe Oqubay Yifu Justin Lin, eds, *China-Africa and an Economic Transformation*, 1st ed (Oxford: Oxford University Press, 2019) 192.

³⁴ Douglas A Yates, *The Scramble for African Oil: Oppression, Corruption and War for Control of Africa's Natural Resources* (London: Pluto Press, 2012). Gillies, supra note 30.

³⁵ Yinka Omorogbe, "Alternative Regulation and Governance Reform in Resource-Rich Developing Countries of Africa" in Barry Barton et al, eds, *Regulating Energy and Natural Resources* (Oxford: Oxford University Press, 2006) 39.

³⁶ Olufunmilayo B Arewa, "Constructing Africa: Chinese Investment, Infrastructure Deficits, and Development" (2016) 49 *Cornell Int'l LJ* 101 at 138. Thirst for African Oil: Asian National Oil Companies in Nigeria and Angola, by Alex Vines et al (London, England: Chatham House, 2009). The Nigerian National Petroleum Corporation and the Development of the Nigerian Oil and Gas Industry: History, Strategies and Current Direction, by Ugo G Nwokeji, *The Changing Role of National Oil Companies in International Energy Markets* (Baker Institute, 2007). Taylor, supra note 32. Zira John Quaghe Alexandra Gillies, "Ensuring a Fair Deal for

framed around resource nationalism, sustainable development, debt sustainability, debt-trap diplomacy, neo-colonialism/empire building, resource scramble, and corporate social responsibility.³⁷ But these vantages do not provide a complete lens for understanding the legal and regulatory challenges as well as the necessity of a new form of regulation. My research aims to fill these gaps. Further, based on my survey of the literature on Sino-Nigeria and Sino-Africa investment relations, theoretical and practical proposals for a co-regulatory method are absent.

I do not lose sight of the societal contexts and dynamics in which my research is located. The issues concerning the Sino-Nigeria OFI investment arrangements cannot be properly studied solely from a legal standpoint. Indeed, as socio-legal scholars have argued:

Foreign direct investment creates and alters relations between many types of human actors –buyers and sellers, consumers and producers, shareholders and company officials, regulators and the regulated –who may be located in the home states from which investments originate, the host states in which investments are made, and beyond.³⁸ And these actors will at the same time be engaged and entangled in multiple forms of interactions.³⁹

The OFI investment model in Nigeria has, as a result of its peculiarity, created and altered relations between the host state and Western private TNOCs, and between the Nigerian people and the Chinese NOCs. As already noted, my literature review engages in an eclectic and interdisciplinary mix of relevant studies in law and regulation, international political economy, and development

Nigerians with Oil-Backed Loans”, (2 February 2018), online: Natural Resource Governance Institute <<https://resourcegovernance.org/blog/ensuring-fair-deal-nigerians-oil-backed-loans>>. Patricia I Vasquez, “China’s Oil and Gas Footprint in Latin America and Africa” (2019) 11.1 International Development Policy | Revue internationale de politique de développement.

³⁷ I Taylor, “Sixty Years Later: Africa’s Stalled Decolonization” (2020) 19:4 Vestnik RUDN International Relations 39. Ian Taylor, “The Institutional Framework of Sino-African Relations” in Arkebe Oqubay Yifu Justin Lin, eds, *China-Africa and An Economic Transformation* (Oxford, United Kingdom: Oxford University Press, 2019) 98. Jędrzej George Frynas Manuel Paulo, “A New Scramble for African Oil? Historical, Political, and Business Perspectives” (2007) 106:423 African Affairs 229. Scott Pegg, “Social Responsibility and Resource Extraction: Are Chinese Oil Companies Different?” (2012) 37:2 Resources Policy 160 [Pegg “Are Chinese Oil Companies Different?”].

³⁸ Amanda Perry-Kessaris, “What Does It Mean to Take a Socio-Legal Approach to International Economic Law?” in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Oxon, UK: Routledge, 2013) 3 at 9.

³⁹ Ibid.

studies. In drawing scholarly insights from several disciplines, I bring a nuanced perspective to the Sino-Nigeria OFI investment arrangements that will help propose a suitable regulatory approach to the state-to-state deals.

2.1 Conceptualizing Regulation

In the lead-up to my review of the debates focused on and around evolving Sino-Nigerian oil relations, it is pertinent for me to elucidate one of the major concepts I use in this dissertation – ‘regulation’. In addition, there are different strands and manifestations of regulation in academic and policy literature. Therefore, it is appropriate for me to situate regulation in the specific context of the Sino-Nigeria OFI investment arrangements.

The meaning of regulation is characterized by epistemological differences and interdisciplinary conversations in what Julia Black refers to as “conceptual confusion and definitional chaos”.⁴⁰ Scholars of various disciplinary orientations such as law, political science, economics, management, and sociology, among others, engage in the study of regulation. Thus, various conceptions and contexts of regulation are used in the literature. Some of the leading and conversations on regulation conceptualize it as a state-centered activity.⁴¹ Similarly, policy literature conceives of regulation through the prism of the state. The World Trade Organization’s (WTO) Dictionary of Trade Policy Terms conceptualizes regulation in two different ways. First, regulation is an omnibus term covering all overt and covert actions or procedures instituted by governments to influence the industry or customers of an industry in a particular manner.⁴² Second, regulation may also refer to a system of rewards and penalties designed to influence the behaviour of firms and consumers.⁴³ The OECD defines regulation as the imposition of rules by the government, backed by the use of penalties that are intended specifically to modify the economic behaviour of

⁴⁰ Ibid at 11.

⁴¹ Robert Baldwin, Colin Scott Christopher Hood, eds, *A Reader on Regulation* (Oxford: Oxford University Press, 1998). Robert Baldwin, Martin Cave Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice*, second ed (Oxford: Oxford University Press, 2015).

⁴² Walter Goode, *Dictionary of Trade Policy Terms*, sixth ed (Cambridge: Cambridge University Press, 2020).

⁴³ Ibid.

individuals and firms in the private sector.⁴⁴ The state centered studies do not recognize, endorse, and legitimize regulation that originates from a non-state source. As will be shown in the following chapters, my understanding of regulation does not view regulatory activity as the monopoly of the state. Regulatory activities and conversations are increasingly taking place between state and non-state actors in local and global spheres of economic and social activity. The state alone does not have a monopoly over social ordering or modification of corporate conduct. Although some of the leading and foremost works are centralist and exclusivist in their conception of regulation, my further review of the literature reveals a notable trend where the concept of regulation has begun to metamorphosize to consider non-state institutions and actors. But this shift is new only in scholarship. The diffusion of regulation as an idea is not novel in Africa, Canada, and Australia. For example, beginning in pre-colonial Africa, plural normative orders have existed simultaneously and are used in human ordering in most parts of the continent.⁴⁵ I will develop this point in chapter 5.

My dissertation does not adopt a centralist and exclusivist conception of regulation because the traditional state-centred regulatory approach has failed the litmus test of good regulation in the Nigerian oil industry. One of the touchstones of good regulation is fairness, accessibility, and transparency in regulatory procedures.⁴⁶ The bribery cases highlighted earlier in this chapter have exposed the ineffectiveness of a state-centred regulation in stemming the tide of bribery of Nigerian government officials by TNOCs. Although the investigations and prosecutions of the bribery cases indicate some ability on the part of the state to hold oil companies to account, the evidence suggests that there are many more bribery practices that remain unchecked and unregulated. To further buttress the ineffectiveness thesis, the process of granting oil mining rights to the Chinese NOCs and the shutting out of Western private TNOCs in some oil licensing

⁴⁴ Glossary of Statistical Terms (Organisation for Economic Co-operation and Development, 2007).

⁴⁵ See, for example, M B Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press, 1975). H W Arthurs, "Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England (Toronto: University of Toronto Press, 1985). Brian Z Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30:3 Sydney L Rev 375.

⁴⁶ Baldwin, Cave Lodge, *supra* note 40 at 27.

exercises by Nigeria was characterized by opacity, bribery, and unfairness. In the context of accessibility of the regulatory procedures, I posit that the decision-making process of the Sino-Nigeria OFI investment arrangements could be externalized to and monopolized by China.

Regulation is defined and conceptualized based on the socio-legal issue or area of activity that is the subject of study.⁴⁷ Regulation literature on global business by John Braithwaite and Peter Drahos⁴⁸ as well as the energy and extractives industries by Barry Barton and others⁴⁹ usually takes a decentered approach to regulation. Baldwin, Cave, and Lodge conceive of regulation as all mechanisms of social control or influence affecting conduct from various sources.⁵⁰ They conceptualize regulation as a fragmented activity between state and non-state actors. Given that my dissertation focuses on the transnational regulation of the global oil industry in the Nigerian context, my analysis fits nicely with Braithwaite, Drahos, and Barton's conceptions of regulation. A decentered and integrated conceptualization of regulation is useful to my dissertation because it illuminates our practical and theoretical understanding of regulation as not an exclusive governmental activity. Indeed, my research is not wedded to the conception of a centered regulation but leans in favour of endorsing and integrating non-state actors and regimes with state actors in the regulation of the Sino-Nigeria OFI investment arrangements. A continued state-centered regulatory approach in the Sino-Nigeria OFI investment arrangements enables and reinforces opacity and bribery. A state-centred regulation enables opacity and bribery because, as it will become clear in chapter 2, the Nigerian government and its agencies are both regulators and investors, and a part of the regulatory problematics. Furthermore, the Chinese state uses its state-to-state relationship with the host government to win oil drilling rights and consequently sets in motion the investment of its NOCs. An exclusivist and uniaxial definitions and conceptions of regulation are not compatible with a decentring and co-regulatory analysis.

⁴⁷ Julia Black, "Critical Reflections on Regulation" (2002) 27 *Austl J Leg Phil* 1.

⁴⁸ John Braithwaite Peter Drahos, *Global Business Regulation* (Cambridge, UK: Cambridge University Press, 2000).

⁴⁹ Barry Barton et al, eds, *Regulating Energy and Natural Resources* (Oxford: Oxford University Press, 2006).

⁵⁰ Robert Baldwin, "Regulation: After Command and Control" in Keith Hawkins, ed, *The Human Face of Law: Essays in Honour of Donald Harris*, 1st ed (New York: Clarendon Press, 1997).

2.2 A Decentred and Co-regulatory Arrangement in the Natural Resource Sector

In this section, I present and discuss key debates around a decentred and co-regulatory approach in the extractive industries. My discussion is organized under two themes: (1) a decentred and co-regulatory arrangement in the natural resource sector, and (2) resource-for-infrastructure (RFI) as an investment model.

2.3 Conceptualizing a Decentered Understanding of Regulation

Many studies on regulation lean in favour of regulatory cooperation, partnership, and interaction between the state, intergovernmental organizations, non-governmental organizations, and business enterprises. Studies undertaken by Julia Black, Colin Scott, Neil Gunningham, Peter Grabosky, and Yinka Omoregbe on decentred and co-regulatory arrangements are increasingly being used to call for a move away from the traditional state-centered regulation.⁵¹ Black's study is instructive as she posits that decentred regulation involves a move away from an understanding of a regulation that assumes that governments have a monopoly on the exercise of power and control, that they occupy a position from which they can oversee the actions of others, and those actions will be altered pursuant to government's demand.⁵² Black's study on decentred regulation endorses a regulatory activity that takes place in other multiple locations outside of the state and acknowledges the changing nature of the state's limited capacity to regulate, and the adoption by the state of particular strategies of regulation".⁵³ Although there are various strands of decentered regulation, decentered regulation in academic literature "essentially involves a shift (and recognition of such a shift) in the locus of the activity of 'regulating' from the state exclusively to other multiple locations and the adoption on the part of the state of particular strategies of regulation".⁵⁴ Relying on the fundamental premise that the state does not have and should not have a monopoly on regulation, a decentered regulation scholarship posits that regulation is

⁵¹ See the collection of essays in Barton et al, *supra* note 48.

⁵² Julia Black, "Regulatory Conversations" (2002) 29:1 *Journal of Law and Society* 163 at 192.

⁵³ *Ibid.*

⁵⁴ Julia Black, "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory'World" (2001) 54:1 *Curr Leg Probl* 103 at 112 [Black "Decentring Regulation"].

occurring within and between other social actors such as inter-governmental organizations, organized groups, non-governmental organizations, transnational enterprises, standard-setting bodies, technical committees, to mention only a few.⁵⁵ In some African countries such as Nigeria where the state often does not make a positive impact on the lives of their citizens, many social orderings are carried out by local community groups and the populace attaches more importance to regulation by the local community groups.⁵⁶ Similarly, Omorogbe notes that “regulatory reforms in resource-rich countries have diverse drivers such as Western countries, international organizations, companies, and the civil society”.⁵⁷ For Western countries, “the motivating factor is primarily self-interest (war, terrorism, migration, and money laundering) and not altruism”.⁵⁸ In their study on Global Business Regulation, Braithwaite and Drahos conclude that the inclusion and participation of NGOs such as Transparency International in regulation is the “key to invigorating good global governance”.⁵⁹ A hallmark of a decentered regulatory arrangement is that it combines state and non-state actors.⁶⁰

Beginning in the last decade of the 20th century, policy-makers in Western governments such as the United Kingdom,⁶¹ Canada,⁶² and Australia⁶³ devised regulatory alternatives that integrate non-state actors in decision-making. These regulatory strategies have resulted in a variety of forms of co-regulation in various sectors of their economy.⁶⁴ A co-regulatory approach combines elements of state-centered regulation and self-regulation.⁶⁵ A study by Neil Gunningham and Darren Sinclair on a co-regulatory approach to environmental issues finds that “the use of multiple

⁵⁵ Ibid.

⁵⁶ Omorogbe, *supra* note 34. See also Black, “Critical Reflections”, *supra* note 46 at 6.

⁵⁷ Omorogbe, *supra* note 34.

⁵⁸ Ibid.

⁵⁹ Braithwaite Drahos, *supra* note 47 at 36.

⁶⁰ Ibid at 111-2.

⁶¹ Alternatives to State Regulation (London: Better Regulation Taskforce, 2000); Encouraging Self- and Co-Regulation in Telecoms to Benefit Consumers (London: Oftel, 2000).

⁶² Assessing Regulatory Alternatives (Ontario: Regulatory Affairs Guide, 1994).

⁶³ Guide to Regulation (Canberra: Productivity Commission, Office of Regulatory Review, 1999) 2nd ed.

⁶⁴ Lesley K McAllister, “Co-Regulation in Mexican Environmental Law” (2012) 32:2 Utah Envtl L Rev 181.

⁶⁵ Ibid.

rather than single policy instruments, and a broader range of regulatory actors, will produce better regulation".⁶⁶ Co-regulation in Third World countries is driven to a greater extent by deficits in state regulatory capacity.⁶⁷ But beyond that, there are endogenous and exogenous variables that cause the regulatory capacity deficit that has not yet been explained in academic literature. The variables include but are not limited to, military interregnums in Nigeria, pressure from Western private companies on the host government to issue weak regulations, and the nature of ownership and control of Chinese NOC. I shall return to these points in chapter 2.

The concepts of a decentered and co-regulatory approach have not been specifically studied in the contexts of the extractive industry and bribery of government officials in Nigeria. In the Nigerian context, scholars that embrace a decentred or co-regulatory approach tend to focus their work on the adoption of a quasi-regulatory tool like multi-actor investment contracts that directly incorporate the interests and perspectives of host communities, the state, and foreign investors.⁶⁸ Research conducted by Ibrionke T. Odumosu-Ayanu, for example, that focus on environmental degradation and oil militancy find that multi-actor investment agreements have regulatory potentials that will enhance the strained relationship between the host communities on the one hand and the government and foreign investors on the other hand.⁶⁹ Other studies call for regulatory cooperation between the state and non-state actors but lean in favour of a passive or relegated regulatory role for the former.⁷⁰ Although I favour a co-regulatory approach, it would not be sufficient, within the OFI investment context, to introduce only regulatory instruments and actors from the state and civil society organizations from host communities. The insufficiency is because, as I will discuss in chapters, 2, 3, and 4, respectively, such a regulatory arrangement might result in regulatory capture in that the Nigerian government and the Chinese NOCs own equity

⁶⁶ Neil Gunningham Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press; Oxford University Press, 1998).

⁶⁷ *Ibid* at 181-2, 194.

⁶⁸ Ibrionke T Odumosu-Ayanu, "Multi-Actor Contracts, Competing Goals and Regulation of Foreign Investment" (2014) 65 UNBLJ 269.

⁶⁹ *Ibid*. See also Ibrionke Odumosu-Ayanu, "Foreign Direct Investment Catalysts in West Africa: Interactions with Local Content Laws and Industry-Community Agreements" (2012) 35:1 North Carolina Central Law Review 65.

⁷⁰ Omorogbe, *supra* note 34.

interests in all the oil drilling rights covered under the OFI deals. I will discuss regulatory capture in chapter 3. Although the architecture of regulating the Nigerian oil industry in the context of Western private TNOCs has been ineluctably influenced, to a limited extent, by the host community movements in Nigeria, this category of actors does not have the organized structure, transnational spread, and financial capacity to engineer a potentially effective regulatory outcome. I will therefore propose a variant of a decentered and co-regulatory model that has the potential to produce an effective result in the Sino-Nigeria OFI investment context. Specifically, I will argue in chapter 6 that to the benefit of the state, foreign investors, and the citizenry, a co-regulatory model must also integrate global anti-corruption non-governmental organizations.

2.4 Resource-for-Infrastructure as an Investment Model

Before the 21st century, joint venture⁷¹ (JV) arrangements and production sharing contracts (PSCs)⁷², which I describe in chapter 2, were the archetypal methods and models of foreign direct investment in Nigeria's oil industry. Indeed, the two contractual arrangements are “the principal representative forms of foreign investment”⁷³ as Sornarajah aptly captures them in the context of international law. In the early 21st century and with the rise of China in world trade and investment, the RFI investment model that the Asian country introduced in Africa has rapidly gained traction in many countries on the continent.

The RFI is a catch-all phrase used in academic and policy literature to describe a variety of “barter agreements between an extractive company and a government where the company uses non-monetary exchange (usually infrastructure) for a country's natural resources”.⁷⁴ In a RFI

⁷¹ In a joint venture, a group of companies, which usually include a state-owned company, join together to conduct explorations and prospectively exploit minerals or hydrocarbons in a specified area under the terms of an agreed contract. See “The EITI Glossary”, online: Extractive Industries Transparency Initiative <<https://eiti.org/glossary>>.

⁷² A production sharing contract is an arrangement in which the contractor bears all costs of exploration and production without such costs being reimbursable if no finding is made in the contact area and in which the government and the contractor are both paid in the resource produced. Ibid.

⁷³ M Sornarajah, *The International Law on Foreign Investment*, 4th ed (Cambridge, United Kingdom: Cambridge University Press, 2017) at 142.

⁷⁴ *Supra* note 65.

arrangement, the resources involved may include exploration or production rights for oil, gas, minerals, and other elements such as access to land, energy, and water resources.⁷⁵ The Sino-Nigeria OFI investment deals is one of the varieties of the RFI arrangements, so I will use the two phrases interchangeably in this dissertation. The resources involved in the Sino-Nigeria deals are oil and gas. Although the Chinese NOCs in Nigeria also signed PSCs with Nigeria's National Petroleum Corporation (NNPC), their key and defining investment route into Nigeria is the OFI deals with the host government that makes their investment distinct and unique. The OFI deals are unique partly because of the conditions on the financing of infrastructure by China in the host state. Another peculiar aspect of the OFI arrangements is the execution of the infrastructure projects by Chinese state-owned engineering and construction companies. The OFI deals are distinct and unique also because they have state-to-state political colouration. The RFI model essentially requires the Chinese government to build various critical infrastructures such as refineries, seaports, electricity-generating plants, railways, airports, and highways, among others, in Nigeria. As I will elaborate in chapters 2 and 4, Nigeria has experienced an acute shortage of infrastructure under military and democratically elected regimes. Hence, the RFI deals and the concomitant provision of infrastructure projects are critical to socio-economic growth in Nigeria.

The literature on RFI is relatively scant as a result of the atypical nature of the investment model and its evolving nature in Africa. The conversations on RFI use various nomenclature such as “minerals-for-infrastructure”, the “Angola mode”, “infrastructure-for-resources”, “commodity-backed” financing, “resource-secured” loans, and oil-backed deals,⁷⁶ among others. A key and common characteristic of this investment model in literature are that one form of natural resource is used to pay for the cost of the infrastructure projects. Most of the academic literature on RFI is rooted in the development and political economy orientations. The development and political economy literature tend to explain the features and operationalization of the unconventional

⁷⁵ Ibid.

⁷⁶ Building Bridges: China's Growing Role as Infrastructure Financier for Sub-Saharan Africa, by Vivien Foster et al, 5 (Washington DC: The World Bank Group, 2009).

investment model from loan and aid perspectives.⁷⁷ Some development and policy scholarship approaches on RFI investment deals focus on how to subject the unconventional investment route to public policy scrutiny through the Extractive Industries Transparency Initiative (EITI) framework.⁷⁸ The public policy scrutiny dimension provided by development and policy scholarship is relevant to my dissertation in at least one respect. It helps ensure that a new regulatory approach to the Sino-Nigeria OFI deals can be deployed to ensure that, for example, some seemingly corporate social responsibility initiatives by China in Nigeria are not stratagems to unduly influence the award of oil drilling rights in favour such of their NOCs.

Some Western policy institutions such as the Brookings Institution,⁷⁹ Chatham House, the Foreign Policy Research Institute (FPRI),⁸⁰ the World Bank, and Natural Resource Governance Institute are critical of the OFI arrangements. They contend that China's acquisition of oil assets in Africa through state-to-state financial deals is unfair to Western private oil companies that do not receive similar benefits from their home states and that the RFI arrangements tilts the level playing field against Western investors.⁸¹ The Brookings Institution posits that China's purchase of upstream assets raises troubling possibilities in the international community because Beijing's financial backing of its NOCs may distort competition in oil rights acquisition by subsidizing its NOCs. The Institution suggests three global institutions that have the potential to regulate China's state-to-state financial deals for oil, namely the International Energy Agency, the WTO, and the Arrangement on Guidelines for Officially Supported Export Credit.⁸² For its part, FPRI questions China's motives and methods as self-serving and potentially exploitative.⁸³ In a meeting

⁷⁷ See for example, Deborah Brautigam, *The Dragon's Gift: The Real Story of China in Africa* (Oxford: Oxford University Press, 2009).

⁷⁸ *Resource Financed Infrastructure: A Discussion on a New Form of Infrastructure Financing*, by Håvard Halland et al, World Bank Studies 88485 (Washington, DC: World Bank, 2014).

⁷⁹ *Untangling China's Quest for Oil through State-backed Financial Deals*, Policy Brief, by Erica S Downs and Peter C Evans, Policy Brief 154 (Washington DC: The Brookings Institution, 2006) at 2.

⁸⁰ Moises Naim, "Rogue Aid" Foreign Policy (15 October 2009), online: <<https://foreignpolicy.com/2009/10/15/rogue-aid/>>.

⁸¹ Vines et al, *supra* note 35.

⁸² *Ibid.* The Brookings Institution also calls on the US to develop a more comprehensive approach that considers the role state financing plays in China's NOCs overseas investments.

⁸³ Naim, *supra* note 79.

with oil executives in Nigeria in 2010, the US Assistant Secretary of State for African Affairs – Johnnie Carson remarked that “China is a very aggressive and pernicious economic competitor with no morals. China is not in Africa for altruistic reasons. China is in Africa for China primarily”.⁸⁴ I will show in chapter 4 that there are notable differences between the Chinese NOCs and Western private oil companies in Nigeria. Chinese NOCs, for example, are risk-averse; hence, they are willing to invest in both high-yielding and potentially less-yielding oil assets in Nigeria.⁸⁵ The business attitude of the Chinese NOCs is unlike their Western competitors who have on some occasions rejected the host government’s invitation to invest in the volatile northern region of the country.⁸⁶ The sources of capital of the Western private companies and Chinese NOCs differ. Their business ideologies and approaches also run counter to each other. More importantly Chinese NOCs act as catalysts for Beijing’s quest to create a new global economic and investment order, expand its NOCs as globally competitive companies, and secure energy supply for the home state.

In analyzing the impact of the RFI in Nigeria and Angola, a Chatham House report acknowledges the shortage of infrastructure in Nigeria but notes that the Sino-Nigeria OFI investment deals were under-the-table deals that undermined the principle of transparency.⁸⁷ As I have indicated, the infrastructure deficit in Nigeria, for example, was chiefly responsible for the adoption of the RFI investment technique. Nigeria’s embrace of the OFI arrangements fits nicely with the United Nations’ Resolution 1803 (XVII) on the Permanent Sovereignty over Natural Resources that recognizes “the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests and with respect for the economic independence of States”.⁸⁸ The national interest that gave rise to Nigeria’s switch to the OFI investment arrange-

⁸⁴ “US: China Lacks ‘Moral’s in Africa”, Aljazeera (9 December 2010), online: <<https://www.aljazeera.com/news/2010/12/9/us-china-lacks-morals-in-africa>>.

⁸⁵ Nwokeji, *supra* note 30.

⁸⁶ *Ibid.*

⁸⁷ Vines et al, *supra* note 35.

⁸⁸ UN General Assembly, Permanent Sovereignty Over Natural Resources, 17 December 1973, A/RES/3171, available at: <https://www.refworld.org/docid/3b00f1c64.html> [accessed 18 February 2022].

ments with China is the critical infrastructure gap in that country. Furthermore, the Nigerian government provided a level playing field to both the Chinese and Western oil investors by offering Western private companies the opportunity to concurrently exploit petroleum resources and invest in infrastructure projects –an offer that was turned down by the Western investors.⁸⁹ The under-the-table-deal’s claim is valid in some respects. For example, one of the key regulatory challenges in the Sino-Nigeria OFI deals is that only the Chinese engineering and construction companies are awarded the OFI-related infrastructure projects in Nigeria. I discuss this transparency issue in the contract process in chapter 4.

As noted and will be discussed in more detail later, up until the turn of the 21st century, Western private oil companies were the foremost and only major investors in the Nigerian oil industry. This era in the Nigerian oil industry was characterized by rent-seeking and oil patronage by the Nigerian ruling class in the face of decaying and moribund social and economic infrastructure. Signature bonuses either went missing or were mismanaged.⁹⁰ Nigeria was also pigeonholed as an exporter of petroleum and non-petroleum products and an importer of refined crude oil and manufactured. Oil revenues in Nigeria were not used to better the lots of the citizenry. What is more, empirical research shows that lack of transparency and other unethical practices in the Nigerian oil sector were institutionalized by the Western oil cartel as the traditional ways of doing business and became the hallmarks of both the Nigerian and Western oil companies’ practices, shaping the way they interacted over time.⁹¹ In situating the Sino-African investment relations in the context of Western economic relations with African states, Olufunmilayo B. Arewa rightly notes that:

[r]elationships between China and African countries unfold in a context shaped by histories of relationships between African countries and external parties, particularly European former colonial powers, which have far too often been exploitative and unequal. These past interactions have been key elements in the construction of

⁸⁹ Nwokeji, *supra* note 35 at 111-2.

⁹⁰ Nwokeji, *supra* note 35 at 76.

⁹¹ Klieman, *supra* note 10.

African infrastructure and institutions. As a result of past experiences, contemporary relationships between African countries and China are filtered through lenses shaped by past experience.⁹²

Arewa's contextualization of the Sino-African RFI investment model in light of the historical dominance of Western investors in Africa is apt. It reinforces one of my points in chapter 4 that over half a century of oil exploitation in Nigeria by Western private multinational companies constrained socio-economic development in the host country and stifled competition in the industry. In addition, the imposition of a Western model of economic development on African states through colonialism, and later by the Bretton Woods Institutions through Structural Adjustment Programme (SAP) laid bare the inequality in bargaining power between Africa and Western institutions.

A few legal scholars who focus on RFI investment arrangements take a contract law approach by comparing the RFI with the traditional JV and PSC forms of investment. Some of the legal scholarship, along with the practices of the EITI,⁹³ conceive of RFIs arrangements as investment contracts and economic exchanges that are governed by the principles of contract law with consequential effects on property rights.⁹⁴ In law and policy literature, the RFI investment arrangements satisfy the requirement of a contract in that natural resources are used as consideration.⁹⁵ Except for the EITI, the contractual approach to RFI deals does not address the ethical issues and opacity surrounding the investment arrangements. The EITI's revised Standard adopted in 2019 provides for standard treatment of RFI investments. The Standard provides for

⁹² Arewa, "Constructing Africa", supra note 30.

⁹³ The Extractive Industries Transparency Initiative Standard, 2019 Requirement 4.3.

⁹⁴ Dunia P Zongwe, "The Competitive Edges of China's Resource-for-Infrastructure Investment Contracts in Africa" (2010) 2 Peking U J Legal Stud 227. Dunia Zongwe, "Seeing the Whole Elephant: A Comprehensive Framework for Analyzing Resource-for-Infrastructure Contracts as Intended by the Parties" (2015) 1:2 Southern African Journal of Policy and Development 38. Dunia Prince Zongwe, *Ore for Infrastructure: A Contractual Model for the Optimization of China's Investments in the Mining Sectors of Africa* Cornell University, 2010) [unpublished].

⁹⁵ Consideration in contract law is anything of value in the eyes of law. It could be in monetary form or through the performance of an act. For consideration to be valid, it does not need to be commensurate or adequate in relation to the benefits that will be derived from the contract. This is the position of law in common law traditions and may not represent the law in civil law systems.

a benchmark in infrastructure provisions and barter arrangements in natural resource contracts.⁹⁶

The EITI Standard underscores the importance of transparency and the need for a level playing field in resource extraction contracts. EITI implementing countries such as Nigeria are expected to create a reporting process that will be used to publish resource payments and revenues.⁹⁷

One of the hallmarks of the EITI is the partnership between governments, extractive industry companies, and (CSGs) for the good governance⁹⁸ of oil, gas, and mineral resources.⁹⁹ Since my dissertation is interested in how to introduce a co-regulatory approach to the Sino-Nigeria OFI arrangements, my analytical framework on the OFI aligns with the EITI Standard treatment of RFI deals. RFI deals can be the launch pad for a viable and feasible co-regulation of the Sino-Nigeria OFI investment arrangements. RFI deals that are properly worked out with public benefit in mind may set in motion the integration of non-state actors into the governance framework of the investment arrangements. The integration of non-state actors is a possibility if Nigeria – an EITI implementing country, for example – complies with the multi-stakeholder requirement on

⁹⁶ The Extractive Industries Transparency Initiative Standard, 2019, Requirement 4.3 states that: The multistakeholder group is required to consider whether there are any agreements or sets of agreements involving the provision of goods and services (including loans, grants and infrastructure works), in full or partial exchange for oil, gas or mining exploration or production concessions or physical delivery of such commodities. To be able to do so, the multistakeholder group needs to gain a full understanding of: the terms of the relevant agreements and contracts, the parties involved, the resources which have been pledged by the state, the value of the balancing benefit stream (e.g. infrastructure works), and the materiality of these agreements relative to conventional contracts. Where the multistakeholder group concludes that these agreements are material, the multistakeholder group is required to ensure that EITI implementation addresses these agreements and disclosures provide a level of detail and disaggregation commensurate with the other payments and revenue streams. The multistakeholder group is required to agree on a procedure to address data quality and assurance of the information set out above, in accordance with Requirement 4.9.

⁹⁷ Halland et al, *supra* note 72.

⁹⁸ In the context of this dissertation, the phrase “good governance” is used more broadly to mean an organic regulatory approach that is participatory, accountable, transparent, effective, and inclusive to the extent that it strengthens civil society participation in extractive industries’ regulation and decision-making. To be clear, the term “good governance” is not used in this research project in the Bretton Woods Institutions’ way where the concept was transplanted as a development agenda to Africa in the 1980s through the imposition of SAP. This dissertation does not adopt the Bretton Woods institutions’ conception of good governance because the institutions’ sense of lack of good governance in the Third World tends to focus on a country’s weak democratic institutions and hardly considers the ills and footprints of colonialism and slavery. See, for example, Antony Anghie, “Decolonising Good Governance” in Gruffydd Jones Branwen, ed, *Decolonizing International Relations* (Lanham, Maryland: Rowman & Littlefield, 2006) 109. See also James Thuo Gathii, “Retelling Good Governance Narratives on Africa’s Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes between Markets and States” (2000) 45:5 *Vill L Rev* 971 [Gathii, *Retelling Good Governance Narratives*] [positing that the good governance prescription of the Bretton Woods institutions empower the weak while protecting the powerful - displaces corruption from the state to the marketplace]. See further, Mari-Lise du Preez, “Interrogating the ‘Good’ in ‘Good Governance’: Rethinking Natural Resource Governance Theory and Practice in Africa” in Andrew J Grant, Nadege WR Compaore & Matthew I Mitchell, eds, *New Approaches to the Governance of Natural Resources International Political Economy Series* (London: Palgrave Macmillan UK) 25.

⁹⁹ *Ibid.*

RFI deals.

The debates in the literature about RFI investment deals raise vital thematic issues surrounding the unconventional investment technique, such as the need to subject it to public scrutiny and transparency. However, they miss one critical point. They identify the RFI model as an agency in undermining transparency and a level playing field in the award of oil drilling rights. However, they neither suggest nor acknowledge that the integration of non-state actors (such as anti-corruption NGOs) into the regulation of the unorthodox investment technique has the potential to bring about a transparent and positive investment outcome for all stakeholders. It is chiefly in the recognition and inclusion of non-state actors in the regulation of the Sino-Nigeria OFI arrangements that my dissertation differs from existing literature on China's RFI investment deals in Africa. I will discuss in chapter 6 how the integration of non-state actors in the Sino-Nigeria OFI investment arrangements will work in practice. To help contextualize this argument on regulation, a discussion of why the investment deals and the importance of alternative regulatory approaches advanced in my dissertation is necessary. To that I now turn.

3. Significance of Research

What drew me to this topic, and why does the academic inquiry on the Sino-Nigeria OFI investment deals matter? Also, of all the African countries where Chinese RFI investment arrangements are gaining momentum, why Nigeria? I am carrying out my research on the Sino-Nigeria OFI investment arrangements because China, through its NOCs and other state-owned enterprises, is a key state actor in transnational investment and a growing major operator in the extractive industries in Nigeria.¹⁰⁰ As figure 9 shows, China's investment in Nigeria's oil and gas industry from 2005 to 2019 stood at more than \$16 billion. In addition, China's "Going Out" strategy, petroleum policy on overseas investment, and statist economic globalization, which I will discuss in chapter 4, are some of the crucial challenges of the 21st century. An academic inquiry on the Sino-Nigeria OFI deals matters because beginning in 2000, the Sino-Africa investment relations

¹⁰⁰ Foster et al, *supra* note 76.

in oil and non-oil sectors have burgeoned and provoked academic and policy debates on the regulation of investment, neo-colonialism, and debt traps, to mention only a few.¹⁰¹ Chinese NOCs operating in the extractive industries in Nigeria, and Africa at large, are catalysts of a paradigm shift in transnational investment patterns and models that some scholars believe undermine the global efforts to address bribery in global business. Specifically, the advent of Chinese NOCs in Nigeria with a comparatively sui generis investment model in an industry dominated by Western private transnational oil companies creates some intractable regulatory problematics. As timely as the regulatory issues arising from the Sino-Nigeria OFI investment arrangements are, they have rarely been researched at the doctoral level.

So, why Nigeria? First, Nigeria's domestic political economy of oil and the country's critical need for infrastructure provide useful lenses to study and understand the RFI arrangements. Second, Nigeria's political economy landscape and natural resource endowments also offer helpful contexts to study China as a major player in economic globalization vis-à-vis its investments in the extractive industries and financing of huge infrastructure projects in Africa. For a significant length of time, Nigeria has been Africa's top oil producer.¹⁰² Most of the Chinese oil fields are in the Niger Delta communities –a region that evokes images of egregious human rights abuses, an admixture of government and corporate brutality, and environmental degradation, to mention but a few. Nigeria is thus an exemplary case of China's RFI investment model. The global oil industry, of which Nigeria is a big part, has the ill-famed distinction of ranking very high among the industries with transparency and graft issues. More importantly, my dissertation contributes to China-Africa scholarship in that whether or not Beijing's RFI investments in Nigeria are well intentioned, it is nevertheless important to regulate the arrangements to mitigate the incidences of unethical business practices. Finally, although the literature on the Nigerian paradigm of Chinese

¹⁰¹ See, for example, "Clinton Warns Against 'New Colonialism' in Africa", Reuters (11 June 2011), online: <<https://www.reuters.com/article/us-clinton-africa-idUSTRE75A0RI20110611>>. Margaret C Lee, "The 21st Century Scramble for Africa" (2006) 24:3 *Journal of Contemporary African Studies* 303. Horace Campbell, "China in Africa: challenging US Global Hegemony" (2008) 29:1 *Third World Quarterly* 89.

¹⁰² "U.S. Energy Information Administration (EIA)", online: Nigeria - International - Analysis <<https://www.eia.gov/beta/international/analysis.php?iso=NGA>>.

economic and corporate globalism is evolving, the regulatory aspect of the OFI investment deals has not been addressed in a comprehensive and broad-based manner. The small number of works on the Sino-Nigeria investment cooperation are interspersed in journal articles and book chapters in the social sciences.¹⁰³ My study intervenes in the discussion by directly addressing the Sino-Nigeria OFI investment discourse.

¹⁰³ Ian Taylor, "China's Relations with Nigeria" (2007) 96:392 *The Commonwealth Journal of International Affairs* 631. Vahid Nick Pay Elemchi Nwosu, "China's Engagement with Africa: Promoting Rentierism? A Case Study of Sino-Nigerian Economic Relations" (2020) 51:2 *Asian Affairs* 347.

Chapter 2: Situating the Structure of the Oil Industry in Nigeria and Its Regulatory Challenges

Introduction

The Nigerian oil industry boasts large hydrocarbon reserves but also a challenging operating environment. Located in the Gulf of Guinea on the Western coast of sub-Saharan Africa and home to the largest population in the continent, Nigeria is a member of the Organization of Petroleum Exporting Countries (OPEC).¹ It is among the largest and active producers of crude oil in the world, attracting both foreign private companies and local (Nigeria) private oil companies and oil services companies. In contrast to ownership structures in other countries, the federal government owns all oil and gas reserves in Nigeria. The Minister of Petroleum Resources (MPR), which I will discuss later in this chapter, grants licenses to foreign and local Nigerian private oil companies through various contractual arrangements to explore and produce petroleum products. These arrangements can take the form of JVs, production sharing contracts (PSCs), and service contracts between Nigeria's state-owned oil company, the Nigeria National Petroleum Company

¹ OPEC is an intergovernmental organization of 14 countries with a substantial net export of crude oil and with common economic interests. The organization was formed in 1960 which was at the twilight of colonialism. The founding member states are Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela. OPEC's headquarters is currently located in Vienna, Austria. One of the organization's early successes was to wrest the control and domination of the international oil market and price from the hands of the international oil companies popularly known as the "Seven Sisters" which comprised British Petroleum, Exxon, Gulf, Mobil, Royal Dutch Shell, Texaco, and Standard of California who were repeatedly reducing the price of oil in the international market without consulting the producing countries. This act was economically detrimental to the producing nations and propelled the formation of the organization. See Organization of the Petroleum Exporting Countries, *I Need to Know: An Introduction to the Oil Industry & OPEC*, 2nd ed (Vienna: Austria: Organization of the Petroleum Exporting Countries, 2013) at 48-63. See also Anthony Sampson, *The Seven Sisters: The Great Oil Companies and The World They Made* (London: Hodder and Stoughton, 1975). One cannot, therefore, agree less with Antony Anghie that "the transformation of colonial territories into sovereign, independent states enabled these territories, which previously had been excluded from the realm of international law, to enter the international territories with all the powers and attributes of sovereignty and as equal members of the Family of Nations". See Antony Anghie, "Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations" (2001) 3 NYU J Int'l L & Pol 513-634.

Limited, and local (wholly owned Nigerian) and foreign oil companies. As will be discussed in more detail below, international (transnational) oil companies have played a dominant role in the sector.

The main purpose of this chapter is to map the structure of the oil industry in Nigeria and identify some of the key regulatory challenges facing the industry. It also will provide an overview of investment arrangements and the entry of new Chinese oil investors. Bribery and corruption are two key challenges facing the industry and undermining the ability of revenues from the industry to contribute in a positive manner to socio-economic developments in the country. Indeed, as we shall see in this dissertation, bribery and corruption have been constant features of the industry and have increased over the years. One response to such issues and related regulatory challenges, as will be argued in subsequent chapters, is a co-regulatory and integrated approach to the regulation of the country's oil industry. First, I outline the role and impacts of Nigeria's political institutions on oil extraction, and identify some of the regulatory challenges facing the country. I then identify and examine the domestic actors in relation to the Nigerian Minister of Petroleum Resources, the Nigerian national oil company, the National Petroleum Investment Management Services, and the Nigerian Upstream Petroleum Regulatory Commission –the latter being the primary petroleum regulatory agency. In particular, I consider the domestic and external socio-political challenges that have plagued the oil industry through the agencies in efficiently discharging their statutory functions and serving the interests of the Nigerian people, namely: regulatory inefficiency that has created a breeding ground for corruption. Second, I assess the place of domestic oil companies in the development of the petroleum sector. Third, I examine the distinct forms of business arrangements in the industry. Fourth, I explore recent changes in the ownership structure of the Nigerian petroleum industry, specifically, the increase in domestic private sector ownership. Lastly, I highlight the entry of new oil investors from China and its regulatory and political economy implications in the Nigerian oil industry. As will be shown in this section and in subsequent chapters, while numerous regulatory challenges have plagued Nigeria's oil industry for decades, new challenges posed by the Sino-Nigeria oil-for-infrastructure

deals necessitate a new approach, one which is neither state-based or uniaxial. As is outlined in detail in subsequent chapters, I propose a decentred and co-regulatory approach. A clear discussion of the regulatory challenges is necessary before proposing my decentred approach. To this historical overview of regulation, I now turn. The following sections set the stage for our understanding of the confluence of interrelated local political institutions, processes, and external factors that have led to regulatory paralysis.

1. Nigeria's Political Economy

In terms of political economy and democratic credentials, Nigeria has a long history of a dysfunctional political system, poor governance, and social instability due in part to the legacy of colonial rule, and also shaped by the challenges of uniting and ruling a large territory that was disunited at independence in 1960.² Beginning in 1966 up until the second quarter of 1999, Nigeria experienced successions of military coups, with short civilian interregna. The regimes were sustained by brute dictatorial logic and opportunistic military force.³ Throughout the 1980s and 90s, the military was more corrupt and powerful as it became the main agency for accumulating wealth and the reinforcement of political patronage.⁴ The entrenchment of military governments stifled regulatory institutions and mechanisms and caused their effectiveness to atrophy. In addition to the fact that the regulatory sites and actors in Nigeria were largely centralized in the state, the military, by their training, lacked the technical capacity and regulatory expertise that could bring about an effective regulatory outcome. In the usual modus operandi of exercising arbitrary powers by military juntas, civil and democratic institutions (e.g., the federal legislature) as well as relevant laws that could provide accountable, effective, and transparent governance of petroleum resources were suspended by dictatorial fiat. Anti-corruption, human rights, and environmental

² Richard Bourne, *Nigeria: A New History of A Turbulent Century* (London: Zed Books, 2015).

³ Max Siollun, *Oil, Politics and Violence: Nigeria's Military Coup Culture (1966-1976)* (New York: Algora Publishing, 2009).

⁴ See for example, Ngozi Okonjo-Iweala, *Reforming the Unreformable: Lessons from Nigeria* (The MIT Press, 2012) at 84. On the legacy of military rule in Nigeria, see John Campbell & Mathew T Page, *Nigeria: What Everyone Needs to Know* (New York: Oxford University Press, 2018) at 38-41. See also Chinua Achebe, *There Was a Country: A Personal History of Biafra* (London: Allen Lane, 2012) at 249.

non-governmental organizations in Nigeria carried out their operations in fear and trepidation, and at the risk of proscription, arbitrary detention, or execution of their leaders. In short, there was a total lack of independent oversight mechanisms.

The dysfunctional political system and centralization of power within the military and executive branch of the government enabled a pattern of abuse to become deeply entrenched. A system of clientelism emerged whereby military and their civilian cronies awarded oil blocks to companies where the military top brass or their civilian allies hold equity interests or to companies owned by the military loyalists.⁵ The dysfunctional political system and centralization of power also resulted in sprees of embezzlement of oil-generated revenues by the military elite and civilian politically exposed persons as well as conflict of interest. In 1998, for example, the military government awarded an oilfield estimated to contain 9.3 billion barrels of crude to a Nigerian private oil company. The military president's son and the then Minister of Petroleum Resources were major shareholders in the local company.⁶ In 2011, Royal Dutch Shell and Eni prevailed over Chinese and Russian competitors for the same oil block by acquiring it for USD \$1.3 billion from the Nigerian government. Shortly after Royal Dutch Shell and Eni paid the money directly to the government, officials of the Nigerian government allegedly instructed JP Morgan to transfer USD \$1.1 billion to an account owned by the former minister.⁷ All the actors including, but not limited to, Royal Dutch Shell, Eni, and the Nigerian former petroleum minister in the oil scandal are currently facing bribery charges in an Italian court.⁸ Similarly, Addax Petroleum, a subsidiary of Sinopec, entered

⁵ Victor Chidubem Iwuoha, "Rethinking the 'Patron-Client' Politics of Oil Block Allocation, Development and Remittances in Nigeria" (2021) 48:170 *Review of African Political Economy* 552 at 554.

⁶ "Nigeria Seizes \$1.2 Billion Oil Bloc in Shell, Eni Scandal", AP NEWS (27 January 2017), online: <<https://apnews.com/article/c3df1b8ccc3c45d3b320210275113329>>. <https://perma.cc/K7HL-76L4>. The Extractive Industries Transparency Initiative (EITI) has noted that developing countries such as Nigeria tend to cloak or shield the real owners of companies. The multi-stakeholder initiative warned that the practice of shielding real owners of companies, if not checked, will continue to pose financial risks to the revenue generation of those countries as shell companies are mostly set up as a means to enrich individuals and defraud nations. See Oil and Gas Industry Audit Report - Full Report, Audit, Audit (Abuja, Nigeria: Nigerian Extractive Industries Transparency Initiative, 2014) at 29.

⁷ For a diagrammatic representation of the alleged money flows in this transaction, see Alexandra Gillies, *Crude Intentions: How Oil Corruption Contaminates the World* ([Oxford] United Kingdom: Oxford University Press, 2020) at 51. Lionel Faull et al, "The Oil Deal, the Disgraced Former Minister, and \$800m Paid via a UK Bank", *The Guardian*, UK (5 March 2017), online: <<https://www.theguardian.com/business/2017/mar/05/the-oil-deal-the-disgraced-minister-and-800m-paid-via-a-uk-bank>>. <https://perma.cc/ZX3U-Y96J>.

⁸ Reuters Staff, "Italian Prosecutor Says Eni, Shell Aware of Bribes in Nigeria Case", Reuters (2 July

into a side letter agreement with a Nigerian military government in 1998. Under the side letter agreement, Addax was granted long years of tax breaks, relief from capital costs, and a reduced royalty rate.⁹ However, in 2014, the Nigerian democratic government attempted to rescind that agreement and demanded \$3 billion in repayments from Addax. The Chinese oil company pushed back through court action. A year later, both parties reached an out-of-court settlement. The host government validated the terms of the side letter agreement and effectively forfeited the \$3 billion owed it by Addax. In 2016, Addax's auditor –Deloitte, flagged a payment that included more than \$20 million made to legal advisers in Nigeria and the US from bank accounts in Nigeria and the Isle of Man. The payments, which were made at the time of the out-of-court settlement, were to ratify the validity and enforcement of the side letter agreement. In 2017, the Swiss authorities fined Addax \$32 million on grounds of its failure to sufficiently document the payment and the uncertainties surrounding the legality of the payment. These two cases foisted a huge loss of revenue on Nigerians and their government. They also demonstrate that the many years of military intervention in the country largely constrained the government's inability to regulate the oil industry. External factors also undermine the regulatory inadequacy in Nigeria's oil industry. For instance, key stakeholders such as Western private oil companies and local militant groups frequently pressure the country's ruling class to issue suboptimal regulatory guidelines resulting in a dysfunctional industry.¹⁰ Western private oil companies lobby for favourable fiscal regimes to increase their petroleum profit margins.¹¹ The Nigerian government has lost US\$5 billion in fiscal oil revenue because of unfair terms in offshore oil contracts.¹² Some Western oil companies profit from weak regulation of the industry by reducing the host country's oil earnings through transfer

2020), online: <<https://www.reuters.com/article/us-eni-shell-nigeria-idUSKBN2432Y7>>. <https://perma.cc/TVC4-DNM8>.

⁹ Hugo Miller & Tom Schoenberg, "Sinopec Is Said to Be Probed by U.S. Over Nigeria Payments" Bloomberg (1 September 2017), online: <<https://www.bloombergquint.com/business/sinopec-is-said-to-be-probed-by-u-s-over-nigeria-payments>>. <https://perma.cc/8Z75-XQ8T>.

¹⁰ Zainab Usman, "The 'Resource Curse' and the Constraints on Reforming Nigeria's Oil Sector" in Carl A Levan & Patrick Ukata, eds, *The Oxford Handbook of Nigerian Politics* (Oxford: Oxford University Press, 2018) 520 at 530-8.

¹¹ Ibid.

¹² "Wish You Were Mine" *The Economist* (11 February 2012), online: <<http://www.economist.com/middle-east-and-africa/2012/02/11/wish-you-were-mine>>. <https://perma.cc/6PMB-2SP6>.

pricing and tax avoidance, among others.¹³ In addition, Western oil companies, for some time, have not invested in hard infrastructure in the petroleum sector. This lack of investment has resulted in ageing pipelines and recurring oil spills, and the related destruction of lands, natural habitats and ecosystems in the resource-producing communities.¹⁴

Furthermore, the discovery of oil laid the foundation for a certain kind of politics and political economy. First, the country became increasingly dependent on petroleum and petroleum products, leading scholars to regard Nigeria as a “petrostate”.¹⁵ Investments in both the agricultural and the manufacturing sectors steadily declined alongside the growing importance of oil since its discovery in 1956 in Oloibiri, in present day Bayelsa state. By the early 1970s traditional export earners, such as peanuts, cotton, cocoa, and palm oil products had dramatically declined in significance and ceased to be important at all while Nigeria’s oil exports continued to increase. High and rising global oil prices in the 1960s and early 1970s led to the gross neglect of non-oil sectors, and transformed the country into a mono-economy, dependent on crude oil exports almost entirely. For example, by the late 1970s, oil accounted for “about 80% of the Federal Government’s revenues and 95% of foreign exchange earnings.”¹⁶ Similar to other oil exporting countries, Nigeria continued to rely on oil exports and did not invest in the energy transition from fossil fuels to renewable energy sources. Second, crude oil extraction and resource governance have led to carnage and brigandage that have left the oil-producing communities devastated and poorer than they probably were before the discovery of crude oil. It bears mentioning that Western companies operated in the Nigerian oil industry for over five decades with no positive contribution and impact on the development of the country. The big five Western oil companies formed a capitalist alliance with the Nigerian government that benefitted only the foreign investors, their shareholders, and few elites in the host country. A sizeable proportion of Nigerians see oil money

¹³ Usman, *supra* note 108.

¹⁴ *Ibid.*

¹⁵ Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro-States* (Berkeley, California: University of California Press, 1997).

¹⁶ Mathias Chukwudi Isiani et al, “Interrogating the International Monetary Fund (IMF) Policies in Nigeria, 1986–2018” (2021) 8:1 *Cogent Arts & Humanities* 1932283 at 6.

as blood money as resource extraction became a recipe for violent conflicts,¹⁷ egregious human rights violations, and the destruction of lands and marine ecosystem in the Niger Delta.¹⁸ The alleged role of Royal Dutch Shell in the unlawful execution of the Ogoni Nine,¹⁹ the numerous environmental and human rights-related transnational litigations against the Western companies,²⁰ and abduction of oil workers in the Niger Delta creeks are notable examples. The environmental, political, and economic problems caused by Western private oil companies in Nigeria and how they bent the rules during the years of an oil boom in the country have been a subject of immense study in law²¹ and political economy²² and need not detain us here. Suffice it to say that opacity and bribery in the oil sector were institutionalized by the Euro-American transnational oil cartel as the traditional ways of doing business and became the hallmarks of both the Nigerian and Western oil companies' practices, shaping the way they interacted over time.²³

¹⁷ For an interesting and recent empirical work on the political anthropology of a triangular struggle and contestations for the control of oil wealth in Nigeria, see Omolade Adunbi, *Oil Wealth and Insurgency in Nigeria* (Bloomington; Indianapolis: Indiana University Press, 2015), particularly, chapters 5-7.

¹⁸ Rufus A Mmadu, "The Search for Environmental Justice in the Niger Delta and Corporate Accountability for Torts: How Kiobel Added Salt to Injury" (2013) 1 *J Sustainable Dev L & Pol'y* 73.

¹⁹ "Nigeria: Shell Complicit in the Arbitrary Executions of Ogoni Nine as Writ Served in Dutch Court", (29 June 2017), online: Amnesty International <<https://www.amnesty.org/en/latest/news/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/>>. <https://perma.cc/ER74-FYC3>.

²⁰ *Kiobel, et al v Royal Dutch Petroleum Co et al*, 569 US _____ (2013) [*Kiobel v. Royal Dutch Petroleum*]. *Larry Bowoto, et al v Chevron Corporation, et al*, [2010] 621 F3d 1116 [*Bowoto v. Chevron Corp.*]. Roger P Alford, "The Future of Human Rights Litigation after *Kiobel*" (2014) 89 *Notre Dame L Rev* 1749. Jordan Paust, "Human Rights Through the ATS After *Kiobel*: Partial Extraterritoriality, Misconceptions, and Elusive and Problematic Judicially-Created Criteria" (2014) 6:1 *Duke Forum for Law & Social Change* 31. *Supra* "Nigeria: Ogoni Widow Testifies Against Shell in the Hague", BBC News (12 February 2019), online: <<https://www.bbc.com/news/world-africa-47210442>>.

²¹ Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto, Canada: University of Toronto Press, 2009). Damilola S Olawuyi, *Extractives Industry Law in Africa*, 1st ed (Cham, Switzerland: Springer International, 2018). Emeka Duruigbo, *Multinational Corporations and International Law: Accountability and Compliance in the Petroleum Industry*, 1st ed (Ardsley, NY: Brill - Nijhoff, 2003). Anupam Chander, "Unshackling Foreign Corporations: *Kiobel*'s Unexpected Legacy" (2013) 107 *Am J Int'l L* 829.

²² Olubayo Oluduro, *Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities* (Cambridge, UK: Intersentia, 2014). Kenneth Omeje, *Extractive Economies and Conflicts in the Global South: Multi-Regional Perspectives on Rentier Politics* (Abingdon, UNITED KINGDOM: Ashgate Publishing Ltd, 2008). Kenneth C Omeje, *High Stakes and Stakeholders: Oil Conflict and Security in Nigeria* (Aldershot, England: Ashgate, 2006). Ike Okonta, *When Citizens Revolt: Nigerian Elites, Big Oil and the Ogoni Struggle for Self-Determination* (Trenton, NJ: Africa Research & Publications, 2008). Andrew Apter, *The Pan-African Nation: Oil and The Spectacle of Culture in Nigeria*, 1st ed (Chicago: University of Chicago Press, 2005). Terisa Turner, "Multinational Corporations and The Instability of the Nigerian State" (2007) 3:5 *Review of African Political Economy* 63. Michael Watts, "Resource Curse? Governmentality, Oil and Power in the Niger Delta, Nigeria" (2004) 9:1 *Geopolitics* 50. Adunbi, *supra* note 25. Ike Okonta & Oronto Douglas, *Where Vultures Feast: Shell, Human Rights, and Oil in the Niger Delta* (London; New York: Verso, 2003). Phia Steyn, "Oil Exploration in Colonial Nigeria, c. 1903-58" (2009) 37:2 *The Journal of Imperial and Commonwealth History* 249. Gillies, *supra* note 104.

²³ For example, see Klieman, *supra* note 10. See also Gillies, *supra* note 104.

Given the country's sole reliance on earnings from crude oil exports and high foreign debt load, the sudden decline in international oil prices in the 1980s created a balance of payment deficit and near collapse of the economy. In exchange for additional loans from the IMF in 1986, the government was forced to implement the unpopular Structural Adjustment Programme (SAP). SAPs generally involve a reduction in government spending, economic liberalization, privatization, and devaluation and other changes to a country's economic, political and financial system.²⁴ The main objectives of the program in Nigeria was to restructure and diversify the economy. However, other conditions attached to the program - such as currency devaluation, public sector retrenchments, and cutting public expenditure for social services without any consideration to the local variables resulted –resulted in rising unemployment, food shortages, and declining education and healthcare.

The intensification of poverty and unemployment linked to the SAP exacerbated existing ethnic divisions in the country that were largely rooted in colonial policies. For instance, the British colonial administration did not yield to local pressure by anti-colonial nationalists in its colony to address the issues of the sociology of co-existence by distinct ethnic groups within the same region.²⁵ The challenges of inter-group relationships, regional rivalry, tribalism, sectarian hatreds, and violence, among other tensions, present at independence increased in the immediate years, leading to a three-year civil war (1967-1970).

The meagre existing infrastructure facilities were largely destroyed by the war. Although the Nigerian military government invested quite strongly in infrastructure from 1975 to 1980, such investments were not adequate to meet the needs of the population, especially given the rapid growth in the youthful population and lack of services and infrastructure put in place during the

²⁴ Poul Engberg-Pedersen, *Limits of Adjustment in Africa: The Effects of Economic Liberalization, 1986-94* (Copenhagen: Centre for Development Research in Association with James Currey, Oxford, Heinemann, Portsmouth, N.H., 1996). Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2004) [Anghie "Imperialism"] at 259.

²⁵ For an excellent account of the partition of Nigeria and Africa after the Berlin Conference of 1884-85, see Joseph C Anene, *The International Boundaries of Nigeria, 1885-1960: The Framework of An Emergent African Nation* (New York: Humanities Press, 1970). See also Makau wa Mutua, "Why Redraw the Map of Africa: A Moral and Legal Inquiry" (1994) 16 *Mich J Int'l L* 1113–1176.

colonial period.

The unstable political system in Nigeria that persisted for more than three decades combined with high population growth led to monumental infrastructural neglect and decay. Africa's most populous country was faced with moribund refineries, abandoned railways, dilapidated airports, bad roads, poor electricity generation, inadequate and substandard healthcare facilities, a high rate of unemployment, and a poverty-stricken populace. These socio-economic challenges, which continued despite investments from Western oil companies were echoed by the then Minister of Finance and Coordinating Minister of the Economy, Ngozi Okonjo-Iweala, when she noted in 2013 that "we need roads, we need power, we need help on aviation, agriculture".²⁶

In 2004, the parlous state of infrastructure in Nigeria became a primary factor for a shift in the investment profile in the oil industry. Hydrocarbons are critical to Nigeria's economic prosperity as they are the linchpin of the country's economy and its main source of foreign earnings. The government leveraged its rich hydrocarbon deposits by using various oil licensing exercises as useful means of infrastructure development. In this connection, the Nigerian and Chinese governments found complementarities of investment interests that quickly resulted, as I will show in chapter 4, in the purchase of direct and indirect equity stakes in various oilfields by Chinese state-owned oil companies.²⁷ In the words of Okonjo-Iweala, "they [China] want more oil and gas...we have something they want now and they have something we want, so you have grounds for negotiations".²⁸ These were against the backdrop of Nigeria's unsuccessful invitations to the dominant Western oil companies such as Royal Dutch Shell, ExxonMobil, Chevron, Total, Eni/Agip to commit to simultaneously exploit crude oil and invest in downstream and infrastructure projects.

The advent of Chinese state-owned investors with a peculiar and unconventional investment model

²⁶ Onuah Felix & Joe Brock, "Nigeria to Sign Off on \$3 Billion in Chinese Loans", Reuters (13 July 2013), online: <<https://www.reuters.com/article/nigeria-china-idUSL5N0F93N620130703>>. <https://perma.cc/9W5M-EMEP>.

²⁷ "China and Nigeria Agree Oil Deal", (26 April 2006), online:<<http://news.bbc.co.uk/2/hi/business/4946708.stm>>. <https://perma.cc/CC6S-P72Q>.

²⁸ Onuah & Brock, *supra* note 27.

in an industry that has been dominated by private Western oil companies created new intractable regulatory challenges in the national and transnational spaces. First, the sui generis nature of China's oil investment profile complicates Nigeria's regulatory deficit as there is state to state and states-internal relations of power that are embedded in the arrangement. For reasons that will become clearer in chapter 4, the quid pro quo nature of the oil-for-infrastructure deals makes the economic interests and political legitimacy of Nigeria inextricably tied to those of China and its NOCs. Second, the Chinese NOCs operate in partnership with the Nigerian government under production sharing contracts (PSCs). Although the PSC arrangement does not in and of itself substantiate corrupt practices and the Western companies operate under the same contractual structure, it particularly makes the art of regulation prone to undue influence by both the Nigerian and Chinese governments. The nature and processes of PSCs blur ethical lines and they do not guarantee strict anti-bribery safeguards. The nature and processes of PSCs blur ethical lines because the host government, through its regulatory agencies, is both a regulator and an investor in the oil industry. This type of regulatory challenge is not peculiar to PSCs but affects multiple forms of contractual arrangements in the industry. The Nigerian government also appoints and promotes top executives of the regulatory agencies, and that can create an avenue for a state internal political control over the regulators. Thus, given that the Nigerian government barter its crude oil in return for infrastructure projects, the government may interfere with the enforcement of regulation if it will threaten the delivery of its electoral promises and political legitimacy. The Sino-Nigeria investment arrangements also have the tendency to breed asymmetrical relations between China and Nigeria that will result in political capture as the host state might be desperate for infrastructure development for its citizenry. It is equally important to mention that China, as I will show in chapter 4, uses a subtly nuanced strategy to enhance its acquisition of oil drilling rights in Nigeria.

Furthermore, the nature of ownership of Chinese NOCs weakens Nigeria's ability to regulate their investment. The Chinese Communist Party (CCP), for example, exercises de jure and de facto control over its NOCs through a central government agency –State-Owned Assets Supervision

and Administration Commission (SASAC).²⁹ SASAC is a ministerial-level agency that performs the responsibilities mandated by the State Council (China's Cabinet). SASAC plays a pivotal role in China's domestic economy and foreign investment strategy, as it is formally responsible for exercising the interests of the Chinese state as an investor in over 100 SOEs.³⁰ The CCP exerts significant political control over senior executives of SOEs through appointment, promotion, and remuneration, among others.³¹ These top-down structures and relations of power complicate the regulation of Chinese oil and infrastructure investment in Nigeria. As I will argue in chapter 6, the unique features of the Sino-Nigeria OFI investment require a reconfiguration of the regulatory landscape, involving both state and non-state actors operating nationally and transnationally. I will return to these points later. At this point, however, a closer look at the Nigerian oil sector is necessary. The Nigerian oil sector has experienced boom and bust dynamics. The oil boom of 1973-83 led to high revenue from crude oil in Nigeria that was poorly managed. Since 2015, Nigeria's oil production and revenue have plummeted because of both domestic and international factors, plunging the country into an economic recession. These factors include the destruction of oil facilities and the abduction of foreign oil workers by the host communities, bribery of the Nigerian government officials, crude oil theft, and unremitted and missing oil revenue.³² Nevertheless, the oil industry has continued to play a pivotal role in the Nigerian economy. In what follows, I highlight the basic make up of the oil sector and the agencies that control it.

The challenges that affect Nigeria's oil industry cannot always be separately attributed to specific actors and investors. However, there is a relationship between challenges in Nigeria generally

²⁹ "What We Do", online: State-owned Assets Supervision and Administration Commission of the State Council <http://en.sasac.gov.cn/2018/07/17/c_7.htm>. <https://perma.cc/H5ZH-MDHA>. Some of the key responsibilities of the SASAC is the appointment and removal of top executives of the NOCs; evaluation of their performances; the grant of reward or infliction of punishment based on their performances; management of the wages and remuneration of the NOCs and the formulation of policies regulating the income distribution of the top executives and implementation of their policies. The SASAC performs investor's responsibilities, supervises and manages the state-owned assets of enterprises under the supervision of the Central Government (excluding financial enterprises), and enhances the management of state-owned assets.

³⁰ Li-Wen Lin & Curtis J Milhaupt, "We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China" (2013) 65:4 *Stan L Rev* 697.

³¹ Curtis Milhaupt J & Wentong Zheng, "Beyond Ownership: State Capitalism and the Chinese Firm" (2015) 103:3 *Geo LJ* 665 at 677.

³² Gillies, *supra* note 30.

and challenges emanating from Chinese investment. The Nigerian government is desperate to provide infrastructure to the citizenry and it has crude oil that it can trade for the provision of infrastructure. The precarious socio-economic situation of the Nigerian government may therefore make it susceptible to pressure from the Chinese government. This is a possibility because the Chinese government needs petroleum resources to run its domestic economy and possesses the economic might to provide the infrastructure that Nigeria needs. In effect, the critical need for energy sources by the Chinese government is a factor that can result in the lowering of regulatory standards in the industry and opaque decision-making processes. The potential for external pressure on the Chinese government is also a reality regarding Western private oil companies. I elaborate on these points in chapter 4. But in sum, the regulatory challenges that emanate from Nigeria's oil industry are distinct from the ones that arise from Chinese investment, and in some cases they intersect.

1.1 The Composition of the Oil Sector

Oil exploration, development, and production activities are carried out both on land, deep-water, and ultra-deep-water areas. The industry plays host to both foreign and local Nigerian companies. The Nigerian oil industry comprises three sectors: the upstream sector, downstream sector, and midstream sector, with the upstream sector being the most important sector of the nation's economy, accounting for up to 80 percent of the government's foreign exchange revenue. The upstream sector involves the exploration, development, and production activities that include searching for, drilling, and extracting crude oil from underground or underwater oil and gas wells. This sector is a highly lucrative but complex, risky, and capital-intensive venture that requires professional expertise, modern geographic and seismic technology, and prone to serious environmental impacts. Specifically, oil operations in the deep-water areas are technically challenging in nature and so Nigeria's state-owned oil company and local oil companies lack the technological and financial capacities to carry out exploration in these areas. It is estimated that the cost of drilling an exploratory well ranges from \$1 million to \$35 million. Consequently, in most cases,

large and experienced oil companies are usually granted licenses to operate in deep-water areas.

The downstream sector is the part of the industry that is engaged in refining crude into usable products such as gasoline/fuel, diesel, kerosene, jet fuel, and petroleum coke. It also involves the transportation of crude oil to consumers and the commercialization of petroleum products. The midstream serves as a bridge between the upstream and downstream sectors as it exhibits some elements of both sectors. The major activities in the midstream sector include the use of pipelines, tankers, trucks, and railway tanks to transport petroleum products from oil wells to the refineries. The Nigerian midstream sector is involved in the gas and power projects and renewable energy business with the goal of working towards making the country a low carbon economy, among others. I focus on the upstream sector because it is the sector that oxygenates the Nigerian economy and propels its revenue base.

The Nigerian federal government generates various types of revenue from the oil sector, namely: sales of equity and profit oil owned by the government; oil-specific taxes paid by the oil companies; and revenue from the payment of royalties, licenses, and acreage rent. In addition, oil companies contribute directly to state governments and to the Niger Delta Development Commission (NDDC), which is a regional agency for oil-producing communities.

1.2 The Control of the Industry

Prior to independence, petroleum resources and operations were under the direct control of the British colonial government, which conducted its trading activities through the Royal Niger Company, a commercial enterprise chartered by the British government. Since independence, the ownership and control of petroleum activities on the land and territorial waters of Nigeria are vested in the federal government and, consequently, the petroleum sector is under the regulatory watch of the state. The change of ownership and control of petroleum resources to the Nigerian autochthonous government is an offshoot of the United Nations' Resolution 1803 (XVII) on the Permanent Sovereignty over Natural Resources that recognizes "the inalienable right of all States

freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States”.³³

1.3 Domestic Actors and Regulators

The Nigerian government was not a major participant in the upstream oil operations immediately after decolonization in 1960 and up to 1970 because the industry was largely controlled by western oil companies. The government's lack of involvement in the industry is evident in the fact that Nigeria signed its first participation contract or a Joint Operating Agreement (JOA) with oil companies in 1973 where it acquired a 35 percent equity interest in oil exploration, development, and production. The first JOA did not stand the test of time as the terms and equity stakes gave the MNCs greater control that led to the amendment of the agreement in 1974 to increase the equity participation of the host state to 55 percent. Nevertheless, Nigeria was more active in the regulation of the downstream sector and the collection of rents, royalties, and taxes. Since that time, the situation has changed considerably. In August 2021, the oil industry was further overhauled through the enactment of the Petroleum Industry Act (PIA) by Nigeria's National Assembly. The PIA replaces and consolidates some provisions of pre-existing legal, regulatory, and fiscal frameworks for the oil industry such as the Petroleum Act and Petroleum Profits Tax Act.³⁴ The PIA restructures regulatory institutions and licensing regimes (some of them with different nomenclatures) for the purpose of promoting transparency, good governance, and accountability in the industry.³⁵ I will map in the next few sections the creation of the new regulatory institutions of the Nigerian oil industry. First, I provide an overview of the new regulatory regime –the PIA.

³³ UN General Assembly, Permanent Sovereignty Over Natural Resources, 17 December 1973, A/RES/3171, available at: <https://www.refworld.org/docid/3b00f1c64.html> [accessed 18 February 2022].

³⁴ The PIA introduces a new tax regime, replacing the existing petroleum profits tax with a hydrocarbon tax and introducing a tax on the income of oil companies. A discussion on the fiscal regime is beyond the scope of this dissertation.

³⁵ Petroleum Industry Act, 2021, Federal Republic of Nigeria, Official Gazette, Lagos, section 2(c).

1.4 An Overview of the Petroleum Industry Act, 2021

The enactment of the PIA represents a commitment and unflinching determination by Nigeria's federal legislature to reform the oil and gas industry. Broadly speaking, the PIA aims to create an investment climate that is more conducive to the growth of the sector, address legitimate grievances of communities adversely affected by extractive operations, and give more opportunities to local (Nigerian-owned) oil companies to participate in the exploration and production of petroleum.³⁶ The PIA provides for the granting and revocation of the petroleum prospecting licenses (PPL) and petroleum mining leases (PML) to a winning bidder through an open, transparent, competitive, non-discriminatory bidding process conducted by the Nigerian Upstream Petroleum Regulatory Commission.³⁷ The winning bidder is to be determined on a points system³⁸ so that the bidder with the highest aggregate number of points shall be the winning bidder. The bidding process is to be open to the public and conducted in the presence of representatives of NEITI, the Federal Ministry of Finance, and the Federal Ministry of Petroleum Resources.³⁹ Although the PIA provides for an open, transparent, competitive, non-discriminatory bidding process in an oil licensing exercise, the new regulatory regime notably gives the Nigerian government powers to bypass the bidding process to grant oil drilling rights to another country or company through a special arrangement. Section 74(3) of the PIA is telling:

Notwithstanding the bidding parameters prescribed in subsection (2), where there is a bilateral or multilateral agreement between Nigeria and another country, the Government may, for strategic purpose and in return for substantive benefits to the nation, direct the Commission to negotiate and award a petroleum prospecting licence or petroleum mining lease to a qualified investor identified in the agreement or treaty.

³⁶ Kasirim Nwuke, "Nigeria's Petroleum Industry Act: Addressing Old Problems, Creating New Ones", (24 November 2021), online: Brookings <<https://www.brookings.edu/blog/africa-in-focus/2021/11/24/nigerias-petroleum-industry-act-addressing-old-problems-creating-new-ones/>>.

³⁷ Petroleum Industry Act, *supra* note 36, sections 73 and 74.

³⁸ The PIA sets the following parameters to be used in determining the winning bidder: a signature bonus to be paid in full prior to the granting of the licence or lease by or on behalf of the winning bidder; a royalty interest; a profit split or profit oil split; and a work programme commitment during the initial exploration period. See *Ibid*, section 74(2)(a)(i)-(v).

³⁹ *Ibid*.

Agreements such as the OFI between Nigeria and China will be covered under section 74(3). It seems plausible that the processes that the government followed in awarding previous oil licenses to Chinese NOCs under the Sino-Nigeria OFI investment deals and the criticisms against the processes in literature, which I will discuss in chapter 4, influenced the inclusion of section 74(3).

In consideration of the historical soured relationship that has existed between oil companies and host communities, the PIA creates Host Communities Development Trust Fund (HCDTF).⁴⁰ The objectives of the HCDTF are to, among others, “foster sustainable prosperity, provide direct social and economic benefits from petroleum to host communities, and enhance peaceful and harmonious coexistence between licensees or lessees and host communities”.⁴¹ Contributions from oil companies are intended to fund the HCDTFs. Specifically, each oil company is required to make an annual contribution to the applicable host communities development trust fund of an amount equal to 3 percent of its annual operating expenses of the preceding fiscal year in the upstream petroleum operations.⁴² It will be interesting to see in the future how successful the HCDTFs will be with respect to improving the relationship between oil companies and their host communities as well as transforming the deplorable conditions in the Niger Delta region.

1.5 Minister of Petroleum Resources

The Minister of Petroleum Resources (MPR) is the head of Nigeria’s oil and gas industry. The PIA entrusts the MPR with the responsibility to “formulate, monitor, and administer government policies in the petroleum sector.”⁴³ Under the PIA, the MPR can negotiate treaties or other international agreements concerning petroleum on behalf of the Nigerian government.⁴⁴ The MPR has powers to grant and revoke PPL and PML on the recommendation of the Nigerian Upstream Petroleum Regulatory Commission.⁴⁵ I shall discuss the regulatory body shortly in

⁴⁰ Ibid, section 234.

⁴¹ Nwuke, supra note 37. See also Petroleum Industry Act, supra note 36, section 239(3)(a)-(i).

⁴² Petroleum Industry Act, supra note 36, section 240(2).

⁴³ Ibid, section 3(1)(a).

⁴⁴ Ibid, section 3(1)(f).

⁴⁵ Ibid, section 3(1)(g) and (h).

this chapter. The MPR exercises a right of pre-emption over petroleum and petroleum products during a national emergency.⁴⁶ Since the return of democracy in Nigeria in 1999, it has become a tradition on the part of most Presidents (including the current President) to assume the dual roles of President and Minister of Petroleum Resources and appoint a Minister of State (a junior minister) for Petroleum Resources. The case of a Nigerian President indirectly appointing himself as the oil Minister is unconstitutional as such appointment has never been confirmed by the Nigerian Senate as required by the constitution) and has not been challenged in the courts. However, the practice appears to be a result of a wide range of reasons namely, the strategic importance of the oil sector to the Nigerian economy, the need to have a firm and top-level control of the activities in the industry, the need to reduce the cases of missing oil revenue, and check corrupt enrichment by few individuals. Nevertheless, this organizational and governance structure has in some cases occasioned conflict of roles and responsibilities between the Minister of State for Petroleum Resources and the management of the national oil company as the latter claims to be responsible to the President who is the “senior” Minister. The PIA created two regulatory agencies to regulate upstream and downstream operations - the Nigerian Upstream Petroleum Regulatory Commission and the Nigerian Midstream and Downstream Petroleum Regulatory Authority. The former regulates the upstream petroleum operations while the latter regulates the midstream and downstream operations. My dissertation focuses only on the upstream petroleum industry. Thus, I discuss the Nigerian Upstream Petroleum Regulatory Commission in the next section because it is the relevant regulatory institution for the purpose of this dissertation.

1.6 Nigerian Upstream Petroleum Regulatory Commission

The Nigerian Upstream Petroleum Regulatory Commission (NUPRC) succeeds the now defunct Department of Petroleum Resources.⁴⁷ The NUPRC is responsible for the technical and commercial regulation of upstream petroleum operations, including the implementation of environmental

⁴⁶ Ibid, section 3(3).

⁴⁷ “Nigerian Upstream Petroleum Regulatory Commission”, online: Nigerian Upstream Petroleum Regulatory Commission <<https://www.nuprc.gov.ng/>>.

laws. The NUPRC is to periodically publish an oil licensing round plan and conduct the licensing exercise.⁴⁸ The NUPRC develops a model licence and model lease, including contractual provisions for PSCs and other contractual arrangements in the oil industry.⁴⁹ The contractual models usually contain an obligation to oil companies to comply with the payment of taxes, fees, royalties, and rents. The statutory regulatory functions of the Commission are listed in section 7 of the PIA. The regulatory functions include but are not limited to:

- conducting oil bidding rounds for the award of PPL and PML;
- computing, determining, assessing, and ensuring payment of royalties, rents, fees, and other charges for upstream petroleum operations;
- establishing parameters and codes of conduct for oil licensees, lessees, or permit holders in the upstream petroleum operations;
- keeping public registers of petroleum licenses, leases, and permits granted by the MPR with respect to beneficial ownership, award, renewal, assignment, amendment, suspension, revocation;
- monitoring the financial viability of oil licensees, lessees, or permit holders with respect to upstream petroleum operations;
- developing, maintaining, and publishing a database of upstream petroleum operations.

The NUPRC has powers to require oil companies to publish specified and non-proprietary information relating to upstream petroleum operations. It can also recommend to the MPR the grant of oil rights to an oil company and the revocation or suspension of the rights. The dissolution of the NNPC, which was long overdue and the creation of the NNPC Limited by the PIA were at the backdrop of inefficiencies, opacity, and corrupt practices in the corporate activities of NNPC.

⁴⁸ Petroleum Industry Act, *supra* note 36, section 73(2).

⁴⁹ *Ibid*, section 85.

The next section will discuss the NNPC Limited and highlight the corrupt practices that use to characterize the activities of the defunct NNPC.

1.7 Nigerian National Petroleum Company Limited (NNPC Ltd)

Nigeria's foremost state-owned oil company is the defunct Nigerian National Oil Company (NNOC). The NNOC was formed in 1971 and served as an agency to actualize the nation's determination to assume full control of the industry. The establishment of the NNOC coincided with the country's joining of OPEC in the same year. These two remarkable events in the history of the oil industry were desirable as Nigeria leveraged the OPEC's Resolution 90 (XVI) that enjoins member States to acquire reasonable participation of up to 51 percent in their ownership of the concession-holding in petroleum contracts.

The NNOC was replaced by the Nigerian National Petroleum Corporation (NNPC) in 1977. However, the perennially loss-making NNPC has metamorphosed into the Nigerian National Petroleum Company Limited (NNPC Limited) following the enactment of the PIA.⁵⁰ The NNPC Limited assumes all the assets, liabilities, and responsibilities of the NNPC.⁵¹ The assumption of the responsibilities of the NNPC by NNPC Limited means that all contractual arrangements entered into by NNPC before the enactment of the PIA will continue to be effective and enforceable against or, in favour of NNPC Limited. The NNPC Limited is created to be an independent, "commercially-oriented, and profit-driven national oil company".⁵² The independence of the NNPC Limited means that it has an obligation to pay its share of all fees, rents, royalties, taxes, and other required payments to the government where it has a participating interest or 100 percent interest in an oil lease or licence.⁵³ The Nigerian federal government participates in the oil industry through the NNPC Limited. The NNPC Limited represents the interests of the Nigerian government and its people in the industry and manages the relationship between the Nigerian

⁵⁰ Nwuke, *supra* note 37.

⁵¹ Petroleum Industry Act, *supra* note 36.

⁵² Nwuke, *supra* note 37. See also Petroleum Industry Act, *supra* note 36, section 53(7).

⁵³ Petroleum Industry Act, *supra* note 36.

government and oil companies. The ownership of all shares in NNPC Limited are vested in the Nigerian government.⁵⁴ The NNPC Limited carries out business activities in the entire spectrum of the oil industry –upstream, midstream, and downstream. The duties of NNPC Limited are to be performed by an eleven-member Board that is appointed by the president.⁵⁵ The Board is responsible for the strategic guidance and determination of the business structure of NNPC Limited.⁵⁶

The objectives of the NNPC Limited include, but are not limited to: carrying out petroleum operations on a commercial basis, comparable to private oil companies in Nigeria; being the concessionaire of all PSCs and other contractual arrangements as the national oil company on behalf of the government; and, assuming the working interest in any joint operating agreement held by NNPC.⁵⁷

The NNPC Ltd engages in commercial activities relating to the oil industry, which include exploration and production, gas development, refining, distribution, and petrochemical production. It holds equity shares in oil production with oil companies. The equity share of NNPC Limited in each contract with an oil company is usually 60 percent except in its operations with Royal Dutch Shell where it holds 55 percent. Although the defunct NNPC was established to provide value-added services to the petroleum value chain, it was remarkably plagued by bribery scandals, ineffectual management, and regulation. The defunct NNPC and some of its subsidiaries collude in accepting bribes from Western oil companies. Over the years, the dissolved NNPC remained notorious for its deep-seated opacity and as an organization that was devoid of strategy and direction. Transparency International reports that NNPC was one of the eight worst performing national oil companies concerning the publication of code of conduct and corporate regulations on anti-corruption programs.

⁵⁴ Ibid.

⁵⁵ Ibid, sections 58 and 59.

⁵⁶ Ibid, section 63.

⁵⁷ Petroleum Industry Act, *supra* note 36, section 64.

Nigeria's national oil company occupies a strategic and important position in the Nigerian oil industry because of the enormous natural resources and wealth entrusted to it. The national oil company was established largely to protect the nation's economic interests in oil and serve as a catalyst for national development by touching the lives of the masses in positive ways. However, various corrupt deals were uncovered under the management of NNPC. As I noted above, the defunct NNPC was a perennially loss-making institution. There were cases of missing crude oil revenue by the national oil company that were reported in various audit reports by the NEITI. NEITI is a subset of the global initiative –EITI, which I will discuss in chapter 3. The NEITI, for example, found some inconsistencies and under-reporting in NNPC's records of revenue on crude oil sales with an implication of \$439.715 million US dollars in revenue loss to the government.⁵⁸ In 1980, a Crude Oil Sales Tribunal that investigated the NNPC's commercial activities found that the company's accounting system lacked transparency and that that led to the illegal sale of crude oil between 1976 and 1979.⁵⁹ In 2014, the Central Bank of Nigeria's (CBN) Governor, Sanusi Lamido Sanusi, alleged that up to US\$21 billion was missing from the NNPC's due remittances to the CBN between 2012 and 2013.⁶⁰ The African Union and the United Nations Economic Commission for Africa reported that Nigeria lost US\$217.7 billion from 1970 to 2008 due to corruption in oil payments and revenue.⁶¹

The NNPC's mission was to add value to Nigeria's hydrocarbon resources for the benefit of all Nigerians and other stakeholders by maintaining integrity and accountability.⁶² However, it recorded failures in using its position as the steward of the nation's oil wealth to enhance economic development, attract and retain investment in the industry, and improve the quality of life of the citizenry. For instance, a summary of the 1994 Dr. Pius Okigbo-led Panel Report revealed that

⁵⁸ Oil and Gas Industry Audit Report - Full Report, Audit, Audit (Abuja, Nigeria: Nigerian Extractive Industries Transparency Initiative, 2014) at 82-5.

⁵⁹ Ibid at 47.

⁶⁰ Oliver Owen, "Revenue and Representation: The Political Economy of Public Participation" in Carl A Levan & Patrick Ukata, eds, *The Oxford Handbook of Nigerian Politics* (Oxford: Oxford University Press, 2018) 473 at 482.

⁶¹ Usman, *supra* note 11 at 524.

⁶² "Mission & Vision", online: Nigerian National Petroleum Corporation <<https://nnpcgroup.com/About-NNPC/Pages/Mission-and-Vision.aspx>>. <https://perma.cc/3NLQ-4W4G>.

\$12 billion oil windfall was missing as the revenue was not documented and the expenditure did not reflect in the federal government's budget.⁶³ The Panel indicted the Ibrahim Babaginda military government and some top officials of Nigeria's Central Bank for squandering the oil windfall on unproductive or dubious projects.⁶⁴ In addition, CSGs in Nigeria in collaboration with Nigeria's chapter of the EITI identified issues of non-remittance and under-reporting of oil revenue to the federation account by the NNPC.⁶⁵ The NNPC's opacity perpetuated regulatory inefficiency, waste, and opacity.⁶⁶

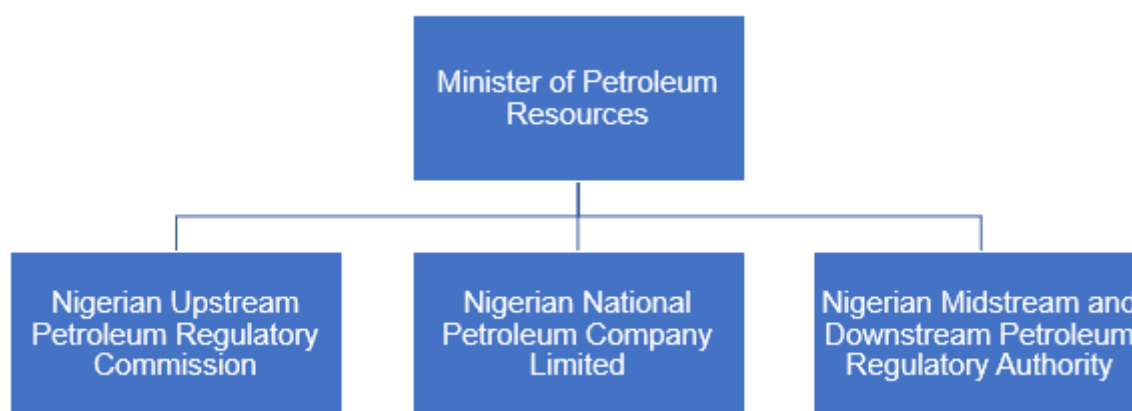


Figure 1: Nigeria's Oil & Gas Regulatory Structure

Source: Author's Compilation

In the preceding sections, I have highlighted the domestic and state-centric regulatory institutions in the Nigerian oil sector. At the same time, the Nigerian government has demonstrated interest in giving increased opportunities to local companies to invest in the oil industry. The government, for example, has initiated various divestment exercises between the Western oil companies and the

⁶³ Siollun, *supra* note 100. See also *The Nigerian National Petroleum Corporation and the Development of the Nigerian Oil and Gas Industry: History, Strategies and Current Direction*, by Ugo G Nwokeji, *The Changing Role of National Oil Companies in International Energy Markets* (Baker Institute/Japan Petroleum Energy Center, 2007) at 47-8.

⁶⁴ Ayo Obe, "The Challenging Case of Nigeria" in Ann Florini, ed, *The Right to Know: Transparency for an Open World Initiative for Policy Dialogue at Columbia: Challenges in Development and Globalization* (New York: Columbia University Press, 2007) 143 at 156-7.

⁶⁵ "Stakeholders Call For Sanction Against Agencies Defaulting On Remediation", online: Nigerian Extractive Industries Transparency Initiative <<https://www.neiti.gov.ng/index.php/media-center/news/418-stakeholders-call-for-sanction-against-agencies-defaulting-on-remediation>>. <https://perma.cc/X9DW-X98V>.

⁶⁶ Usman, *supra* note 11 at 534.

local oil companies and has conducted new licensing rounds thereby enabling Nigerian companies to acquire higher equity stakes in the upstream sector. Major Western oil companies such as Royal Dutch Shell, Total, and Eni have re-aligned their asset portfolios in Nigeria by divesting parts of their interests in some oilfields.⁶⁷ In 2013, a US energy giant ConocoPhillips divested its entire onshore and offshore assets to a local oil company –Oando.⁶⁸ It is to the question of the presence of the local oil companies and how that is influencing the investment landscape of the industry that I now turn.

2. Local Oil Companies in Nigeria

Although local private oil companies have existed in the country since the 1990s because of the government's resolve to indigenize the industry and add local content to its activities; local oil companies, as I will graphically highlight in figure 2 below, contribute only ten percent of crude oil production in Nigeria. The Nigerian government recognizes the need to build and utilize local capacities in the upstream and downstream sectors of the industry and has continuously encouraged local private oil companies to bid for oil licenses. For example, nineteen oil blocks were allocated to seven local oil companies in 1990.⁶⁹ The government usually reserves marginal⁷⁰ and sole risk oil fields for local companies. In 2001, twenty-four oil drilling licenses were granted to thirty-one local (Nigeria) private oil companies in marginal field areas.⁷¹

The Nigerian government's interest in increasing local companies' involvement in the industry

⁶⁷ Supra note 7 at 248.

⁶⁸ "ConocoPhillips Announces Further Progress on Asset Disposition Program with Intended Sale of Nigerian Business Unit", (20 December 2012), online: ConocoPhillips <<http://www.conocophillips.com/news-media/story/conocophillips-announces-further-progress-on-asset-disposition-program-with-intended-sale-of-nigerian-business-unit/>>. <https://perma.cc/6LC5-XHWX>.

⁶⁹ Supra note 7 at 107.

⁷⁰ In Nigeria, marginal fields refer to oil fields discovered by a oil companies but not developed after a period of at least ten years. A marginal field concession arrangement is made between the NNPC and the relevant oil company to relinquish or farm-out the field for re-assignment to local (Nigeria) private oil companies. In any event, the President reserves the right to declare any field that has not been developed for a period of ten years as a marginal field to encourage local oil companies to participate in the upstream oil industry. Petroleum Act, Chapter P10, Laws of the Federation of Nigeria (LFN), 2004 1969, [The Act], s.17.

⁷¹ Supra note 7 at 50.

has been demonstrated through the enactment of the Nigerian Oil and Gas Industry Content Development Act in 2010. Under section 3(1) and (2), local Nigeria private oil companies that demonstrate ownership of engineering, drilling, and construction equipment and Nigerian personnel are given first consideration in the award of the oil block, oil field licenses, and oil lifting licenses. Considering their financial capacities and technological expertise, local oil companies usually operate under joint venture agreements with the NNPC as the oilfields that they operate are located in the onshore and shallow water areas. They have, however, begun to operate in deepwater fields but in partnership with oil companies that usually possess the capacity to explore, develop, and produce crude oil in risky and technologically challenging oilfields.

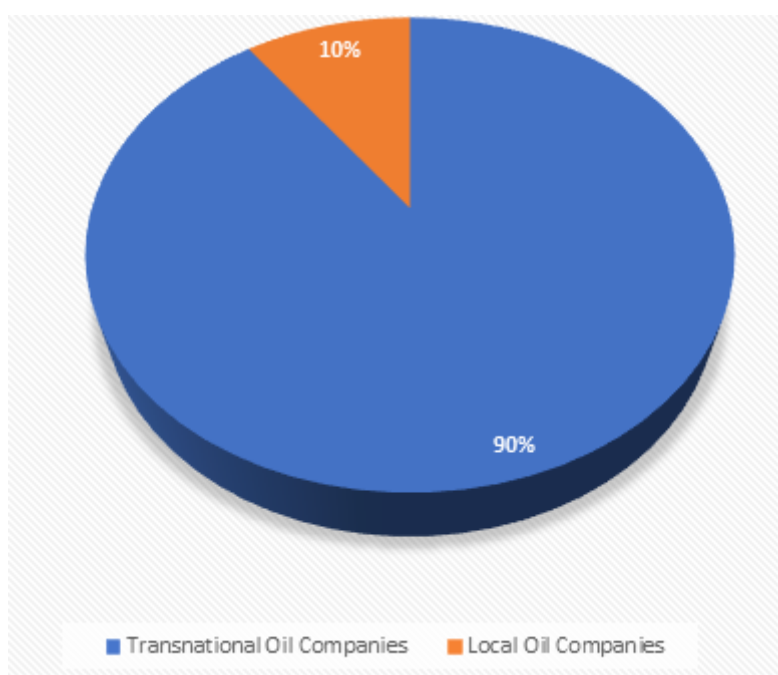


Figure 2: Percentage of Local and Foreign Oil Companies

Source: Nigeria Extractive Industries Transparency Initiative

3. Contractual Arrangements in the Oil Industry

Oil exploration and production businesses in Nigeria are carried out under various legal arrangements such as JVs,⁷² PSCs, modified carry agreements (MCAs), farm-out agreements, service contracts, and sole risks. However, the two most widely used and lucrative models are the JVs and PSCs. The contractual arrangements are legal techniques that the Nigerian government uses to exert some measure of control over foreign oil companies. In the next section, I will limit my discussion to JVs and PSCs as they are, in the words of Sornarajah, “the principal representative forms of foreign investment”.⁷³

3.1 The Joint Venture Arrangement

A JV is a collaborative arrangement between two or more businesses to achieve a particular objective or to participate in another fresh project that may be more successfully pursued as a result of their pooling of resources or technology.⁷⁴ The business relationship between the NNPC and most of the Western and non-Western oil companies in Nigeria is carried out under the JV arrangement.⁷⁵ Under the JV model, the oil companies are the operators and the NNPC (which represents the interest of the federal government) is the concessionaire or license/leaseholder. The operators and the concessionaire contribute to the funding of the oil exploration and production activities in proportion to their equity holdings and share the gains or losses proportionately by sharing the volumes of crude oil produced. The spreading of the risk of failure enables the parties to proceed with the project with more confidence whereas bearing the risk alone would have

⁷² A JV is a business arrangement in which the NNPC and a foreign or local oil company agree to pull their resources together for oil exploration, development, and production. A JV is the foremost and standard type of financing arrangement in Nigeria. In the JV arrangement, the NNPC is the concessionaire and the oil companies are the operators. Each party contributes a specific percentage of funds to the business in proportion to its equity interest. The assets used in the exploration and production of crude oil are owned by foreign oil investors. When the oil is extracted, each party is entitled to its share of production based on working interest and each entity bears its tax obligations. See *Ibid* at 20.

⁷³ M Sornarajah, *The International Law on Foreign Investment*, 4th ed (Cambridge, United Kingdom: Cambridge University Press, 2017) at 142.

⁷⁴ *Ibid* at 143.

⁷⁵ “Oil Production”, online: Nigerian National Petroleum Corporation <<https://nnpcgroup.com/NNPC-Business/Upstream-Ventures/Pages/Oil-Production.aspx>>. <https://perma.cc/SE93-H8BB>.

made any of the parties unwilling to embark on it.⁷⁶ The assets or technologies used in the oil operations under a JV are owned by the foreign oil company. Foreign oil companies are highly useful and relevant in the JV arrangement especially due to their ability to purchase high and expensive technology and provide finance that is needed to carry out petroleum operations.⁷⁷ The JV agreement is governed by the Joint Operating Agreement.⁷⁸

As figure 3 below shows, since 1993, the host government's equity interest has largely remained at 60 percent leaving the oil companies with 40 percent. Royal Dutch Shell is an exception as it owns 45 percent interest while the government owns 55 percent. Effectively, oil companies have "minority interests" in the industry but they account for 90 percent of crude oil production. When the oil is extracted, each party under a JV is entitled to its share of production based on working interest and each entity bears its tax obligations. The JV model is the US contribution to international commerce.⁷⁹ It has become popular for the reasons that the penetration of new markets through local business partners is easier, the risks are diversified, and market information is more readily gained through local partners.⁸⁰ However, the JV contract model in Nigeria's oil sector is gradually being phased out as a result of the NNPC's recurrent default in meeting its funding obligations under the arrangement. The traditional method for funding the JV operations is the Cash Call.⁸¹ However, one of the key changes introduced by the PIA to encourage investment and competitiveness is the creation of incorporated joint venture companies. The objective of the creation of the incorporated joint venture companies is to allow JV partners to take

⁷⁶ Sornarajah, *supra* note 74 at 143.

⁷⁷ For the advantages and disadvantages of a JV, see *Ibid* at 143-4.

⁷⁸ The Joint Operating Agreement is the legal framework that defines the working relationship between the NNPC and the oil companies. It contains the operational, management, and technical details of the relationship with regard to the work projects to be undertaken by each of the parties, provision, and transfer of technology, funding of joint operations, the formation of the operating committee, reports and dealings with government, payments to government, training, and assignment of staff, disposal of crude oil, force majeure, notices, etc. See also Adamu Kyuka Usman, *Nigerian Oil and Gas Industry Laws: Policies, and Institutions* (Lagos: Malthouse Press, 2017) at 223.

⁷⁹ Sornarajah, *supra* note 74.

⁸⁰ *Ibid*.

⁸¹ Cash Call is the amount which the parties to the JV agreement must pay into the joint account, in order to meet their respective participating interests. This includes a share of both the capital expenditure and operating expenditure. *Ibid*.

investment decisions swiftly without the need to follow government bureaucracy.⁸² According to PricewaterhouseCoopers, the existence of the incorporated joint venture companies will resolve the issue of the failure of the NNPC to fulfill cash call obligations. The table below shows the names of each JV arrangement between the NNPC and oil companies as well as the percentage of participatory interests by each JV partner.

SN	Name of Joint Venture	Operator	Percentage of Participatory Interest					
			NNPC	Shell	Mobil	Chevron	Total	NAOC
1	NNPC/Shell Joint Venture	Shell	55	30	-	-	10	5
2	NNPC/Mobil (ExxonMobil)	Mobil	60	-	40	-	-	-
3	NNPC/Chevron Joint Venture	Chevron	60	-	-	40	-	-
4	NNPC/Total Joint Venture	Total	60	-	-	-	40	-
5	NNPC/Nigeria Agip OilCompany (NAOC) Joint Venture	NAOC	60	-	-	-	-	40

Figure 3: Foremost Joint Venture Arrangements in Nigeria

Source: Extractive Industries Transparency Initiative

3.2 Production Sharing Contract (PSC)

The PSC is a unique contractual arrangement in the global oil industry that was transplanted from Indonesia. Its introduction was the result of two factors; the NNPC's persistent default in funding its share of the JV agreement, and the need to encourage foreign investment in the offshore oilfields. Under the PSC arrangement, the risk of oil exploration is passed onto a foreign oil company and the host state regulates the exploitation of oil.⁸³ An oil company in a PSC arrangement with the dissolved NNPC solely commits its fund to search and discover crude oil and recovers its cost if the oil is found and produced in commercial quantity. Before the enactment of the PIA, the defunct NNPC does not expend any money unless oil is discovered. An oil company that does not find crude oil in commercial quantities cannot recover the costs associated with the exploration. The PSC is based on the concept that the ownership of crude oil is always in the state, and that the state alone has the right to its disposal - a reflection of the

⁸² Nigeria's Petroleum Industry Act: Redefining the Nigerian Oil and Gas Landscape, by PricewaterhouseCoopers (Nigeria: PWC, 2021) at 31.

⁸³ Sornarajah, *supra* note 74 at 93.

principle of permanent sovereignty over natural resources.⁸⁴ Under the PSC, the NNPC Limited is the license/leaseholder and will continue to represent the government. The oil companies are contractors.

PSCs are risky business arrangements in comparison with JVs. PSCs apply to operations in the deep offshore water areas and inland basins that require more financial capacity and commitment. An oil company brings technology and capital to explore petroleum resources.⁸⁵ In Nigeria, an oil company that is in a PSC arrangement with the NNPC recovers its capital and operating expenditures through cost oil. The government levies in respect of royalty, petroleum profit tax (PPT), and share of profit from the PSC operations are settled by crude oil allocation to the NNPC. Royalty is calculated based on the depth of water and based on contract agreements. The determination of the PPT liability is based on the PSC agreement and the relevant provisions of the law. All the Chinese NOCs, that I will discuss in chapter 4, operate in production sharing contracts with the Nigerian government.

Conclusion

This chapter mapped and analyzed the political economy of oil in Nigeria in order to identify some of the primary factors that have given rise to regulatory challenges facing the country today, with particular attention to the history of corruption and bribery that characterized the sector and its relationship to successive military governments. The ethnically federated architecture of the Nigerian state and political institutions stymied its regulatory capacity in the petroleum industry. I also discussed the regulation of the industry under the new regulatory regime (the PIA) by outlining the state regulatory agencies in the petroleum industry and some of their roles. I discussed the increased presence of local oil companies in Nigeria, some contractual arrangements that exist in the industry, and how the business arrangements have been managed by the regulators and the host government. There is a web of complex and inextricably intertwined factors in both

⁸⁴ Sornarajah, *supra* note 74 at 144.

⁸⁵ *Supra* note 5 at 107.

national and transnational spaces that are responsible for the regulatory deficit in Nigeria's oil industry.

One of the primary regulatory concerns in the Sino-Nigeria OFI investment arrangements is the bribery and corruption of host government officials. Thus, the next chapter turns to discuss various state and non-state anti-corruption regimes in the Nigerian oil industry and explore their legitimacy.

Chapter 3: Examining Bribery and Corruption Regulatory Frameworks in Nigeria's Petroleum Industry

Introduction

As is generally well known, and as was clearly outlined in the previous chapter, Nigeria's national oil company is bedevilled with corrupt activities such as missing oil revenues and a lack of transparency in the management of the country's hydrocarbon wealth. Some steps have been taken both nationally and internationally to address these problems. This chapter turns to examine some of these initiatives, specifically national and transnational anti-corruption frameworks applicable to oil investment in Nigeria. As will be shown, these frameworks have had limited success and other regulatory approaches are needed.

Indeed, the increasing wave of cross-border trade and investment, capital, and technological advancement have necessitated more creative and legally innovative regulatory approaches to transnational business. In addition to the traditional state-based regulatory frameworks that appear to be ineffective in regulating corporate conduct, soft law and hybrid regulatory initiatives have emerged and are now increasingly gaining as much traction as state-based regimes in the regulation of transnational commercial activities. Thus, to supplement state-based regimes, intergovernmental organizations (IGOs), standard-setting bodies, business enterprises, and non-governmental organizations (NGOs) have formed regulatory partnerships and international cooperation aimed at enacting quasi-legal instruments that would effectively regulate transnational business conduct. This chapter describes state and non-state based anti-corruption regimes that govern the business conduct of oil companies from the U.S. and China in Nigeria's oil indus-

try. More importantly, I explore their legitimacy with a view to demonstrating how regulatory frameworks have been used to hold oil companies accountable.

The anti-corruption regulatory landscape comprises a plurality of regulatory models derived from diverse sources such as the state, IGOs, standard-setting bodies, NGOs, and business enterprises. Thus, this chapter is structured around three typologies: state-based regimes, intergovernmental regimes and multi-stakeholder initiatives, and private standards. Bearing in mind that my dissertation seeks to propose a decentred and co-regulatory approach in the fight against corruption in transnational business, a seamless integration of state and non-state regulatory regimes has the potential to produce a positive outcome in this area.

1. State-Based Anti-Corruption Regimes

There are three principal actors in international investment relations, namely, the host state that admits the foreign investor, the home country of the investor, and the investor. Each of the actors strives to protect its social, economic, and political interests.¹ As host states in the Third World continually make efforts to attract foreign direct investment in their territories, there is a concomitant challenge of regulating such investments to maximize their economic and social benefits.² Further, international investment relations in natural resources between advanced countries and Third World states have burgeoned and continue to grow stronger.³

¹ Peter Muchlinski, "Regulating Multinationals: Foreign Investment, Development and the Balance of Corporate and Home Country Rights and Responsibilities in a Globalising World" in Jose Alvarez & Karl Sauvant, eds, *The Evolving International Investment Regime: Expectations, Realities, Options* (New York: Oxford University Press, 2011) 30. Muchlinski notes that intergovernmental organizations and non-governmental organizations are two other significant actors that have influenced the development of international investment rules.

² The challenges include the percentage of local ownership in the new investment, technology and skills transfer, and job opportunities, among other things. See Peter T Muchlinski, *Multinational Enterprises and the Law*, 2nd ed (Oxford [England]; New York: Oxford University Press, 2007) at 85.

³ Specifically, beginning in 1937 when oil exploration activities commenced in Nigeria, Africa's most populous country has increasingly attracted oil investors from numerous jurisdictions as a result of its rich petroleum deposits. The increased oil investments is despite the rate of oil militancy in the Niger Delta region. The WTO reports that "in recent years there has been a global surge in investment activity –including exploration –in resource sectors". It notes that exploration and development expenditure by the 70 largest global companies in the oil sector increased from US\$315 billion in 2007 to US\$ 480 billion in 2011. See *World Trade Report 2014 - Trade and Development: Recent Trends and the Role of the WTO* (Geneva, Switzerland: World Trade Organization). See also "Joint Operating Agreement", online: <<https://www.nnpcgroup.com/NNPC-Business/Upstream-Ventures/Pages/Joint-Operating-Agreement.aspx>>. See also Jędrzej George Frynas & Manuel Paulo, "A New Scramble for African Oil? Historical, Political, and Business Perspectives" (2007) 106:423 *African Affairs* 229 at 233.

However, there is regulatory polarization between Third World states and Western countries over the applicable regime for the regulation of foreign investment and the proper venue for the resolution of transnational investment disputes. This division is because of some efforts by the West to use the regime of international arbitration to displace the primacy of national law in the regulation of foreign investment.⁴ Some scholars from the Third World contend that the right to regulate foreign investment is primarily vested in the host state as this is a right that flows from sovereignty.⁵ In the words of Sornarajah, “the regulation of foreign investment begins and ends with domestic law”.⁶ For their part, Western investors are concerned about the protection of their investments; hence they maintain that only an international regime such as the rules of international investment arbitration can guarantee such protection.⁷ According to Peter Muchlinski:

To date, the predominant concern of international investment law has been the development of rules and procedures to promote and protect foreign investment both by individuals and corporations. It grew out of the belief that uncontrolled state power was a potential obstacle to the security of such investments, which could not always be adequately protected by national laws and procedures...especially in newly independent post-colonial states.⁸

The reasons for the division on who should regulate transnational investment between the two

⁴ M Sornarajah, *The International Law on Foreign Investment*, 4th ed (Cambridge, United Kingdom: Cambridge University Press, 2017) at 108. It has been argued that international investment law has indeed displaced, and in some cases, replaced the right of a host state to regulate the activities of foreign investors. See, for example, Jeswald W Salacuse & Nicholas P Sullivan, “Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain” (2005) 1 *Harv Int'l LJ* 67–130.

⁵ The attempt to externalize the regulation of foreign investment is one of the issues in a recent and ongoing dispute between the Nigerian government and an engineering and project management company –P&ID over an oil and gas infrastructure agreement. See “Nigeria Misses Chance to Transform Lives –and Must Pay \$9bn Damages | Global development | The Guardian”, online: <https://www.theguardian.com/global-development/2019/aug/24/nigeria-must-pay-9bn-damages?CMP=Share_iOSApp_Other>. According to Peter Muchlinski, government officials from the Third World responsible for their state’s international investment agreement programs are increasingly expressing views that what they thought they had signed up for were benign agreements that would enhance their country’s chances of obtaining much needed foreign investment, but that what they have experienced is something else.

⁶ Sornarajah however argues that a treaty obligation of a host state can in some cases make this right to be not absolute.

⁷ Sornarajah, *supra* note 67.

⁸ Muchlinski, *supra* note 1 at 31.

geographical areas are not far-fetched. Some significant global events led the West to feel concerned that newly decolonized states would exercise unfettered power in the regulation of foreign investment. The attainment of statehood by Third World states from the 1950s to the late 1960s and their demand for Permanent Sovereignty over Natural Resources (PSNR) led to the spirited determination by the West to vest international law with the jurisdiction of regulating foreign investment.⁹ The demand for PSNR, it has been argued, was a political attempt to assert economic sovereignty but that endeavour was transformed by, and subsumed within, a nascent regulatory framework dealing with foreign investment.¹⁰ The tendency to exercise uncontrolled state power by the Third World, as Muchlinski rightly observed, and a sense of investment vulnerability by the West have thus far polarized into two competing investment regulatory regimes, namely, host state regime and home state regime. In addressing the question of who has the power to regulate transnational bribery, Kevin E. Davis argues that “the rules that determine whether any given country can regulate a particular transaction typically depends on factors such as the country’s ties to the actors involved and where the relevant conduct takes place”.¹¹ In using the Bonny Island oil contract bribery scandal in Nigeria¹² as an example, Davis concludes that in anti-corruption law, regulatory power can reside in multiple countries.¹³ In what follows, I examine host state and home state regulatory regimes on bribery and corruption with a focus on Nigeria, the U.S., and China, in that order.

⁹ Antony Anghie argues that “the transformation of colonial territories into sovereign, independent states enabled these territories, that previously had been excluded from the realm of international law, to enter the international territories with all the powers and attributes of sovereignty and as equal members of the family of nations. See Antony Anghie, “Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations” (2001) 3 NYU J Int’l L & Pol 513 at 513-4.

¹⁰ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2013) at 95-103.

¹¹ Kevin E Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (New York, United States: Oxford University Press, 2019) at 195-7.

¹² For details of the Bonny Island oil contract bribery scandal, see Ryan Dezember And Tess Styne, “Halliburton to Pay Nigeria \$35 Million to Settle Bribery Case”, *Wall Street Journal* (22 December 2010), online: <<https://www.wsj.com/articles/SB10001424052748703581204576033663462863014>>. See also “KBR Pleads Guilty in Nigerian Bribery Case”, *Reuters* (11 February 2009), online: <<https://www.reuters.com/article/us-usa-kbr-bribes-idUSTRE51A6M720090211>>.

¹³ Davis, *supra*.

2. Host State Regulation: Nigeria

Generally, public sector corruption is rife in Nigeria. The 2018 Corruption Perceptions Index by Transparency International shows that the level of public sector corruption in Nigeria is 27.¹⁴ The extractive sector, which the oil industry is a part of, is the highest risk sector in foreign bribery. As shown in figure 4 below, the Organization for Economic Co-operation and Development (OECD) found that 21 percent of foreign bribery cases occurred in the extractive industry.¹⁵ Data includes the amount paid in bribes and the transaction value. Transparency International reports that the oil and gas industry is one of the sectors that is prone to bribery.¹⁶ A large number of resolved and on-going transnational bribery cases involving oil companies from the West are connected with their Nigerian business operations.¹⁷ The lucrative nature of crude oil and Nigeria's rich crude oil reserve make the jurisdiction prone to corrupt practices.¹⁸

¹⁴ The Corruption perception Index, which ranks 180 countries and territories by their perceived (not actual) levels of public sector corruption according to experts and businesspeople, uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean. See Transparency International, "Corruption Perceptions Index 2018", online: www.transparency.org <<https://www.transparency.org/cpi2018>>.

¹⁵ See also OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials, Text (Organization for Economic Co-operation and Development, 2014) at 22. [perma.cc/3N6M-7ZTT].

¹⁶ Bribe Payers Index 2011, by Deborah Hardoon & Finn Heinrich (Berlin, Germany: Transparency International, 2011).

¹⁷ Fritz Heimann, Gillian Dell & Kelly McCarthy, Progress Report 2011: Enforcement of the OECD Anti-Bribery Convention, 4th edition (Oslo, Norway: Transparency International, 2011) at 4. <https://perma.cc/4EBS-P5U7>.

¹⁸ According to the Organization for Petroleum Exporting Countries (OPEC), Nigeria's proven crude oil reserve in 2018 stood at almost 37 million barrels. See OPEC Annual Statistical Bulletin, 54th ed (Organization for Petroleum Exporting Countries, 2019).

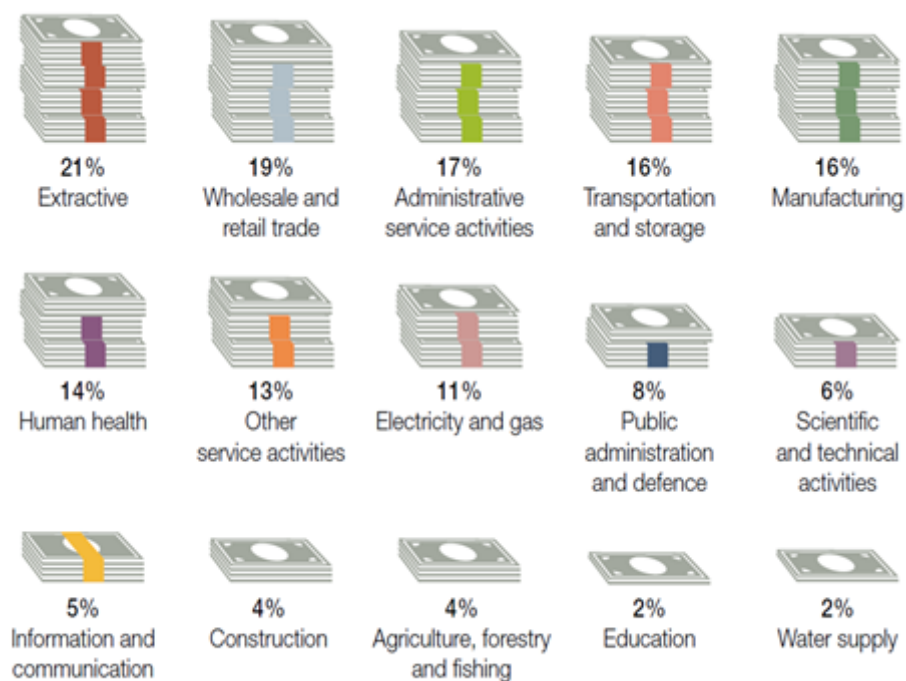


Figure 4: OECD Analysis of 55 Foreign Bribery Cases Concluded (15 February 1999 to 1 June 2014).

Source: OECD

As the host state to many transnational oil companies (TNOCs)¹⁹ and given the rate of oil-sector-related bribery, the Nigerian government has taken regulatory measures by enacting anti-corruption laws. In addition, it also has established special anti-corruption enforcement agencies to prosecute all forms of corrupt practices in the country. Although the laws apply to both oil and non-oil-related corruption cases, the next section describes the anti-corruption regimes, the enforcement agencies, and how they impact oil industry actors specifically.²⁰

¹⁹ For the purpose of this study, the phrase “transnational oil companies (TNOCs)” will be preferred over either the phrases “multinational companies/corporations” or “multinational enterprises”. The preference for TNOCs is because whereas this dissertation focuses only on oil companies, the latter phrases encompass all companies in various sectors of the global economy whose operations cut across multiple jurisdictions. I will only use “multinational companies/corporations” or “multinational enterprises” when they appear in the title of a publication or in a quotation.

²⁰ For a detailed enforcement account of non-oil related corruption cases in Nigeria, see Letitia Lawson, “The Politics of Anti-Corruption Reform in Africa” (2009) 47:1 J Modern Afr Stud 73–100.

2.1 Nigeria Extractive Industries Transparency Initiative Act, 2007

The EITI is an international coalition of governments, companies, and civil society that seeks to improve transparency and good governance in the management of oil, gas, and mining revenues. The EITI is a hybrid public-private standard-setting body initially proposed by the United Kingdom.²¹ The premise for developing the EITI is that revenue transparency will help to promote government accountability and reduce corruption in many resource-rich-yet-poor-countries such as Nigeria.²² In 2003, Nigeria resolved to adopt a global standard for the good governance of its petroleum resources by becoming an implementing country of the EITI.²³ In 2007, it strengthened its commitment to the multi-stakeholder initiative by enacting the Nigeria Extractive Industries Transparency Initiative Act (NEITI Act).²⁴ The NEITI Act is a co-regulatory framework aimed at ensuring transparency and accountability in revenues from the extractive industries.²⁵ One of the objectives of NEITI is to eliminate all forms of corrupt practices in the determination, payments, receipts, and posting of revenue accruing to Nigeria's federal government from extractive industry companies.²⁶

²¹ Victor V Ramraj, "Transnational Non-State Regulation and Domestic Administrative Law" in Susan Rose-Ackerman, Peter L Lindseth & Blake Emerson, eds, *Comparative Administrative Law, Research Handbooks in Comparative Law Series*, 2nd ed (Cheltenham, UK: Edward Elgar Publishing, 2017) 582 at 583. See also "Who we are", online: Extractive Industries Transparency Initiative <<https://eiti.org/who-we-are>>.https://perma.cc/FGG6-A5WC .

²² Cynthia A Williams, "Civil Society Initiatives and Soft Law in the Oil and Gas Industry" (2003) 36 *NYU J Int'l L & Pol* 457 at 484.

²³ "2014 Nigeria EITI Report covering oil and gas | Extractive Industries Transparency Initiative", online: <<https://eiti.org/document/2014-nigeria-eiti-report-covering-oil-gas>>.https://perma.cc/6N5K-VEA2 .

²⁴ Nigeria Extractive Industries Transparency Initiative Act, 2007. Nigeria is the first country to support the global EITI implementation with a legislation.

²⁵ *Ibid.* Section 21 defines extractive industry company as 'any company in Nigeria that is engaged in the business of prospecting; mining, extracting, processing and distributing minerals and gas, including-oil, gold, coal, tin, bitumen, diamonds, precious stones and such like; and includes any agency or body responsible for the payment of extractive industry proceeds to the Federal Government or its Statutory Recipient'.

²⁶ *Ibid.*, s.2(c). Other objectives include to ensure due process and transparency in the payments made by all extractive industry companies to Nigeria's federal government; to monitor and ensure accountability in the revenue receipts of the federal government from extractive industry companies; to ensure accountability and transparency by government in the application of resources from payments received from extractive industry companies; and to ensure conformity with the principles of the EITI. See *Ibid.*, s.2(a-e).

2.2 Enforcement of the NEITI Act in Nigeria

Section 6 of the NEITI Act creates a National Stakeholders Working Group (NSWG) that formulates strategies and policies for the effective implementation of the global EITI values.²⁷ The NEITI framework has a multi-level oversight process that makes it very transparent and accountable. As a multi-stakeholder regulatory initiative that derives its authority through legislation, NEITI members are held accountable by Nigeria's presidency and federal parliament.²⁸ NEITI activities are monitored by the office of Nigeria's president through the Office of the Secretary of the Government of the Federation.²⁹ The global EITI Board is the main governing body of the multi-stakeholder initiative and exercises oversight functions on the Nigerian chapter.³⁰ The global EITI Board meets two to four times a year and evaluates implementing governments' performance, including Nigeria, in the implementation of the initiative.³¹

The enforcement of EITI principles and values in Nigeria's oil sector through the NEITI Act has been substantially impressive. The EITI standard has been used in Nigeria as a multi-stakeholder platform to proactively strengthen transparency and drive reforms in both government and oil companies.³² Implementation of the EITI standard in Nigeria has mostly focused on oil and gas, which accounts for 99% of extractive sector revenue. Since 1999, NEITI has audited TNOCs and local oil companies annually. The audit is usually carried out by an independent auditor appointed by NEITI in accordance with section 4 of the NEITI Act. As I stated in chapter 2, the EITI initiative in Nigeria has exposed outstanding debts by the national oil company to the government, recovered uncollected taxes, identified weaknesses in Nigeria's regulatory institutions,

²⁷ The National Stakeholders Working Group is a multi-stakeholder group comprising an executive secretary, representatives of extractive industry companies, civil society, labour unions in the extractive industries, experts in the extractive industry, and one member from each of Nigeria's six geo-political zones.

²⁸ Ibid, s.4(4).

²⁹ "EITI: Nigeria Extractive Industries Transparency Initiative - Overview", (22 November 2019), online: Nigeria Extractive Industries Transparency Initiative <<https://eiti.org/nigeria>>. <https://perma.cc/4LVJ-PSYM>.

³⁰ "The EITI Board", online: Extractive Industries Transparency Initiative <<https://eiti.org/about/board>>. <https://perma.cc/U5QE-PWE9>.

³¹ Ibid.

³² "The Board agreed that Nigeria has made satisfactory progress overall with implementing the 2016 EITI Standard.", (27 February 2019), online: Extractive Industries Transparency Initiative <<https://eiti.org/board-decision/2019-20>>.

audited oil-related transfers to the subnational government, estimated oil theft, and examined oil sales.³³ The audit exercises have resulted in the recovery of huge amounts of money to the Nigerian government.³⁴ It is noteworthy that an independent auditing firm engaged by NEITI to audit an extractive industry company cannot be appointed for more than two consecutive years.³⁵ A plausible reason for the short-term engagement of the auditing firm is to avoid regulatory capture, a concept that I will discuss later in this chapter. There is also a possibility that an auditing firm might get too familiar with the oil companies it is auditing and consequently fail to be rigorous in its statutory duties. There is no report at the time of writing to suggest that the short-term engagement approach does not prevent the auditing firms from doing a thorough and consistent job. EITI's global independent evaluation shows that Nigeria has made satisfactory progress in the implementation of its standards in the areas of civil society engagement, allocation of oil license, and revenue collection, among others.³⁶ However, Nigeria's chapter of Transparency International (TI) has a contrary view. According to TI, the EITI standard is not functioning very well in the country and the Nigerian government's attitude to the NEITI work, and specifically, its audit exercises encourage corruption in the oil industry.³⁷ The claim by TI is because the Nigerian government does not implement the findings and recommendations from the NEITI audit reports with respect to the underpayment of taxes and royalties. The non-implementation of the NEITI audit reports by the government might be because of fear of losing oil investors or corrupt practices by government officials.

³³ Ibid.

³⁴ "Case Study: Nigeria EITI - Making Transparency Count, Uncovering Billions", (6 March 2012), online: Extractive Industries Transparency Initiative <<https://eiti.org/document/case-study-nigeria-eiti-making-transparency-count-uncovering-billions>>. <https://perma.cc/S29C-SBUL>.

³⁵ NEITI Act, s.4(6).

³⁶ "Extractive Industries Transparency Initiative", online: Nigeria: Implementation <<https://eiti.org/nigeria>>. For some literature on the EITI, see Gerry A Ferguson, *Global Corruption: Law, Theory & Practice: Legal Regulation of Global Corruption Under International Conventions, US, UK and Canadian Law*, third edition ed (Victoria, BC: University of Victoria, 2018) at 491 & 833. Cynthia A Williams, "Civil Society Initiatives and Soft Law in the Oil and Gas Industry" (2003) 36 NYU J Int'l L & Pol 457 at 484.

³⁷ CISLAC Nigeria, "Government Attitude to NEITI Reports Encourage Corruption In Oil Sector", (30 January 2019), online: CISLAC Nigeria | Civil Society Legislative Advocacy Centre <<http://cislacnigeria.net/government-attitude-to-neiti-reports-encourage-corruption-in-oil-sector-rafsanjani/>>. <https://perma.cc/4Y35-M5C3>.

2.3 The Economic and Financial Crimes Commission Act, 2004

The Economic and Financial Crimes Commission Act (EFCC Act) was enacted by Nigeria's National Assembly in 2004 as an affirmative response to the concerns raised by the Financial Action Taskforce that Nigeria is among 23 countries that are not cooperating in the global efforts to combat money laundering.³⁸ The EFCC Act regulates any crime of an economic or financial nature involving private individuals, government officials, and companies within Nigeria.³⁹ Under the EFCC Act, it is a financial crime to engage in fraud, bribery, money laundering, counterfeiting, illegal charge transfers, future market fraud, fraudulent encashment of negotiable instruments, credit card fraud, contract scam, funding terrorist activities, illegal acquisition or possession of property.⁴⁰

The EFCC Act establishes a government anti-graft agency - the Economic and Financial Crimes Commission (EFCC).⁴¹ The EFCC investigates, prosecutes, and where necessary, confiscates proceeds of economic crimes. The EFCC has investigated and prosecuted government officials, individuals, and local and foreign companies alleged to be involved in oil-related bribery and money laundering cases.⁴² The anti-graft agency and international law enforcement agencies investigated a one-time Halliburton's Chief Executive Officer and former US Vice President - Dick Cheney in connection with his company's bribery of Nigerian officials for the award of contract to build a

³⁸ *Nigeria's Struggle with Corruption*, Statement of Mr. Nuhu Ribadu, Executive Chairman, Economic and Financial Crimes Commission, Federal Republic Of Nigeria Before the Subcommittee on Africa, Global Human Rights And International Operations of The Committee on International Relations House of Representatives, One Hundred Ninth Congress, Second Session, No. 109–172 (US Congress, 2006).

³⁹ Economic and Financial Crimes Commission (Establishment, Etc) Act, 2004. It defines economic and financial crimes as 'the non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms deal, smuggling, human trafficking and child labour, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited goods, etc'. Ibid, s.46.

⁴⁰ EFCC Act, ss 6,15 & 18.

⁴¹ Ibid. s.1(1).

⁴² "Economic and Financial Crimes Commission - EFCC - Malabu Oil Scandal: Court Awaits Adoke's Extradition, Adjourns to June 18", online: <<https://efccnigeria.org/efcc/news/3055-malabu-oil-scandal-court-awaits-adoke-s-extradition-adjourns-to-june-18>>. "Nigeria Court Orders Arrests Over Shell and Eni Malabu Oil Deal", Bloomberg.com (17 April 2019), online: <<https://www.bloomberg.com/news/articles/2019-04-17/nigeria-court-orders-arrests-over-shell-and-eni-malabu-oil-deal>>.

liquefied natural gas facility in Bonny Island, Nigeria.⁴³ Following the intervention of former US President George Bush Sr and former Secretary of State James Baker, the Nigerian government dropped the bribery charges against Halliburton and accepted a payment of \$35 million as fine. In a related case, the EFCC in November 2010 arrested and several employees of Halliburton over a chain of bribery incidents involving a consortium of four transnational oil-services companies known as TSKJ.⁴⁴ In an out-of-court settlement agreement, Snamprogetti Netherlands B.V, a subsidiary of the Italian oil giant Eni SpA, agreed to pay Nigeria \$32.5 million in criminal penalty and reimbursement of legal expenses in relation to the Bonny Island bribery case.⁴⁵ In a bidding process for an oil license that was perceived to be lacking in transparency, in 2016 the EFCC investigated Mobil Producing Nigeria, an ExxonMobil subsidiary, for winning a renewal bid for four oil fields despite underbidding Chinese National Offshore Oil Corporation (CNOOC).⁴⁶ Because of an on-going investigation and prosecution of Shell and Eni by the Nigerian anti-corruption agency in connection with alleged bribery in a lucrative oil block in the Niger Delta, a Nigerian court has ordered that the two TNOCs forfeit the disputed oil block and its assets.⁴⁷ The EFCC also cooperates with foreign anti-corruption agencies in the US, the UK and Switzerland to uncover

⁴³ Obiora C Okafor & Benson Olugbuo, "The EFCC and Accountability of Foreign Corrupt Actors in Nigeria" (2011) 3 Law & Dev Rev 2 at 7. "Foreign Corrupt Practices Act: Enforcement Action Dataset", online: <<http://fcpa.stanford.edu/enforcement-action.html?id=126>>. In a settlement agreement with the Securities and Exchange Commission, Halliburton agreed to, among other things, pay Nigeria \$35 million to settle the bribery allegations. David Smith, "Nigeria to Drop Dick Cheney Charges after Plea Bargain", The Guardian (15 December 2010), online: <<https://www.theguardian.com/world/2010/dec/15/nigeria-dick-cheney-plea-halliburton>>.

⁴⁴ "Oil Firms Questioned in Nigeria", BBC News (30 November 2010), online: <<https://www.bbc.com/news/world-africa-11877434>>. <https://perma.cc/N4BS-LQE7>. In the TSKJ case, four oil services companies in a joint venture - JGC, Kellogg Brown & Root Inc. (KBR), Technip S.A. and Snamprogetti Netherlands B.V., from four different nationalities -Japan, the U.S., Italy, and the Netherlands was awarded four contracts by Nigeria LNG Ltd. (NLNG) between 1995 and 2004. The contract was valued at \$6 billion and was to build liquefied natural gas (LNG) facilities in Bonny Island, Southern Nigeria. The joint venture hired two consultants and paid them approximately \$182 million, part of which was to be used to bribe top Nigerian government officials. As we shall see in the discussion under the FCPA, all the four companies also were investigated and punished by the U.S. authorities under the FCPA as either their stocks are traded in America or their parent company is registered in that country.

⁴⁵ Samuel Rubinfeld, "Eni Unit Reaches \$32.5 Million Settlement With Nigeria" The Wall Street Journal (20 December 2010), online: <<https://blogs.wsj.com/corruption-currents/2010/12/20/eni-unit-reaches-325-million-settlement-with-nigeria/>>. <https://perma.cc/7QW2-J58U>.

⁴⁶ Sam Thielman, "ExxonMobil Under Investigation Over Lucrative Nigerian Oil Deal", The Guardian (23 June 2016), online: <<https://www.theguardian.com/business/2016/jun/23/exxonmobil-nigeria-oil-fields-deal-investigation>>. <https://perma.cc/VL5Y-6QCY>.

⁴⁷ Nigeria Court Orders Temporary Forfeiture of Shell, Eni Oilfield in Corruption Probe - Reuters", online: <<https://www.reuters.com/article/uk-nigeria-oil/nigeria-court-orders-temporary-forfeiture-of-shell-eni-oilfield-in-corruption-probe-idUKKBN15A2J1>>.

some corrupt deals that have Nigerian links.⁴⁸

There are some existential challenges with the enforcement of the EFCC Act and the operations of the EFCC. First, investigations into some of the high-profile cases are not conclusively carried out by the EFCC and the public is neither informed about their status nor their final outcomes. Second, there is no independent oversight of the operations of the EFCC either by another branch of government or a combination of a government agency and CSGs. Crucially, Civil Society Network Against Corruption, a Nigerian-based NGO has noted that the fight against corruption in the country should not be restricted to anti-corruption agencies that are appointed by the government and the political class.⁴⁹ In the U.K., for example, there are more than three independent committees that exercise oversight on the Serious Fraud Office (SFO), and that effectively infuses the SFO with some level of public trust.⁵⁰ Third, Obiora C. Okafor and Benson Olugbuo have argued that the EFCC has not been proactive in investigating and prosecuting TNOCs implicated in bribery cases in Nigeria.⁵¹ In some cases that arose directly from the Nigerian operations of TNOCs, the EFCC waits for the US Department of Justice and other foreign prosecutorial authorities to take the lead.⁵² However, the cases highlighted above demonstrate that the EFCC is not a lame duck in the enforcement of the EFCC Act against foreign companies and persons. At any rate, Nigeria is considered one of the developing countries that is most active in prosecuting domestic bribery by foreign companies.⁵³

⁴⁸ “Department of Justice Seeks to Recover Over \$100 Million Obtained From Corruption in the Nigerian Oil Industry”, (14 July 2017), online: <<https://www.justice.gov/opa/pr/departments-justice-seeks-recover-over-100-million-obtained-corruption-nigerian-oil-industry>>. “\$42 million superyacht Galactica Star sold after Nigerian corruption scandal”, online: Yacht Harbour <https://yachtharbour.com/news/%2442-million-superyacht-galactica-star-sold-after-nigerian-corruption-scandal-3372?src=news_view_page_bar>. See also EFCC Act, s 6(j).

⁴⁹ “Nigerians to follow their Oil Money in Zambia | CSNAC”, online: <<https://csnacng.org/nigerians-to-follow-their-oil-money-in-zambia/>>. <https://perma.cc/BLQ3-NF49>.

⁵⁰ “SFO Governance Arrangements”, online: <<https://www.justiceinspectors.gov.uk/hmcpis/media/press-releases/2016/05/sfo-governance-arrangements/>>.

⁵¹ Okafor & Olugbuo, *supra* note 44 at 15. See also Adefolake O Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption* (Cambridge, UNITED KINGDOM: Cambridge University Press, 2012) at 69.

⁵² *Ibid* at 13.

⁵³ Heimann, Dell & McCarthy, *supra* note 17 at 20.

2.4 The Independent Corrupt Practices Act, 2000

Nigeria's Independent Corrupt Practices Act (ICP Act) covers a broad range of corruption offences in the government and private sectors. The ICP Act prohibits a public officer from receiving any property or benefit of any kind from a current holder or prospective holder of a contract, license, permit, or employment from a government department.⁵⁴ Other offences under the ICP Act include but not limited to:

- (a) asking for, receiving or obtaining any property or benefit of any kind; or
- (b) agreeing or attempting to receive or obtain any property; or
- (c) agreeing or attempting to receive any benefit of any kind either for one's self or for any other person on account of anything done or omitted to be done, in the discharge of official duties or in relation to any matter connected with the business of a Government Department, or corporate body or other organization in which the person is serving as an official.⁵⁵

The Independent Corrupt Practices and Other Related Offences Commission (ICPC)⁵⁶ has the responsibility to enforce the provisions of the ICP Act.⁵⁷ Although the ICP Act criminalizes corrupt practices by both public officers and private institutions, in practice, the ICPC focuses on prosecuting government employees and petty corruption by individuals in Nigeria. In addition, unlike the EFCC Act, the ICPC Act has never been enforced on any oil industry-related corrupt act; thus a longer discussion of the regime is not needed. The key point here is that there is an overlap in the offences covered under the ICPC Act and the EFCC Act as both laws prohibit bribery and financial crimes by a public official.

⁵⁴ The Corrupt Practices and Other Related Offences Act, 2000, Cap C31, Laws of the Federation of Nigeria (LFN) [ICP Act], s.8(2)(a).

⁵⁵ Ibid, s.8(1) (a-c).

⁵⁶ ICPC, "About ICPC", online: Independent Corrupt Practices And Other Related Offences Commission <<https://icpc.gov.ng/about-icpc/>> (Accessed 7 October 2019)>.

⁵⁷ Ibid, s.3.

3. Home State Regulation

Home states,⁵⁸ as I noted above, are not spectators in the regulation of the offshore business conduct of their TNOCs. The home state of a business enterprise is one of the principal actors in transnational business regulation. It is one of the principal actors in the sense captured by Muchlinski when he argues that

...the home state's legal and regulatory system might be used to ensure that multinational enterprises based there conform to certain standards of good corporate citizenship through the sanction of home country laws and regulations, and through the provision of legal redress for claimants from outside the home country who are in dispute with the parent company for the acts of its overseas subsidiaries.⁵⁹

Bribery payments made by TNOCs or their subsidiaries to a foreign official can give rise to investigations and prosecution not only in their home states but also in countries where their shares are traded. There are national, international, and transnational regimes that have placed responsibilities on home states to regulate the domestic and foreign operations of their corporate citizens.⁶⁰ It has been noted, for example, that the U.S no longer represents the comparatively laissez-faire approach to business regulation as it has begun to combat corruption and promote human rights through the enactment of the Foreign Corrupt Practices Act and the Alien Tort

⁵⁸ In this dissertation, the home state of a TNOC is the state where the corporation's parent company originated and from where financial and administrative control is exercised for its subsidiaries and affiliates. For a detailed description of the concept of the home state, see Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press, 2006) at 146-151.

⁵⁹ Muchlinski, *supra* note 2 at 84.

⁶⁰ Article 21 of the United Nations Convention Against Anti-Corruption (UNCAC), for example, provides that each state party shall consider adopting such legislative and other measures as may be necessary to establish bribery as criminal offences, when committed intentionally in the course of economic, financial or commercial activities. See United Nations Convention Against Corruption (2003). In addition, Article 12(1) of the UNCAC provides that "each state party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector...and where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures". Similarly, Article 4(2) of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents, 1997 provide:

(1) Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

Statute.⁶¹ Sornarajah argues that beyond the increasing expectation among developing countries and NGOs that home states of MNCs should exert control over the activities of their corporate nationals operating overseas, home states are under obligation to take measures that seek to ensure that MNCs do not act to the detriment of host states.⁶² Specifically, home states of TNOCs are increasingly enacting anti-corruption regimes with extra-territorial reach and amending existing ones to comply with their international commitments and standards. The next section will now turn to the home state regimes on bribery and anti-corruption and how they have been enforced by those states to ensure that the activities of TNOCs are in accordance with global anti-corruption architecture.

3.1 Home State Regulation: The United States

Beginning in 1960 when Nigeria attained national independence, the US has maintained diplomatic, bilateral trade and investment relations with the sub-Saharan African nation.⁶³ The US is the largest foreign investor in Nigeria and home to two of the largest TNOCs - ExxonMobil and Chevron, operating in the African country. The US foreign direct investment in Nigeria is largely in the petroleum, mining, and wholesale trade sectors.⁶⁴ Nigerian goods exported to the U.S. include but are not limited to crude oil, cocoa, cashew nuts, and animal feed.⁶⁵ According to the Office of the United States Trade Representative, the value of mineral fuels imported by the US from Nigeria in 2018 was \$5.4 billion.⁶⁶ The reasons for the remarkable bilateral trade

⁶¹ Andrew Brady Spalding, "The Irony of International Business Law: U.S. Progressivism and China's New Laissez-Faire" (2012) 2 UCLA L Rev 354.

⁶² Sornarajah, *supra* note 4 at 172. In this dissertation, I will use either of the phrases "multinational companies" (MNCs) or "multinational enterprises" (MNEs) only where they appear in the title or body of a publication.

⁶³ U.S. Relations with Nigeria: Bilateral Fact Sheet (United States Department of State: Bureau of African Affairs, 2018). [<https://perma.cc/A9AA-XZGA>]. However, the business operations of the U.S. international oil companies (IOCs) in Nigeria predate the decolonization of the country. Chevron's petroleum operations in Nigeria began in 1913 under Texaco. ExxonMobil Nigeria commenced operations in Nigeria in 1955 under the name Mobil Exploration Nigeria Incorporated. Chevron Policy Affairs Government and Public, "Nigeria Highlights of Operations", online: [chevron.com <https://www.chevron.com/worldwide/nigeria>](https://www.chevron.com/worldwide/nigeria) (accessed 8 October 2019). "Mobil Producing Nigeria Unlimited (MPN) operations", online: ExxonMobil <<https://corporate.exxonmobil.com:443/Locations/Nigeria/Mobil-Producing-Nigeria-Unlimited-MPN-operations>>.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ "Nigeria | United States Trade Representative", online: Office of the United States Trade Representative <<https://ustr.gov/countries-regions/africa/west-africa/nigeria>>. <https://perma.cc/778G-QNJ6>.

and investment relations are not far-fetched. Nigeria is Africa's biggest crude oil exporter and has about 37 million barrels of crude oil reserve.⁶⁷

The US is home to the largest and most powerful business enterprises that export capital around the world.⁶⁸ Similarly, many transnational oil companies that are not headquartered in the US have a form of business presence on the US soil, thus making them subject to the country's laws. Therefore, to curtail the incidences of bribery payments to foreign government officials by its business enterprises, the US enacted the Foreign Corrupt Practices Act (FCPA). Generally, the FCPA covers domestic and foreign bribery as well as books and accounting offences. However, the focus of this discussion will be limited to the foreign bribery, books, and accounting provisions.

3.2 Foreign Corrupt Practices Act, 1977

The enactment of the FCPA⁶⁹ by the US Congress in 1977 marked a major watershed in the regulation of transnational corporate bribery. With its extraterritorial reach, the FCPA is a pacesetter regime in the global anti-corruption regulation. Its enactment and enforcement have, as we shall see later in this chapter, influenced the development of other anti-corruption regimes not only by the US trading partners but intergovernmental and regional organizations. The enactment of the FCPA was a national response to the growing trend of transnational bribery by big American businesses as shown in the Lockheed bribery scandals⁷⁰ and the so-called Bananagate scandal.⁷¹ There was a consensus among the US lawmakers, civil servants, and business executives that

⁶⁷ See note 19 above. See also "Overview", online: World Bank <<https://www.worldbank.org/en/country/nigeria/overview>>.

⁶⁸ Sornarajah, *supra* note 5 at 170.

⁶⁹ Foreign Corrupt Practices Act, 15 USC SS 78dd-1, 78dd-2, 78dd-3, 78m, 78ff 1977, SS 78dd-1, 78dd-2, 78dd-3, 78m, 78ff.

⁷⁰ The Lockheed bribery scandals was a chain of bribes paid by the U.S. aerospace company - Lockheed Corporation to West German, Italian, Japanese, and Dutch government officials in the negotiation of the sale of aircraft. See William H Jones & John F Berry, "Lockheed Paid \$38 Million in Bribes Abroad", *Washington Post* (27 May 1977), online: <<https://www.washingtonpost.com/archive/business/1977/05/27/lockheed-paid-38-million-in-bribes-abroad/800c355c-ddc2-4145-b430-0ae24afd6648/>>.

⁷¹ In the Bananagate scandal, a Swiss company - United Brands Company paid bribes to the Honduran and Italian government officials to influence both governments to make favourable trade policies on banana exports for the benefit of United Brands. See The Associated Press, "United Brands Bribe Is Laid to Honduran", *The New York Times* (16 May 1975), online: <<https://www.nytimes.com/1975/05/16/archives/united-brands-bribe-linked-to-honduran-honduran-official-named-in.html>>.

foreign corporate bribery is not only unethical, but also bad business.⁷² In the hearing leading to the passing of the FCPA, the US House Committee on Interstate and Foreign Commerce reported that “since 1974, approximately 200 American corporations have admitted making questionable payments exceeding \$300 million. The majority of these firms are Fortune 500 Industrials. They are involved in aerospace, airlines and air service, drugs and healthcare, oil and gas production and services, and food products”.⁷³ The purpose of the FCPA is to prevent corrupt practices, protect investors, and provide a level playing field for honest companies trying to win business based on quality and price rather than bribes.⁷⁴ The passing into law of the FCPA also represents an attempt by the US government to rehabilitate the image of its companies whose foreign operations had been tainted with graft.

3.3 To Whom Does the FCPA Apply and What Conduct is Prohibited?

There are three categories of persons and entities whose conduct is subject to the FCPA. The first category of persons is US “issuers” and their officers, directors, employees, agents, and shareholders.⁷⁵ The second category is “domestic concerns” and their officers, directors, employees, agents, and shareholders.⁷⁶ The third category, which is generally known as territorial jurisdic-

⁷² Hearings of the Committee on Interstate And Foreign Commerce, 95th Congress, 1st Session, 95–11 (Washington DC: U.S. House of Representatives, 1977). In the deliberations leading to the passing of the FCPA in 1977, the U.S. Senate is quoted to have said that “corporate bribery is bad business. In our free market system, it is basic that the sale of products should take place on the basis of price, quality, and service. Corporate bribery is fundamentally destructive of this basic tenet. Corporate bribery of foreign public officials takes place primarily to assist corporations in gaining business. Thus, foreign corporate bribery affects the very stability of overseas business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business”. <https://perma.cc/C2RD-WY52>.

⁷³ Ibid.

⁷⁴ A Resource Guide to the U.S. Foreign Corrupt Practices Act (The U.S. Department of Justice & Securities and Exchange Commission, 2012).

⁷⁵ FCPA, 15 U.S.C. s. 78dd-1. See also Securities Exchange Act, 1934, 30A. A company is an “issuer” under the FCPA if it has a class of securities registered under the Exchange Act or is required to file periodic and other reports with SEC under Section 15(d) of the Exchange Act. In effect, any company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with SEC, is an issuer. A foreign company that trades in the U.S. financial market is an issuer. In addition, officers, directors, employees, agents, or stockholders acting on behalf of an issuer (whether U.S. or foreign nationals), and any co-conspirators, also can be prosecuted under the FCPA.

⁷⁶ FCPA, 15 U.S.C. s.78dd-2. A domestic concern is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the U.S. In addition, officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern, including foreign nationals or companies, are also subject to the FCPA.

tion, covers foreigners and foreign non-issuers whose alleged violation of the FCPA occurred on American soil.⁷⁷

Under the anti-bribery provisions of the FCPA, US issuers and domestic concerns⁷⁸ are prohibited from making payments to a foreign official to either obtain or retain business and to maintain transparent accounting records.⁷⁹

Examples of actions taken to obtain or retain business include but not limited to winning a contract, influencing the procurement process, gaining access to non-public bid tender information, obtaining exceptions to regulation. The FCPA also prohibits the payment of bribes, whether directly or through third parties, in business transactions in order to gain an improper advantage.⁸⁰ The legislative provisions prohibiting these two forms of conduct are collectively known as the business purpose test.⁸¹ Furthermore, the FCPA prohibits the corrupt use of mails or instrumentality of interstate commerce, whether by a company or its agents, for the purpose of paying bribe to a foreign official or influencing the decision of a foreign official in order to assist a company to obtain or retain business advantage.⁸² The use of instrumentality of state commerce was established against JGC Corporation –a Japanese firm, in relation to Nigeria’s Bonny Island LNG project bribery scheme.⁸³ In a Deferred Prosecution Agreement (DPA), the DOJ noted

⁷⁷ FCPA, 15 U.S.C. s.78dd-3.

⁷⁸ The FCPA defines U.S. domestic concerns as ‘any individual who is a citizen, national, or resident of the U.S.; and any corporation partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States’. Foreign Corrupt Practices Act, 1977 [FCPA], 15 USC. s. 78dd-1.

⁷⁹ Ibid, ss.78dd-1(a), 78dd-2(a), 78dd-3(a). It defines “foreign official” as ‘any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization’. The FCPA permits payments to foreign governments so long as such payment are not used for corrupt purposes.

⁸⁰ For a detailed analysis of the FCPA including elements of foreign bribery offence and imposition of sanctions, see Gerry Ferguson, *Global Corruption: Law, Theory & Practice: Legal Regulation of Global Corruption Under International Conventions, US, UK and Canadian Law*, 3rd ed (Victoria, BC: University of Victoria, 2018) at 182-89.

⁸¹ Under the FCPA, a facilitation payment to a foreign official, political party, or party official the purpose of which is to expedite or secure the performance of a routine governmental action by a foreign official, political party, or party official are not prohibited. See FCPA, 15 U.S.C s.78dd-1(b).

⁸² Ibid.

⁸³ *United States of America v JGC Corporation*, 2011 United States District Court, Southern District of Texas, Houston Division. <https://perma.cc/H5CD-YJKT>.

that JGC Corporation authorized wire transfers through a New York-based bank that was used to bribe officials of the NNPC Limited and Nigeria's Ministry of Petroleum Resources to obtain a liquefied natural gas construction contract.⁸⁴

The FCPA accounting provisions apply only to public companies. The accounting provisions contain two parts, namely, the "books and records" provision and the "internal controls" provision. Under the books and records provision, public companies are required to make and keep books, records, and accounts that, to a reasonable extent, accurately reflect a company's transactions.⁸⁵ The internal controls provision requires public companies to create and maintain a system of internal accounting controls sufficient to assure management's control, authority, and responsibility over the company's assets.⁸⁶

The accounting provisions are aimed at eliminating the possibility of falsifying corporate books and records by companies in order to conceal bribery payments. In 2017, Swiss authorities fined Addax Petroleum, a subsidiary of China's Sinopec, 31 million Swiss francs (\$31.85 million) for failure to adequately document in its accounting books alleged bribery payments of over \$20 million made to Nigerian officials.⁸⁷ In another case, Willbros Group, an oil and gas pipeline company operating in Nigeria with an office in Houston, Texas, was found to have violated the books and records provisions of the FCPA by authorizing the payment of over \$6 million in bribes in Nigeria to obtain two huge contracts.⁸⁸ The company was also found to have used its employees to employ a long-running fraudulent scheme to use the company's petty cash accounts in Nigeria to make a series of corrupt payments to Nigerian tax and court officials.⁸⁹ In

⁸⁴ Ibid.

⁸⁵ The Exchange Act, s.13(b)(2)(A). See also 15 U.S.C. s.78m(b)(2)(A).

⁸⁶ Ibid, s.13(b)(2)(B). See also 15 U.S.C. s.78m(b)(2)(B).

⁸⁷ "Chinese-owned oil firm Addax shuts offices after Swiss bribery case", Reuters (7 August 2017), online: <<https://www.reuters.com/article/us-swiss-addax-idUSKBN1AN23I>>. <https://perma.cc/WH3E-Y5AD>. See also "Chinese Oil Giant Sinopec Probed by the U.S. Over Nigeria Bribery Allegations", Bloomberg.com (30 August 2017), online: <<https://www.bloomberg.com/news/articles/2017-08-30/sinopec-is-said-to-be-probed-by-u-s-over-nigeria-payments>>. <https://perma.cc/4995-Q2W8>.

⁸⁸ *Securities and Exchange Commission v. Willbros Group, Inc., et al.*, [2008] Civil Action No. 4:08-CV-01494 U.S.D.C./Southern District of Texas (Houston Division)

⁸⁹ Ibid.

a civil suit brought by the U.S. Securities and Exchange Commission, Willbros Group agreed to pay \$10.3 million in disgorgement.⁹⁰ Willbros Group's offence consists in non-disclosure of the payments in its accounting books. As we shall see later under self-regulatory initiatives, the FCPA books and records provisions have led many TNOCs to develop anti-corruption compliance and internal control mechanisms. An important component of the DPA in the JGC Corporation's case highlighted earlier was that the defendant company was mandated to enhance its anti-corruption programs. The absence of an internal control mechanism, or a weakness thereof, could increase the liability of a company if found guilty of foreign bribery.⁹¹ There are, of course, other violations of the books and records provisions by US oil companies in Nigeria, as will be discussed later in this dissertation.

3.4 Defences Under the FCPA

There are some defences available for a party charged under the FCPA. First, it is a defence to plead that the payment, gift, or offer that was made was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country.⁹² Second, the payment, gift, offer that was made was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, or party official.⁹³ Third, payments made for the execution or performance of a contract with a foreign government or agency are not bribes within the meaning of the FCPA.⁹⁴ The burden of proof lies with the defendant as these are affirmative defenses.

As stated earlier in this chapter, the FCPA has extraterritorial application as it applies to prohibited conduct by US companies and citizens anywhere in the world.⁹⁵ Nevertheless, the extraterrito-

⁹⁰ SEC Charges Willbros Group and Former Employees with Foreign Bribery, Press Release, Press Release 2008–86 (U.S. Securities and Exchange Commission, 2008). <https://perma.cc/6FV9-LGGY>.

⁹¹ A conduct that violates the FCPA provisions may also violate other laws or regulations as there are other US laws that are related to the FCPA. These laws include the Travel Act, the Anti-money Laundering Statute, The Mail and Wire Fraud Statutes, and the US Tax Law.

⁹² FCPA, 15 USC s.78dd-1(c)(1).

⁹³ Ibid, 15 USC s.78dd-1(c)(2).

⁹⁴ Ibid, 15 USC s.78dd-1(c)(2)(B).

⁹⁵ Sornarajah notes that the subject of extraterritoriality is usually studied from the point of view of the US law,

riality of the FCPA is limited. At present, the FCPA criminalizes the act of offering bribery but does not outlaw the act of receiving bribery.⁹⁶ This implies that Nigerian government officials, for example, who demand or receive bribery from US companies are not in the categories of persons covered by the FCPA.⁹⁷ Specifically, American courts have held that the US government cannot employ the theories of conspiracy and complicity to extend liability beyond the categories of persons listed in the FCPA in order to charge a defendant.⁹⁸ However, if the Foreign Extortion Prevention Bill currently before the US Congress is passed into law, foreign government officials who demand or accept bribes from American companies or persons will be in violation of the FCPA.⁹⁹ It is not yet clear if the foreign officials will be tried in absentia or if the US government will wait until they set foot on American soil. Furthermore, under the FCPA, facilitation payment made to a foreign official, political party, or party official that is for the purpose of securing the performance of a routine governmental action by the foreign official is not considered as a bribe.¹⁰⁰ However, such facilitation payments must be recorded in the accounting books of a company.¹⁰¹ This exception could be open to abuse as a company can deliberately increase the amount of money it gives to a foreign government official under the pretext that it is paying for a

as no other country engages in the practice of extritoriality as extensively as the US. See Sornarajah, *supra* note 5 at 186.

⁹⁶ However, that situation is likely to change in the future as the Foreign Extortion Prevention Bill currently before the US Congress seeks to widen the prohibition of bribery to foreign officials or persons who demand or solicit bribes. See Sheila Jackson Lee, "All Info - H.R.4140 - 116th Congress (2019-2020): Foreign Extortion Prevention Act", (28 August 2019), online: <<https://www.congress.gov/bill/116th-congress/house-bill/4140/all-info>>.

⁹⁷ *United States v Hoskins*, 2018 United States Court of Appeals for the Second Circuit. <https://perma.cc/N8LM-8QL6>. In this case, Hoskins and other defendants participated in a scheme to bribe Indonesian officials so that their company - Alstom Power, Inc., headquartered in Connecticut, a subsidiary of Alstom S.A. in France, could be awarded a \$118 million contract by the Indonesian government. Hoskins never worked for Alstom U.S.A. in a direct capacity. But the government alleges that several parts of the bribery scheme occurred in the U.S. as one of the consultants kept a bank account in Maryland. It further alleged that Hoskins, while working from France for Alstom Resources Management, was one of the people that approved payments to the consultants and that he knew that a portion of the payments was intended for Indonesian officials for them to influence the contract award.

⁹⁸ *Ibid.* See also *US v Castle*, 1991 United States Court of Appeals, Fifth Circuit. <https://perma.cc/8SYY-N7NC>.

⁹⁹ At the time of writing, the Bill is referred to the House of Representatives Sub-committee on Crime, Terrorism, and Homeland Security.

¹⁰⁰ *Ibid.*, 15 USC. s.78dd-1(b).

¹⁰¹ Ferguson, *supra* note 6 at 190. For a detailed discussion of the provisions of the FCPA, see Robert W Tarun & Peter P Tomczak, *The Foreign Corrupt Practices Act Handbook: A Practical Guide for Multinational Counsel, Transactional Lawyers and White Collar Criminal Practitioners.* (Lanham: American Bar Association, 2019).

routine governmental service. The susceptibility to abuse is heightened because the FCPA does not and cannot set a benchmark for routine governmental services in foreign countries.

3.5 The Enforcement Mechanisms of the FCPA

The primary responsibility to enforce the provisions of the FCPA lies with the US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC).¹⁰² The DOJ exercises both criminal and civil authority. It enforces the FCPA against US public companies and their officers, citizens, residents, as well as foreign nationals and companies that violated the FCPA provisions while in American territory. SEC is responsible for the civil enforcement of the FCPA against US companies, their officers, and agents. The DOJ has in recent years significantly increased its FCPA enforcement.¹⁰³ According to DOJ's Assistant Attorney-General - Mathew Friedrich,

Through international instruments like the OECD convention and the U.N. convention against corruption, we have seen our international partners significantly step up their anti-corruption efforts. Everything we're seeing suggests that this trend will continue. South Africa, for example, became the 37th country and the first African nation to become a party to the OECD convention in 2007. Israel followed suit in September of this year, becoming the 38th signatory.¹⁰⁴

Over the years, the FCPA has been enforced against some US registered companies operating in Nigeria's oil and gas industry. These companies include Shell, Eni, Haliburton, Kellogg Brown & Root LLC (KBR), Willbros Group, and Glencore.¹⁰⁵ Snamprogetti Netherlands B.V. and its parent company Eni –an Italian oil giant operating in Nigeria paid \$365 million to resolve FCPA-

¹⁰² Supra note 59 at 4-5.

¹⁰³ “#08-1112: Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations (2008-12-15)”, online: <<https://www.justice.gov/archive/opa/pr/2008/December/08-opa-1112.html>>.

¹⁰⁴ Ibid.

¹⁰⁵ “U.S. Securities and Exchange Commission”, (8 April 2019), online: SEC Enforcement Actions: FCPA Cases <<https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>>. See also “U.S. Slaps Glencore With Subpoena as Part of Money-Laundering Probe”, Reuters (3 July 2018), online: <<https://www.reuters.com/article/us-glencore-subpoena-idUSKBN1JT0PA>>. See also Jon Jordan, “Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend towards Greater Accountability in the Prevention of Foreign Bribery” (2010) 7 NYU JL & Bus 845–872.

related bribery charges that occurred in Nigeria.¹⁰⁶ In a related case, KBR and its Chief Executive Officer pled guilty in 2009 to paying Nigerian government officials up to \$182 million in bribes for engineering, procurement, and construction contracts to build liquified natural gas facilities in Bonny Island, Nigeria.¹⁰⁷ KBR paid a \$402 million fine to DOJ, making it one of the largest criminal fines for an FCPA violation.¹⁰⁸

In 2010, Shell Nigeria, a subsidiary of Royal Dutch Shell, admitted that it paid \$2 million in bribe to Nigerian officials through its subcontractors and falsely recorded the bribe payment as legitimate business expenses in their accounting records.¹⁰⁹ Consequently, Shell Nigeria was charged in the US with violating the FCPA books and accounting provisions. It paid \$30 million in criminal penalty to the DOJ.¹¹⁰ Shell Nigeria also paid \$10 million fine to Nigerian government

¹⁰⁶ “Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty”, (7 July 2010), online: <<https://www.justice.gov/opa/pr/snamprogetti-netherlands-bv-resolves-foreign-corrupt-practices-act-investigation-and-agrees>>. Dutch-based Snamprogetti was charged by the DOJ with one count of conspiracy and one count of aiding and abetting violations of the FCPA. Snamprogetti, Kellogg Brown & Root Inc. (KBR), Technip S.A., and JGC of Japan were part of a four-company joint venture called TSKJ. It won four contracts from Nigeria LNG Ltd. between 1995 and 2004 to build LNG facilities on Bonny Island. The contracts were worth more than \$6 billion. Snamprogetti authorized the joint venture to hire two agents, London-lawyer Jeffrey Tesler and a Japanese trading company, to pay bribes to Nigerian government officials, including “top-level executive branch officials,” to help win the Bonny Island contracts. The DOJ charged that TSKJ paid about \$132 million to a Gibraltar corporation controlled by Tesler and more than \$50 million to the Japanese trading company. Some of the money, prosecutors alleged, was intended to be used as bribes. See also Darrell A Hughes And Tess Stynes, “Eni, Snamprogetti to Pay Total \$365 Million to Settle Bribery Charges”, Wall Street Journal (8 July 2010), online: <<https://www.wsj.com/articles/SB10001424052748703636404575353673801750984>>.

¹⁰⁷ “Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine”, (11 February 2009), online: <<https://www.justice.gov/opa/pr/kellogg-brown-root-llc-pleads-guilty-foreign-bribery-charges-and-agrees-pay-402-million>>. KBR entered guilty pleas to a five-count criminal information in federal court in Houston before US District Judge Keith P. Ellison. According to court documents, KBR was part of a four-company joint venture that was awarded four EPC contracts by Nigeria LNG Ltd. (NLNG) between 1995 and 2004 to build LNG facilities on Bonny Island. The government-owned NNPC Limited was the largest shareholder of NLNG, owning 49 percent of the company. KBR pleaded guilty to conspiring with its joint-venture partners and others to violate the FCPA by authorizing, promising and paying bribes to a range of Nigerian government officials, including officials of the executive branch of the Nigerian government, NNPC Limited officials, and NLNG officials, to obtain the EPC contracts. KBR also pleaded guilty to four counts of violating the FCPA related to the joint venture’s payment of tens of millions of dollars in “consulting fees” to two agents for use in bribing Nigerian government officials.

¹⁰⁸ Ibid. In a civil settlement related to the KBR case, KBR and its former parent company –Halliburton reached a civil settlement with the SEC. The SEC’s civil complaint charged KBR and Halliburton with engaging in books and records and internal controls violations related to the bribery. The SEC’s complaint revealed that Halliburton’s internal controls failed to detect or prevent the bribery, and that its records were falsified to cover up the illegal payments.

¹⁰⁹ United States v. Shell Nigeria Exploration And Production Company Ltd. (U.S. Department of Justice, 2010). <https://perma.cc/QZ8T-REE8>.

¹¹⁰ “Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties”, (4 November 2010), online: <<https://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery>>.

as part of the broader resolution of the bribery charges.¹¹¹ Between 2001 and 2002, Chevron paid approximately \$20,000,000 in kickbacks to Iraqi officials for oil allocation under the UN Oil-for-Food programme thereby violating the internal controls, books and records provision of the FCPA.¹¹² Under two non-prosecution agreements with the SEC and DOJ, Chevron was fined \$28,000,000 and \$27,000,000.¹¹³ Although there is unprecedented rate of enforcing the FCPA against TNOCs, the host state of the defendant companies do not benefit from most of these decisions and fines. The TNOCs are not made to pay restitution to the host state when they are fined by the DOJ and/or SEC for violating the FCPA provisions in connection with their Nigerian operations. Unlike the United Nations Convention Against Corruption that I will discuss below, the FCPA has no provision for host communities or countries who have suffered damage as a result of payment of bribe by a TNOC to seek compensation.

4. Home State Regulation: China

Chinese NOCs in Nigeria originate from China and are state-owned enterprises (SOEs). The Chinese government regulates the business activities of the NOCs. In this section, I begin with some historical background on Sino-investment profile in Nigeria to enable us to understand how the regulatory instruments might apply to China's investments in Nigeria.

Beginning in February 1971 when China and Nigeria established diplomatic relations, bilateral business ties between the two countries have experienced continuous growth.¹¹⁴ In contemporary times and specifically since 2011, Sino-Nigeria economic cooperation has grown at meteoric rates. Figure 5 below, which represents foreign direct investment (FDI) in total, shows that between 2004

¹¹¹ "Shell Pays \$10 Million Fine to Nigerian Government", Bloomberg.com (22 December 2010), online: <<https://www.bloomberg.com/news/articles/2010-12-22/shell-pays-10-million-fine-to-nigerian-government-update1->>.

¹¹² "Foreign Corrupt Practices Act: Group of Enforcement Actions", online: <<http://fcpa.stanford.edu/fcpa-matter-enforcement-actions.html?id=242>>.

¹¹³ Ibid.

¹¹⁴ "Ministry of Commerce: Economic and Commercial Counsellor's Office, Embassy of the People's Republic of China in the Federal Republic of Nigeria", (22 July 2014), online: Brief Introduction of Bilateral Relations <<http://nigeria2.mofcom.gov.cn/article/bilateralcooperation/inbrief/201407/20140700669579.shtml>>. <https://perma.cc/DNC7-TDYH>. China and Nigeria signed the first economic and technical agreement in 1972.

and 2014, the growth rate of FDI from China to Nigeria was consistently high at 41 percent per annum. The figure further shows that across eight selected African countries, including Nigeria, FDI growth (including the oil industry) from China was equally continuously high, ranging from 16 to 89 percent each year. Sino-Nigeria's latest bilateral investment treaty was signed in 2001 and entered into force in 2010.¹¹⁵ Bilateral trade between the two countries in 2011 totaled \$10.78 billion, exceeding \$10 billion for the first time. In 2012, Sino-Nigeria bilateral trade accounted for 5.3% of China's total trade with Africa.¹¹⁶ In 2013, total bilateral trade (including the oil industry) stood at \$13.6 billion.¹¹⁷

¹¹⁵ China - Nigeria BIT (2001) | International Investment Agreements Navigator (United Nations Conference on Trade and Development (UNCTAD)). <https://perma.cc/KR6B-2GGW>. See also Won Kidane & Weidong Zhu, "China-Africa Investment Treaties: Old Rules, New Challenges" (2013) 37:4 Fordham Int'l LJ 1035–1086. Won Kidane, "China's Bilateral Investment Treaties with African States in Comparative Context" (2016) 49 Cornell Int'l LJ 141 at 177. See also Uche Ewelukwa Ofodile, "Africa-China Bilateral Investment Treaties: A Critique" (2013) 35:1 Mich J Int'l L 131 at 208.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

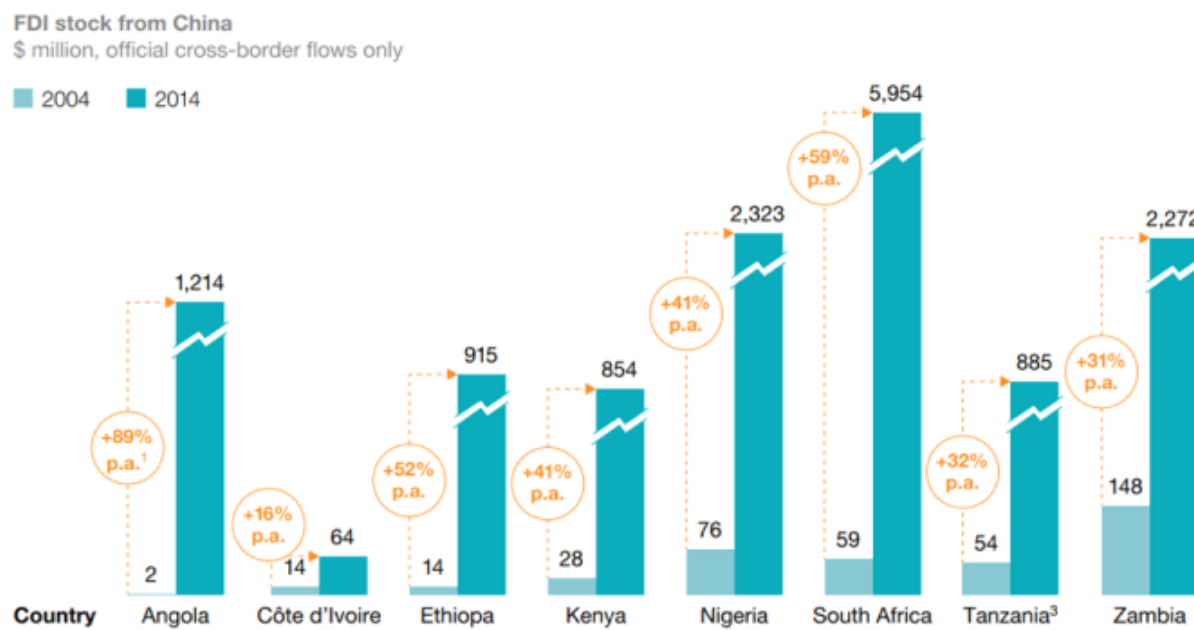


Figure 5: China's Foreign Direct Investment in Eight African Countries from 2004-2014.

Source: Exhibit from "Dance of the Lions and Dragons: How are Africa and China Engaging, and How Will the Partnership Evolve?", June 2017, McKinsey & Company, www.mckinsey.com.

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Nigeria is China's third-largest trading partner and second export market in Africa, only next to South Africa, while China is Nigeria's number one import source.¹¹⁸ China's major imports from Nigeria are crude oil, liquefied natural gas, and other hydrocarbon products.¹¹⁹ China's main exports to Nigeria are electronic and machinery products, textile, yarn, woven fabrics, and goods and high-tech products. In 2013, China made \$180 million of direct investment in Nigeria.¹²⁰ One of such key investment projects is the Egina Deepwater oil field, offshore Nigeria, by CNOOC.¹²¹

¹¹⁸ Supra Ibid. For a political economy analysis of Sino-Nigeria trade relations, see Ian Taylor, "China's Relations with Nigeria" (2007) 96:392 *The Round Table: The Commonwealth Journal of International Affairs* 631.

¹¹⁹ Supra note 302. On the unbalanced and exploitative natures of contemporary Sino-Nigeria trade relations and how oil and gas are catalyzing that relationship, see Ian Taylor, "The Pathology of Dependency: Sino-Nigerian Relations as a Case Study" in Carl Levan & Patrick Ukata, eds, *The Oxford Handbook of Nigerian Politics* (Oxford University Press, 2018) at 743.

¹²⁰ Ibid.

¹²¹ "Nigeria: Production Commences - CNOOC International Limited", (2 January 2019), online: Production commences from Egina Field, Offshore Nigeria <<https://cnoocinternational.com/en/related-content/nigeria/production-commences-from-egina-field>>. <https://perma.cc/XU37-6C9U>. The Egina deepwater oil field commenced production in January 2019.

Since 2004, three major Chinese national oil companies (NOCs)¹²² have been investing in new oil fields and buying equity stakes in existing ones from both local and foreign oil companies in Nigeria. The exponential growth in Chinese investments and the argument by some scholars that their entry into Nigeria's oil industry will worsen corruption¹²³ no doubt necessitates effective home state regulation by the Chinese government. However, a recent data from Transparency International shows no improvement in public sector corruption in China.¹²⁴ That said, I will now examine China's anti-corruption regulatory frameworks and the government's efforts in enforcing the regimes.

4.1 Article 164 of the Criminal Law of the People's Republic of China, 1997

In 2011, China took measures to fulfill its obligation under the United Nations Convention Against Corruption (UNCAC).¹²⁵ This led to the amendment of the Criminal Law of China.¹²⁶ Article 164 of the Criminal Law makes illegal the act of offering bribe to a foreign official by a Chinese company or national for the purpose of obtaining illegitimate benefits. It provides

Whoever gives any property to a functionary of a foreign country or an official of an international public organization for any improper commercial benefit shall be punished according to the provision of the preceding paragraph.¹²⁷

¹²² In this dissertation and in the context of China, national oil companies (NOCs), also known as state-owned enterprises, will be used to refer to companies recognized by a national regulation as an enterprise in which the state exercises ownership either by the state being the ultimate beneficiary owner of the majority of voting shares or otherwise exercising an equivalent degree of control. OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 ed (Paris: OECD Publishing). See also Curtis Milhaupt J & Zheng, *supra*.

¹²³ Taylor, *supra* note 27. Pegg, *supra* note 31. This dissertation will engage with such arguments as well as the gloomy prognosis of Sino-Nigeria investment relations by other scholars in chapter 4.

¹²⁴ In Transparency International's 2018 Corruption Perception Index, China ranked 39.

¹²⁵ Article 16(1) of the UNCAC enjoins each State Party to "adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties,

in order to obtain or retain business or other undue advantage in relation to the conduct of international business".

¹²⁶ Criminal Law of the People's Republic of China, Order No 83 1997.

¹²⁷ *Ibid*.

The use of the word “property” in Article 164 is intended to cover both cash, movable and immovable properties or items. Article 164 is not as broad as the FCPA provisions on foreign bribery. A good number of bribery payments made by transnational companies to foreign officials are in fact done through the engagement of the services of one or two intermediaries or agents.¹²⁸ In this connection and unlike the FCPA, China’s Criminal Law is silent in a situation where a Chinese company engages a foreign national as a intermediary for the purpose of bribing a foreign official on its behalf. However, the prosecution could argue that although a bribe was given to a foreign official through an agent, the primary source knew that it was to be paid as bribe to a foreign or international official. More importantly is the fact that at present, there is no record of China’s investigation or prosecution of its national companies operating overseas for bribery. Scholars have asserted that since the enactment of Article 16, China has not prosecuted any of its enterprises for paying bribes overseas.¹²⁹ Scholars have also noted that China’s regime and attitude toward combating corruption in international business is largely *laissez-faire*.¹³⁰ China has shown real commitments, albeit, in non-transparent ways, in the prosecution of directors, officers, and employees of its NOCs for corrupt personal enrichment and embezzlement, which is the demand side of bribery.¹³¹ Be that as it may, wherever Chinese laws fall short of regulating foreign bribery of their NOCs in Nigeria, the FCPA provisions can be invoked as the stocks of the NOCs or those of their subsidiaries are traded on the floor of the New York Stock Exchange (NYSE).¹³² The practical effect of listing the securities of Chinese NOCs on the NYSE is that all the three Chinese NOCs operating in Nigeria are American issuers by virtue of 15 U.S.C. s.78dd-1 of the FCPA.

¹²⁸ Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty, 10–751 (The United States Department of Justice, 2010).

¹²⁹ Daniel CK Chow, “How China Promotes Its State-Owned Enterprises at the Expense of Multinational Companies in China and Other Countries” (2015) 41:3 NC J Int’l L 455–490.

¹³⁰ Spalding, *supra* note 44 at 388.

¹³¹ “UPDATE 2-Former PetroChina vice chairman to be prosecuted for graft”, Reuters (15 June 2015), online: <<https://www.reuters.com/article/china-corruption-petrochina-idUSL3N0Z11PP20150615>> <https://perma.cc/FM29-ND9Y>. For a discussion on the lack of transparency of the prosecutions, see Daniel CK Chow, “How China’s Crackdown on Corruption Has Led to Less Transparency in the Enforcement of China’s Anti-Bribery Laws” (2015) 49:2 UCD L Rev 685–702.

¹³² “Listings Directory for NYSE Stocks”, online: <https://www.nyse.com/listings_directory/stock>. See also FCPA, *supra* note 53 15 U.S.C. s. 78dd-1.

In addition to the Criminal Law of China highlighted above, there are some administrative guidelines and regulations issued by relevant Chinese regulatory agencies that are generally applicable to Chinese state-owned enterprises. The objective of issuing the administrative guidelines and regulations is to ensure that Chinese state-owned enterprises (SOEs) comply with local, national, and international laws, treaties, and conventions in their overseas business operations. It also has been suggested that the corporate irresponsibility of Chinese companies in national and transnational business resulted in the development of the guidelines and regulations by China.¹³³ The Chinese State-owned Assets Supervision and Administration Commission of the State Council (SASAC), for example, issued Guidelines for State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities (the Guidelines).¹³⁴ According to SASAC, the Guidelines serve as an impetus for state-owned enterprises to fulfill their corporate social responsibilities.¹³⁵ Paragraph 8 of the Guidelines states that

Insisting on a legal and honest way in business operation, the CSOEs are asked to comply with regulations and laws, public ethics and commercial conventions, and trade rules. They should also fulfill their tax obligations, undertake the interests of investors and creditors, protect intellectual property rights, keep business creditability, oppose improper competition and eradicate corruption in commercial activities.¹³⁶

On November 2, 2018, SASAC also released Guidelines for Compliance Management of Central State-Owned Enterprises (Trial), 2018 (the Guidelines).¹³⁷ Article 13 of the Guidelines urge Chinese SOEs to establish a sound self-discipline integrity system, guard against risks of commercial bribery, unfair asset bidding, and unfair competition. The Guidelines require SOEs to, among other things, improve their transaction management systems and focus on the rules of antitrust

¹³³ Li-Wen Lin, "Corporate Social Responsibility in China: Window Dressing or Structural Change?" (2010) 28:1 Berkeley J Int'l L 64–100.

¹³⁴ "Guidelines to the State-owned Enterprises Directly under the Central Government", (6 December 2011), online: <http://en.sasac.gov.cn/2011/12/06/c_313.htm>. <https://perma.cc/89JK-QMAN>.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Guidelines for Compliance Management of Central Enterprises (Trial), State-owned Assets Development Regulation 2018. <https://perma.cc/2CP6-N35Y>.

and preventing commercial bribery, in order to decrease overall compliance risks effectively. The Guidelines emphasize the need to supervise overseas investment and the operational behavior of overseas personnel. Article 16 requires SOEs to study the regulatory frameworks of their host states and international law, and to understand their prohibitive provisions in order to identify the bottom lines of overseas investment and operations. Chinese SOEs are to regularly review and sort out the risk status of overseas investment, focusing on compliance risks in major decision-making, major contracts, large capital control, and corporate governance control of overseas subsidiaries.¹³⁸ Chinese SOEs are to report compliance issues to SASAC as soon as they arise to contain problems and prevent the occurrence of new ones. However, there is no provision on how SASAC enforces the Guidelines. This situation reinforces the argument that Chinese state-led CSR initiatives suffer from enforcement deficiency.¹³⁹

5. Intergovernmental Regimes and Multi-Stakeholder Initiatives

One of the global challenges that has been subject of alternative forms of regulation is bribery and corruption in international business transactions. Over the years, IGOs and multi-stakeholder organizations have drawn up conventions and guidelines aimed at strengthening the regulation of foreign bribery by TNOCs and other types of businesses. The conventions and guidelines generally make up for the weaknesses or non-existence thereof, of state legal orders in regulating foreign and transnational bribery in business activities. The United Nations Convention Against Corruption (UNCAC), for example, represents a remarkable effort by the world body to adopt a global and comprehensive instrument that aims to promote and strengthen measures to combat domestic and foreign bribery, embezzlement, and money laundering. As Adefolake Adeyeye has noted, “the UNCAC is the clearest indication to date that the international community is serious in its fight against corruption, not simply because it affects international trade but also because of the effect it has on other aspects of international life.”¹⁴⁰ Similarly, the Convention on Combating

¹³⁸ Ibid, Art 16(3).

¹³⁹ Lin, *supra* note 123 at 96.

¹⁴⁰ Adeyeye, *supra* note 35 at 126

Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-bribery Convention)¹⁴¹ makes it illegal for a person or company to offer a bribe to a foreign official and recommends that a state party prosecute a company suspected of bribing a foreign official in the course of its business.

The distinction between intergovernmental regimes and state-based regimes discussed above lies in their composition, governance capacity, and enforcement mechanisms, respectively. Intergovernmental regimes are agreed upon by treaty-based organizations that largely derive their governance capacity and legitimacy from the direct participation of, or delegation from, national governments.¹⁴² The responsibility to enforce the regulatory regimes of IGOs is that of national governments. State-based regimes, frequently referred to as ‘command-and-control regulation’ in regulation scholarship, involve the promulgation of legal rules backed by sanction, and in some cases, persuasion, by an elected parliament.¹⁴³ This type of law is known in legal theory as legal positivism –a mainstream and dominant legal theoretical paradigm that is the antitype of legal pluralism that I discussed in chapter 5.¹⁴⁴ State-based regimes usually have clear-cut monitoring, enforcement, and compliance mechanisms, which, as we saw earlier, are carried out by state agencies such as the DOJ, SEC, EFCC, etc. In terms of similarity, the state remains the “relational constant”¹⁴⁵ in both intergovernmental regimes and state-based regimes. For the purpose of this dissertation, the UN and OECD are two archetypes of IGOs that I now describe their

¹⁴¹ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).

¹⁴² Colin Scott, Fabrizio Cafaggi & Linda Senden, “The Conceptual and Constitutional Challenge of Transnational Private Regulation” (2011) 38:1 *JL & Soc’y* 1 at 2.

¹⁴³ Julia Black, “Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World” (2001) 54:1 *Curr Leg Probl* 103 at 105-6. See also Black, “Critical Reflections”, *supra* note 34.

¹⁴⁴ Classical legal positivists are Jeremy Bentham, John Austin, and H.L.A Hart. For some of the seminal works by leading proponents of the theory of legal positivism, see John Austin, *The Province of Jurisprudence Determined*, 2nd ed (London: J. Murray, 1861). Hans Kelsen, *General Theory of Law and State*, translated by Wedberg Anders, 20th century legal philosophy series vol. I (New York: Russell & Russell, 1961). H L A Hart, *The Concept of Law*, Clarendon Law Series (Oxford: Clarendon Press, 1961).

¹⁴⁵ I have borrowed this phrase from Peter J. Spiro who used it in relation to how transnational NGO activity cements intergovernmental regimes at the national level. See Peter J Spiro, “Nongovernmental Organizations in International Relations (Theory)” in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge, United Kingdom: Cambridge University Press, 2012) 223 at 231.

anti-corruption regimes.¹⁴⁶ Although there is the African Union Convention on Preventing and Combating Corruption, this regional framework will not be considered in this dissertation for two reasons. This dissertation has discussed two anti-corruption frameworks by the Nigerian government (the EFCC Act and the ICPC Act) and these domestic anti-corruption laws are increasingly used to punish corrupt practices by Nigerian and non-Nigerians. In addition, the provisions of the African Union Convention on Preventing and Combating Corruption are essentially domesticated and captured by the EFCC Act and the ICPC Act. Thus, the African Union Convention on Preventing and Combating Corruption is passed over to keep the discussion focused.

5.1 The United Nations Convention Against Corruption, 2005

The UNCAC¹⁴⁷ is a legally binding international regime enacted by the UN General Assembly to combat domestic and foreign corrupt practices. It represents a remarkable effort by an IGO to negotiate and ratify a multilateral binding treaty that aims to promote and strengthen measures to combat corrupt practices in UN member states. The UNCAC criminalizes many corrupt acts such as commercial bribery, money-laundering, embezzlement, trading in influence, etc. However, the discussion of this regime will be focused on the bribery of national officials of a state party, foreign public officials, and individuals in the private sector, to retain business advantage.¹⁴⁸

The UNCAC seeks to promote, facilitate, and support international cooperation and technical assistance in the prevention and fight against corruption.¹⁴⁹ The UNCAC prohibits both the acts of giving and accepting a bribe, otherwise called active and passive bribery, in domestic and international commercial transactions by national public officials and private persons.¹⁵⁰ Articles

¹⁴⁶ For other examples of regulatory regimes by IGOs, see Kenneth W Abbott & Duncan Snidal, "Taking Responsive Regulation Transnational: Strategies for International Organizations" (2013) 7:1 Regulation & Governance 95–113.

¹⁴⁷ This chapter does not include a discussion of the United Nations Global Compact, which has a section on anti-corruption (Principle 10). "The Ten Principles | UN Global Compact", (2000), online: <<https://www.unglobalcompact.org/what-is-gc/mission/principles>>. This is because this chapter deals with only key anti-corruption regimes and there is a need to keep the discussion focused.

¹⁴⁸ For a detailed analysis of the UNCAC, see Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press, 2015) at 97.

¹⁴⁹ UNCAC, *supra* note 43, Art 1.

¹⁵⁰ *Ibid*, Arts 15(a)&(b) & 21. Article 15 provides: "Each State Party shall adopt such legislative and other

21 and 22 of UNCAC that apply to private sector corruption is hortatory and so non-binding. It urges state parties to consider adopting legislative and other measures as may be necessary to criminalize bribery in the private sector.

The enforcement of the UNCAC is the responsibility of the Conference of State Parties (COSP) and state signatories to the regime.¹⁵¹ The enforcement of the UNCAC in various countries by state parties is evaluated through a peer-review process –the Implementation Review Mechanism.¹⁵² To strengthen the enforcement mechanism of the UNCAC, the COSP monitors its enforcement by providing state parties with necessary resources and assistance.¹⁵³ The COSP also carries out a periodic review of the enforcement of the UNCAC by state parties and making recommendations to improve on the provisions and enforcement of the regime.¹⁵⁴

Significantly, Article 13 of the UNCAC recognizes the important role and potential of civil society organizations (CSOs), NGOs, and community-based organizations in the fight against corruption and to raise public awareness regarding the existence and threat posed by the scourge.¹⁵⁵ In

measures as may be necessary to establish as criminal offences, when committed intentionally: (a) the promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; (b) the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties". Article 21 states: "Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities: (a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting; (b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting".

¹⁵¹ UNCAC, *supra* note 43, Arts 63 & 65.

¹⁵² The Implementation Review Mechanism (IRM) is a peer review process that assists states parties to effectively enforce the Convention. Each state party is reviewed by two peers - one from the same regional group - which are selected by a drawing of lots at the beginning of each year of the review cycle. The functioning and the performance of the IRM is guided and overseen by the Implementation Review Group.

¹⁵³ UNCAC, *supra* note 43, Art 63(4)(1)(a)-(d) & (g). The Conference of State Parties is not defined by UNCAC except that the body shall be convened by the UN Secretary-General. Nevertheless, the United Nations Office on Drugs and Crime (UNODC) describes the Conference of State Parties as the main policy-making body of the UNCAC. It supports state parties in their implementation of the UNCAC and give policy guidance to UNODC to develop and implement anti-corruption activities. The Conference meets every two years. See "Conference of the States Parties to the United Nations Convention against Corruption", online: <<https://www.unodc.org/unodc/en/corruption/COSP/conference-of-the-states-parties.html>>. <https://perma.cc/F8FM-EW2C>.

¹⁵⁴ UNCAC, *supra* note 43, Art 63(4)(e) & (f).

¹⁵⁵ United Nations Convention against Corruption: Resolution adopted by the General Assembly, 21 November

a similar vein, UNCAC Coalition, which is a global network of over 350 CSOs in more than 100 countries, promotes the ratification, implementation, and monitoring of UNCAC across the world.¹⁵⁶

Although the UNCAC Coalition is independent of the UN and the United Nations Office on Drugs and Crime (UNODC), it has maintained active links with the COSPs and the UNODC in the implementation of the UNCAC. As an anti-corruption umbrella body of NGO organizations that facilitates a broad network of CSOs in their war against corruption, it participates in the meetings of the COSPs for the promotion of the UNCAC.¹⁵⁷ The UNODC facilitates this participation. On many occasions, the UNCAC Coalition has submitted formal statements to the COSPs on how to make UNCAC work in UN member states.¹⁵⁸ CSOs and NGOs serve as independent monitoring body for the enforcement of the international anti-corruption regime.

Under the UNCAC, acts of corruption by a TNOC can lead to a revocation of its oil mining concession by a host state.¹⁵⁹ Furthermore, by virtue of Article 35 of the UNCAC, host communities, a host government, or an individual, for example, who has suffered damage as a result of a corrupt act by a TNOC may through court action, obtain compensation for damages against such company. The possibility of obtaining compensation for damages is because corruption leads to waste, inefficient use of public resources, and perpetuates poverty.¹⁶⁰ In recent cases, the Nigerian government has separately sued Shell, Eni, and JP Morgan Chase Bank for acts of corruption and negligence linked to an oil prospecting license (OPL) off the coast of Niger

2003, A/RES/58/4, available at: <https://www.refworld.org/docid/3fdc4d3e7.html> [accessed 27 September 2019]. Article 13 provides “each state party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption...” [emphasis added].

¹⁵⁶ “UNCAC Coalition”, online: About the Coalition <https://uncaccoalition.org/en_US/about-us/about-the-coalition/>. <https://perma.cc/3DUL-99UV>.

¹⁵⁷ Eighth Session of the Conference of the States Parties to the United Nations Convention against Corruption - Abu Dhabi, 16-20 December 2019 (New York, United States: United Nations Office on Drugs and Crime). <https://perma.cc/VU47-5PJV>.

¹⁵⁸ Ibid.

¹⁵⁹ UNCAC, *supra* note 43, Art 34.

¹⁶⁰ Ferguson, *supra* note 65 at 9-11.

Delta.¹⁶¹ The signing and ratification of the UNCAC by state parties has largely influenced the enactment of anti-corruption regimes and the amendment of existing ones in many jurisdictions, including Nigeria and China.¹⁶² Nigeria, China, and the U.S. have all signed and ratified the UNCAC.¹⁶³

5.2 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997

Another IGO that has taken leadership role in the global efforts to combat transnational bribery is the OECD¹⁶⁴ through the signing of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention).¹⁶⁵ The OECD Anti-Bribery Convention specifically criminalizes the bribery of foreign public officials in international business transactions.¹⁶⁶ It is a legally-binding regime on state parties. All the

¹⁶¹ The Federal Republic of Nigeria v JP Morgan Chase Bank, NA [2019] EWHC 347 (Comm), 2019 England and Wales High Court (Commercial Court). <https://perma.cc/UP54-4FRE>. “Shell, Eni Officials Named in \$1 Billion Nigeria Lawsuit”, Bloomberg.com (7 May 2019), online: <<https://www.bloomberg.com/news/articles/2019-05-07/shell-eni-executives-named-in-1-billion-nigeria-bribery-suit>>. <https://perma.cc/9C9J-7JY5>.

¹⁶² Nigeria has been consistent in its domestication and compliance with the provisions of the UNCAC. It has passed several legislations in relation to preventive anti-corruption measure and asset recovery including the Money Laundering (Prohibition) Act 2011 (as amended); the Electoral Act 2010 (as amended) (EA); the Public Procurement Act 2007 (PPA); and, the Freedom of Information Act 2011 (FOIA). See “United Nations Office on Drugs and Crimes (UNODC)”, online: Country Profile - Nigeria <<https://www.unodc.org/unodc/treaties/CAC/country-profile/CountryProfile.html?code=NGA>>. <https://perma.cc/P62B-V5T3>. As I noted earlier, Article 164 of the Criminal Law of China was enacted in fulfilment of the country’s obligations under the UNCAC.

¹⁶³ “Signature and Ratification Status”, online: United Nations Office on Drugs and Crime (UNODC) <<https://www.unodc.org/unodc/en/corruption/ratification-status.html>>. <https://perma.cc/PL6A-QLS8>.

¹⁶⁴ The OECD is an intergovernmental organization (IGO) comprising 36 states who are mostly from developed countries. Formed in 1961, it focuses on global governance of trade, investment, and other economic issues. Over the years, the OECD has developed international norms and standards on bribery and corruption, taxation, environment, the operations of global business. OECD countries and partners represent about 80 percent of world trade and investment. Many industry actors in Nigeria’s extractive industries are from OECD countries including US, UK, Canada, France, Italy, and the Netherlands. As we will see later under this section, China is a key partner country to the OECD and participates in policy discussions in OECD committees on anti-bribery. The day-to-day administration of the OECD is carried out by the Secretary-General. The office of the Secretary-General receives direction and guidance from member states. “About the OECD - OECD”, online: OECD <<https://www.oecd.org/about/>>. <https://perma.cc/6M4H-HPXV>.

¹⁶⁵ In Article 1(4)(a), it defines “a foreign public official” as any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation. The Preamble to the OECD Anti-Bribery Convention mentions that the anti-bribery treaty was framed in consideration that bribery is a widespread phenomenon in international business transactions, trade, and investment. Article 1(4)(b) defines a “foreign country” to include all levels and subdivisions of government, from national to local. This chapter will also not discuss the OECD Guidelines for Multinational Enterprises, 2011 as it is not an anti-corruption-specific instrument.

¹⁶⁶ Ibid. Article 1 provides that “each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or

36 member-states of the OECD and 8 non-member states are signatories to the Anti-Bribery Convention.¹⁶⁷ China is not a signatory to the OECD Anti-Bribery Convention. However, as we will see later in this section, China is a key partner of the OECD on bribery in international business. Unlike the UNCAC, the OECD Anti-Bribery Convention targets only international companies because it does not provide for the act of receiving or soliciting bribery by a foreign public official. Article 1(2) requires each state party to prohibit acts of complicity, incitement, aiding and abetting, authorization, attempt, and conspiracy to bribe a foreign public official. The OECD Anti-Bribery Convention makes the bribery of foreign public officials “punishable by effective, proportionate, and dissuasive criminal penalties”.¹⁶⁸ It also requires state parties to consider the imposition of additional civil or administrative sanctions upon a person.¹⁶⁹ Like the FCPA, the OECD Anti-Bribery Convention has an accounting provision that prohibits the falsification of accounting records by companies for the purpose of bribing foreign public officials or hiding such bribery.¹⁷⁰

5.3 The Enforcement Mechanism

Similar to the UNCAC, the OECD Anti-Bribery Convention is enforced through state parties. Like the UNCAC, the OECD Anti-Bribery Convention creates an oversight body –the OECD Working Group on Bribery (WGB). The WGB is responsible for monitoring the enforcement of the anti-

other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business”. All OECD countries and 8 non-OECD countries are signatories.

¹⁶⁷ The 8 OECD non-member states that are signatories are Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Peru, Russia, and South Africa. “OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions”, online: OECD <<http://www.oecd.org/corruption/oecdantibriberyconvention.htm>>. <https://perma.cc/JAV6-7UEX>.

¹⁶⁸ Ibid, Article 3(1).

¹⁶⁹ Ibid, Article 3(4). The civil or administrative sanctions are exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

¹⁷⁰ Ibid, Article 8. Paragraph IV of the OECD’s Recommendation of the Council on Guidelines on Anti-Corruption and Integrity in State-Owned Enterprises, 2019 that Adherents ensure that their ownership policy fully reflects that a cornerstone of promoting integrity and preventing corruption in and concerning SOEs is effective company internal controls, ethics and compliance measures that prevent, detect and mitigate corruption-related risks, and enforce rules”.

bribery treaty.¹⁷¹ The WGB regularly monitors, and reviews steps taken by countries to enforce the OECD Anti-Bribery Convention. As is shown in figure 6 below, the OECD Anti-Bribery Convention is enforced in four phases with a high-level monitoring and enforcement mechanism. OECD member countries send experts to visit and evaluate the enforcement rate of the OECD Anti-Bribery Convention.¹⁷² During their visit, the experts meet with government, parliamentarians, judiciary, legal and accounting professions, businesses, the media and civil society.¹⁷³ The monitoring and review of enforcement by the WGB leads countries to refine their enforcement practices.

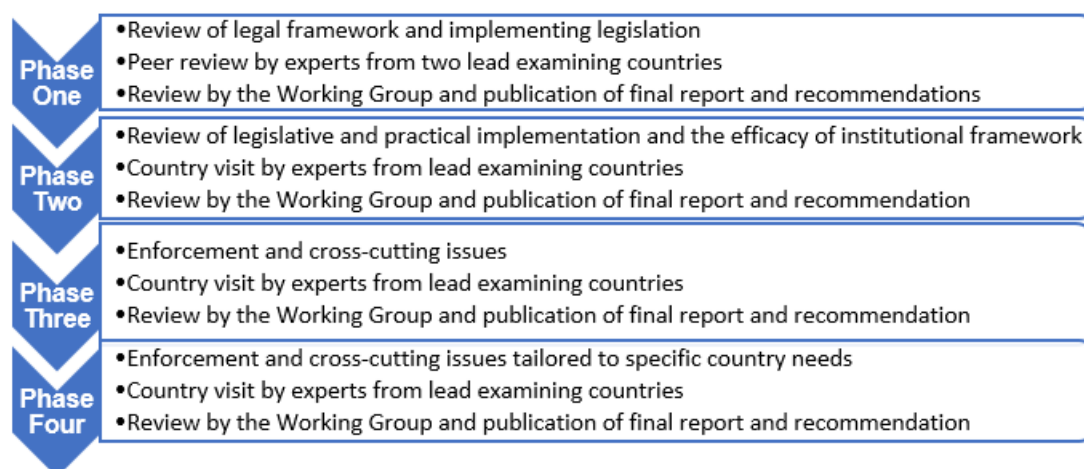


Figure 6: Various Phases of Enforcing the OECD Convention on Bribery

Source: OECD, 2018

The OECD Anti-Bribery Convention has recorded significant enforcement outcomes since its entry into force in 1999. Data from the OECD as shown in figure 7 indicates that up to 560 individuals and 184 entities have received criminal sanctions for foreign bribery between 1999 and 2017 in six OECD states. Of that number, 125 individuals have received custodial sentences for foreign bribery.¹⁷⁴ Over 500 investigations are ongoing in 30 OECD states and up to 155 criminal

¹⁷¹ Ibid, Art 5.

¹⁷² "Country monitoring of the OECD Anti-Bribery Convention - OECD", online: <<http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm>>. <https://perma.cc/JR9Z-JV5Y>.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

proceedings are ongoing against individuals and business enterprises.¹⁷⁵ Figure 7 further shows that as of 2017, 146 individuals and nine companies are facing prosecutions in 11 countries for allegedly violating the OECD Anti-Bribery Convention. Data from the OECD WGB shows that the US has the highest number of enforcement outcomes.¹⁷⁶

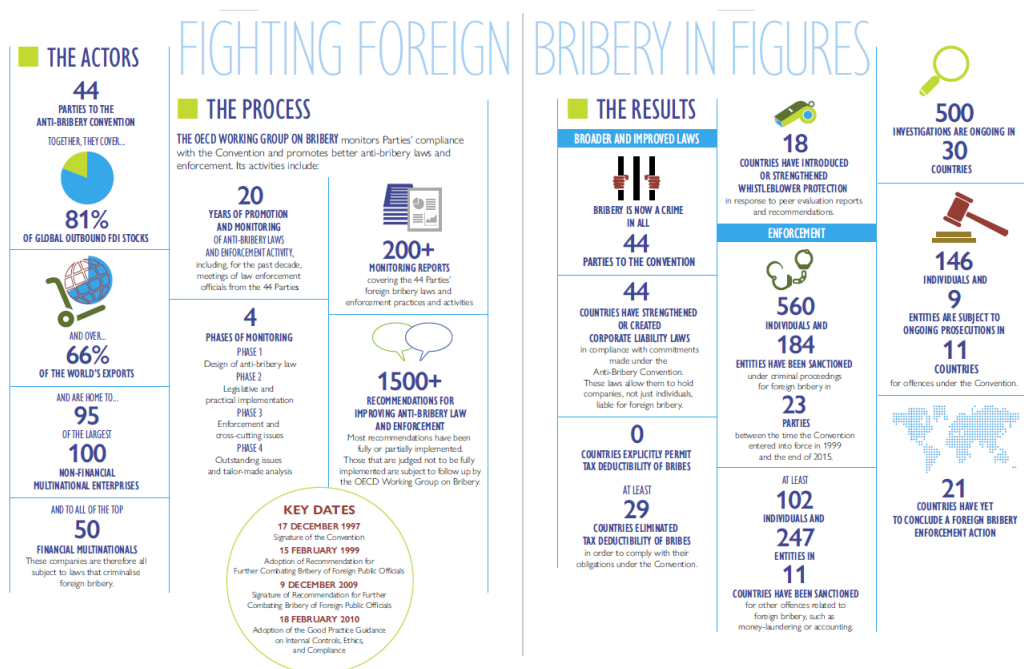


Figure 7: Facts and Figures on the Enforcement of the OECD Anti-Bribery Convention

Source: OECD (2018), Fighting the Crime of Foreign Bribery: the Anti-Bribery Convention and the OECD Working Group on Bribery

The OECD's approach to implementation of the Anti-Bribery Convention is one of inclusiveness. It welcomes non-members of the organization who are participants in the OECD WGB to sign up for the Anti-Bribery Convention and has taken measures to expand the global anti-bribery community.¹⁷⁷ The OECD/African Development Bank Initiative (OECD/ADB Initiative), for example, brings together African policy makers, businesses, regional and international organiza-

¹⁷⁵ Ibid

¹⁷⁶ Enforcement of the Anti-Bribery Convention - Special focus: What Happened to the Public Officials in Sanctioned Foreign Bribery Schemes? (Paris: OECD Working Group on Bribery, 2018). See also Cecily Rose, International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems (Oxford University Press, 2015) at 73.

¹⁷⁷ OECD Anti-Bribery Convention, supra note 125, Article 13.

tions.¹⁷⁸ The objective of the OECD/ADB Initiative is to assist African countries in their fight against bribery of public officials in business transactions and to improve corporate integrity and accountability.¹⁷⁹ There is also the OECD Anti-Corruption Initiative for Asia-Pacific.¹⁸⁰ As I stated earlier in this section, China has begun to contribute to policy discussions with the OECD on bribery in international business. According to the OECD, the WGB has a long tradition of welcoming China to its meetings and the latter has shown openness to dialogues for its possible future adherence to the Anti-Bribery Convention. Specifically, there is increased co-operation between China and the OECD that has contributed to further efforts in combating bribery and corruption in global terms.¹⁸¹ China remains an active member in the G20 Anti-Corruption Working Group (ACWG) meetings and the OECD expects that China will accede to the OECD membership in the future.¹⁸² The OECD recognizes that China plays an important role in the fight against transnational corruption and that the Asian country has shown commitment in combatting corruption through its engagement in a number of key anti-bribery dialogues with the OECD WGB.¹⁸³ China has also stepped up its co-operation in monitoring and implementing the OECD Anti-Bribery Convention. The OECD believes that China's potential adherence to the Convention would increase the reputation of transparency for Chinese national companies involved in cross-border transactions.¹⁸⁴ However, it is unclear if China would sign up for the OECD Anti-Bribery Convention because it might consider the impact of doing that on its economy.

¹⁷⁸ Fighting the Crime of Foreign Bribery: The Anti-Bribery Convention and the OECD Working Group on Bribery (Organization for Economic Co-operation and Development (OECD), 2018). <https://perma.cc/GCW9-Z9W5>.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Active with the People's Republic of China (Paris, France: Organisation for Economic Co-operation and Development (OECD), 2018) at 38-9. <https://perma.cc/M28Q-VJD2>.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

6. Non-Governmental Organizations

Governments, IGOs, and NGOs have engaged in various efforts to fight bribery and other corrupt practices in the oil industry in Africa.¹⁸⁵ NGOs such as TI and Publish What You Pay (PWYP), among others, advocate for an accountable and transparent resource extraction value chain that will benefit communities, and support sustainable social and economic development.¹⁸⁶ For example, TI collaborates with governments, business enterprises, CSOs, and local communities to build a fairer and clearer process for obtaining natural resource mining permits.¹⁸⁷ Founded in May 1993 by Peter Eigen who worked in Nigeria and witnessed corruption there,¹⁸⁸ TI is an international NGO with its global headquarters in Berlin, Germany, and national chapters in more than 100 countries, including Nigeria. It plays a leading role in the fight against corruption in the extractive industries through anti-corruption initiatives and framework.¹⁸⁹ TI spotlights the often-opaque process of obtaining mining or exploration permits with particular attention to who gets resource extraction rights and under what conditions.¹⁹⁰ TI is a global governance organization active in all four stages of the policy process. First, it engages in agenda-setting by raising awareness of corruption and the need for transparency.¹⁹¹ Second, it participates in policy formulation by advocating anti-corruption laws.¹⁹² For example, TI was instrumental in the drafting of the UNCAC and OECD Anti-Bribery Convention.¹⁹³ Third, TI is involved in policy implementation by lobbying for the application of anti-corruption laws.¹⁹⁴ Fourth, it engages in

¹⁸⁵ See Douglas A Yates, *The Scramble for African Oil: Oppression, Corruption and War for Control of Africa's Natural Resources* (London: Pluto Press, 2012) at 58 (noting that "efforts to fight oil corruption in Africa are a special case of global governance").

¹⁸⁶ "Extractive Industries - Our Priorities", online: Corruption in the Extractive Industries <<https://www.transparency.org/en/our-priorities/extractive-industries>>.

¹⁸⁷ Ibid.

¹⁸⁸ Yates, *supra* note 28.

¹⁸⁹ See for example, "Business Principles for Countering Bribery", online: Transparency.org <<https://www.transparency.org/en/publications/business-principles-for-countering-bribery>>. See also "State-Owned Enterprises: Beacons of Integrity?", (10 March 2018), online: Transparency.org <<https://www.transparency.org/en/publications/state-owned-enterprises-beacons-of-integrity>>.

¹⁹⁰ *Supra* note 378.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

policy evaluation through ranking and measurement of the changes in the perception of corruption in many countries over time.¹⁹⁵ As Douglas A. Yates notes concerning TI, “everywhere it is a watchdog of corruption, acting at all levels, and making a name for itself in the process”.¹⁹⁶

PWYP, which was launched in June 2002 is an international transparency initiative comprising a group of CSOs that advocates for transparency and accountability in the extractive industries.¹⁹⁷ Although PWYP has over 1000 member organizations and more than 50 national coalitions, it is run by a small decentralized Secretariat and a Board. National coalitions of PWYP are present in three African oil-exporting countries, namely, Nigeria, Cameroon, and Congo.¹⁹⁸ PWYP Nigeria was launched in 2004 and has supported effective EITI implementation, including the adoption of an EITI Act.¹⁹⁹ National coalitions of PWYP include TI, Oxfam, Save the Children, and Human Rights Watch.²⁰⁰ PWYP persuades governments to regulate natural resource extraction openly and responsibly so that companies operate within effective governance frameworks and civil society has the capacity and freedom to make natural resource extraction work for the benefit of all.

7. Corporate Codes of Conduct as Transnational Regulatory Standards

In the preceding parts, we have seen the roles that some states, IGOs, NGOs, and multi-stakeholder organizations are playing in the regulation of transnational corrupt activities in the oil industry. TNOCs and other types of business enterprises have become necessary actors in transnational non-state regulation. This section will therefore highlight some of the corporate or self-regulatory standards emanating from TNOCs operating in Nigeria. The private regulatory

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ “Publish What You Pay”, online: <<https://www.pwyp.org/about/>>. See also Emeka Duruigbo, “The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa” (2005) 26:1 U Pa J Int’l Econ L 1 at 51.

¹⁹⁸ Yates, *supra* note 195 at 62.

¹⁹⁹ “Publish What You Pay”, online: Nigeria Coalition <https://www.pwyp.org/pwyp_members/nigeria/>.

²⁰⁰ Yates, *supra* note 28.

standards are internal corporate codes of conduct by TNOCs.²⁰¹ Although the nation-state and its regulatory emanations –IGOs, remain the central focus of regulatory action; these sites of formal regulation couple with the sites of informal regulation by non-state actors and self-regulating MNEs to form a pluralistic regulatory environment.²⁰²

TNOCs have been developing and updating internal corporate codes of conduct to guide employees, officers, and directors when they engage in business on behalf of their companies. Generally, corporate codes of conduct are in-house compliance tools and programs used by companies to ensure that they are not on the wrong side of relevant regulatory instruments when carrying out their businesses. They are voluntary commitments by companies to abide by a set of principles governing their conduct toward employees, suppliers, communities, and the environment.²⁰³ They address specific industry and global issues such as bribery and corruption, human rights, environment, child and forced labour, safety standards, and anti-trust, among others. Corporate codes of conduct are complementary to state-based, intergovernmental, and multi-stakeholder regimes. Scholars have argued that corporate codes of conduct are the most common means to express and implement social responsibility and that they must be issue-specific, strictly implemented, and monitored and combined with alternative regulatory arrangements.²⁰⁴

There are some reasons for the development of corporate codes of conduct by TNOCs. In the neo-liberal tradition, the concept of corporate self-regulation is advocated as part of the business-friendly climate as it fills the regulatory gap created by ineffective state-based regimes.²⁰⁵ Additionally, to filling the regulatory gap, TNOCs use corporate codes of conduct to hold themselves out to their investors and non-investors as responsible corporate citizens. TNOCs are seemingly

²⁰¹ There are some other private regulatory standards on anti-corruption and transparency such as the Partnering Against Corruption Initiative under the auspices of the World Economic Forum. Many TNOCs are signatories to this initiative. On the purpose of this initiative and its modus operandi, see “Partnering Against Corruption Initiative”, online: World Economic Forum <<https://www.weforum.org/communities/partnering-against-corruption-initiative/>>. <https://perma.cc/3P4W-KF3U>.

²⁰² Muchlinski, *supra* note 3 at 81.

²⁰³ Ramraj, *supra* note 164 at 584.

²⁰⁴ Ans Kolk & Rob van Tulder, “The Effectiveness of Self-Regulation: Corporate Codes of Conduct and Child Labour” (2002) 20:3 *European Management Journal* 260.

²⁰⁵ Muchlinski, *supra* note 3 at 113.

committed to fostering a culture of ethics and transparency in business that contributes to the reduction of corporate exposure to civil and criminal liabilities if a company is charged for corruption offence. More importantly, the increasing development of corporate codes of conduct as regulatory instruments by TNOCs complies with the provisions and guidance of some of the state-based and intergovernmental regimes that I discussed in this chapter. As I showed earlier in this chapter, the FCPA “internal controls provision” requires public companies to create and maintain a system of internal accounting controls sufficient to assure management’s control. The OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance, for example, requires companies to develop effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery.²⁰⁶

TNOCs in Nigeria such as Shell,²⁰⁷ Exxon Mobil,²⁰⁸ and Chevron²⁰⁹ have publicly accessible corporate codes of conduct applicable to their employees, directors, contractors, and consultants. Exxon Mobil’s Anti-Corruption Legal Compliance Guide states that it is the policy of Exxon Mobil Corporation that directors, officers, employees, and third parties acting on its behalf are prohibited from offering or paying, directly or indirectly, any bribe to any employee, official, or agent of any government, commercial entity, or individual in connection with the business or activities of the Corporation. Chevron’s Business Conduct and Ethics Code and its updated

²⁰⁶ OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance. Article 12(2)(f) of the UNCAC requires state parties to take measures to ensure “that private enterprises…have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures”. David Vogel notes that another factor that gave rise to the trend of private regulatory standards in the oil sector is the decades of NGO-led criticisms against oil companies with regard to their human rights and environmental. David Vogel, “The Private Regulation of Global Corporate Conduct” in Walter Mattli & Ngaire Woods, eds, *The Politics of Global Regulation* (Princeton; Oxford: Princeton University Press, 2009) 151 [Vogel, “Private Regulation”].

²⁰⁷ “Shell Code of Conduct”, (2015), online: Shell Nigeria: Our Values <<https://www.shell.com.ng/about-us/our-values.html>>. <https://perma.cc/TGQ9-8FC3>. Paragraph 3.2 of Shell’s Code of Conduct states that “everyone in Shell’s business must comply with the anti-bribery and corruption (ABC) laws of the countries where we operate, as well those that apply across borders”.

²⁰⁸ “Standards of Business Conduct”, (2017), online: ExxonMobil: Who We Are <<https://corporate.exxonmobil.com/company/who-we-are/standards-of-business-conduct>>. <https://perma.cc/HCE9-Q4Y5>. A bribe for purposes of this policy is any money, goods, services, or other thing of value offered or given with the intent to gain any improper advantage for the Corporation. No director, officer, employee, or third party should assume that the Corporation’s interest ever requires otherwise”.

²⁰⁹ Chevron Policy Affairs Government and Public, “Chevron Corporate Governance”, online: chevron.com <<http://www.chevron.com/investors/corporate-governance>>. <https://perma.cc/7W9V-SCT3>.

version prohibit bribery. This Code states that “bribery of any government official in any country is strictly against Chevron policy, even if the refusal to make such a payment would result in the company losing a business opportunity. Chevron employees and contractors are prohibited from making payments or providing anything of value directly or indirectly to government officials with the intent to improperly influence the performance of their official duties or gain any other improper advantage”.²¹⁰

Likewise, CNOOC, in its 2018 Corporate Social Responsibility Report, states that it has built a strict internal prevention and management system to address and deal with all corruption and malpractice cases accordingly.²¹¹ As I have noted earlier in this chapter, China has begun to develop Corporate Social Responsibility (CSR) standards through laws and regulations, governmental guidelines, and non-governmental standards.²¹² Some of the Chinese CSR standards cover many global social and economic issues such as bribery and corruption, human rights, the environment, and labour rights, among others. While some scholars and activists might applaud China’s adoption of CSR, others are more cynical about the effectiveness of Chinese government-led CSR initiatives in light of the business practices of some of its NOCs such as CNPC and PetroChina in Africa.²¹³ Furthermore, as Ho and others have argued, although CSR is now well-established in the Chinese legal and political system, it is not clear whether the guidelines and regulations are legally binding or exhortatory and some of the standards are temporary and in the trial stage.²¹⁴ An example of a Chinese state-issued CSR standard that is in the trial stage is the Guidelines for Compliance Management of Central State-Owned Enterprises (Trial), 2018 that I have discussed in this chapter.

²¹⁰ “Chevron Business Conduct and Ethics”, (2018), online: Chevron: Board of Directors, Governance and Ethics <<https://www.chevron.com/corporate-responsibility/our-approach/board-of-directors-governance-and-ethics>>.

²¹¹ “Environmental, Social and Governance Reports”, (2018), online: CNOOC Limited <<https://www.cnoc ltd.com/col/col7601/index.html>>. <https://perma.cc/2XRE-SGJA>. It states that CNOOC Limited focuses on anti-corruption and sets strict internal punitive mechanisms and management policies.

²¹² Lin, “Corporate Social Responsibility in China”.

²¹³ Ibid. See also Virginia Harper Ho, “Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China” (2013) 2 Vand J Transnat’l L 375 at 397.

²¹⁴ Ibid at 96.

The development of corporate codes of conduct by TNOCs shows that these non-state actors contribute to transnational regulation of business activities. In doing so, they “create their own system-specific internal proto-legal orders”.²¹⁵ Although the corporate codes of conduct are internal mechanisms, their compliance might be achieved by an internal audit or by independent third-party auditing.²¹⁶ And the results of the audits could sometimes be published as part of the company’s public disclosure practices.²¹⁷ Nigeria’s EITI chapter, for example, audits TNOCs operating in the country almost every year and publishes the reports on its website. That the corporate codes of conduct have their roots in the provisions and guidance of relevant state-based and intergovernmental regimes give them some degree of legitimacy, credibility, and acceptance. This study does not however lose sight of concerns that self-regulatory initiatives may be more prone to regulatory capture –a concept that I shall discuss later in this chapter. More importantly, the corporate codes of conduct can be more effective and command some degree of legitimacy if there is a formal independent monitoring mechanism that involves local and transnational NGOs.

There is an industry association - the Oil Producers Trade Section (OPTS), which is the umbrella association of businesses in the Nigerian oil industry who have come together in order to promote their common interests. The group membership includes both local and foreign-owned companies registered in Nigeria that hold oil concession". Beyond the fact that the OPTS provides a forum for advocacy in relation to government policies, laws and regulations that impact the Nigerian oil and gas industry, it does not play a regulatory role in the industry.

8. Evaluating the Regulatory Regimes Through the Lens of Legitimacy

In both law and political science literature, there is a question of whether regulatory regimes by non-state actors have acquired legitimacy given that unlike state-based regimes, they have no

²¹⁵ Muchlinski, *supra* note 3 at 113. See also Gunther Teubner, “Global Bukowina: Legal Pluralism in the World-Society” in Tubner Gunther, ed, *Global Law Without a State* (Rochester, NY: Brookfield: Dartmouth, 1997) 3. On three possible options open to domestic law respond to or engage with transnational private regulation, see Ramraj, *supra* note 164 at 589.

²¹⁶ Lesley K McAllister, “Harnessing Private Regulation” (2013) 3:2 *Mich J Envtl & Admin L* 291 at 308. Also cited in Ramraj, *supra* note 164 at 584.

²¹⁷ Ramraj, *supra* note 164 at 584.

public mandate and, in some cases, government is not involved in the process.²¹⁸ As Ramraj has noted, the proliferation of transnational non-state actors demands a fine-grained approach to their legitimacy as regulators.²¹⁹ These are important questions that I consider in the next part. According to Daniel Bodansky, for most international lawyers and political scientists, legitimacy is of interest primarily as a basis of compliance and effectiveness.²²⁰

The pace of globalization and the perceived inadequacy of state-based regulation has contributed to increased development of non-state regulatory regimes on various global issues such as anti-corruption, the environment, climate change, human rights, labor standards, just to mention a few. Indeed, globalization has been implicated in the transfer of decision-making authority from the state to different types of unelected and unaccountable international or transnational organizations.²²¹ This “policy void in national and transnational regulation” as Steven Bernstein and Benjamin Cashore²²² describe it has led to a fecundity of interdisciplinary scholarship with the discourse centering on legitimacy, legality, enforcement and accountability of the regimes.²²³ Over the years, international lawyers tended to focus on legality rather than legitimacy.²²⁴ And, many political scientists tended to focus on power and interests, rather than on normative factors such as legitimacy.²²⁵ But in recent times, there has been a significant shift to, and burgeoning interest

²¹⁸ Julia Black, “Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes” (2008) 2:2 *Regulation & Governance* 137–164. Steven Bernstein & Benjamin Cashore, “Can NonState Global Governance be Legitimate? An Analytical Framework” (2007) 1:4 *Regulation & Governance* 347–371. Daniel Bodansky, “Legitimacy” in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (London, England: Oxford University Press, 2008) 705. Thomas M Franck, “Legitimacy in the International System” (1988) 82 *Am J Int’l L* 705. Thomas M Franck, “Why a Quest for Legitimacy” (1987) 21 *UC Davis L Rev* 535. Peer Zumbansen, “The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of Context” (2012) 13 *German LJ* 1269–1281. Thomas M Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990). Steven Bernstein, “Legitimacy in Intergovernmental and Non-State Global Governance” (2011) 18:1 *Review of International Political Economy* 17–51.

²¹⁹ Ramraj, *supra* note 164 at 591.

²²⁰ Daniel Bodansky, “Legitimacy in International Law and International Relations” in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012) 321 at 328.

²²¹ Bodansky, *supra* note 191 at 705.

²²² Bernstein & Cashore, “Non-State Global Governance”.

²²³ See note 191 *supra*.

²²⁴ *Ibid* at 322.

²²⁵ *Ibid*.

in legitimacy.²²⁶ Legitimacy and accountability of regulatory organizations even at the state level has long been the subject of debate.²²⁷ The broad literature on legitimacy and enforcement is partly because international governance affects not only states, but also individuals and other non-state actors.²²⁸ In addition, international governance is increasingly being exercised by private and public-private institutions, as well as IGOs.²²⁹

8.1 What is Legitimacy and What are the Characteristics of a Legitimate Regime?

In both law and political science, there are different categories or nature of legitimacy such as the political legitimacy of a regulatory institution, the legitimacy of a regulatory framework, and the legitimacy of a particular law. In law, legitimacy is referred to as the justification and acceptance of the political authority of a legitimate institution to govern based on tradition, expertise, legality, or public accountability and not based on the mere exercise of power.²³⁰ According to Bodansky, legitimacy is most easily understood by contrasting it with two other bases of governance – rational persuasion and power.²³¹ In political science literature, legitimacy is the acceptance and justification of shared rule by a community.²³² International law relies on concepts such as state consent and legality for its legitimacy.²³³ Thomas Franck in his jurisprudential inquiry as to why nation-states comply with voluntary normative orders in the international system refers to legitimacy as “that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process”.²³⁴

Thus far, I have discussed some interdisciplinary views about the different categories of legitimacy and the importance of the concept. That said, the legitimacy of the regulatory institutions and

²²⁶ Ibid.

²²⁷ Black, *supra* note 191 at 141.

²²⁸ Bodansky, *supra*.

²²⁹ Ibid.

²³⁰ Bodansky, *supra*.

²³¹ Bodansky, *supra* note 191 at 707.

²³² Bodansky, *supra*.

²³³ Ibid at 703. See also Bernstein & Cashore, *supra* note 191 at 351.

²³⁴ Franck, *supra* note 191 at 706.

regulatory frameworks that are discussed in this chapter can be assessed through some key criteria. State-based regimes are legitimate if they exert obedience through either coercion, persuasion, or voluntary compliance by the citizenry. International law relies on state consent and legality for its legitimacy.²³⁵ The legitimacy of an international regime is also measured by its textual and process determinacy, symbolic validation, coherence, and adherence to a normative hierarchy.²³⁶ In addition, the source and pedigree of the law-making institution confer some degree of legitimacy on an international instrument.²³⁷ Another litmus tests for the legitimacy of a regulatory framework is whether the creation of the institution or organization that promulgated it followed the right process and the institutional source is valid.²³⁸ Furthermore, interactional legal theorists posit that a regulatory instrument is legitimate when it is produced through the participation and interaction of the state, elites, the media, NGOs, and ordinary citizens.²³⁹ The legitimacy of intergovernmental regimes and non-state regulatory regimes such as the EITI standard is gauged from an interaction of community of actors who must accept the authority of the institution with broader legitimating norms and discourses that prevail in the relevant issue area.²⁴⁰ Political economists set out some major criteria to measure a supposed legitimacy of non-state regulatory regime. Some of the benchmarks include acceptance by the party it seeks to regulate, the regulator's expertise, the relationship between that expertise and democratic accountability, and good practices with respect to standard-setting and enforcement, among others.²⁴¹ I shall briefly analyze some of these criteria in turn.

Given the adverse impact of corruption on human rights, the environment, healthcare, and social

²³⁵ Ibid at 753 & 756. According to Franck, the consent is not to the treaty or its texts but consent by a state's accession to the membership of a lawmaking organization. This is a consent that flows from the status of a state as a member of an international organization.

²³⁶ Ibid at 712.

²³⁷ Ibid at 706.

²³⁸ Franck, *supra* note 191 at 725 & 706.

²³⁹ Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge; New York: Cambridge University Press, 2010) at 53.

²⁴⁰ Bernstein, *supra*.

²⁴¹ Steven Bernstein, "When is Non-State Global Governance Really Governance" (2010) 2010:1 Utah L Rev 91 at 95-102. Also cited in Ramraj, *supra* note 164 at 591-2.

infrastructure, can it be said that state and non-state anti-corruption regimes have attained some degree of legitimacy among peoples, states, and TNOCs around the world? At the level of states, governments under the command and control approach use coercion, military might, economic, or political pressure to induce individuals, other states, business enterprises, and international organizations to comply with state-based regimes. American companies and persons, for example, submit to the jurisdiction of and comply with the decisions of the DOJ and SEC, when they are found to have violated any provision of the FCPA. The voluntary compliance can be in the form of obeying a U.S. Court order, honouring a Deferred Prosecution Agreement (DPA) with the DOJ or SEC, payment of fines, or an order to create an internal system of anti-corruption-related accounting controls. In this connection, the U.S. companies and persons, perhaps, are persuaded that a U.S. court's decision or an administrative sanction by the DOJ or SEC is legitimate based on self or corporate interest, societal interest, justice, or legality.

States comply with the resolutions or treaties of international organizations or IGOs because they consent to the legality and the existence of the institution and agree to respect their regulatory frameworks. As we saw earlier in this chapter, China has, in compliance with Articles 15 and 16 of the UNCAC, enacted laws aimed at criminalizing the bribery of national and foreign public officials. China's compliance with the UNCAC is partly because it agrees with the world body that such effort would assist in reducing the threats posed by corruption in jeopardizing sustainable development and the rule of law. Socio-legal concepts that were hitherto obscure in Chinese jurisprudence such as bribery of foreign public officials and officials of public international organizations, for example, have been incorporated in its national law.²⁴² This confers the UNCAC with some level of legitimacy in the comity of nations. Franck's criteria of textual determinacy and process determinacy²⁴³ of international law are apposite for our analysis, although the former may be elementary law. Textual determinacy means that to be legitimate, a regime must

²⁴² Criminal Law of China, *supra* note 113, Article 164. See also State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation, 2nd ed (Vienna: Austria: United Nations Office on Drugs and Crime, 2017). <https://perma.cc/98BG-78PU>.

²⁴³ Franck, *supra* note 191 at 713-6.

communicate what conduct is permitted and what conduct is out of bounds as the degree of determinacy of an international regime directly affects the degree of its perceived legitimacy.²⁴⁴ Article 1 of the OECD Anti-Bribery Convention, for example, clearly states that it is a criminal offence under the law of an OECD state “for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business”. In a similar vein, Article 15(a)&(b) of the UNCAC specifies what conduct it prohibits.²⁴⁵

The elements of good practices in standard-setting and enforcement, as well as acceptance of a regime by the party it sets to regulate as are advanced by political economists, are apt for the OECD Anti-Bribery Convention. The aptness is because the legitimacy of the intergovernmental regime has been (the OECD regime) enhanced by its capacity to evolve through some associated non-binding instruments.²⁴⁶ The associated instruments are innovative measures developed periodically by the OECD to ensure that the enforcement of the Anti-Bribery Convention at national levels continues to respond to new complexities emanating from transnational investment and foreign bribery. More importantly, all 36 OECD countries and 8 non-OECD states accepted to be bound by the anti-bribery Convention, thereby injecting the regime with legitimacy. Crucially, as we saw earlier in this chapter through data from the OECD in figure 7, the OECD Anti-Bribery Convention, has recorded significant enforcement actions against international companies and individuals. The increasing enforcement rate of the regime and obedience to its provisions by

²⁴⁴ Franck, *supra* note 191 at 713-6.

²⁴⁵ UNCAC, *supra* note 246. Art 15(a): The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; and (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

²⁴⁶ Rose, *supra* note 132 at 62,69-70. The non-binding instruments are the OECD’s Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, 26 November 2009, Doc No C(2009)159/REV1/FINAL (amended on 18 February 2010). Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions [Adopted 24 May 2009], OECD/LEGAL/0371. Good Practice Guidance on Internal Controls, *supra* note 203.

transnational companies not only strengthen its legitimacy but entrenches a good measure of an anti-corruption norm in transnational business.

After many years of debates, lobbying, and interactions by scholars, governments, journalists, CSGs, and oil and mining companies, the EITI initiative was launched in 2002.²⁴⁷ As we have seen in this chapter, the EITI standard is a hybrid and multi-stakeholder regulatory framework that promotes transparency and accountable management of revenues from the extractive industries. The global initiative is enforced in resource-rich states through the interactions, efforts, and commitments of a community of actors such as states, CSGs and TNOCs. The community of actors recognizes the issue of bribery, corruption, and opacity that are prevalent in the global extractive industry and have increasingly played active roles in the implementation of the EITI standard. The interaction of actors and the initial mutual efforts of stakeholders in developing the industry-specific anti-corruption norm confer legitimacy on the EITI.

One of the critiques of both state and non-state regulation is that although both are ideally in the public interest, yet they could be counter-productive as the regulator is potentially and unduly influenced by politics, regulated parties, and parties intended to benefit.²⁴⁸ The susceptibility of regulatory regimes to social, economic, and political influences is what is known in social science literature as regulatory capture – a concept that I hereunder discuss briefly.

8.2 Regulatory Capture in the Context of Transnational Bribery

The concept of regulatory capture as enunciated in social science literature is that over time regulators will succumb to pressure and influence from the companies they are intended to regulate in the public interest, and that inevitably regulation will protect the interests of those companies.²⁴⁹

²⁴⁷ “History of the EITI”, online: Extractive Industries Transparency Initiative <<https://eiti.org/history>>. <https://perma.cc/2HB4-VLVY>.

²⁴⁸ Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York, UNITED STATES: Oxford University Press, 1992) at 54. See also George J Stigler, “The Theory of Economic Regulation” (1971) 2:1 *The Bell Journal of Economics and Management Science* 3–21.

²⁴⁹ Barry Barton, et al, *Regulating Energy and Natural Resources* (London: Oxford University Press, 2006) at 18. For a broad definition of regulatory capture, see Daniel Carpenter & David A Moss, eds, *Preventing Regulatory Capture: Special Interest Influence and How to Limit it* (New York: Cambridge University Press, 2013) at 13.

In analyzing corruption risks related to the regulation of business operations in the extractive industries, the OECD notes that regulatory capture occurs when a regulator, created to act in the public interest, furthers the interests of groups that dominate the industry or sector it is responsible for regulating.²⁵⁰ One of the resultant effects of regulatory capture is that it could influence the regulatory design or enforcement of relevant anti-bribery laws thereby perpetuating corruption in an industry.²⁵¹

Where a regulator such as the NUPRC, DOJ, SEC, or China's Ministry of Commerce (MOFCOM) is captured by TNOCs, there could be laxity in the enforcement of existing anti-corruption laws and regulations. The weak enforcement is particularly possible where the relevant legislation gives the regulator some level of discretion in enforcing its provisions. Regulatory capture also tends to influence the substance of a regulatory framework or elements of its provision and thereby defeat the legitimacy of a state-based regime. For example, beginning in 2012, US resource extraction issuers such as ExxonMobil, Shell, Chevron, and their umbrella association – the American Petroleum Institute have resisted the enactment of section 1504 of the Dodd-Frank Act²⁵² that adds section 13(q) to the Securities and Exchange Act.²⁵³ The Dodd-Frank Disclosure Rule addresses incidences of corruption, opacity, rigging of oil license bid, missing oil revenue, and waste by foreign officials of resource-rich countries and TNOCs. I have discussed some of these issues in chapter 2 and will be discussing some others in chapter 4. The corporate resistance against the revenue transparency rule is as a result of what the US TNOCs call the inclusion of arbitrary and detailed reporting requirements and disclosures that go beyond those specified in

²⁵⁰ OECD, *Corruption in the Extractive Value Chain: Typology of Risks, Mitigation Measures and Incentives*, OECD Development Policy Tools (Paris: OECD Publishing, 2016) at 61. <https://perma.cc/6T47-GZM2>.

²⁵¹ *Ibid* at 61.

²⁵² Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 USC 2010, 1504.

²⁵³ The Exchange Act. Section 13(q) directs the SEC to issue rules requiring resource extraction issuers – a company listed on a US stock exchange that engages in the commercial development of oil, natural gas, or minerals, to include in an annual report information related to payments made to a foreign government in relation to commercial development of oil, natural gas, and minerals. It further requires the oil companies to provide, in an interactive data format, information about the type and total amount of payments made for each of their projects related to the commercial development of oil, natural gas, and minerals and the type and total amount of payments made to each government.

the Dodd-Frank Disclosure Rule”.²⁵⁴ The US resource extraction issuers argue that the proposed disclosure would expose highly sensitive and proprietary commercial information. Through a legal action by the US resource extraction issuers, the 2012 version of the rule was struck down by a US court.²⁵⁵ In 2017, the US resource extraction issuers successfully lobbied the Congress to disapprove the 2016 version of the rule proposed by the SEC.²⁵⁶ As a result of the resistance by US TNOCs, the SEC has, in December 2019, proposed changes to the Dodd-Frank Disclosure Rule that some Americans believe would enable unfettered corruption in the extractive industries.²⁵⁷ With the proposed changes, it more or less appears that extractive industry corporate actors have captured the regulator and the US lawmaking institutions thereby impugning the legitimacy of a state-based regime. Furthermore, regulatory capture could play out where the regulator performs dual roles in that it is both a regulator and an oil producing enterprise. Regulatory capture can happen with respect to Nigeria’s NNPC Limited which operates in JV and PSCs with TNOCs and at the same regulates the entry of foreign investors in the oil industry. According to the OECD, NOCs may perpetrate corruption stemming from regulatory capture because of their dual role as producer and industry regulator.²⁵⁸ International lawmaking could be a victim of some degree of regulatory capture. Regulatory capture in international lawmaking can happen when TNOCs convince their home states to enact a non-binding provision in an anti-corruption treaty. The soft law nature of private sector bribery and Article 35 of the UNCAC is due in part to opposition by the US business community through their government who feared that making private sector corruption binding will open a floodgate of litigation against U.S. companies operating abroad.²⁵⁹

²⁵⁴ Specialized Disclosures, Title XV Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Comments, Comments received after the February 14, 2017 joint resolution of disapproval enacted pursuant to the Congressional Review Act Comments (Washington DC: Securities and Exchange Commission, 2019). <https://perma.cc/MD8G-HBWR>.

²⁵⁵ American Petroleum Institute, et al v Securities & Exchange Commission, Oxfam America, Inc, [2013] 953 F Supp 2d 5 [API, et al v SEC, & Oxfam].

²⁵⁶ Statement at Open Meeting on Resource Extraction, by Elad L Roisman (Securities and Exchange Commission, 2019). <https://perma.cc/AT6A-W4SK>.

²⁵⁷ Comments of D. Moore on Proposed Rule: Disclosure of Payments by Resource Extraction Issuer (Washington DC, 2020). <https://perma.cc/F5NK-5WTN>.

²⁵⁸ Ibid at 63.

²⁵⁹ Ferguson, *supra* note 66 at 95. See also Webb, *supra* note 259 at 214.. Article 35 provides that “Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate

Hybrid or multi-stakeholder regulatory frameworks such as the EITI standard are not immune to regulatory capture. The plausibility of this theory lies in the governance structure of the EITI that is not completely at arm's-length from implementing governments. Generally, the funding for the implementation of the EITI initiative, for instance, is the responsibility of adhering states.²⁶⁰ Although in some countries, financial support is provided by international development agencies, national EITI secretariats including the salaries of staff are funded and paid by implementing governments.²⁶¹ As we saw earlier in this chapter, the governing body of the EITI chapter in Nigeria is the NSWG and it is appointed and paid by the Nigerian government.²⁶² However, the membership of the NSWG comprises representatives from different interest groups and civil society organizations. Furthermore, the final implementation of the EITI standard is not completely disembedded from state institutions. The audit reports of oil revenue carried out by the Nigerian chapter of the EITI are submitted to the federal legislature and the presidency who presumably determine what to do with the reports.²⁶³ The governance structure and funding of the EITI and the associated political and power dynamics have the tendency to undermine the legitimacy of hybrid or multi-stakeholder regimes.

Conclusion

In this chapter, I have described state-based regulatory regimes on anti-corruption applicable to TNOCs in three jurisdictions, namely, Nigeria, the U.S., and China. I discussed anti-corruption instruments and codes of conduct by non-state actors and hybrid organizations such as the UN, OECD, EITI, and TNOCs. One of the points that emerges from the regulatory regimes that

legal proceedings against those responsible for that damage in order to obtain compensation”.

²⁶⁰ “Funding”, online: Extractive Industries Transparency Initiative <<https://eiti.org/funding>>. <https://perma.cc/G9YC-3RYL>.

²⁶¹ Ibid. See also NEITI Act, *supra* note 180, s.13(1-3).

²⁶² NEITI Act, *supra* note 180, s.13(1-3).

²⁶³ Section 4(7) of the NEITI Act is the enabling law of the EITI in Nigeria and requires the Auditor-General to “publish any comment made or action taken by the government on the audit reports”. There is no known action taken or comment provided by the government on any EITI audit in Nigeria. In a 2019 visit to Nigeria’s Auditor-General, the EITI reminded the presidency on the need to review the annual audit reports sent to it and give feedback for a more robust alliance between both establishments. See for example, “FGIP: OAUFG Collaborates with NEITI”, (16 August 2019), online: OAUFG <<https://oaufg.ng/news1/305-fgip-oaufg-collaborates-with-neiti>>. <https://perma.cc/7WJ5-56AS>.

are discussed is that in a growing pluralistic regulatory landscape, both state and non-state actors are increasingly setting standards of business conduct on anti-corruption. Given the rate of implementation that we have seen, these regulatory instruments are having positive effects in transnational petroleum business. Whereas the state and its laws largely remain the “relational constant”²⁶⁴ especially in the enforcement of both the state and non-state regimes, non-state actors are nevertheless actively playing complementary roles in regulating bribery and corruption in the global oil industry. I also moved from describing to evaluating the efficacy and legitimacy of both state and non-state anti-corruption regimes. It is clear that the transparent and inclusive lawmaking process, textual certainty, standard-setting and enforcement mechanisms of the non-state instruments²⁶⁵ have imbued them with a significant measure of legitimacy. Although it is important to be alert to the dangers of regulatory capture that erode a claim to the legitimacy and effectiveness of both state and non-state regulatory instruments, the discussion in this chapter has shown that based on the criteria highlighted in the literature on legitimacy, non-state and multi-stakeholder anticorruption regimes have a stronger claim to legitimacy than state-based regulatory regimes. To reiterate, the creation of non-state and multi-stakeholder regimes through the interaction and inputs of community of actors such as the state, NGOs, and ordinary citizens, who accept the regulatory instrument as a standard principle of normative conduct in business gives these types of regimes a stronger claim to legitimacy than purely state-based regimes. To buttress this point, the joint creation and interactive nature of implementing the EITI regime by governments, civil society, and industry groups as well as its voluntary acceptance in the extractive industries as a tool for promoting resource revenue transparency are testaments to its legitimacy and enforcement potentials. Thus, the blending of both varieties of regulatory frameworks in the fight against bribery and corruption in the oil industry has the potential to yield a stronger enforcement result.

The question, however, is whether a combination of regulatory regimes would be sufficient to

²⁶⁴ Spiro, *supra* note 13.

²⁶⁵ In this dissertation, non-state instruments are principles and codes of conduct developed by non-state actors such as Business Principles for Countering Bribery and Partnering Against Corruption Initiative.

address the specific challenges arising from the Sino-Nigeria investment arrangements. The next chapter answers this question by analyzing the business operations of Chinese NOCs and US TNOCs in Nigeria, the regulatory challenges arising from the two dissimilar oil investors and how to effectively regulate their operations to prevent bribery. In doing these, I will situate their business operations and regulatory challenges within the contexts of Sino-Nigeria oil-for-infrastructure deals; the alleged tendency of the deals to undermine global efforts to address corruption; and its displacement of the conventional method of gaining access to oil blocks in Nigeria.

Chapter 4: China's Oil Investment in Nigeria and the Regulatory Challenge of Bribery of Host Government Officials

Introduction

Given the burgeoning trade and investment relations between China and Nigeria, and the importance of addressing corruption and other regulatory challenges, will a combination of regulatory regimes be sufficient to address specific challenges arising from the Sino-Nigeria investment arrangements? This chapter begins to answer this question by providing an overview of China's oil and non-oil investments in Nigeria, focusing on outlining and analyzing the Sino-Nigeria OFI pacts and the regulatory issues arising from the OFI arrangements. My particular interest is the alleged opacity of the deals and the absence of a level-playing field. This overview will show that the entry of China into Nigeria's oil industry is a result of a huge infrastructure deficit in the country and it is consistent with China's "Going Out" strategy and petroleum policy on overseas investment. Based on the key issues that emerge from this discussion, I then turn –in the next chapter –to map out the theoretical frameworks that provide the analytical foundation for my dissertation.

Under the Sino-Nigeria OFI deals, China deploys its enterprises and agencies such as its national oil companies and financial institutions as well as a Chinese state-led regional multilateralism to consolidate its investment in Nigeria. Indeed, as will be shown, state institutions play a critical role in the actualization of Beijing's trade activities. And, as we will also see, bribery and corruption of Nigerian government officials in the transnational oil business take variegated and complex methods. It is even more complex when some of the channels involve host and

home state government officials. It may be pertinent to state from the outset that this chapter moves beyond positions for or against Sino-Nigeria trade and investment relations. After all, as Deborah Brautigam puts it, “the developmental impact of Chinese economic cooperation will almost certainly vary country by country and sector by sector. The deciding factor in each case is likely not to be China, but individual African countries and their governments”.¹ In addition, many aspects of the issues that I discuss here are moot points. The opacity of the Sino-Nigeria OFI deals as well as the concomitant loan agreements, for example, continue to be the subject of debate and scrutiny by Nigeria’s federal legislature.² Whereas this chapter and my dissertation are concerned with the unique challenges of Sino-Nigeria OFI arrangements and how to regulate the complex nature of the investment, my discussions of Sino-Nigeria investment cooperation and Chinese loans illuminate the OFI arrangements. To understand the critical step of gaining access to oilfields by investors, I turn first to the petroleum concession and licensing process in Nigeria.

1. Oil Concession and Licensing Process in Nigeria

In chapter 2, I outlined various contractual models that are used in the oil business in Nigeria such as the JV and PSC. Here I take a closer look at the oil concession and licensing process in Nigeria. The oil concession process, which is a prerequisite to the entry and business operations of a foreign investor, is a very crucial contractual stage in the petroleum industry and investment. It is crucial in that it is through the concession agreement that the investor acquires rights, interests, duties, and obligations in an oil mining field. An oil concession agreement, in its traditional sense, is a legal arrangement that grants an oil company or a consortium of oil companies the right to explore and produce hydrocarbons in a specified block or license area for a specific time.³ The concession

¹ Deborah Brautigam, *The Dragon’s Gift: the Real Story of China in Africa* (Oxford: Oxford University Press, 2009) at 21.

² “Stakeholders Demand Terms for \$47b Chinese Loan, Projects Execution”, *The Guardian*, Nigeria (3 March 2020), online: <<https://guardian.ng/news/stakeholders-demand-terms-for-47b-chinese-loan-projects-execution/>>. <https://perma.cc/S8RD-SEBJ>.

³ *Petroleum Exploration and Production Rights: Allocation Strategies and Design Issues*, by Silvana Tordo, David Johnston & Daniel Johnston, 51840 (The World Bank, 2010), Working Paper No 179 at 9.

is said to be the first system used in world petroleum arrangements and has been traced to silver mining operations in Greece in 480 B.C.⁴ The earliest forms of concessions granted broad and lopsided rights to extractive companies and contemplated a passive role for the host state that was confined to receiving royalties for the oil that was exported.⁵ Consequently, in Africa and some of the Arab states, the foremost oil concession system did not survive beyond the second half of the 20th century⁶. The decolonization movements across Africa and in some parts of the Persian Gulf, the demand by Third World countries for PSNR, and the creation of OPEC in 1961, among others, cumulatively unleashed waves of fundamental changes both in the traditional concession system and in the international oil investment agreements at large. The traditional concession system has given way to modern concessions that are seemingly equitable and mutually beneficial both to the host state and the foreign investor.⁷ The Nigerian government uses the modern concession system (which, as I noted in chapter 2, is structured as JVs and PSCs) and is initiated through a bidding process.

I have just highlighted the condition precedent for an investor to acquire oil drilling rights in Nigeria. However, there are socio-legal principles governing a procurement process in the national and international systems. In the next section, I discuss those principles, the bid process in the oil industry, and the typologies of modern concessions that are used in Nigeria.

⁴ Fiscal System Analysis: Concessionary and Contractual Systems Used in Offshore Petroleum Arrangements., by Mark J Kaiser & Allan G Pulsipher, 2004–016 (New Orleans, Louisiana: Coastal Marine Institute) at 5.

⁵ M Sornarajah, *The International Law on Foreign Investment*, 4th ed (Cambridge, United Kingdom: Cambridge University Press, 2017) at 92-3, 144. See also Damilola S Olawuyi, *Extractives Industry Law in Africa*, 1st ed (Cham, Switzerland: Springer International, 2018) at 200. In Nigeria, for example, the oil concession granted to Royal Dutch Shell by the colonial government covered the entire mainland of Nigeria which comprised 357,000 square miles. See Ludwig Schätzl, *Petroleum in Nigeria* (Ibadan, Nigeria: Oxford University Press, 1969) at 1-4.

⁶ Olawuyi, *supra* note 5 at 202.

⁷ There are some differences between the traditional concession and modern concession systems. Unlike the traditional concession, oil companies now have more fiscal obligations toward their host states. The scope of grant in the modern concession is narrowly defined to include either crude oil, natural gas, or minerals. The geographical area that the concession covers is now comparatively larger. *Ibid.* In Nigeria, for example, the fiscal obligations of oil companies toward the host government have been expanded to include concession rentals, royalties, signature bonus, Niger Delta Development Commission Levy, higher tax rates, production bonus, Nigerian Content Development Levy, among others. See *Oil and Gas Industry Audit Report - Full Report, Audit, Audit* (Abuja, Nigeria: Nigerian Extractive Industries Transparency Initiative, 2014) at 17-18. <https://perma.cc/7CQS-W3NY>.

1.1 Principles of Public Procurement

In common law, there are established and universally accepted socio-legal principles that govern procurement regulation such as transparency, equality of treatment, non-discrimination, contestability, efficiency, and value for money.⁸ To keep the discussion focused, I will briefly examine the principles of transparency, equality of treatment, and non-discrimination and how they have been applied in the regulation of public procurement in Nigeria.

The principle of transparency is used by the government to guarantee knowledge of the facts of a bidding round and to ensure verification and administrative control.⁹ It requires that contracts or concessions are publicized and that the parameters of a bid are clearly defined.¹⁰ Transparency is further included in the selection and award process so that the criteria applied are known to all participants in advance and objectively verifiable.¹¹ The application of transparency in a procurement process is important as it ensures the availability of bid records and the announcement and explanation of results.¹² A vigorous application of transparency by the government through its procurement agent would go a long way in leveling the field, and will also strengthen procurement regulation and ultimately lends credibility to the process.

The principle of equality of treatment connotes that all tenders must be treated equally regardless of their nationality.¹³ It implies that any condition of eligibility based on nationality or local provenance will automatically give rise to unequal treatment as it discriminates against a certain class of tenderer or favours another.¹⁴ The principle of equality also ensures that winners in a competitive bid are selected based on the stated criteria without any effort at obtaining a better

⁸ Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (London, United Kingdom: Oxford University Press, 2004) at 3.

⁹ *Ibid* at 5.

¹⁰ *Ibid* at 93-4.

¹¹ *Ibid*.

¹² *Ibid*

¹³ *Ibid* at 177.

¹⁴ *Ibid*.

price or some other form of favour.¹⁵ Further, the application of the principle ensures that no bidder is permitted to change the substance or price of his/her bid unless it is for clarification or correction.¹⁶ Equality of treatment in a procurement process inspires confidence in the bidders as they are persuaded to offer realistic prices and that that would increase their chances of success in the exercise.¹⁷

In the international system for procurement regulation, one of the central and important governing principles is the most-favoured-nation (MFN) treatment –also known as the non-discrimination rule.¹⁸ Article 1 of the General Agreement on Tariffs and Trade (GATT) requires that if a signatory to the WTO grants to another country more favourable treatment, such as a reduction in the customs duty payable on imports of a particular item, it must immediately and unconditionally extend the same treatment to imports from all signatories.¹⁹ All WTO member states are entitled to receive the most favourable treatment given by any member and not to be discriminated against.²⁰ Several derogations are permitted where they are necessary to advance and protect the legitimate interests of the state. The grounds of derogation include, but are not limited to, public morality, public policy or public security, and the protection of industrial or commercial property, or any ground of general interest.²¹ It, therefore, seems plausible that a state can derogate from the MFN treatment principle on the ground of a critical national need for infrastructure development “subject to the condition that the derogation does not constitute a means of arbitrary

¹⁵ Ibid.

¹⁶ Ibid at 273.

¹⁷ Ibid.

¹⁸ Ibid at 178.

¹⁹ WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 154, 33 ILM 1144 1994[hereinafter Marrakesh Agreement or WTO Agreement]. Article 4 of the Agreement Establishing the African Free Trade Area and Its Protocol on Trade in Goods, of which Nigeria is a party, provides that state parties shall accord MFN treatment to one another. However, it goes ahead to provide that “nothing in this Protocol shall prevent a State Party from concluding or maintaining preferential trade arrangements with Third Parties, provided that such trade arrangements do not impede or frustrate the objectives of this Protocol, and that any advantage, concession or privilege granted to a Third Party under such arrangements is extended to other State Parties on a reciprocal basis”. See Agreement Establishing the African Continental Free Trade Agreement, 2018, (entered into force 30 May 2019), [hereinafter AfCFTA]. The MFN principle applies only to import and export activities and does not apply to the purchase or lease of a good or an asset in-country.

²⁰ Trepte, *supra*.

²¹ Ibid at 180.

or unjustifiable discrimination against some countries, or a disguised restriction on transnational trade.”²²

1.2 The Bid Process in Nigeria’s Oil Industry

Having discussed the principles governing the regulation of procurement in common law, I now examine the bid process in the oil industry, the winner’s curse theory, and the typologies of modern concessions. Public procurement in Nigeria is governed by the Public Procurement Act, 2007.²³ The Procurement Act applies to all procurement of goods, works, and services carried out by the federal government and all procurement entities.²⁴ The Procurement Act essentially contains all the principles that I discussed in the previous section such as transparency, competition, efficiency, etc. Generally, there are two ways of obtaining oil drilling rights: through bilateral or direct negotiation and competitive bidding.²⁵ The prevailing method in Nigeria is the competitive bid process.²⁶ For an investor to win an open competitive bid, its bid must be the lowest evaluated responsive tender to the bid solicitation.²⁷ As I depict in figure 9 below, under the competitive bidding process, a typical oil bidding round is advertised by the Commission in a national newspaper as well as on the website of the regulatory institution, and companies are invited to apply.²⁸ The criteria for pre-qualification and deadlines are outlined by the regulator.²⁹ In practice, oil companies compete against one another by submitting their applications with their best profiles, seismic, and drilling capabilities to win the contract. Figure 9 shows how the concession process that begins with an advertisement of the bidding round culminates in the announcement of bid winners for oil blocks. There is unanimity in the literature that the

²² Ibid at 181.

²³ Public Procurement Act, No14, Laws of the Federation of Nigeria, (LFN) 2007[hereinafter Procurement Act].

²⁴ Ibid, s.15.

²⁵ Olawuyi, *supra*. See also Corruption in the Extractive Value Chain: Typology of Risks, Mitigation Measures and Incentives, OECD Development Policy Tools (Paris: OECD Publishing, 2016) at 38.

²⁶ Public Procurement Act, *supra* note 21, s.24.

²⁷ Ibid, s.33(1). However, the Procurement Act further provides that the selected bidder needs not to be the lowest cost bidder provided the procuring entity can show good grounds derived from the provisions of the Act.

²⁸ Petroleum Industry Act, 2021, section 74(5)

²⁹ Ibid at 202-3.

advertisement of the competitive bidding process fosters greater transparency and decreases risks of corruption in the award of an oil concession.³⁰ However, as I will show later in this chapter, some oil concession bids in Nigeria show that the concepts of transparency and a level playing field that are international best practices are, sometimes, absent in the process.³¹ More specifically, there are concerns that Chinese NOCs use their connections with their home state to outbid other oil companies in the acquisition of oil concessions in Nigeria. I address this claim and related ones later in this chapter.

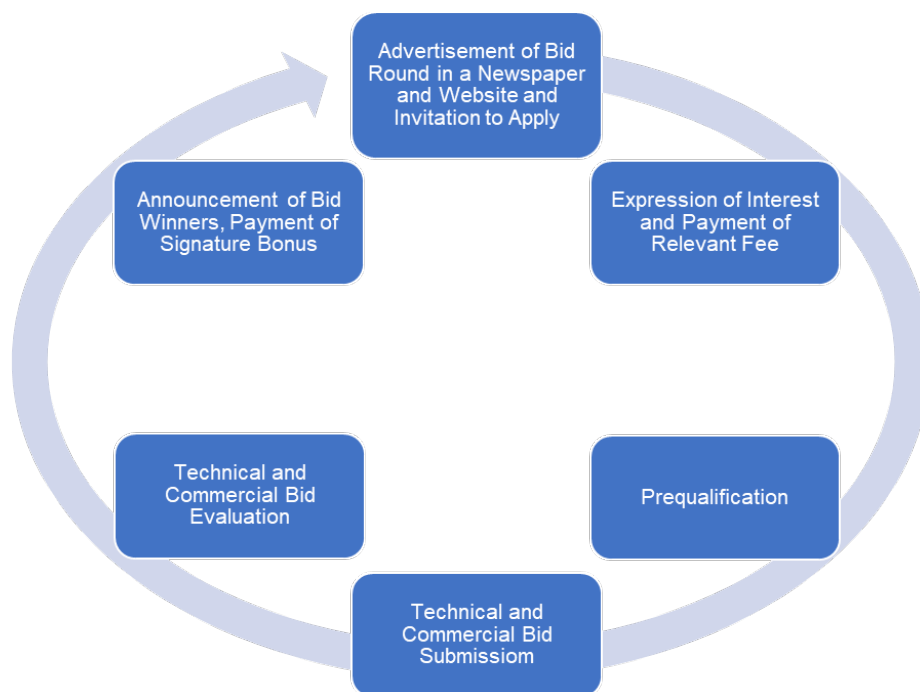


Figure 8: Steps and Processes in Granting Oil Concession Rights in Nigeria

Source: Adapted from EITI Nigeria, 2020

³⁰ Ibid at 202. Supra note 8 at 50. Open Contracting for Oil, Gas and Mineral Rights: Shining a Light on Good Practice (Natural Resource Governance Institute, 2018). <https://perma.cc/U4LT-LQ5X>. Tordo, Johnston & Johnston, supra note 1 at 16.

³¹ Thielman, supra. <https://perma.cc/6QRC-M62Y>. "Probe Into Murky ExxonMobil Deal Shows Why Strong U.S. Transparency Rules are Needed for Oil Companies", (24 June 2016), online: Global Witness <<https://www.globalwitness.org/en/press-releases/probe-murky-exxonmobil-deal-shows-why-strong-us-transparency-rules-are-needed-oil-companies/>> [Probe Into Murky ExxonMobil Deal]. <https://perma.cc/Q7CN-HY8G>.

1.3 The Winner's Curse Theory and Interest Group Capture in Oil Industry Procurement

Scholars and procurement regulation experts have propounded the winner's curse theory in the oil industry bidding process. This propoundment is against a backdrop of a chain of problems identified in bidding for offshore oil licenses and the uncertainties of information available to the bidding oil companies.³² The problem arose because the winners sometimes did not know the true value of the oilfield they were bidding for and, to win the bid, had to rely on estimations.³³ The resultant consequence is that some bidders will overestimate the value of the oil block and offer too much price.³⁴ The winner will generally be the company prepared to pay the highest price and is probably the one who overestimated the value the most, which leads to adverse selection. The winner's curse theory is that he pays too much for an oilfield which results in higher bid prices where there is increased competition.³⁵ In the extractive industries, SOEs typically acquire and pay more for resources.³⁶ SOEs frequently pay more because of high competition for natural resources and the related fact that their owners (e.g., China) are intent on securing petroleum resources from foreign countries for their domestic use.

Public procurement regulation is not immune to corporate or interest group capture. There are three main actors in the public procurement process –the government, the procurement agent (usually a government agency or ministry), and the bidder.³⁷ The government is susceptible to corporate capture because corporate interests do not always align with societal interest.³⁸ There is a perceptible effect of capture on the government procurement agencies such as the Nigerian Upstream Petroleum Regulatory Commission or the NNPC Limited. The perceptible effect is

³² Trepte, *supra* note 6 at 90.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ A Erin Bass & Subrata Chakrabarty, "Resource Security: Competition for Global Resources, Strategic Intent, and Governments as Owners" (2014) 45:8 *J Int Bus Stud* 961.

³⁷ *Ibid* at 4.

³⁸ *Ibid* at 120.

because there is an informational asymmetry between the three actors in public procurement with an implication that the agent has the benefit of information regarding the market or industry, the price of goods, and the bidders, among others.³⁹ The procurement agent can manipulate the information to affect the result of a bid, cover-up bribery or conflicts of interest, and ultimately favour certain interest groups, companies, or bidders over others.⁴⁰ Following an allegation of bid-rigging leveled against ExxonMobil Nigeria by an anti-corruption NGO in 2015,⁴¹ the EFCC investigated the US energy giant for beating out CNOOC over a lucrative oilfield despite underbidding the Chinese NOC by US\$2.25 million.⁴²

1.4 Typologies of Modern Concession in Nigeria

As I have noted in chapter 2, the current regulatory and governance framework for the oil concession and licensing process in Nigeria is the PIA. The PIA empowers the MPR to grant three classes of licenses and leases, namely, petroleum exploration license (PEL), PPL, and PML.⁴³ A PEL is an authorization for a company to explore petroleum in the area of the license. The objective of granting a PEL is to encourage petroleum exploration in areas with unknown hydrocarbon potentials and unexplored frontier basins.⁴⁴ Under the PIA, a PEL gives an oil company exploratory rights on a non-exclusive basis for a renewable 3-year term provided the company has satisfied the conditions of the license and the minister is satisfied with the work done.⁴⁵

A PPL gives the holder an exclusive right to drill oil wells and a non-exclusive right to carry out petroleum exploration operations within the area of its license.⁴⁶ A company that is granted a PPL may carry away and dispose of crude oil or natural gas extracted from oil wells subject to the

³⁹ Ibid.

⁴⁰ Ibid at 83.

⁴¹ "CSNAC Petitions EFCC Over Fraudulent Renewal of Oil Mining Leases", (20 July 2015), online: <https://csnacng.org/csnac-petitions-efcc-over-fraudulent-renewal-of-oil-mining-leases/>.
<https://perma.cc/PF3P-3E52>.

⁴² Thielman, *supra*.

⁴³ Petroleum Industry Act, *supra* note 28, section 70(1)(a)-(c).

⁴⁴ Olawuyi, *supra* note 3 at 177.

⁴⁵ Petroleum Industry Act, *supra* note 28, section 70(3)

⁴⁶ Ibid.

conditions imposed by the minister.⁴⁷ The company carries out seismic activities to determine the quantity and commercial value of hydrocarbon deposits in the license area. A PPL gives an oil company a non-exclusive right to carry out petroleum exploration for a maximum of 6 years for onshore and shallow water acreages and 10 years for deep offshore and frontier acreages.⁴⁸

With the enactment of the PIA, which I discussed in chapter 2, a PML is the highest class of concession right for the commercial development of hydrocarbons in Nigeria. A PML is granted to a company that holds a PPL, whose prospecting activities were satisfactorily successful, and has discovered oil in commercial quantities.⁴⁹ A company that has been granted a PML has relatively broader and exclusive rights within the leased area to treat as it chooses, petroleum resources discovered in the leased area, including but not limited to storing, transporting, or exporting the product. The term of a PML is a maximum of 20 years.⁵⁰ The details of the licenses such as financing of the oil field, cost-sharing, and sharing quota on oil produced are captured under various contractual agreements such as JV and PSC, which I have discussed in chapter 2.⁵¹ Any OPL or oil mining lease granted under the repealed Petroleum Act, 1969 that is subsisting as of the commencement of the PIA will continue to be in effect. The holders of the oil rights may decide to convert their licences to PPL or PML.

2. China's Investment in Nigeria: The Genesis and Policy Framework

To this point, I have outlined the processes and principles that govern petroleum concession and licensing in Nigeria as well as the rights and duties that confer on an investor. Given that this chapter focuses on China's oil and infrastructure investment in Nigeria, I consider in this section the historical origin of the investment relations. Similar to other African countries, China's

⁴⁷ Petroleum Industry Act, *supra* note 28, section 70(1)(a)-(b).

⁴⁸ Petroleum Industry Act, *supra* note 28, section 70(1)-(2).

⁴⁹ *Ibid*, 1st Schedule, para 8. Oil shall be deemed to have been discovered in commercial quantities by the holder of an OPL if the Minister, upon the evidence adduced by the licensee, is satisfied that the licensee is capable of producing at least 10,000 barrels per day of crude oil from the licensed area.

⁵⁰ Petroleum Industry Act, *supra* note 28, section 88(1).

⁵¹ See also section 85(2) and (3), *Ibid*.

investment relations with Nigeria are not a recent development. The history of China's investment in Nigeria, albeit, in the non-oil sector, dates to the early 1960s when Chinese of Hong Kong and Taiwanese extraction established manufacturing and production companies in Lagos and Kano.⁵² There are two pioneer and existing Chinese companies that are notable in this regard. According to the Nigerian Investment Promotion Commission, Lee Group of Companies, which produces footwear, plastics, steel, sugar, and ceramics established Nigeria's operations in 1962.⁵³ Western Metal Products Company (WEMPCO), owned by the Tung family, carries its businesses in the areas of ceramics, construction materials, and hospitality.⁵⁴ However, contemporary Chinese investment in Nigeria is markedly different in nature, scale, characteristics, and approach. There has also been a total metamorphosis in terms of the actors, institutional and policy frameworks, as well as governing regimes.

2.1 China's "Going Out" Strategy

China's "Going Out" strategy and petroleum policy on overseas investment that will be discussed in this section are policy frameworks that shape Chinese oil investment in Nigeria and the blueprints fit into Beijing's OFI arrangements with Abuja. The discussion on China's "Going Out" strategy and petroleum policy are not, strictly speaking, the focus of this chapter but they have an important bearing on the issues that animate it. Following approximately a decade of domestic economic reforms in China, in 1999, the Central Committee of the Communist Party of China (CPC) proposed the implementation of the "Going Out" strategy.⁵⁵ The "Going Out" strategy is a plan of action by Beijing for entering and navigating the mainstream global trade and invest-

⁵² Omolade Adunbi & Howard Stein, "Political Economy of China's Investment in Nigeria: Prometheus or Leviathan?" in Arkebe Oqubay & Yifu Justin Lin, eds, *China-Africa and an Economic Transformation*, 1st ed (Oxford: Oxford University Press, 2019) 192 at 194. See also John Campbell & Mathew T Page, *Nigeria: What Everyone Needs to Know* (New York: Oxford University Press, 2018) at 150.

⁵³ "Lee Group of Companies Partner Jigawa State to Establish 120,000Mt Sugar Company", (4 May 2017), online: Nigerian Investment Promotion Commission <<https://nipc.gov.ng/2017/05/04/lee-group-companies-establishes-120000mt-sugar-coy-jigawa/>>. <https://perma.cc/35XB-D85W>. It now has over 40 companies across Nigeria.

⁵⁴ Adunbi & Stein, *supra* note 27.

⁵⁵ "Better Implementation of the 'Go Global' Strategy", (15 March 2006), online: The Central People's Government of the People's Republic of China <http://www.gov.cn/node_11140/2006-03/15/content_227686.htm>. <https://perma.cc/T28R-UHUM>.

ment landscape through its SOEs. China, once an outsider, has now become a norm shaper. The fundamental objectives of the “Going Out” strategy are to expand the space for China’s economic development, promote common development, supplement the resources that the Asian country needs, drive the export of goods and services, cultivate the country’s multinational companies and well-known brands, promote the employment of host countries’ citizens, and ease investment and trade frictions.⁵⁶ The “Going Out” investment strategy that was largely necessitated by the exigencies of China’s domestic political economy of oil⁵⁷ and seen in some quarters as a departure from the Mao-era’s tenet of self-reliance⁵⁸ encourages SOEs, which includes NOCs, to invest overseas. In the 1990s, China experienced a steady decline in domestic oil production and refining capacities.⁵⁹ China’s three main oil-producing zones—Daqing, Shengli, and Liaohe, situated in the northern and north-eastern parts of the country were nearing depletion.⁶⁰ In western China, oil fields in Xinjiang basins had a complex geological structure that required sophisticated oil extracting technology.⁶¹ In addition, the legitimacy of the Communist regime was seen as contingent on the country’s access to reliable and sufficient foreign oil.⁶² An examination of all the objectives of the “Going Out” strategy is beyond the scope of this dissertation. However, access to petroleum resources, concerning Nigeria, and the promotion of common development, which ostensibly sums up China’s philosophy on outbound foreign investment, will be discussed later in this chapter. As it will become clear shortly, the adoption and implementation of the “Going Out” strategy are catalyzing a paradigm shift in global oil trade and investment patterns

⁵⁶ Ibid.

⁵⁷ Hongying Wang, “A Deeper Look at China’s ‘Going Out’ Policy”, (8 March 2016), online: <<https://www.cigionline.org/publications/deeper-look-chinas-going-out-policy>>. <https://perma.cc/JLR3-JK27>.

⁵⁸ “China Going Global: Between Ambition and Capacity”, (10 April 2017), online: China Policy <<https://policycn.com/cp-public/>>.

⁵⁹ “China Accelerates Shift in Energy Policy, Restructuring of State Petroleum Firms” *The Oil and Gas Journal* (10 January 2000) 14. Philip Andrews-Speed, Stephen Dow & Zhiguo Gao, “The Ongoing Reforms to China’s Government and State Sector: The Case of the Energy Industry” (2000) 9:23 *Journal of Contemporary China* 5.

⁶⁰ Sergei Trough, “China’s Changing Oil Strategy and Its Foreign Policy Implications”, (1 September 1999), online: The Brookings Institution <<https://www.brookings.edu/articles/chinas-changing-oil-strategy-and-its-foreign-policy-implications/>>. <https://perma.cc/D9H3-DSHZ>.

⁶¹ Ibid.

⁶² Bo Kong, *China’s International Petroleum Policy*, Energy and Security Series (Santa Barbara, California: ABC-CLIO, 2009).

that some scholars believe undermines the global efforts to address bribery and corruption.

2.2 China's Investment Principles and Philosophy in Nigeria

From the cradle of its nationhood, China's international trade and economic principles and philosophy have remained the same –the principle of equality and mutual benefit, commonly known as “win-win”. Beginning in 1955, China has continuously stressed that international trade and economic relations should not take a dominance-dependence structure.⁶³ China's opposition to the imposition of political conditions to economic assistance has been a necessary ideology embedded in its nationhood. In his speech at the Bandung Conference,⁶⁴ Zhou Enlai, the Chinese first Premier and Head of its Delegation to the conference, stated that “the cooperation among us the Asian-African countries should be based on equality and mutual benefit, with no conditions for privilege attached”.⁶⁵ That the economic policy of equality and mutual benefit undergirds Chinese international trade and investment relations has at least two telling indicators. First, China's investment principles and philosophy were not recently developed as convenient tools to exploit natural resources in Africa. As Brautigam has empirically established, China is undoubtedly interested in gaining access to Africa's natural resources but there is little evidence that economic aid is offered exclusively, or even primarily, for that purpose.⁶⁶ Brautigam notes that the primary purposes of Chinese economic aid are strategic diplomacy, commercial benefit, and society's ideologies and values.⁶⁷ Second, Sino-Nigeria trade and investment relations may not have been designed to exacerbate bribery and corruption in the continent. This position is rein-

⁶³ Chen Yifeng, “Bandung, China, and the Making of World Order in East Asia” in Luis Eslava, Michael Fakhri & Vasuki Nesiiah, eds, *Bandung, Global History, and International Law: Critical Past and Pending Future* (Cambridge: Cambridge University Press, 2017) 177 at 182.

⁶⁴ The Bandung Conference was used by the then emerging Asian and African states to resist hegemonic international law and advocate for a global order that is responsive to the needs and aspirations of Third World peoples. One of the objectives of the Bandung Conference was to consider problems of mutual and special interest to Asian and African peoples such as national sovereignty, racism, and colonialism. See A Appadorai, “The Bandung Conference” (1955) 11:3 *India Quarterly* 207 at 209.

⁶⁵ Main Speech by Premier Chou En-lai, Head of the Delegation of the People's Republic of China, Distributed at the Plenary Session of the Asian-African Conference (April 19, 1955) at 17, cited in Chen Yifeng, “Bandung, China, and the Making of World Order in East Asia” in Luis Eslava, Michael Fakhri & Vasuki Nesiiah, eds, *Bandung, Global History, and International Law: Critical Past and Pending Future* (Cambridge: Cambridge University Press, 2017) 177 at 185.

⁶⁶ Brautigam, *supra* note 1 at 21.

⁶⁷ *Ibid* at 15.

forced by the fact that China has begun to incorporate some normative standards of transparency and accountability into its oil-backed loans to Nigeria. Furthermore, as discussed below, Chinese NOCs are now adhering to the EITI regulatory requirements on payments to foreign governments and beneficial ownership.

2.3 China's Petroleum Policy on Overseas Investment

China's petroleum policy was formulated at the backdrop of some pivotal moments in the history of international trade and the global oil industry. In addition to the shortage of domestic energy supply in China, there was a wave of mergers and acquisitions in the global petroleum industry in the late 1990s amongst Western oil majors that undoubtedly would give them a competitive advantage in the international market.⁶⁸ The acquisition of Mobil by Exxon in 1998⁶⁹ and the merger of Chevron with Texaco in 2000⁷⁰ are notable cases. The corporate alliance between Mobil and Exxon, for example, led to a significant expansion of its business operations in Nigeria with an increased number of oil blocks in the deepwater areas compared to the number that was operated by Mobil Producing Nigeria Unlimited before the merger.⁷¹ Crucially, between 1999 and 2001, China stood at historic crossroads regarding access to overseas oil concessions. This crossroads coincided with its negotiation for accession to the WTO⁷² that confers the privilege of participating in the mainstream global economy through international trade and investment. It was these oil mergers alongside China's membership in the WTO that led to the formulation of China's petroleum policy. The developments also led to the restructuring and repositioning of

⁶⁸ B Rajesh Kumar, "Mergers and Acquisitions in the Energy Sector" in B Rajesh Kumar, ed, *Mega Mergers and Acquisitions: Case Studies from Key Industries* (London: Palgrave Macmillan, 2012) 166. Bo Kong, *China's International Petroleum Policy, Energy and Security Series* (Santa Barbara, California: ABC-CLIO, 2009) at 14.

⁶⁹ "Our History", (4 September 2018), online: ExxonMobil <<https://corporate.exxonmobil.com:443/Company/Who-we-are/Our-history>>. <https://perma.cc/K327-6T7C>.

⁷⁰ Chevron Policy Affairs Government and Public, "Chevron History", online: [chevron.com <https://www.chevron.com/about/history>](https://www.chevron.com/about/history). <https://perma.cc/BG56-AHW2>.

⁷¹ "Esso Exploration and Production Nigeria Limited (EEP NL), Nigeria | Profile", online: Gulf Oil & Gas <<https://www.gulfoilandgas.com/webpro1/prod1/suppliercat.asp?sid=9868>>. <https://perma.cc/24ZB-7SWN>. "Esso Exploration and Production Nigeria Limited", online: ExxonMobil <<https://corporate.exxonmobil.com:443/Locations/Nigeria/Esso-Exploration-and-Production-Nigeria-Limited>>. <https://perma.cc/3ZMB-CWD9>.

⁷² "WTO Ministerial Conference Approves China's Accession", (10 November 2001), online: World Trade Organization <https://www.wto.org/english/news_e/pres01_e/pr252_e.htm>. <https://perma.cc/DR72-A8RT>.

Chinese NOCs for “Going Out” and emerging as key competitors in overseas oil investment.⁷³

China’s international petroleum policy rests on six pillars: (a) implementing the “going out” strategy; (b) diversifying the country’s petroleum imports in terms of import variety, supply sources, and mode of transportation; (c) building globally competitive flagship oil companies; (d) conducting petroleum diplomacy; (e) building a domestic oil tanker fleet and expanding China’s blue water navy; and (f) creating a national petroleum investment fund.⁷⁴ Chinese NOCs and other state actors are co-makers and co-implementers of the country’s petroleum policy.⁷⁵ Because of its petroleum policy, China has become a petroleum-investing, importing, and consumer juggernaut in the global oil industry, so much so that it is currently the world’s largest importer of crude oil.⁷⁶ In its operating strategy for 2020, CNOOC stated that it is focusing on the acquisition of high-quality oil blocks in exploration hot spots overseas.⁷⁷ According to data from the US Energy Information Administration (EIA), China’s annual crude oil imports in 2019 were over 10 million barrels per day.⁷⁸ From 2005 to 2019, Chinese worldwide investment in the energy sector stood at \$727.5 billion.⁷⁹ That China imports the highest volume of crude oil in the world in part explains why it is increasingly investing in oil fields in Africa in general, and in Nigeria in particular, through its NOCs. Nigeria, as Africa’s largest oil exporter, largest economy, and most populous country, particularly provides an attractive destination for Chinese petroleum investment. Given this, it is no surprise that the Sino-Nigerian OFI deals emerged. With China’s policy framework on international oil investment in mind, I return to a discussion of Nigeria’s political economy of oil and highlight the historical continuities and discontinuities in the industry

⁷³ Kong, *supra* note 32 at 7-28.

⁷⁴ Kong, *supra* note 32 at 61.

⁷⁵ *Ibid* at 2.

⁷⁶ “China’s Crude Oil Imports Surpassed 10 Million Barrels Per Day in 2019”, (23 March 2020), online: Today in Energy - US Energy Information Administration <<https://www.eia.gov/todayinenergy/detail.php?id=43216>>. <https://perma.cc/594Z-77XX>.

⁷⁷ “2020 Strategy for CNOOC Limited”, (13 January 2020), online: CNOOC - CNOOC International. <https://perma.cc/3L5P-PP27>.

⁷⁸ According to the EIA, in 2019, 55% of China’s crude oil imports came from countries within the OPEC.

⁷⁹ “China Global Investment Tracker”, online: American Enterprise Institute-AEI <https://www.aei.org/china-global-investment-tracker/>.

as well as the fundamental paradigm shift that occurred in the foreign oil investment profile.

3. Oil-for-Infrastructure as an Investment Model: Continuities and Discontinuities

Nigeria as a nation-state and its oil industry have had checkered histories. The history of the Nigerian state was largely shaped by the 19th-century colonial and imperial practices of the British Empire.⁸⁰ More importantly, the history of the regulation of Nigeria's oil industry was largely influenced by British oil imperialism⁸¹ as the regulatory powers of the colonial government over petroleum resources and operations in the colony were unassailable.⁸² For example, a British oil policy made in 1904 required that oil concessions on Crown lands in British colonies and India would be granted only to companies under British control.⁸³ Consequently, non-British companies were expressly excluded from obtaining oil concessions in colonial Nigeria.⁸⁴ Beginning in 1903, petroleum exploration in Nigeria was monopolized by a British entity –the Nigerian Bitumen Co. & British Colonial Petroleum that was succeeded by the Anglo-Dutch company –Royal Dutch Shell.⁸⁵ Further, British oil imperialism inaugurated a pattern of acquisition, domination, and

⁸⁰ For seminal work on the European partition of Nigeria and Africa after the Berlin Conference of 1884-85, see Anene, *supra*. For a memoir on the role of the British government in Nigeria's three-year civil war because of the former's oil interests and how the amalgamation of the southern and northern protectorates of Nigeria inextricably complicated the African country's unity and existence, see generally, Achebe, *supra*. See also Frederick Forsyth, "Buried for 50 Years: Britain's Shameful Role in the Biafran War", *The Guardian* (21 January 2020), online: <<https://www.theguardian.com/commentisfree/2020/jan/21/buried-50-years-britain-shamesful-role-biafran-war-frederick-forsyth>> (Accessed 9 April 2020). <https://perma.cc/Y2H2-JDZU>.

⁸¹ In this dissertation, the term 'imperialism' will be used to refer to the domineering political and exploitative economic practices of the British Empire in colonial Nigeria, since I agree with Antony Anghie that the British Empire of the nineteenth century engaged in both colonial and imperial practices. See Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2004) at 11. Similarly, Michael Doyle defines 'empire' as 'a relationship, formal or informal, in which one state controls the effective political sovereignty of another political society. It can be achieved by force, by political collaboration, by economic, social, or cultural dependence. Imperialism is simply the process or policy of maintaining an empire', see Michael W Doyle, *Empires* (New York, United States: Cornell University Press, 1986) at 45.

⁸² For example, in addition to the right of pre-emption that the British Crown had over all mineral oils exploited in Nigeria, the laws provided that companies shall erect efficient refineries only in the colony or protectorate of Nigeria or elsewhere in Her Majesty's dominions, and in the absence of a refinery by a licensee or lessee, the crude oil produced shall be refined in an approved refinery located in British territory. See Mineral Oil Pre-emption Ordinance, 1907.

⁸³ Brian Stuart McBeth, *British Oil Policy, 1919-1939* (London, England: Frank Cass & Co. Ltd, 1985).

⁸⁴ Section 6(1)(a) Minerals Oils Ordinance No. XVII, 1914 provides that "no lease or license shall be granted except to a British subject or to a British company registered in Great Britain or a British Colony and having its principal place of business within His Majesty's Dominions, the Chairman and the Managing Director (if any) and the majority of the other Directors of which are British subjects".

⁸⁵ Steyn, *supra*.

exploitation that served only to further the economic fortune and social needs of the metropole. As oil exploration and exploitation are inextricably associated with the ownership of the continental shelf, the exclusive economic zone, and the territorial sea, some legal stratagems were employed by Britain to enjoy unhindered access to petroleum resources. The British Crown, for instance, was vested with unfettered powers to acquire title to land in the colony.⁸⁶

Between 1955 and 1962 –a period that marked the gradual decline of colonialism in Africa –other Western companies such as ExxonMobil, Chevron, Eni/Agip, and Total were granted oil concessions in Nigeria. However, by the year 2004, the Nigerian government’s interest in attracting and retaining oil investors from the West had begun to wane. Indeed, the year 2004 marked a watershed in the history of Nigeria’s oil industry as the entry of NOCs from China reconfigured the process and some criteria for the acquisition of oil mining rights. The Chinese NOCs came into Nigeria’s oil industry with an investment blueprint (the resource-for-infrastructure model) that is alien and seemingly opposed to Western models of investment. The Sino-Nigeria OFI deals have become a significant source of external finance for infrastructure in Nigeria.

Given that a key component of the objectives of the “Going Out” strategy is to secure access to natural resources, Chinese investment in Nigeria is concentrated in the petroleum resources and infrastructure areas. Thus, in what follows, I provide an anatomy of Chinese oil and infrastructure investment in Nigeria. I begin by tracing the Asian historic origin of the resource-for-infrastructure arrangements. The brief historical origin will shed some light on the Sino-Nigeria OFI investment deals.

⁸⁶ Gilbert Stone, *The Mining Laws of the British Empire and of Foreign Countries*, Volume 1, Nigeria (London: His Majesty’s Stationery Office, 1920) at 2. For example, the Minerals Ordinance provided that ‘the entire property in the control of all minerals, and mineral oils, in, under or upon any lands in Nigeria, and of all rivers, streams, and watercourses throughout Nigeria, is and shall be vested in the Crown’. The Minerals Ordinance (Amended by Minerals (Amendment) Ordinance, 1918), 1916, s.3(1). See also F D Lord Lugard, *The Dual Mandate in British Tropical Africa* (Edinburgh and London: Adam Matthew Digital, 1922) at 347. In addition, threats of use of force and military might were employed by the colonial government to coerce native authorities to enter into ‘unequal treaties’ with Her Majesty. In this connection, by the provisions of the Lagos Treaty of Cession, 1861, made between Great Britain and King Dosunmu of Lagos, the title to the land of the Port and Island of Lagos was ceded to the British Crown. Although compensation was paid to the occupants of native lands by the holder of an oil lease or license for the disturbance of their rights of occupancy, this was done at the discretion of the colonial government. See Mineral Oil Ordinance, *supra*.

3.1 Crude Oil as a Bargaining Chip

RFI as an investment model has an Asian historic origin. Many years after the end of the Second Sino-Japanese War and World War II, bilateral and trade relations between China and Japan returned to normalcy in the 1970s.⁸⁷ At the time, China was on the verge of modernizing its infrastructure facilities, which coincided with Japan's indication of interest in China's Daqing oil-rich region.⁸⁸ These developments led to the signing of a series of contractual agreements for the building of large infrastructure projects in China.⁸⁹ The construction of the infrastructure was funded through Japanese loans and China repaid with oil and coal exports to its benefactor.⁹⁰ As part of the Sino-Japanese RFI agreement, US\$10-billion in oil was exported to Japan, and Japanese construction engineering firms frequently won contracts to build large-scale projects in China.⁹¹ Japanese loans were used to build roads, railways, ports, and other major infrastructure projects in China.⁹² At present, the status of the Chinese government has changed from a recipient to a donor state and it is applying the RFI business model that it learned from Japan in many African countries, one of which is Nigeria. As Brautigam has argued, China is different as a donor and strategic investment partner to Africa because it is also a developing country, and its development success (explicitly, its rapid economic transformation and its reduction of poverty) give it a great deal of credibility as a partner with relevant experience.⁹³

In Nigeria, China's "Going Out" strategy has found practical expression in the Sino-Nigeria OFI arrangements. The OFI is now considered a component of the Belt and Road Initiative (BRI). In

⁸⁷ Tomozo Morino, "China-Japan Trade and Investment Relations" (1991) 38:2 Proceedings of the Academy of Political Science 87.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Sezgi Cemilolu, *China's Economic Engagement in Africa: A Case Study of Angola* (New York: Peter Lang, 2015).

⁹¹ "Why China-Japan Economic Exchanges Override Political Tensions" East Asia Forum Quarterly "Economics and Security" (December 2019), online: <<https://www.eastasiaforum.org/2019/12/02/why-china-japan-economic-exchanges-override-political-tensions/>>. <https://perma.cc/K8NZ-J7EV>.

⁹² Ibid.

⁹³ Brautigam, *supra* note 1 at 11.

2018, Nigeria signed up to the BRI⁹⁴ –the BRI being a multi-billion-dollar infrastructure interconnectivity project that fits nicely with some major Chinese projects such as the Lagos and Calabar deep seaports,⁹⁵ which I will discuss in this chapter. The “Going Out” strategy is a broader policy framework of the BRI. The “Going Out” strategy is inextricably intertwined with the BRI and has been subsumed in the BRI as both policies are geared towards developing an expanded, interdependent market for China, growing China’s economic and political power, and creating the right conditions for China to build a high technology economy”.⁹⁶ Against the backdrop of contemporary reciprocal visits between Chinese and Nigerian leaders that started in 1999⁹⁷ and, as I noted in chapter 2, the refusal of Western oil companies to invest in infrastructure projects in Nigeria, the host government invited NOCs from China to invest in its petroleum industry. To that end, the Nigerian government used crude oil as a bargaining chip to reach specific quid pro quo deals with China.⁹⁸ Precisely, under the Sino-Nigeria OFI arrangements in 2004, Chinese NOCs were awarded oil blocks in exchange for undertaking to invest in infrastructure projects in Nigeria.⁹⁹ The projects include but are not limited to, the resuscitation of moribund

⁹⁴ “Nigeria Formally Joins China’s Belt, Road Initiative”, (15 February 2019), online: Forum on China-Africa Cooperation <https://www.focac.org/eng/zfgx_4/jmhzt1637922.htm>. <https://perma.cc/MK97-TVYX>.

⁹⁵ “Lekki Port Signs US\$629m Facility Agreements with China Development Bank”, (23 October 2019), online: Lekki Port <<https://lekkiport.com/lekki-port-signs-us629m-facility-agreements-with-china-development-bank/>>. <https://perma.cc/VNT7-MWA4>.

⁹⁶ “What is China’s Belt and Road Initiative (BRI)?”, (13 September 2021), online: Chatham House <<https://www.chathamhouse.org/2021/09/what-chinas-belt-and-road-initiative-bri>>.”

⁹⁷ “Obasanjo in China”, *The Mail & Guardian* (12 April 1999), online: <<https://mg.co.za/article/1999-04-12-obasanjo-in-china/>>. <https://perma.cc/UGF9-BSGZ>. “Hu Jintao Holds Talks with Nigerian President Obasanjo”, (27 April 2006), online: Ministry of Foreign Affairs, the People’s Republic of China <https://www.fmprc.gov.cn/mfa_eng/wjw_663304/zjzg_663340/fzs_663828/gjlb_663832/3059_664144/3061_664148/t249448.shtml>. <https://perma.cc/SRA3-QUVF>. “Xi Jinping Holds Talks with President Muhammadu Buhari of Nigeria- The Two Heads of State Decide to Jointly Elevate Sino-Nigeria Strategic Partnership to a New Level”, (14 April 2016), online: Embassy of the People’s Republic of China in the Federal Republic of Nigeria <<http://ng.china-embassy.org/eng/zt/buharivisit/t1355511.htm>>. <https://perma.cc/L2L7-6TUK>. “Joint Communiqué Between the People’s Republic of China and the Federal Republic of Nigeria on 15 April 2002”, (4 June 2015), online: Embassy of the People’s Republic of China in the Federal Republic of Nigeria <<http://ng.china-embassy.org/eng/zngx/wj/t1270311.htm>>. <https://perma.cc/MM2Q-4H8R>.

⁹⁸ *Thirst for African Oil: Asian National Oil Companies in Nigeria and Angola*, by Dr Alex Vines Obe, Lillian Wong & Markus Weimer and Indira Campos, www.chathamhouse.org (Chatham House, 2009). <https://perma.cc/WVM8-B44B>.

⁹⁹ Ian Taylor, “China’s Relations with Nigeria” (2007) 96:392 *The Commonwealth Journal of International Affairs* 631 at 636. See also Ian Taylor, “The Pathology of Dependency: Sino-Nigerian Relations as a Case Study” in Carl Levan & Patrick Ukata, eds, *The Oxford Handbook of Nigerian Politics* (Oxford University Press, 2018) at 746-7.

refineries,¹⁰⁰ construction of railways,¹⁰¹ airports,¹⁰² seaports, highways,¹⁰³ electricity-generating plants,¹⁰⁴ and free trade zones.¹⁰⁵ Further, some of the Chinese NOCs signed crude oil supply contracts with the NNPC –the predecessor company to the NNPC limited.¹⁰⁶ From 2004 to 2006, three Chinese NOCs –CNOOC, China National Petroleum Corporation (CNPC), and China Petroleum and Chemical Corporation (SINOPEC) were awarded deepwater oil blocks in the Niger Delta basin.¹⁰⁷ The Nigerian government gave the Chinese NOCs the right of first refusal in the 2006, 2007, and 2008 oil licensing rounds in exchange to invest in refineries, railways, airports, seaports, electricity-generating plants, and free trade zones.¹⁰⁸ The Sino-Nigeria OFI investment arrangements therefore mirrors the defunct Japan-China RFI arrangement that contributed to China’s industrialization. It will be interesting to see what sustainable impacts the Sino-Nigeria

¹⁰⁰ “Investment Project Information Database”, (13 July 2016), online: Ministry of Commerce - Public Services: Project Basic Info <http://project.fdi.gov.cn/1800000091_2_76229_0_7.html>. <https://perma.cc/53CR-8P FV>.

¹⁰¹ “Remarks of H.E. Dr. Zhou Pingjian of China to Nigeria, at the Commissioning Ceremony of the First Phase of the Abuja Rail Transit Project”, (13 July 2018), online: Ministry of Foreign Affairs of the Peoples Republic of China <https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/t1576790.shtml>. <https://perma.cc/NBU3-P2AZ>. See also “Ambassador ZHOU Pingjian: ‘China Opens Door Wide to Nigeria’”, (12 February 2017), online: Ministry of Foreign Affairs of the Peoples Republic of China <https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/t1437778.shtml>. <https://perma.cc/43U2-QVST>.

¹⁰² “Remarks of Ambassador Zhou Pingjian of China to Nigeria at the Commissioning Ceremony of the New Terminal Building at Nnamdi Azikiwe International Airport (NAIA), Abuja”, (21 December 2018), online: Ministry of Foreign Affairs of the Peoples Republic of China <https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/t1623849.shtml>. <https://perma.cc/7AY3-6N3B>. 陈柳兵, “CCECC builds ‘most beautiful airport terminal in Nigeria’ - Chinadaily.com.cn”, (25 February 2019), online: China Daily <<http://www.chinadaily.com.cn/a/201902/25/WS5c73498fa3106c65c34eb26e.html>>. <https://perma.cc/9B8Q-X8GY>.

¹⁰³ Charles Onunaju, “Nigeria’s Road Infrastructure Renewal and China Relations”, THISDAY (26 January 2020), online: <<https://www.thisdaylive.com/index.php/2020/01/26/nigerias-road-infrastructure-renewal-and-china-relations/>>. <https://perma.cc/Y2J8-DSHA>. Dave Makichuk, “China builds on the Trans-Saharan dream”, Asia Times (13 November 2019), online: <<https://asiatimes.com/2019/11/trans-saharan-highway-project-on-track/>>. <https://perma.cc/5DT2-VK9D>.

¹⁰⁴ “China Helps Light up African Countries -”, (16 July 2019), online: Ministry of Commerce - People’s Republic of China/China Daily <<http://english.mofcom.gov.cn/article/newsrelease/counseloroffice/westernasiaandaf ricareport/201907/20190702882058.shtml>>. <https://perma.cc/FE3S-TT5Q>. See also Femi Asu, “\$1.29bn Zungeru hydropower project 68% completed – Ministry”, Punch Newspapers (28 October 2019), online: <<https://punchng.com/1-29bn-zungeru-hydropower-project-68-completed-ministry/>>+. <https://perma.cc/3232-NR5G>.

¹⁰⁵ *Supra*, note 557. See also Arewa, “Constructing Africa”, *supra* note 30. Deborah Brautigam, *The Dragon’s Gift: the Real Story of China in Africa* (Oxford: Oxford University Press, 2009) at 145.

¹⁰⁶ *Building Bridges: China’s Growing Role as Infrastructure Financier for Sub-Saharan Africa*, by Vivien Foster et al, Trends and Policy Options 5 (Washington DC: The World Bank Group, 2009) at 26. <https://perma.cc/XE3F-PNJB>.

¹⁰⁷ Taylor, *supra* note 53. See also Cyril Obi, “The Changing Dynamics of Chinese Oil and Gas Engagements in Africa” in Arkebe Oqubay & Yifu Justin Lin, eds, *China-Africa and An Economic Transformation* (Oxford, United Kingdom: Oxford University Press, 2019) 173 at 181-2.

¹⁰⁸ Nigeria Extractive Industries Transparency Initiative (NEITI) Report 2006-2008: Executive Summary of Recommendations and Proposed Actions, H/332/C (Abuja, Nigeria: Nigeria Extractive Industries Transparency Initiative, 2011). <https://perma.cc/386X-TKXF>.

OFI deals will make on the socio-economic conditions of Nigeria as the unconventional investment arrangement becomes fully established and survives different governments.

4. An Overview of China's Oil Investment in Nigeria

Generally, China's investments in Nigeria, as I will graphically show in figure 9 below, straddles various industries such as oil and gas, transport, real estate, information technology, agriculture, education, medical sciences, and manufacturing. As I stated in chapter 3, the last decade and a half have seen an increasingly robust bilateral trade and investment cooperation between the two countries. In the words of China's Ambassador to Nigeria, Zhou Pingjian, "the Sino-Nigeria relations have since entered a new stage of rapid development with prominent achievements."¹⁰⁹ As Africa's largest crude oil exporter and presumably, a weak regulatory jurisdiction, Nigeria is an attractive destination for China's oil investment. China has made some important investment foray into Nigeria's petroleum sector through the acquisition of oil concession rights, signing of biofuel production pact, crude oil supply contracts, construction of refineries and natural gas pipelines. According to Nigeria's national oil company, the NNPC Limited, China's investment in Nigeria's oil and gas industry has reached \$16 billion.¹¹⁰ The statement by the NNPC Limited bolsters data from the American Enterprise Institute in figure 9, which shows that from 2005 to 2019, China invested \$16.3 billion in Nigeria's oil industry.

¹⁰⁹ "Remarks of Ambassador Zhou Pingjian at the Forum on Sino-Nigeria Production Capacity and Investment Cooperation", (18 August 2018), online: Ministry of Foreign Affairs of the Peoples Republic of China <<http://ng.china-embassy.org/eng/zngx/cne/t1586187.htm>> Accessed 2 February 2020. <https://perma.cc/X5BX-WXEC>.

¹¹⁰ Chika Oduah, "China Invests \$16 Billion in Nigeria's Oil Sector", (28 August 2019), online: Voice of America <<https://www.voanews.com/africa/china-invests-16-billion-nigerias-oil-sector>> Accessed 4 December 2019. <https://perma.cc/9GUW-D5KP>

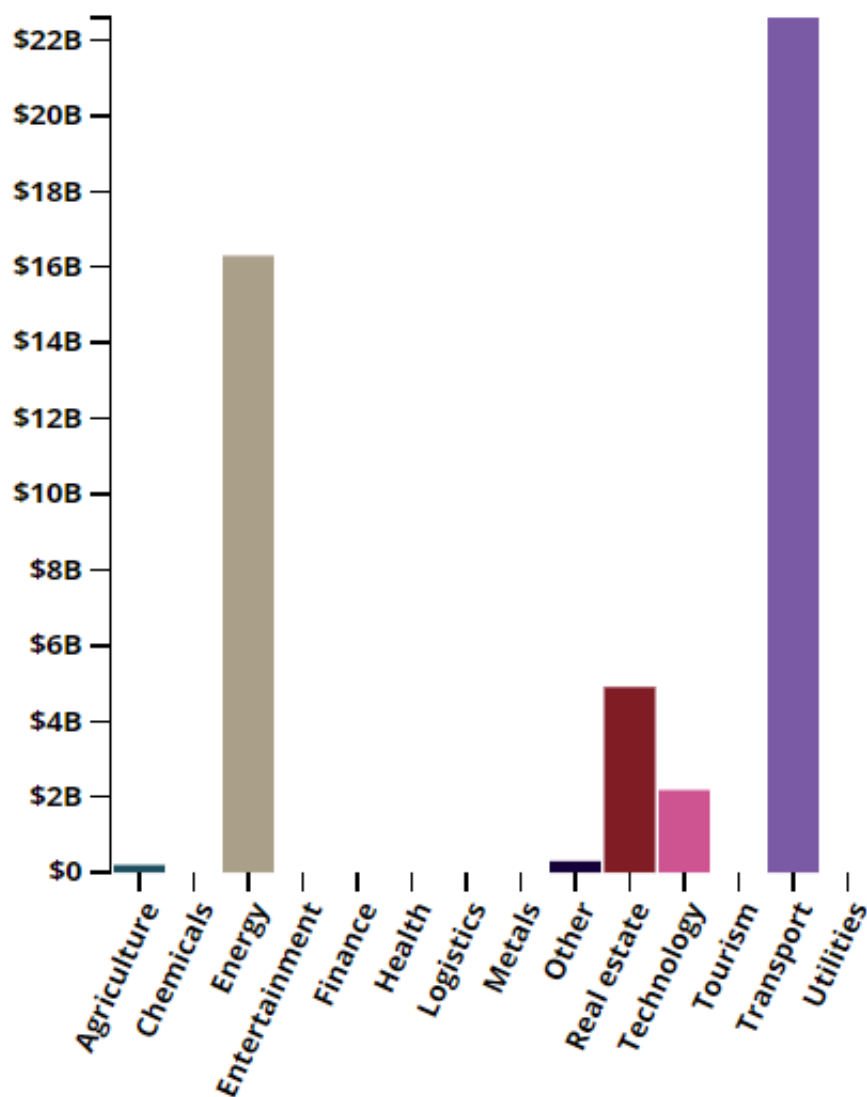


Figure 9: China's Sectoral Investments and Contracts in Nigeria (2005-2019)

Source: American Enterprise Institute

Since the beginning of the 21st century, China, through its NOCs, has invested in both upstream and downstream sectors of Nigeria's petroleum economy. China's foremost foreign direct investment in Nigeria has been made by its three NOCs –CNOOC, SINOPEC, and CNPC, respectively. One notable investment route for most of the Chinese NOCs and their subsidiaries in Nigeria is to acquire a stake in an existing oil concession either from Western or local Nigerian companies.

There are a couple of plausible explanations for such an investment path. It provides a higher degree of certainty on the profitability of the oilfields as the prospecting activities that are economically riskier have been carried out by other companies and, petroleum has, to an extent, been discovered in commercial quantities. It also provides an accelerated investment return in terms of crude oil production which as I have shown earlier in this chapter, is a critical part of China's "Going Out" strategy and international petroleum policy.

What then are the particularities of China's oil investment in Nigeria? It is to this question that I now turn. First, a brief snapshot of the corporate profile of CNOOC. If the level of detail on the Chinese oil investment in Nigeria and the corporate profile of the NOCs over the next few pages are more than we want to know, it is because they may help our understanding of some of the regulatory challenges of the Sino-Nigeria OFI arrangements.

4.1 CNOOC/Nexen

CNOOC (中国海洋石油有限公司) is the largest offshore oil and gas producer in China.¹¹¹ Headquartered in Beijing, CNOOC was founded in 1982.¹¹² After over 30 years of reform and development, it has become an international energy company, a complete industrial chain, and business spread across 40 countries and regions. In 2017, CNOOC transformed from an enterprise owned by the whole people into a limited company wholly owned by the state.¹¹³ The Company was ranked 63rd in 2019 Fortune Global 500¹¹⁴ and 126th Forbes' Global 2000 List.¹¹⁵ As of the end of 2019, CNOOC and its subsidiaries owned net proved reserves of approximately 5.18 billion barrels of oil equivalent and the entity's average daily net production was 1,387,564 barrels of oil equivalent.¹¹⁶ The overseas' investment of CNOOC accounts for approximately 55 percent

¹¹¹ "CNOOC", online: Company Overview <<https://www.cnooc.com.cn/col/col6141/index.html>>. <https://perma.cc/Q8DW-AHCC>.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ 2019 Annual Report (Hong Kong: China National Offshore Oil Company (CNOOC) Limited, 2020) at 7.

¹¹⁶ bid at 8.

of the company's assets.¹¹⁷ CNOOC has become a corporate entity with a transnational reach with its shares traded on the floors of the New York Stock Exchange (NYSE), the Toronto Stock Exchange (TSE), and the Stock Exchange of Hong Kong. That the shares of CNOOC and its subsidiaries are listed on the US and Canadian financial markets remarkably bodes well for the regulation of bribery of foreign public officials in international business as it makes the Chinese NOC subject to the FCPA, which I discussed in chapter 3, as well as the Corruption of Foreign Public Officials' Act of Canada.

Figure 10 below shows that CNOOC has increasingly been establishing an oil and gas production base in Nigeria by investing in commercially viable blocks. In 2005, CNOOC purchased a 45 percent stake in OML130¹¹⁸ –deepwater oil block, through an existing oil mining license for an investment value of US\$2.69 billion. This makes CNOOC the highest equity stakeholder for the license area. The OML 130 license area comprises four oilfields, namely, Akpo, Egina, Egina South, and Preowei.¹¹⁹ From 2009, the Akpo field, which produces gas and condensate¹²⁰ maintained a stable net production of 56,000 barrels per day of condensate. In its 2019 Annual Report, CNOOC stated that the field maintained a daily net production of 44,000 barrels of oil equivalent for the fiscal year.¹²¹

¹¹⁷ Ibid.

¹¹⁸ In Nigeria, oil blocks and fields are identified by a unique designation after a licensee or lessee must have obtained the written approval of the Commission. The designation of a block consists of the name of the oil well to be drilled and the serial number which indicates the chronological order in the drilling sequence for the field. All oilfields bear names in a Nigerian vernacular language which generally refers to any geographical or topographical features in the vicinity of the field. The names of fields are chosen from the names of the flora or fauna of Nigeria. See Petroleum (Drilling and Production) Regulations, Legal Notice 69 1969, s.34.

¹¹⁹ "Nigeria", online: CNOOC International </en/operations/middle-east-and-africa/nigeria>. <https://perma.cc/T4QD-PNAF>.

¹²⁰ Condensate is a mixture of light liquid hydrocarbons, which is similar to a very light crude oil. It is typically separated out of a natural gas stream at the point of production when the temperature and pressure of the gas are dropped to atmospheric conditions. Condensate is mostly composed of natural gas liquids – commonly known in the industry circle as NGLs. Once separated from natural gas, condensate is generally treated as crude oil. It can be blended with other heavier crude streams or sent to the market directly by pipeline or tanker. Condensate can be processed in a refinery if blended with more conventional crude. It is typically valued lower than crude oil because of its high light ends content, which yields a lot of lower value liquified petroleum gas and light naphtha and makes it difficult to process in high volumes in a refinery. However, there are some condensates containing up to 40% of jet fuel and diesel that are priced higher than crude oil, as they contain very little residue material. See "Condensate", online: McKinsey & Company - Energy Insights <<http://www.mckinseyenergyinsights.com/resources/refinery-reference-desk/condensate/>>. <https://perma.cc/VA3X-MHC5>.

¹²¹ "Reports and Filing: Annual Report", online: CNOOC Limited - Investor Relations <<https://www.cnoocld.com/col/col7511/index.html>>. <https://perma.cc/Z6K7-MGFZ>.

Company/Subsidiary	Year of Acquisition	Type of License Area/Name of Oilfield	% of Working Interest	Investment Value
CNOOC/Nexen	2005	OML 130 (Akpo, Egina, Egina South, and Preowei)	45%	US\$2.69 billion
	2002	OML 138 (Usan)	20%	US\$2.5 billion
	2008	OML 139(Owowo South B-1)	18%	Not known
	2018	OML 154(Owowo South B)	18%	Not known
SINOPEC/Addax	2007	OML 138(Usan)	20%	US\$2.5 billion
	2002	OML 124(Osu, Izombe, and Njaba 2)	100%	Not known
	2002	OML 123	100%	Not known
	2004	OML 126(Okwori and Nda)	100%	Not known
	2007	OML 137	100%	Not known
	2000	OPL 227	40%	Not known
	2006	OML 67(Okwok)	12%	Not disclosed
CNPC/PetroChina/ Chinese National Oil & Development Company/China Petroleum Pipeline Engineering Company Limited	2005	Not applicable	Not applicable	800 million
	2006	OPL 471	90%	Not disclosed
	2006	OPL 298	Not known	Not disclosed
	2006	OPL 721	Not known	Not disclosed
	2006	OPL 732	Not known	Not disclosed

Figure 10: China's Foremost & Ongoing Investment in Nigeria's Oil Industry

Source: Author's compilation based on data from various sources¹²²

The Egina field, which is a flagship ultra-deep offshore oil investment is located in approximately 1,600 meters of water depth and operated by the French energy firm, Total.¹²³ Crude oil production commenced in the Egina field in December 2019 with a production capacity of 200,000 barrels per day.¹²⁴ For China, the acquisition and development of OML 130 in Nigeria is hugely significant. First, in addition to being an oil block of gargantuan size, the prolificacy of the asset largely represents the actualization of China's "Going Out" investment strategy and international petroleum policy. Second, it brings to the limelight one of the corporate hues of China's NOCs as implementers of both the "Going Out" strategy and the country's petroleum policy. To quote

¹²² Oil companies' websites, Nigeria's Department of Petroleum Resources, and newspaper and magazine articles.

¹²³ <https://perma.cc/62LF-AKRX>. The Egina project is based on a subsea production system connected to a floating production, storage, and offloading vessel, commonly known in the industry as an FPSO. The capacity storage of the FPSO is 2.3 million barrels of oil.

¹²⁴ Ibid.

Yuan Guangyu, the Chief Executive Officer of CNOOC, “the successful commencement of production of the Egina field will strongly support the high-quality development of the company and become a new growth driver to our overseas production”.¹²⁵ According to CNOOC’s key operational statistics for the first quarter of 2020, the company’s overseas production increased by 9.0 percent to 44.5 million barrels of oil equivalent, mainly due to production contribution from Egina oilfield and Appomattox oilfield in the Gulf of Mexico.¹²⁶ For the host state, the Egina oilfield acts as a stimulus for the expansion and further development of its offshore projects and economy because the Egina field and its floating platforms were primarily developed locally to accelerate the pace of Nigeria’s industrial fabric and the transfer of technology.¹²⁷ The oil field drives local development and expertise and contributes almost 10 percent to the host country’s total oil production.¹²⁸ More than half of the workforce employed in building the Egina oil infrastructure are Nigerians and about 77 percent of the project hours were spent onsite in either Port Harcourt or Lagos.¹²⁹ Crucially, it extends and enhances oil infrastructure in Nigeria as a result of the construction of a 500-meter-long dock to assemble the FPSO.¹³⁰

¹²⁵ Ibid.

¹²⁶ “CNOOC”, (6 May 2020), online: CNOOC Limited Announces Key Operational Statistics for Q1 2020 <https://www.cnooc.com.cn/art/2020/5/6/art_6261_15304211.html>. <https://perma.cc/R9F9-MSBN>.

¹²⁷ “Egina: A Flagship Offshore Project Driving Local Development and Expertise”, online: Total.com <<https://www.total.com/energy-expertise/projects/oil-gas/deep-offshore/egina-nigeria>>. <https://perma.cc/5N9A-JJTR>.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

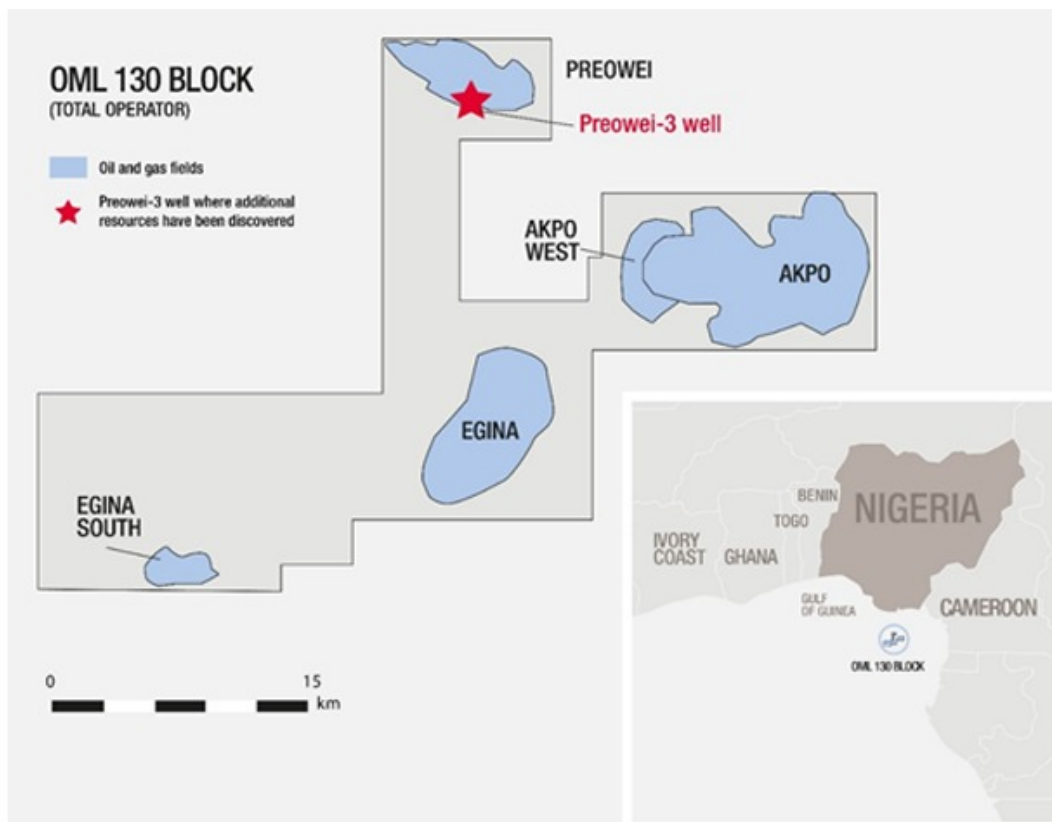


Figure 11: Map of OML 130 oil block comprising Egina, Egina South, Akpo, Akpo West, and Preowei oilfields, respectively, in the Gulf of Guinea

Source: Total Energies

The third producible oilfield in the block is Preowei and it is estimated to produce about 70,000 barrels of oil equivalent per day.¹³¹ However, development activities in the Preowei field have been suspended as a result of the COVID-19 pandemic, a new fiscal regime in the Nigerian oil industry,¹³² and a plunge in the price of oil in the international market. Figure 10 also shows that in 2002,¹³³ Nexen Petroleum Nigeria Limited, a subsidiary of CNOOC, won a prospecting license

¹³¹ "TOTAL Suspends Preowei Project", (14 April 2020), online: Africa Oil & Gas Report <<http://africaoilgasreport.com/2020/04/in-the-news/total-suspends-preowei-project/>>. <https://perma.cc/WQZ3-YGGT>.

¹³² "Deep Offshore and Inland Basin PSC (Amendment) Act, 2019", (16 December 2019), online: KPMG - Nigeria <<https://home.kpmg/ng/en/home/insights/2019/12/deep-offshore-and-inland-basin-psc-amendment-act-2019.html>>. <https://perma.cc/K5EE-X6CR>.

¹³³ This investment predates the entry of CNOOC into Nigeria's oil industry. In December 2012, CNOOC acquired Nexen –a Canadian oil company for \$15.1 billion. Consequently, Nexen Nigeria operates as a subsidiary of CNOOC. Commodities & Energy, "CNOOC-Nexen Deal: Chinese Firm Closes \$15.1-Billion Acquisition", (25

in the Usan field under a PSC with the NNPC Limited.¹³⁴ The Usan field is a deepwater asset located in depths ranging from 780 to 850 meters of water in the Niger Delta.¹³⁵ In 2008, the concession was converted to a mining license by Nigeria, and petroleum production commenced in February 2012.¹³⁶ It is estimated that the Usan field will ramp up to plateau production of 180,000 barrels of oil per day.¹³⁷ Usan is a lucrative asset with an estimated proved and proven reserves of more than 500 million barrels.¹³⁸

Figure 10 further shows that in 2008, CNOOC acquired, through its subsidiary, Nexen, an 18 percent non-operated interest in OML139, popularly called Owowo field. The Owowo field is a license area covering 230,000 acres offshore Nigeria.¹³⁹ The geographical contiguity of the Owowo field with Usan, Egina, Preowei makes it a strategic investment for China. In its 2011 annual report filed with the US Securities and Exchange Commission, Nexen notes that the acquisition of Owowo provides the company with significant exploration potential contiguous with its other licenses.¹⁴⁰ It is also a significant investment for CNOOC as it has proven high-quality oil-bearing sandstone reservoirs and a potential recoverable resource of between 500 and 1 billion barrels of oil.¹⁴¹

February 2013), online: <<https://financialpost.com/commodities/energy/cnooc-completes-contentious-15-1-billion-acquisition-of-nexen>>. <https://perma.cc/N2NU-RESV>.

¹³⁴ “Nigeria: Deepwater Reserves Deliver Steady Production”, online: CNOOC - Operations - Nigeria <<https://operations/middle-east-and-africa/nigeria>>. <https://perma.cc/PLK6-ZZ49>.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ “Nexen Announces Development Approval for the Usan Project, Offshore Nigeria”, (29 February 2008), online: Europetrole <<https://www.euro-petrole.com/nexen-announces-development-approval-for-the-usan-project-offshore-nigeria-n-i-2522>>. <https://perma.cc/58LS-WGND>.

¹³⁸ “Offshore Profond Nigérien: Lancement Du Projet Usan”, (28 February 2008), online: Total.com <<https://www.total.com/media/news/press-releases/offshore-profond-nigerian-lancement-du-projet-usan>>. <https://perma.cc/6PJP-B26U>.

¹³⁹ United States Securities and Exchange Commission, Washington D.C - Annual Report Pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934, 1–6702 (Washington DC: Nexen Inc., 2012). <https://perma.cc/2HE7-7HZC>. ExxonMobil holds 27 percent interest and is the operator for the Owowo field (OML 139). Other stakeholders in the oilfield include Chevron (27 percent interest), Total E&P Nigeria Limited (18 percent interest), and the Nigeria Petroleum Development Company Limited (10 percent interest).

¹⁴⁰ Ibid.

¹⁴¹ “ExxonMobil Announces Significant Oil Discovery Offshore Nigeria”, (27 October 2016), online: ExxonMobil <https://corporate.exxonmobil.com:443/News/Newsroom/News-releases/2016/1027_ExxonMobil-announces-significant-oil-discovery-offshore-Nigeria>. <https://perma.cc/5CBE-6XP3>.

Nexen, through a PSC, acquired an 18 percent working interest in OML154 –Owowo South B, a deep offshore block in the Niger Delta region.¹⁴² The oil block covers an area of 463 square kilometers.¹⁴³ A key operation strategy by CNOOC is to establish an oil and gas production base in West Africa with a Nigeria-centred investment acquisition.¹⁴⁴ As China’s largest producer of offshore petroleum resources, offshore Nigeria is a core investment area for CNOOC and its subsidiaries as the entities have so far made several discoveries that offer relatively low-risk exploration for prolific reservoirs. Generally, CNOOC’s oil investments in Africa are primarily located in Nigeria and Uganda. As of the end of 2019, the reserves and production of the company and its subsidiaries in both countries reached 83.6 million barrels of oil equivalent and 120,925 barrels of oil equivalent a day.¹⁴⁵

4.2 Sinopec/Addax

Sinopec (中国石化) Group of companies is a super-large petroleum and petrochemical enterprise group, established by the Communist Party in 1998 as a successor company to the defunct China Petrochemical Corporation.¹⁴⁶ It was further incorporated as a limited liability corporation in 2018.¹⁴⁷ A petroleum and petrochemical group of very great size, the company has a registered capital of 274.9 billion yuan.¹⁴⁸ Sinopec Group is the largest oil and petrochemical products suppliers and the second-largest oil and gas producer in China, the largest refining company, and the third-largest chemical company in the world. Sinopec Group ranked 3rd on Fortune’s Global 500 List in 2018.¹⁴⁹ The leadership team of Sinopec Group predominantly comprises chieftains

¹⁴² 2018 Nigerian Oil and Gas Industry Annual Report (Lagos, Nigeria: Department of Petroleum Resources, 2018) at 18. The equity distribution of the oil block is as follows: Total (18 percent), ExxonMobil (27 percent), Chevron (27 percent), and Nigerian Petroleum Development Company –a subsidiary of the NNPC Limited (10 percent).

¹⁴³ Ibid.

¹⁴⁴ “CNOOC Limited”, online: Key Operating Areas: Overseas<<https://www.cnooc ltd.com/col/col7321/index.html>>. <https://perma.cc/ST8A-4FD2>.

¹⁴⁵ Ibid at 15.

¹⁴⁶ “China Sinopec”, online: About Sinopec Group <<http://www.sinopecgroup.com/group/en/companyprofile/AboutSinopecGroup/>>. <https://perma.cc/PM4L-XNTH>.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

of the CPC.¹⁵⁰ As of the end of 2018, Sinopec had 50 oil and gas exploration and production projects in 26 countries,¹⁵¹ including Nigeria.

Sinopec and Addax Petroleum, its subsidiary, are two Chinese NOCs that have also made prolific investments in Nigeria's oil industry. As laid out in figure 12 below, Sinopec acquired a 20 percent interest in OML138 that contains the Usan oilfield for US\$2.5 billion in 2012.¹⁵² The acquisition by Sinopec brings the total equity stake by Chinese NOCs in the lucrative Usan oilfield to 40 percent.

From the outset, the entry of Addax into Nigeria's oil industry was enmeshed in a miasma of opacity, bribery of the host government officials, and allegations of economic sabotage. The grant of oil drilling rights to Addax in concessions 124, 123,¹⁵³ 126, and 137,¹⁵⁴ respectively, which are shown in figure 10 by the Nigerian government entangled the Chinese entity in a cauldron of national and transnational lawsuits and fines. As figure 10 illustrates, OML124 - an onshore asset that contains the Osu, Izombe, and Njaba 2 fields were awarded to Addax in 2002 by the Nigerian government. The Chinese entity has a 100 percent equity interest in the license area under a production sharing contract with the NNPC Limited. The concession covers an area of 74,100 acres,¹⁵⁵ in the comparatively stable and peaceful Imo State, Nigeria. The three fields under the license area are now producing oil.

¹⁵⁰ "China Sinopec", online: Leadership <<http://www.sinopecgroup.com/group/en/companyprofile/Leadershipip/>>. <https://perma.cc/AU2B-5J7X>. See also Li-Wen Lin & Curtis J Milhaupt, "We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China" (2013) 65:4 Stan L Rev 697 at 700.

¹⁵¹ "International Operations | China Sinopec", online: Sinopec: International Oil and Gas E&P <<http://www.sinopecgroup.com/group/en/business/InternationalTrade2012/>>. <https://perma.cc/5JUQ-XF4Y>.

¹⁵² "Nigeria: Total Announces the Sale of Its Participating Interest in the Offshore OML 138", (19 November 2012), online: Total.com <<https://www.total.com/media/news/press-releases/nigeria-total-announces-sale-its-participating-interest-offshore-oml-138>>. <https://perma.cc/PA8L-MFFP>.

¹⁵³ OML 123 contains nine producing oil fields (Adanga, Oron West, Oron North, Ebughu and extensions, Adanga North and South, Inagha, Kita Marine, Bogi and Mimbo); one undeveloped oil field (Antan) three unappraised oil discoveries (Adanga East, Adanga West and Ebughu Northeast); a large 8,600 acre (35 km²) undeveloped gas discovery (Oron) and several exploration prospects. "Addax Petroleum", online: Nigeria: License Areas <<https://www.addaxpetroleum.com/operations/nigeria>>. <https://perma.cc/9NYF-NXFY>.

¹⁵⁴ OML 137 contains the Ofrima North oil discovery and several potentially commercial natural gas discoveries such as Shokoloko, Toriye, Odum, Asanga and Ofrima; four identified oil prospects (Ofrima North, Atuma, Udele and Asa) and a number of shallow and deep potentials. Ibid.

¹⁵⁵ Ibid.

OML123 is Addax's largest license area as measured by reserves and production and is located offshore approximately 60 km south of the town of Calabar in the south-eastern part of Nigeria, in the Gulf of Guinea.¹⁵⁶ The concession covers an area of 90,700 acres in water depths ranging from 3 to 40 metres.¹⁵⁷ OMLs126 and 137 are two contiguous oil blocks located 90 km offshore, south of Port Harcourt, in water depths ranging between 50 and 210 meters.¹⁵⁸ According to the Addax website, when combined, they represent the company's largest Nigerian properties as measured by area. Petroleum production from OML126 commenced in March 2005 and averaged 15,000 barrels of oil per day in 2015.¹⁵⁹

In 2008, Addax through a farm-in agreement secured the approval of the Nigerian government to acquire a 40 percent interest in OPL227.¹⁶⁰ The OPL227 oil block is a shallow water asset within the Niger Delta Basin and one of the most prolific petroleum basins. The investment is in proximity to Shell's highly profitable deep offshore East Area field and covers approximately 210,300 acres.¹⁶¹ There are some remarkable features of OPL127 and the Chinese company's investment strategy in Nigeria. First, other co-investors in the oil block are local Nigerian companies who presumably lack the financial and technological capacities to develop the acreage.¹⁶² Second, Addax is the technical advisor and will carry out technical operations in the license area. In return, the Chinese company paid an undisclosed farm-in fee to the local companies and a signing bonus to the Nigerian government. In addition, it is obligated to fund 80 percent of the work program comprising a minimum of 500 per square kilometer of 3D seismic acquisition during the exploration period.¹⁶³ Third, Addax will also fund 80% of all capital and operating costs on the asset and will be entitled to a higher than pro-rata share of the net production from the oil block until all capital

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ "UPDATE 1-Addax Acquires 40 Pct of Oilfield Offshore Nigeria", Reuters (11 June 2008), online: <<https://uk.reuters.com/article/nigeria-addax-oilfield-idUKL1180091420080611>>. <https://perma.cc/DT3S-GEAS>.

¹⁶¹ Ibid.

¹⁶² Supra note 92 at 21.

¹⁶³ Ibid.

costs have been recovered.¹⁶⁴ Thereafter, all parties will be entitled to their pro-rata share of production.¹⁶⁵ In the oil industry, farm-in agreements are entered into between oil companies for many reasons - one of which is to help the original lessor with development costs and effectively secure for the buyer a source of crude oil or natural gas.¹⁶⁶ In light of the financial and revenue base of Sinopec, its parent company, the Chinese company can execute the project and the ultimate objective of securing petroleum resources is congruent with the objectives of its home state.

4.3 CNPC/PetroChina and Their Affiliates

In 1998, CNPC (中國石油天然氣集團有限公司) was reorganized to become an integrated group of companies with its businesses covering oil and gas upstream and downstream operations, oilfield services, and engineering construction.¹⁶⁷ CNPC, with its affiliates as a group, is the largest oil and gas producer and seller in China and one of the largest companies in the Asian country in terms of revenue.¹⁶⁸ The Chinese NOC is also one of the largest oil companies in the world.¹⁶⁹ CNPC operates in Nigeria with three affiliates; PetroChina, Chinese National Oil & Development Company (CNDC), and China Petroleum Pipeline Engineering Company Limited. Since they entered the Nigerian oil sector, China and its NOCs have increasingly broken new ground in the African country. In 2005, China and Nigeria entered into a long-term sales contract for the supply of 30,000 barrels of crude oil per day to the Asian country, as shown in figure 10.¹⁷⁰ The parties to the contract are PetroChina and the NNPC Limited. In its 2018 report, CNPC stated that the US\$800-million-dollar crude oil sales contract provided a solid foundation for developing the

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ For the reasons why extractive companies farm-out some of their interests in a concession, see Olawuyi, *supra* note 5 at 217-8.

¹⁶⁷ "CNPC", online: History <http://www.cnpc.com.cn/en/history/history_index.shtml>. <https://perma.cc/YR46-MZ2K>.

¹⁶⁸ PetroChina Company Limited: 2019 Annual Report (Beijing, China: PetroChina, 2020). <https://perma.cc/WT4K-63ST>.

¹⁶⁹ Ibid.

¹⁷⁰ "FACTBOX-China's Oil Deals in Africa", Reuters (29 September 2009), online: <<https://www.reuters.com/article/china-africa-oil-idUKPEK34126420090929>>. <https://perma.cc/USC5-LP7T>.

African market.¹⁷¹ The duration of the contract is not disclosed to the public. In a bid round held in 2006, CNPC reached an oil and gas cooperation agreement with the government of Nigeria and won the tender of four blocks, namely OPL471, OPL298, OPL721, and OPL732, respectively.¹⁷² CNPC owns a 90 percent equity stake in OPL471 through a production sharing contract. The oil block is located in the Niger Delta and covers an area of about 1,370 square kilometers.¹⁷³ The stages of petroleum operations in all the concessions to the CNPC and its affiliates are not available in the public domain.

To this point, I have been discussing China's three NOCs and their affiliates with respect to their Nigerian operations. In the next section, I discuss the crucial importance of the NOCs to invest against climate change and in renewable energy projects and technologies in Nigeria. Although fossil fuel extraction by the Chinese NOCs in Nigeria is new in comparison to Western private oil companies, however, their business operations will in the long run contribute significantly to greenhouse gas emissions (GHG) that will exacerbate the environmental degradation caused by Western companies in the Niger Delta.

4.4 Climate Change Considerations in the OFI Arrangements

NOCs account for more than half of global oil and gas output, making them part of the biggest global emitters of greenhouse gases (GHG).¹⁷⁴ In 2021, for example, CNPC was the world fourth biggest oil and gas producer. As corporate actors in the extractive industries invest in projects to transition away from fossil fuel, climate change considerations and requirements should be incorporated into the Sino-Nigeria OFI agreements. Research by Wood Mackenzie finds that NOCs are allocating less than 5 percent of their capital spending to energy transition.¹⁷⁵ Hy-

¹⁷¹ 2018 Annual Report (Beijing: China National Petroleum Corporation, 2018). <https://perma.cc/M9HS-9VH8>.

¹⁷² "CNPC", online: CNPC in Nigeria <http://www.cnpc.com.cn/en/Nigeria/country_index.shtml>. <https://perma.cc/UNX7-TXNX>.

¹⁷³ Supra note 92 at 21.

¹⁷⁴ Raphael Portela & Kavita Jadhav, "How are Global NOCs Tackling the Energy Transition?", (29 March 2022), online: Wood Mackenzie <<https://www.woodmac.com/news/opinion/how-are-nocs-tackling-the-energy-transition/>>.

¹⁷⁵ Ibid.

drocarbon extraction contributes significantly to GHG emissions that adversely affect oil and gas producing communities. At the time of writing, China is the second largest emitter of GHG and relies heavily on imported petroleum products, hence its increasing investment in fossil fuel in Nigeria. However, as an emerging superpower and second largest economy that is competing with the US and whose adherence to global standards of foreign investment is viewed with increased cynicism in the West, Beijing's investment in the oil and gas industry in Nigeria presents it with an opportunity to invest in more¹⁷⁶ renewable energy sources and projects in the most populated country in Africa.

At the backdrop of decades of environmental degradation by Western private oil companies in Nigeria, China needs to invest in low carbon fuels and finance and build more renewable energy projects in Nigeria such as carbon capture infrastructure. The renewable energy infrastructure projects will reduce the carbon footprints of Chinese NOCs in Nigeria and contribute to the global fight against climate change in line with the Paris Agreement. Meaningful and aggressive investment in low carbon projects in Nigeria has the potential to make the Chinese NOCs relatively acceptable by oil producing communities and Nigerians at large. Furthermore, Nigeria and the Chinese NOCs should comply with the EITI's Requirement 6.4 on the reporting of climate mitigation measures. The compliance will be an indicator of how the Nigerian government and China (through its NOCs) are meeting corporate and home state global pollution reduction targets. In September 2020, President Xi Jinping announced China's commitment to reach carbon neutrality in 2060.¹⁷⁷ At the UN Framework Convention on Climate Change Conference of the Parties (COP26), Nigeria committed to net zero by 2060, restricting methane emissions, and ending international financing for fossil fuels. Chinese NOCs' investment in more renewable energy projects in the host state will be a way to foster a win-win investment in the Sino-Nigeria OFI deal and deliver sustainable returns to the Nigerian people. Nigeria needs to continue to provide

¹⁷⁶ As figure 12 shows, China is currently building and financing hydroelectric plants and clean energy projects in some states in Nigeria. The projects include a biofuel production plant, modular refinery flare gas recovery programme, Gurara II hydropower project, Mambilla hydroelectric power plant, and Zungeru hydropower plant.

¹⁷⁷ "China - Energy", (4 January 2022), online: Department of Commerce, United States of America: International Trade Administration <<https://www.trade.gov/country-commercial-guides/china-energy>>.

the enabling investment climate for the Chinese investments to grow and be sustainable. More importantly, the effective regulation of the Sino-Nigeria OFI investment deal must not downplay the profound importance of decarbonizing the Nigerian oil-dependent economy and transitioning to cleaner sources of energy. The integration of non-state actors in the regulatory architecture of the Sino-Nigeria OFI arrangements, as this dissertation will propose in chapter 6, will strengthen Nigeria's quest to decarbonize its economy. This is because NGOs have been at the forefront of advocating for a transition to cleaner energy sources and they possess the expertise that will enhance investment in renewable energy infrastructure projects in Nigeria.

China's oil investment in Nigeria is permitted by the host government and conditional on investing in infrastructure projects in the various sectors of the host country's economy. As noted previously, this investment in infrastructure is critical for the country, given the tremendous need for such developments in the country. The next section outlines the features of China's infrastructure projects that compound the regulatory challenges and complexity.

5. China's Infrastructure Investment Projects in Nigeria

The nation (Nigeria) has a huge infrastructure deficit for which we require foreign capital and expertise to supplement whatever resources we can marshal at home. In essence, increased engagement with the outside world is called for as we seek public-private partnerships in our quest for enhanced capital and expertise. This is the way of the new world for all countries in the 21st century.¹⁷⁸

The Peoples' Republic of China is Nigeria's valued partner in progress. We have cooperated extensively in the fields of trade, technology, security, infrastructure, and human development.¹⁷⁹

We send our gratitude to the Chinese for all their support to Nigeria. Since independence, no country has helped our country with infrastructural development like the

¹⁷⁸ "ICRC Regulates PPP in Nigeria", online: ICRC | Infrastructure Concession Regulatory Commission <<https://www.icrc.gov.ng/>>. <https://perma.cc/KMZ6-9MA9>.

¹⁷⁹ "President Buhari Congratulates China on 69th Anniversary", (29 September 2018), online: The State House, Abuja <<https://statehouse.gov.ng/news/president-buhari-congratulates-china-on-69th-anniversary/>>. <https://perma.cc/F34X-XTTX>.

Chinese. In some projects, the Chinese help us with 85 percent payment, and soft loans that span 20 years. No country has done that for us.

- Muhammadu Buhari –President, Federal Republic of Nigeria

China-Africa cooperation must give Chinese and African people tangible benefits and successes that can be seen, that can be felt.¹⁸⁰

- Xi Jinping –President, People’s Republic of China

The foregoing statements by Nigeria’s and Chinese presidents succinctly evince the acute dearth of infrastructure in Nigeria and the pivotal position of China in the economic and social development of the host country. Below I posit that the Sino-Nigeria OFI pact is a methodical and strategic resistance by the host state against the transnational capitalist hegemony of the US and other Western oil companies in Nigeria’s petroleum sector. It is resistance against over half a century of exploitation of petroleum resources that have stifled competition in the industry, reinforced a culture of rent-seeking and transnational bribery among Nigeria’s political class, and effectively constrained socio-economic developments in the country. A confluence of the dearth of infrastructure, a culture of rent-seeking, and bribery of government officials have become some of the socio-economic and regulatory incubus of Nigeria’s nationhood and oil industry.

What then is China doing through the OFI arrangements to redefine and re-historicize some of the phenomena? Are there some challenges and concerns with Chinese oil and infrastructure investments in Nigeria? The next sections address these crucial questions.

5.1 China’s Infrastructure Projects in Nigeria

In chapter 2, I noted that Nigeria invested in infrastructure in the 1970s but the many decades of political instability and burgeoning youth population¹⁸¹ have led to the inadequacy of economic

¹⁸⁰ “China’s Xi Offers \$60bn in Financial Support to Africa”, Aljazeera News (3 September 2018), online: <<https://www.aljazeera.com/news/2018/09/china-xi-offers-60bn-financial-support-africa-180903100000809.html>>. <https://perma.cc/NKN4-3C7L>.

¹⁸¹ “Nigeria: Out of Recession and Looking Beyond Oil”, (15 March 2018), online: International Monetary Fund <<https://www.imf.org/en/News/Articles/2018/03/15/na031518-nigeria-out-of-recession-and-looking-beyond-oil>>. <https://perma.cc/3ZTJ-QT6B>.

infrastructure. Deficient and moribund transport, energy, and health facilities have posed fundamental challenges to Nigeria, retarding the socio-economic development of non-oil sectors. In both colonial and post-colonial eras, trade and investment relations between Western countries and Nigeria have been asymmetrical. As a result, Nigeria has been pigeonholed as an exporter of petroleum and an importer of refined crude oil and manufactured products.¹⁸² Since 1999, successive democratic governments and governing political parties have made infrastructure investment a key issue in their proclamations and manifestos. In a recent multilateral asset repatriation agreement with the US and the British Dependency of Jersey, the Nigerian government undertook to use a US\$300 million recovered loot from a former military president to develop major road infrastructure.¹⁸³

Successive Nigerian and Chinese presidents have exchanged official visits to each others' countries and have used the platforms to reach some agreements on bilateral trade and investment that have proved powerful cement in Sino-Nigeria relations. Under the Sino-Nigeria OFI deals, China, through its state-owned financial institutions (SOFIs), gives long-term soft loans to Nigeria to finance its large infrastructure projects. Chinese SOFIs, namely, the Export-Import Bank of China (China Exim Bank), China Development Bank (CDB), and China Export & Credit Insurance Corporation (SINOSURE) provide capital for these major projects. Capital provided through various models such as counterpart funding, escrow account, build and transfer, as well as build, operate, own, and transfer public-private partnerships.

As shown in figure 12 below, beginning in 2003, Chinese state-owned engineering and construction firms have increasingly pursued the ambitious execution of infrastructure projects in many sectors of the Nigerian economy. One of the hallmarks of Chinese infrastructure projects in Nigeria is

¹⁸² Dr. Ian Taylor has, however, argued that Nigeria's trade relations with China is also extremely unbalanced as the African country imports ten times more than it exports to China. See Taylor, *supra* note 97 at 755.

¹⁸³ George Libby, "U.S., Jersey Sign \$300 Million Abacha Loot Repatriation Deal with Nigeria", Reuters (4 February 2020), online: <<https://www.reuters.com/article/us-usa-nigeria-idUSKBN1ZY1W0>>. <https://perma.cc/YJ46-2T5E>. See also Terhemba Daka, "'Returned \$311m Abacha Loot for Three Priority Projects Only'", The Guardian Nigeria (14 May 2020), online: <<https://guardian.ng/news/returned-311m-abacha-loot-for-three-priority-projects-only/>>. <https://perma.cc/2EYH-MB4Y>.

the interconnectivity and movement of goods and people across the country. From investments in commuter trains and high-speed railway transit systems to the construction of deep seaports, from mega power projects to boost electricity generation to the construction of airports in major cities. China is gradually making major strides in infrastructure development in Nigeria. Some of the OFI projects have been completed and handed over to Nigeria while others are in progress. The following projects have been completed including but not limited to the Abuja light rail,¹⁸⁴ Abuja-Kaduna rail line,¹⁸⁵ Papalanto Power Plant, Omotosho power plant phase 1, and Abuja, Port-Harcourt,¹⁸⁶ and Lagos airports, respectively. One of the contractual formulas used in the Chinese infrastructure investment in Nigeria is that in most of the projects, the host country requires a performance bond from the Chinese firm.¹⁸⁷ All the railways, seaports, airports, and transnational highways projects in Nigeria are being handled by Chinese state-owned engineering and construction firms and their subsidiaries. The firms include China Railway Construction Corporation Limited (CRCC), China Civil Engineering and Construction Corporation, China Harbour Engineering Company, China Petroleum Pipeline Engineering Company Limited, China Gezhouba Group Corporation, Sinohydro Corporation, and China Geo-Engineering Group Corporation.

Why do Chinese companies get all the infrastructure contracts? The answer to this question lies in what Nigeria's Minister of Transportation generally refers to as "a good working relationship

¹⁸⁴ "President Muhammadu Buhari's Address at the Commissioning of the Abuja Light Rail System", (12 July 2018), online: State House, Abuja <<https://statehouse.gov.ng/news/president-muhammadu-buharis-address-at-the-commissioning-of-the-abuja-light-rail-system/>>. <https://perma.cc/9F6N-52F5>.

¹⁸⁵ "Abuja-Kaduna Rail Line", online: Railway Technology <<https://www.railway-technology.com/projects/abuja-kaduna-rail-line/>>. <https://perma.cc/HC6C-QWAS>.

¹⁸⁶ "President Muhammadu Buhari's Speech at the Commissioning of the New Terminal at Port Harcourt International Airport Omagwa, Rivers State", (25 October 2018), online: State House, Abuja <<https://statehouse.gov.ng/news/president-muhammadu-buharis-speech-at-the-commissioning-of-the-new-terminal-at-port-harcourt-international-airport-omagwa-rivers-state/>>. <https://perma.cc/B4H9-ZKMS>.

¹⁸⁷ Okechukwu Nnodim, "FG, China Sign \$3.9bn Abuja-Itakpe-Warri Rail Contract", *Punch Newspapers* (11 October 2019), online: <<https://punchng.com/fg-china-sign-3-9bn-abuja-itakpe-warri-rail-contract/>>. <https://perma.cc/P2WR-LL96>. A performance bond is a tripartite insurance agreement in which a bonding company or surety guarantees to the project owner that the contractor will faithfully perform its obligations under the construction contract and complete the project. The bonding company undertakes to compensate the project owner/client if the contractor fails to complete the project. In a performance bond, a bonding company is usually a financial institution. Parties to a construction project sign a performance bond in order to avert risks, uncertainties, and delays associated with construction. See, for example, Aron J Frakes, "Surety Bad Faith: Tort Recovery for Breach of a Construction Performance Bond" (2002) 2002:2 U Ill L Rev 497.

between Chinese companies and the Nigerian government”.¹⁸⁸ In addition, in light of the gigantic nature of the projects, Nigeria is unlikely to pay non-Chinese contractors as a result of insufficient liquidity as the country is in a post-recession era with huge external debt¹⁸⁹ and budget deficit. Thus, the OFI arrangements may be the most economically, perhaps even the most politically expedient method of completing the projects. Both reasons appear to undermine the principles of transparency and equality of treatment in procurement regulation that I have discussed in this chapter. Similarly, the practice of awarding all the infrastructure contracts to Chinese state-owned firms may be a violation of Nigeria’s commitment to Article 9(1) of the UNCAC that enjoins state parties to “...take the necessary steps to establish appropriate systems of procurement, based on transparency, competition, and objective criteria...in preventing corruption”. Although these are the case, the derogations that are permitted under the MFN treatment principle in the GATT (that is, the advancement of the legitimate interest of the state), may release Nigeria from its commitment to some of the international best practices in procurement based on a critical national need for infrastructure development.

In a similar vein, it is concerning that the Nigerian government award contracts to some Chinese construction and engineering firms that have been debarred by multilateral financial and donor institutions. In June 2019, the World Bank Group (WB) debarred CRCC International and some of its subsidiaries for fraudulent and corrupt practices in procurement.¹⁹⁰ Other Chinese firms that have been debarred and cross-debarred by the WBG and African Development Bank (ADB) include China Gezhouba Engineering, China Zhonghao Nigeria Limited.¹⁹¹

¹⁸⁸ Nnodim, *supra* note 660. Brautigam has pointed out that infrastructure contracts are tied to Chinese firms and the bidding is not very transparent. See Brautigam, *supra* note 1 at 11.

¹⁸⁹ “Debt Management Office Nigeria”, online: External Debt Stock <<https://www.dmo.gov.ng/debt-profile/external-debts/external-debt-stock>>. <https://perma.cc/Y2G4-EZMR>.

¹⁹⁰ “World Bank Group Debars China Railway Construction Corporation Ltd. and Two Subsidiaries”, (5 June 2019), online: The World Bank <<https://www.worldbank.org/en/news/press-release/2019/06/05/world-bank-group-debars-china-railway-construction-corporation-ltd-and-two-subsidiaries>>. <https://perma.cc/Q84Z-SLFX>.

¹⁹¹ “Debarment and Sanctions Procedures: List of Debarred Entities”, (10 May 2019), online: African Development Bank Group <<https://www.afdb.org/en/projects-operations/debarment-and-sanctions-procedures>>. <https://perma.cc/DC6S-Z83S>. By virtue of the Agreement for Mutual Enforcement of Debarment Decisions signed by five Multilateral Development Banks (MDBs), individuals and firms debarred by one MDB for a minimum of one year are automatically debarred by the other MDBs. The Five MDBs are the African Development Bank Group, the Asian Development Bank, The European Bank for Reconstruction and Development,

Year	Project	Project Cost (Notional)
2003	Maintenance & Construction of Nigeria Railway System & Supply of Locomotives	RMB4.4 billion
2016	Abuja Light Rail	US\$824 million
2011	Abuja-Kaduna Rail Line	US\$876 million
2019	Abuja-Itakpe-Warri Rail Line	\$3.9 billion
2003	Lekki Deep Sea Port	\$1.6B
2017	Ajaokuta-Kaduna-Kano (AKK) Gas Pipeline	\$2.8B
2017	Mambilla Hydroelectric Plant	US\$5.8B
2019	Gurara II Hydropower Project	\$1B
2013	Zungeru Hydropower Plant	\$1.29B
2018	Modular Refinery and Flare Gas Recovery Programme	500M
2019	Dualization of Abuja-Keffi/Trans-Saharan Highway	Not Known
2018	Port-Harcourt Airport	US\$600M
2018	Abuja Airport	US\$600M
2017	Lagos Airport	Not known
2013	Sino-Nigeria Friendship Hospital	US\$12M

Figure 12: Selected China's Key Infrastructure Projects in Nigeria

Sources: Companies' websites, Nigerian government's websites, Website of the Chinese Embassy in Nigeria, Global Development Policy Center, and China Aid Data.

The infrastructure projects that I tabulated in figure 12 are funded with the aid of Chinese loans. As Brautigam has stated, Chinese aid and economic cooperation differ, both in their content and in the norms of aid practice –it emphasizes infrastructure, production, and university scholarships at a time when the traditional (Western) donors downplayed all of these.¹⁹² However, there are concerns by Nigeria's federal legislature that the terms and conditions of the loans are opaque and are a potential source of debt trap for the recipient country. It is this concern by a branch of government that I briefly examine hereunder.

the Inter-American Development Bank Group, and the World Bank Group. See Susan Finder, "The International Fraud and Corruption Sanctioning System: The Case of Chinese SOEs" in Julien Chaisse, ed, *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (Oxford: Oxford University Press, 2019) 397 at 398-9.

¹⁹² Brautigam, *supra* note 1 at 11.

6. Chinese Oil-Backed Loans to Nigeria

China's concessional loans to Nigeria, most of which are used to fund the infrastructure projects in figure 12 above, have come under critique and scrutiny on the floor of Nigeria's federal legislature. The Nigerian lawmakers argue that the Chinese loans were obtained under unfair contractual terms¹⁹³ and without due process,¹⁹⁴ and that the executive branch is pledging away the nation's resources and sovereignty through excessive borrowing. The lawmakers argue that this is a debt trap for Nigeria.¹⁹⁵ Data from Nigeria's Debt Management Office show that as of December 2019, the country's debt to China Exim Bank stood at US\$3.18 billion.¹⁹⁶ Based on those issues and the current nosedive in oil prices caused by COVID-19, some of the lawmakers are demanding a renegotiation or cancellation of Sino-Nigeria loan agreements.¹⁹⁷ In the context of what he calls "China's human rights exceptionalism in Africa", James Thuo Gathii argues that altering the terms according to which China invests in Africa to promote long-term economic growth could lift millions from poverty.¹⁹⁸ In the context of bilateral and economic ties, the outright cancellation of the Chinese loans to Nigeria or modification of their terms may be inimical to the robust trade and investment relations between the two countries and antithetical to the host country's quest for infrastructure development.

This dissertation identifies one form of transparency challenge arising from the Sino-Nigeria OFI

¹⁹³ "Concerns Mount Over Loan Agreement Clause Waiving Nigeria's Sovereignty Immunity", THISDAYLIVE (3 August 2020), online: <<https://www.thisdaylive.com/index.php/2020/08/03/concerns-mount-over-loan-agreement-clause-waiving-nigerias-sovereignty-immunity/>>. <https://perma.cc/CF3T-JE49>.

¹⁹⁴ Ihuoma Chiedozi, "DMO Faults Reps, Says Lawmakers Approved \$3.18bn Chinese Loans", Punch Newspapers (29 May 2020), online: <<https://punchng.com/dmo-faults-reps-says-lawmakers-approved-3-18bn-chinese-loans/>>. <https://perma.cc/7DZW-NN8E>.

¹⁹⁵ "Chinese Loans: Nigeria, Others Can't Plead Sovereignty, Says Akinyemi", THISDAYLIVE (2 August 2020), online: <<https://www.thisdaylive.com/index.php/2020/08/02/chinese-loans-nigeria-others-cant-plead-sovereignty-says-akinyemi/>>. <https://perma.cc/TFV5-PTDL>.

¹⁹⁶ "Press Release - Facts About Chinese Loans to Nigeria", (18 June 2020), online: Debt Management Office Nigeria <<https://www.dmo.gov.ng/news-and-events/dmo-in-the-news/press-release-facts-about-chinese-loans-to-nigeria>>. <https://perma.cc/2QP9-9F2B>.

¹⁹⁷ Levinus Nwabughio, "COVID-19: Reps Seek Review, Cancellation of Chinese Loans to Nigeria", Vanguard News (13 May 2020), online: <<https://www.vanguardngr.com/2020/05/covid-19-reps-seek-review-cancellation-of-chinese-loans-to-nigeria-2/>>. <https://perma.cc/3U97-TC5F>.

¹⁹⁸ James Thuo Gathii, "Beyond China's Human Rights Exceptionalism in Africa: Leveraging Science, Technology and Engineering for Long-Term Growth" (2012) 51:3 Colum J Transnat'l L 664 at 681, hereinafter, Gathii "Beyond China's Human Rights Exceptionalism in Africa".

investment arrangements. In this connection, there is a lack of viable and open competition in the award of oil concessions and infrastructure contracts. The invitations to bid for oil-backed infrastructure contracts are not made open to both Chinese and non-Chinese engineering firms. The Chinese NOCs and engineering firms get all the contracts because there is no viable and open competition process in the award of the infrastructure projects. This is against international best practices in the procurement process. The basic features of good practices in public procurement are embedded in the UNCAC and some other international regimes such as GATT. The good practices in procurement include ensuring transparency and encouraging the use of competition in the allocation of contracts through open tendering, measures to promote competition and prevent collusion between bidders, clarity on the evaluation criteria that will be used to determine the winning bid, including the relative weight that will be given to price as opposed to qualitative criteria or technical quality and whether there will be a preference given to (certain types of) domestic firms, providing feedback to bidders why they were not selected and domestic review and complaints mechanisms permitting firms to contest perceived non-compliance by procuring entities with domestic law and procurement regulations.¹⁹⁹ For example, Article 9 of the UNCAC mandates each State Party to take the necessary steps to establish appropriate systems of procurement, based on transparency, competition, and objective criteria in decision-making, that are effective, in preventing corruption. In other words, bidding rounds should be advertised publicly, the criteria of bids should be clearly defined, and there should be a material disclosure of the procurement process followed in awarding the oil and infrastructure contracts. Although the peculiarity of each country's socio-economic needs plays a crucial role in the country's ability to comply with international standards in procurement, effectively addressing a lack of viable and open competition in the OFI arrangements by the Chinese and Nigerian governments will enhance the integrity and accountability of the investment model and may reduce the level of skepticism that currently attend the arrangements. The process of incorporating a viable and

¹⁹⁹ UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422, available at: <https://www.refworld.org/docid/4374b9524.html> [accessed 1 December 2022]. See also Tania Ghossein, Bernard Hoekman, and Anirudh Shingal "Public Procurement in the Belt and Road Initiative" (Discussion Paper No. 10, MTI Global Practice, December 2018) at 9.

open competitive process in the award of oil and infrastructure contracts in the OFI deals will level the playing field. The opening up of the procurement process to non-Chinese companies will also ensure that the best-qualified firms are selected and that the quality of work in relation to the infrastructure projects is very high.

7. Other Key State Actors and Institutional Mechanism in Sino-Nigeria Investment Relations

In addition to the Chinese NOCs that I have discussed in this chapter, Beijing, in its investment activities in Nigeria, deploys a host of other state actors and institutions such as the China Exim Bank, CDB, SINOSURE, and the Forum on China-Africa Cooperation (FOCAC). My task in the next section is to provide a brief snapshot of some of the other key state actors and institutional mechanisms and how they fit both in the broader Chinese trade and investment agenda as well as in the Sino-Nigeria OFI deals. The discussion of China's use of its policy banks is helpful because conceptualizing and analyzing how China is leveraging its financial policy institutions and FOCAC to advance its oil and infrastructure investment interests in Nigeria is vitally important to understanding by what means Beijing is enlarging its investment footprints in Nigeria, and Africa at large.

7.1 China's State-Owned Financial Institutions

Although the three Chinese SOFIs –the China Exim Bank,²⁰⁰ CDB,²⁰¹ and SINOSURE²⁰² have separate and independent legal personalities, they are state-funded and state-owned financial institutions directly under the leadership of the State Council. The State Council maintains an oversight role for aid.²⁰³ It approves the annual aid budget, any grants of cash above US\$1.5 million, all aid projects above 100 million RMB (about US\$12.5 million), aid to “politically sensitive countries”, and any requests to exceed the annual plan for foreign aid.²⁰⁴ The three SOFIs are policy-oriented financial institutions that are established to meet the demands of economic globalization and are playing crucial roles in supporting Beijing's foreign trade and investment and implementing the “Going Out strategy.”²⁰⁵ The SOFIs, along with other Chinese state-owned financial institutions play crucial roles in Beijing's infrastructure projects overseas and the BRI. For example, SINOSURE plays a critical role in supporting the construction of the BRI.²⁰⁶ The China Exim Bank provides export credits, guarantees, and concessional loans to foreign governments for the execution of their infrastructure projects and finances the import of goods from

²⁰⁰ In China, the Bank has 32 branches on the mainland and one representative office in Hong Kong. Overseas, it has the Paris Branch, Representative Office for Southern and Eastern Africa, St. Petersburg Representative Office, Representative Office for Northern and Western Africa. See “Introduction: The Export-Import Bank of China”, online: About the Bank <<http://english.eximbank.gov.cn/Profile/AboutTB/Introduction/>>. <https://perma.cc/F9BR-CCUH>.

²⁰¹ Founded in 1994 and incorporated in 2008, CDB was officially defined by the State Council as a development finance institution in 2015. CDB has a registered capital of RMB 421.248 billion. Its shareholders include the Ministry of Finance of the People's Republic of China (36.54%), Central Huijin Investment Ltd. (34.68%), Buttonwood Investment Holding Co., Ltd. (27.19%) and the National Council for Social Security Fund (1.59%). See “China Development Bank”, online: About CDB <http://www.cdb.com.cn/English/gykh_512/khjj/>. <https://perma.cc/V57A-LWAZ>.

²⁰² SINOSURE commenced operations in December 2001. As of the end of 2019, it had accumulatively supported more than USD 4.6 trillion of domestic and foreign trade and investment, provided credit insurance-related services for over 160,000 enterprises, paid a total of USD 14.2 billion claims and facilitated 200+ banks offering more than RMB 3.6 trillion of financing for exporters. See “China Export & Credit Insurance Corporation”, online: Corporate Profile <<http://www.sinosure.com.cn/en/Sinosure/Profile/index.shtml>>. <https://perma.cc/5MSG-622R>.

²⁰³ Brautigam, *supra* note 1 at 107.

²⁰⁴ *Ibid.*

²⁰⁵ “Introduction”, online: The Export-Import Bank of China <<http://english.eximbank.gov.cn/Profile/AboutTB/Introduction/>>. <https://perma.cc/F9BR-CCUH>.

²⁰⁶ According to the OECD, By December 2015, SINOSURE had underwritten US\$570.56 billion for China's export, investment, and contracting projects in the countries along the BRI area, with US\$1.855 billion paid out as indemnities. In July 2015, SINOSURE signed a co-operation agreement on the BRI with the Industrial and Commercial Bank of China, focusing on supporting projects in regions along the BRI area. See “China's Belt and Road Initiative in the Global Trade, Investment and Finance Landscape” in OECD Business and Finance Outlook 2018 (Paris: OECD Publishing, 2018) at 19.

Africa, among other things.²⁰⁷ As of the end of 2015, CDB, which is notably the world's largest development finance institution, had supported more than 400 energy-resource and construction projects worth more than US\$110 billion in 37 countries along the BRI.²⁰⁸

The China Exim Bank, CDB, and SINOSURE play pivotal roles in the Sino-Nigeria OFI and loan deals. The China Exim Bank and CDB provide up to 85 percent funding for many infrastructure projects that I set out in figure 12 above including but not limited to, the Mambilla hydroelectric plant, Gurara II, and Zungeru hydropower projects, and the LNG modular refinery.²⁰⁹ For its part, SINOSURE insures Chinese companies operating in Nigeria for up to 90 percent in the event of economic losses resulting from political risks such as expropriation, exchange restrictions, war, political riot, and breach of contract.²¹⁰ SINOSURE, through its overseas investment debt insurance, assumes the loss of claims on debts by Chinese companies for their Nigerian oil and infrastructure investment projects, including the AKK gas pipeline.²¹¹

In addition to the strategic roles of the financial institutions in the Sino-Nigeria OFI deals, the investment arrangements have also evolved through a framework of Chinese-led multilateralism.²¹²

The FOCAC, which is an institutional macrocosm of Beijing's trade engagements with Abuja, is used as a platform to project China's foreign economic policy both in Nigeria and in the African

²⁰⁷ "China Eximbank Officially Set up a USD5 Billion Special Fund for Financing Imports from Africa", (19 February 2019), online: The Export-Import Bank of China <http://english.eximbank.gov.cn/News/NewsR/201904/t20190410_8835.html>. <https://perma.cc/K8RX-9TXN>.

²⁰⁸ Supra note 256 at 18.

²⁰⁹ "China Eximbank Signed Loan Agreements with Nigerian Finance Ministry", (30 May 2018), online: The Export-Import Bank of China <http://english.eximbank.gov.cn/News/NewsR/201810/t20181016_6946.html>. <https://perma.cc/D38L-FSEC>. See also supra note 175 at 60.

²¹⁰ "China Offers Nigeria Export Credit Guarantees - FT", Reuters (1 April 2008), online: <<https://uk.reuters.com/article/Sino-Nigeria-idUKPEK9950620080402>>. <https://perma.cc/XZC2-CRZF>.

²¹¹ "Chinese Bank, Sinosure to Fund \$2.6bn Ajaokuta-Kano Pipeline", (2 July 2020), online: Nigerian Investment Promotion Commission <<https://nipc.gov.ng/2020/07/02/chinese-bank-sinosure-to-fund-2-6bn-ajaokuta-kano-pipeline/>>.

²¹² Here, multilateralism is used in its generic institutional sense and international trade context to refer to institutional arrangements created to coordinate relations among three or more states in accordance with generalized or certain principles of conduct (e.g. non-discrimination), to define and stabilize the international property rights of states, to manage coordination problems, and to resolve collaboration problems in trade and investment relations. See, for example, John Gerard Ruggie, "Multilateralism: The Anatomy of An Institution" (1992) 46:3 *International Organization* 561 at 567-571.

continent.

7.2 The FOCAC

Beginning in the mid-twentieth century, China and other Asian states have forged institutional and policy frameworks with Africa for the advancement of their collective political and economic cooperation. The Asian-African Conference of 1955 that was convened and coordinated by the Indonesian government and held in Bandung was a precursor forum for Asia-Africa political and economic partnerships. It was at Bandung that China made its initial exploratory ties with the African continent.²¹³ FOCAC is intended to serve as an institutional link between China and Africa for the advancement of their economic and political agendas. The FOCAC was set up in 2000 to deepen and foster Sino-African economic cooperation and to create a new international political and economic order in the 21st century.²¹⁴ Some of the self-declared objectives of the FOCAC are to eradicate the huge gap in the living standard that currently exists between the industrialized West and the Third World and to establish a just and equitable new international political and economic order that will enable the effective participation of developing countries in the international process of decision-making.²¹⁵

The FOCAC, its internal mechanisms, and 33 member departments and agencies are major drivers of Beijing's economic engagement with African states. After 20 years of its establishment, the FOCAC has become an effective economic platform between Nigeria and China and has boosted Sino-Nigeria trade and investment cooperation. The Sino-Nigeria trade and investment relations through the FOCAC have resulted in the execution of critical national oil-funded infrastructure

²¹³ Ian Taylor, *The Forum on China- Africa Cooperation (FOCAC)* (London, UNITED KINGDOM: Routledge, 2011) at 5.

²¹⁴ "Beijing Declaration of the Forum on China-Africa Cooperation", (20 September 2006), online: Ministry of Foreign Affairs, the People's Republic of China <<https://www.fmprc.gov.cn/zflt/eng/bjzl/t404142.htm>>. <https://perma.cc/C3G5-6VF6>. At present, 53 African countries, including Nigeria, are members of FOCAC. A FOCAC forum is held every three years and the venue is rotated between Beijing and Africa. For a detailed account of the origins, structure, workings, and activities of FOCAC, see Taylor, *supra*.

²¹⁵ As a result of the increased success of FOCAC as a platform for regional economic cooperation, similar institutions have been established between China and 17 Central and Eastern European states (now commonly known as the 17+1), and China and Community of Latin American and Caribbean States (CELAC) Forum. See, for example, Jakub Jakóbowski, "Chinese-led Regional Multilateralism in Central and Eastern Europe, Africa and Latin America: 16 + 1, FOCAC, and CCF" (2018) 27:113 *Journal of Contemporary China* 659.

projects valued at US\$5 billion.²¹⁶ A major challenge of FOCAC is that China is in control of the whole process as it sets the agenda, and the declarations and outcomes.²¹⁷ Furthermore, the establishment of FOCAC demonstrates that Beijing, as I stated in chapter 2, projects its economic and political influence and power in a variety of subtle ways that provide an alternative to the existing Western-led international liberal order. Scholars who conceptualize power beyond the confines of economic prowess and natural resource extraction have shown that China's power is also relational and social.²¹⁸ In this context, the internal mechanisms, departments, and agencies of FOCAC are increasingly deployed by China to drive human capital development, technical capacity building, people-to-people exchange programs in the Sino-African investment relations. For example, the FOCAC Legal Forum is a mechanism that brings together legal experts from China and African countries to exchange knowledge on the impact of legal systems on Sino-Africa trade and investment relations as well as dispute resolution. In addition to the Chinese state-led investments in petroleum resources and infrastructure projects, these social connections and people-to-people exchanges are some of the subtle ways that China is projecting its economic power and influence in African states.

In the preceding sections, I have shown how Chinese state-owned financial institutions and FOCAC are propelling the Sino-Nigeria OFI deals. I will now consider the position of scholars and the responses of NGOs concerning the regulation of the Sino-Nigeria resource-for-infrastructure investment. The responses of NGOs are important because, in terms of bribery and corruption in the global oil industry, NGO activities, powers, and influences have been exercised through and against state actors and business enterprises.²¹⁹ Local and transnational NGOs have shown the

²¹⁶ "President Buhari Greets President Xi Jinping on Chinese Lunar Year", (21 January 2020), online: The State House, Abuja <<https://statehouse.gov.ng/press-releases/president-buhari-greets-president-xi-jinping-on-chinese-lunar-year/>>.

²¹⁷ Ian Taylor, "The Institutional Framework of Sino-African Relations" in Arkebe Oqubay & Yifu Justin Lin, eds, *China-Africa and An Economic Transformation* (Oxford, United Kingdom: Oxford University Press, 2019) 98 at 119.

²¹⁸ Lina Benabdallah, *Shaping the Future of Power: Knowledge Production and Network-Building in China-Africa Relations* (Ann Arbor: University of Michigan Press, 2020). Non-dominant international relations scholarship study power not only through the lens of materialism but through knowledge production and people-centred diplomacy.

²¹⁹ "SERAP Asks Court to Order Buhari to Publish Details of Govt Loans Since 2015", online: Socio-Economic

ability to expose corrupt corporate and individual actors, prompting anti-corruption agencies in various jurisdictions to investigate and prosecute oil-related bribery cases.²²⁰ NGOs have proved to be strong advocates for the repatriation of stolen funds from the West to Nigeria.²²¹

8. Regulatory Concerns over Sino-Nigeria Oil-for-Infrastructure Arrangements

A number of scholars and activists have expressed concern about the entry of Chinese NOCs into Nigeria's oil industry. I cluster critiques of such ties, and of China's role in particular, into two main groups: those who focus on the opaque aspects of the deal and those who are concerned with the exclusion of Western oil companies. First, scholars, such as Cyril Obi, John Campbell, Ian Taylor, and Alex Vines are critical of the Sino-Nigeria OFI relationship, and argue that the process of granting oil mining rights to Chinese NOCs was opaque.²²² For example, Obi, Taylor, and Campbell (who served as US Ambassador to Nigeria from 2004-2007) have noted that many oil agreements between China and Nigeria were short on details and the negotiations were tainted with bribery and corruption.²²³ According to Taylor, Chinese actors have often succeeded in bidding for oil drilling rights in Nigeria because Western companies either have not been interested in bidding for a particular project or have not played ball with Nigerian government demands whilst the Chinese have been prepared to do so. Campbell notes that "negotiations were heavily greased by bribery and other forms of corruption".²²⁴ The second group of scholars such

Rights and Accountability Project (SERAP) <<https://serap-nigeria.org/serap-asks-court-to-order-buhari-to-publish-details-of-govt-loans-since-2015.ngo/>>. <https://perma.cc/QG82-FT8N>.

²²⁰ Supra Shell Knew, www.globalwitness.org (Global Witness, 2017). <https://perma.cc/5ART-LWF7>.

²²¹ Supra "We Will Relay Abacha Loot Letter to Trump", Says US Embassy –SERAP", online: <<https://serap-nigeria.org/we-will-relay-abacha-loot-letter-to-trump-says-us-embassy.ngo/>>. <https://perma.cc/22BZ-WUT2>.

²²² Obe, Wong & Campos, supra note 94 at 12-28. Cyril Obi, "The Petroleum Industry: A Paradox or (sp)oilier of Development?" (2010) 28:4 *Journal of Contemporary African Studies* 443. *The Nigerian National Petroleum Corporation and the Development of the Nigerian Oil and Gas Industry: History, Strategies and Current Direction*, by Ugo G Nwokeji, *The Changing Role of National Oil Companies in International Energy Markets* (Baker Institute/Japan Petroleum Energy Center, 2007) at 109.

²²³ Obi, Ian Taylor, "Chinese Interest in Nigeria's Oil and the American Context" (2014) 48:3 *Canadian Journal of African Studies / Revue canadienne des études africaines* 391 at 399.

²²⁴ John Campbell, "Opinion: Who's in charge, China or Nigeria?", (7 June 2010), online: *Global Post* <<https://theworld.org/stories/2010-06-07/opinion-whos-charge-china-or-nigeria>>.

as Alexandra Gillies, Erica Downs, et al, and Scott Pegg,²²⁵ posit that Western oil investors were excluded from the oil licensing rounds of 2006, 2007, and 2008, respectively,²²⁶ and thus, the entry of Chinese NOCs into Nigeria exacerbates corruption and spells doom for the global efforts to address bribery and corruption. Gilles, for example, notes that one of the serious shortcomings suffered by the 2007 and 2008 oil licensing rounds was the application of inconsistent bid round qualifications that worked to the disadvantage of Western companies and the award of preferential first refusal rights to companies that promised to make infrastructure investments.²²⁷ Downs argues that China's purchase of oil drilling rights for its NOCs through the support of Chinese policy banks poses regulatory challenges as it affects the ways in which companies compete in developing countries.²²⁸

These concerns and arguments are as compelling as they are grounded in empirical facts. However, the regulatory concerns and challenges arising from the Sino-Nigeria OFI investment arrangements are as complex as they are subtly nuanced. They do not lend themselves to straightforward binaries. For example, one of the challenges of regulating the Sino-Nigeria OFI deals is that the arrangements tend to be vulnerable to international influences. Given the structure and actors (including Chinese state-owned financial institutions and the party-State) that currently govern the arrangements, the location and site of the major decision-making of the arrangements may be technically externalized and centralized. A superpower state such as China has the economic clout and political capacities to use diplomatic and tactful ways to dominate the decision-making ecosystem of the deals concerning the oilfield licensing process, conditionalities, and the terms of accessing finance for infrastructure. According to China's "Five No" approach²²⁹ to trade and

²²⁵ Scott Pegg, "Social Responsibility and Resource Extraction: Are Chinese Oil Companies Different?" (2012) 37:2 Resources Policy 160.

²²⁶ Obe, Wong & Campos, *supra*. See also Brautigam, *supra* note 71.

²²⁷ Alexandra Gillies, "Reforming Corruption Out of Nigerian Oil? Part One: Mapping Corruption Risks in Oil Sector Governance", (2009), online: U4 Brief <<https://www.cmi.no/publications/3295-reforming-corruption-out-of-nigerian-oil-part-one>>.

²²⁸ Untangling China's Quest for Oil through State-backed Financial Deals, Policy Brief, by Erica S Downs and Peter C Evans, Policy Brief 154 (Washington DC: The Brookings Institution, 2006) at 2.

²²⁹ "Spotlight: FOCAC Beijing Summit Shows China's Approach, Dedication to Africa", (6 September 2018), online: Embassy of the People's Republic of China in Canada <<http://ca.china-embassy.org/eng/zgxw/t1592807.htm>>. <https://perma.cc/6DT7-NZJX>.

investment, Beijing does not impose its will on African countries, does not interfere in African countries' pursuit of development paths that fit their natural conditions, and does not attach political strings to financial assistance to Africa. However, researchers have demonstrated that China largely determines the agenda and charts the course of its relations with Nigeria and other African states.²³⁰ For instance, Pay and Nwosu have also argued that the exclusion of civil society, absence of deep engagement with wider social actors, and unequal economic practices in the Sino-Nigeria trade and investment relations could be detrimental to the prospects of the arrangements.²³¹ Conversely, Campbell posits that "Abuja, not Beijing is in the driver's seat" of the Sino-Nigeria OFI investment relations noting that any Chinese economic role in Nigeria is constrained and shaped by specifically Nigerian political and economic realities and domestic political rivalries.²³² In his speech to the US-Africa Business Forum in 2014, Barack Obama assured Africa that the US will be "a good partner, an equal partner, and a partner for the long term",²³³ noting that:

We don't look to Africa simply for its natural resources; we recognize Africa for its greatest resource, which is its people and its talents and their potential. We don't simply want to extract minerals from the ground for our growth; we want to build genuine partnerships that create jobs and opportunity for all our peoples and that unleash the next era of African growth. That's the kind of partnership America offers.²³⁴

Whereas China's "Five No" approach could be a normative trade and investment philosophy, the exclusive presence of state actors and institutions and the absence of non-state actors in the

²³⁰ Taylor, *supra* note 27. Ian Taylor, *Global Governance and Transnationalizing Capitalist Hegemony: the Myth of the "Emerging Powers"*, 1st ed (London: Routledge, 2017). Taylor, *supra* note 31. David H Shinn & Joshua Eisenman, *China and Africa: A Century of Engagement* (Philadelphia, United States: University of Pennsylvania Press, 2012) at 3.

²³¹ Pay & Nwosu, "China's Engagement with Africa", *supra* note 97.

²³² Campbell, *supra*.

²³³ "President Obama Speaks at the U.S.-Africa Business Forum", (5 August 2014), online: [whitehouse.gov <https://obamawhitehouse.archives.gov/blog/2014/08/05/president-obama-speaks-us-africa-business-forum>](https://obamawhitehouse.archives.gov/blog/2014/08/05/president-obama-speaks-us-africa-business-forum).

²³⁴ *Ibid.*

regulation of Sino-Nigeria investment arrangements might make it mere political rhetoric. The lack of a regulatory approach mutually orchestrated by state and non-state actors could reinforce opacity and bribery incidents in the OFI investment deals.

In the same vein, there is a dialectical polarity of views and dichotomy of findings among anti-corruption NGOs and multi-stakeholder organizations concerning China's oil investment in Nigeria and the African continent at large. The TI report shows that China is Africa's biggest economic partner and a big exporter of corruption that has recorded little or no enforcement of the OECD Anti-Bribery Convention.²³⁵ For Natural Resource Governance Institute (NRGI), details of resource-backed loans are often hidden and can exacerbate financial distress.²³⁶ Sino-Nigeria oil-backed loans tend to be opaque, preventing third-party oversight on the repayment terms and utilization of the loans.²³⁷ The NRGI recommends that governments should encourage competition amongst potential resource-backed loan providers and contractors on loan terms and financed infrastructure projects.²³⁸ Oil-backed loans should be carefully structured and managed to ensure fair deals for Nigerians and avoid the tendency of mortgaging the country's resource wealth without many productive returns.²³⁹ Global Witness (GW) posits that Chinese oil and gas companies have shown a willingness to transparently disclose payments made to foreign governments. According to GW, resource-for-infrastructure deals are an important means of investment for Chinese companies overseas and represent a significant new development model for the world.²⁴⁰ Payments to governments should be agreed on in legally binding contracts and openly reported on by governments and extractive companies.²⁴¹ Whether or not Chinese investment will be a

²³⁵ Foreign Bribery Rages Unchecked in Over Half of Global Trade, Exporting Corruption - Progress Report 2018: Assessing Enforcement of the OECD Anti-Bribery Convention (Oslo, Norway: Transparency International, 2018).

²³⁶ Resource-Backed Loans: Pitfalls and Potential, by David Mihalyi, Aisha Adam & Jyhjong Hwang, resource-governance.org (New York, 2020). <https://perma.cc/Q68C-EG3W>.

²³⁷ Quaghe & Gillies, *supra* note 30. <https://perma.cc/AFK8-96NX>.

²³⁸ Mihalyi, Adam & Hwang, *supra* note 213 at 39.

²³⁹ Quaghe & Gillies, *supra* note 30.

²⁴⁰ "Increasing Transparency and Anti-corruption Safeguards for Chinese Overseas Investments", online: Global Witness <<https://www.globalwitness.org/en/archive/increasing-transparency-and-anti-corruption-safeguards-chinese-overseas-investments/>>. <https://perma.cc/L665-4D6N>.

²⁴¹ Transparency Matters: Disclosure of Payments to Governments by Chinese Extractive Companies (London,

force for positive change overseas will be determined by the investment practices and standards that Chinese firms and their local partners follow.²⁴² Improved transparency surrounding such deals could be a “win-win” for Chinese investors and host populations alike. For the EITI,

[t]he assumption is often that Chinese companies are less transparent than other foreign investors in the extractive sector, but in fact, Chinese companies have been willing to disclose information on their operations abroad. Some companies such as CNPC and PetroChina go beyond minimum disclosure requirements by publishing project-level information, allowing stakeholders to understand the financial impact of their specific projects.²⁴³

The multi-stakeholder institution found that Chinese companies disclose information on payments to governments to the same extent as companies from other countries.²⁴⁴ Chinese companies now report in about 24 of the 44 EITI implementing countries, including Nigeria, with published reports.²⁴⁵ According to the EITI, Chinese NOCs in Nigeria have also disclosed information on their beneficial owners.²⁴⁶

From the last two sections, it is clear that some non-state actors and multistakeholder institutions are relatively satisfied and sanguine about the business practices of the Chinese NOCs in Nigeria with respect to transparency. It is also evident from the last two sections how the Sino-Nigeria OFI arrangements and loan finance have deepened concerns that the relations tend to exacerbate bribery and corruption and get the host country deeper into debt. I will now consider some of the broader strategies of Chinese economic engagements with Nigeria. In doing this, I will compare the business operations of Chinese oil companies with those of the US companies as analytical constructs in the context of bribery of host government officials. The comparison is important

England: Global Witness, 2013) at 6.

²⁴² “China programme | Global Witness”, online: <<https://www.globalwitness.org/en/countries/china/?p=7#more>>. <https://perma.cc/SS9F-ZPXA>.

²⁴³ Chinese Companies Reporting in EITI Countries: Review of the Engagement of Chinese Firms in Countries Implementing the EITI (Oslo, Norway: Extractive Industries Transparency Initiative, 2016) at 6.

²⁴⁴ Ibid at 4.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

because it highlights the differences between the two investors and their challenges that demand a novel regulatory approach.

9. Chinese NOCs and US Oil Companies in Comparative Contexts

The Nigerian operations of China's NOCs and the US private TNOCs –two different types of investors from two distinct and opposing legal, economic, and political ideologies –raise some intractable regulatory challenges. The US oil majors –ExxonMobil and Chevron, as well as American issuers²⁴⁷ from other Western countries –are the dominant oil companies in Nigeria and their investments pre-date those of Chinese NOCs. Crucially, there is an increased focus by the DOJ on FCPA cases involving Chinese companies operating overseas.²⁴⁸ A key component of the DOJ's China Initiative is to identify FCPA cases involving Chinese companies that compete with American businesses.²⁴⁹ That being said, I will proceed by discussing the differences between Chinese and American strategies of operations and engagement with the Nigerian government and their regulatory implications for bribery and corruption in the international oil business.

In terms of formation, ownership, type of capital, and business strategies, Chinese NOCs are the corporate antitypes of their American competitors. Since the beginning of crude oil exploration in Nigeria, payments by oil companies for the acquisition of oil blocks, and their management and accountability by the government are usually sunk in a murky mire of embezzlement and hardly benefit the mass of the population. But in dealing with the Chinese, Nigeria departs from the traditional practice of tying the issuance of oil license solely to the payment of signature bonuses and concession rentals by attaching infrastructure development conditions to oil drilling

²⁴⁷ For this study and its line of inquiry, Shell will be treated as a US company regardless of its global head office and place of incorporation –the Netherlands and the United Kingdom. This is because as I stated in chapter 3, Royal Dutch Shell is an American issuer and its subsidiaries are US domestic concerns within the meaning of the Foreign Corrupt Practices Act, 15 USC, § 78dd-1(a) & 78dd-2(h)(1). Similarly, American and other Western oil and gas services companies have become major actors and sources of bribery in the international oil business. Thus, this part of my dissertation covers companies such as Halliburton and KBR which are US domestic concerns and subject to the FCPA.

²⁴⁸ “China Initiative Conference”, (6 February 2020), online: The United States: Department of Justice, Office of Public Affairs <<https://www.justice.gov/opa/gallery/china-initiative-conference>>. <https://perma.cc/JR7J-2H3L>.

²⁴⁹ Ibid.

rights. However, Beijing, in its quest to gain access to oilfields in Nigeria, deploys variegated strategies that tend to blur the boundaries between a bona fide gift and a bribe that complicates the regulation of the OFI deals. For example, as we saw in figure 12 above, China built a 150-bed Sino-Nigeria Friendship Hospital in Abuja as a gift to mark the 42nd anniversary of the establishment of diplomatic relations between the two countries. At the time of writing, Beijing is funding the construction of a University of Transportation that is being constructed by China Civil Engineering Construction Company and sited in the hometown of Nigeria's President.²⁵⁰ In the last decade, the Chinese government has rolled out various scholarships, exchanges, and training opportunities targeted at Nigerians and other Africans.²⁵¹

In light of the definition of corruption by TI²⁵² as well as the elements of bribery and corruption listed in the FCPA, UNCAC, the OECD Anti-Bribery Convention, there appears to be no private gain in the hospital, university, or scholarship grants. On the contrary, they are for the public good and could easily pass for CSR programs. The hospital, university, and scholarship are for the public good because a common feature in the definition and elements of bribery and corruption in the regulatory regimes is that the act must be for personal enrichment or to gain an improper business advantage. However, China's dealings with Nigeria appear to be fraught with peculiar regulatory challenges. First, there is a lack of transparency, competition, and a level playing field on who gets the construction contracts for the Chinese-funded OFI projects in Nigeria. Thus, how can we ensure that there is a level-playing field in the oil industry? Second, how, in terms of regulatory approach, do we ensure that China's gifts to the Nigerian government and possible CSR programs are not used as smokescreens for bribery and to influence the outcome of

²⁵⁰ "Remarks of Ambassador Zhou Pingjian of China to Nigeria at the Ground Breaking Ceremony of the University of Transportation in Daura, Katsina State", (2 December 2019), online: Embassy of the People's Republic of China in the Federal Republic of Nigeria <<http://ng.china-embassy.org/eng/zngx/cne/t1720910.htm>>. <https://perma.cc/XK2M-28SE>.

²⁵¹ "Feature: Chinese Scholarships Offer Hope for Nigerian Beneficiaries", Xinhua (9 August 2019), online: <http://www.xinhuanet.com/english/2019-08/09/c_138296964.htm>. <https://perma.cc/A5LK-7MEU>. "512 Nigerian Students Enjoy Chinese Scholarship - Official", Punch Newspapers (22 August 2019), online: <<https://punchng.com/512-nigerian-students-enjoy-chinese-scholarship-official/>>. <https://perma.cc/2H2T-SCLH>.

²⁵² Transparency International defines corruption as the abuse of entrusted power for private gain. This includes bribery, embezzlement, nepotism, money laundering, and bid-rigging. See "What is Corruption?", online: Transparency.org <<https://www.transparency.org/en/what-is-corruption>>. <https://perma.cc/9PRM-FLLT>.

business transactions in the extractive industry?²⁵³ These regulatory issues and questions about China's oil and infrastructure investments challenge us to rethink the definition of bribery in international business transactions, the line between a gift and bribe, and perhaps, the whole gamut of regulatory challenges of fighting transnational bribery of foreign government officials.

For the US oil investors, their bribery and corruption scorecards in Nigeria are significantly different in several ways. Alleged and established bribery of Nigerian government officials by the US private TNOs, issuers, and company executives take different forms such as transnational wire transfers, use of intermediaries and agents, concealment of bribery payments in accounting books, bid-rigging, cash-filled briefcases, and car gifts.²⁵⁴ In 2016, ExxonMobil Nigeria was investigated by the EFCC for alleged bid-rigging against CNOOC over a lucrative oilfield.²⁵⁵ In 2010, a Houston-based court found that Shell Nigeria violated the FCPA by falsifying its accounting books and using the "instrumentalities of interstate commerce"²⁵⁶ in furtherance of payment of bribes to Nigerian government officials to obtain an improper business advantage for the Bonga Deepwater oilfield.²⁵⁷ A consortium of American and non-American oil services companies which includes Halliburton and Houston-based KBR pled guilty in the US for bribery and falsification of accounting books in connection with their Nigerian operations. Halliburton and its subsidiary –KBR, used intermediaries and offshore entities to funnel money to both high and low-ranking Nigerian government officials over ten years to win a contract for the construction of an LNG

²⁵³ Gifts and CSR programs could be used to influence official business decisions of foreign government officials because in a case involving the Nigerian operations of a US drilling services company –Parker Drilling, a payment of USD\$1.25 million meant for the entertainment of a Nigerian government official that later led to a US\$3,050,000 reduction of a previously assessed customs fine was held to be a bribe and an improper business advantage. See "SEC Charges Parker Drilling Company with Violating the Foreign Corrupt Practices Act", (16 April 2013), online: US Securities and Exchange Commission: Securities and Exchange Commission v Parker Drilling Company, Civil Action No 1:13CV461 (ED Va, April 16, 2013) <<https://www.sec.gov/litigation/litreleases/2013/lr22672.htm>>. <https://perma.cc/B2VU-KEPK>.

²⁵⁴ "SEC Charges Italian Company and Dutch Subsidiary in Scheme Bribing Nigerian Officials With Carloads of Cash: ENI and Snamprogetti to Pay \$365 Million to Settle FCPA Violations", (7 July 2010), online: Securities and Exchange Commission <<https://www.sec.gov/news/press/2010/2010-119.htm>>. <https://perma.cc/52HU-YAFJ>.

²⁵⁵ Thielman, *supra* note 232. Regrettably, the outcome of the investigation was not made public.

²⁵⁶ FCPA, *supra* note 230, 15 U.S.C. §§ 78dd-1(g), 78dd-2(i).

²⁵⁷ note 5. <https://perma.cc/H6GA-365Z>.

facility in Bonny Island, in the Niger Delta region.²⁵⁸

There is a difference between the regulatory challenges raised by Chinese and US oil investments and operations in Nigeria. The two types of investors also differ markedly in their investment models and the nature and sources of capital. But beyond that, the salience of the difference between the problems that are identified in their operations is that in the case of China, there is a blurry line between public and party-political benefits. The blurry line is largely because of the proximity to state power of the Chinese NOCs and their distinctive and unique corporate nature as mediums for the actualization of Beijing's economic policies and objectives. The NOCs are an important part of the global face of China.²⁵⁹ Broadly, the Chinese state-led oil investment in Nigeria has multiple objectives of enhancing Beijing's quest to create a new global economic and investment order, expand its NOCs as globally competitive companies, maximize profit, and secure energy supply for the home state. China is creating a new investment order in the global oil industry through a gradual alteration of the basic structure and processes for obtaining oil drilling rights both in Nigeria and some other African countries. For the US companies and from the Anglo-American standpoint, the objective of their investments is narrow. The beneficiaries are more likely to be private individuals, shareholders, and companies, some of whom have been held accountable by anti-corruption enforcement agencies. Nevertheless, the home state can influence, albeit minimally, the investment pursuits of the US private companies.

²⁵⁸ The SEC alleges that officials of the joint venture formed a "cultural committee" to decide how to carry out the bribery scheme. The committee decided to use the United Kingdom agent to make payments to high-ranking Nigerian officials and to use the Japanese agent to make payments to lower-ranking Nigerian officials. As the joint venture was paid for work on the construction project, the joint venture in turn made payments to the Japanese agent and the Swiss and Monaco bank accounts of the United Kingdom agent. The total payments to the two agents exceeded \$180 million. After receiving the money, the United Kingdom agent made substantial payments to accounts controlled by Nigerian government officials and beginning in 2002 paid \$5 million in cash to a Nigerian political party. See "SEC Charges KBR, Inc. with Foreign Bribery; Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations —Companies to Pay Disgorgement of \$177 Million; KBR Subsidiary to Pay Criminal Fines of \$402 Million; Total Payments to be \$579 Million", (11 February 2009), online: US Securities and Exchange Commission <<https://www.sec.gov/litigation/litreleases/2009/lr20897a.htm>>. <https://perma.cc/3P5E-FUZN>. For a more elaborate account of the bribery case in literature, see Kevin E Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (New York, United States: Oxford University Press, 2019) at 197-227.

²⁵⁹ Lin & Milhaupt, "We Are the (National) Champions", *supra* note 152 at 702.

Conclusion

In accentuating the role of China's political and economic interests in its OFI investments in Nigeria, Beijing through its petroleum policy on overseas investment, the "Going Out" strategy, and investment principles is using its NOCs, SOFIs, and FOCAC to grow its imprint in Nigeria. As I noted in this chapter, the Sino-Nigeria investment relations date to the 1970s, and some of the Chinese-funded infrastructure projects in Nigeria have been completed and handed over to Nigeria. However, despite these economic engagements, China's non-imposition of governance standards in Africa, and what seems to be tangible benefits at present, Nigeria's socio-economic challenges are yet to improve. The host country's economy is still heavily dependent on petroleum resources. Furthermore, the quality and sustainability of the Chinese-funded infrastructure projects in Nigeria are not yet known because it is early in the investment relations to ascertain whether the projects are of a high standard. Although some of these questions are beyond the scope of this dissertation, a new form of regulating the Sino-Nigeria OFI investment arrangement that I will propose in this research project could consequentially address some of these concerns.

Chinese approaches in its OFI investment deals in Nigeria raise some regulatory conundrums in the contexts of bribery and corruption. The entry and business operations of both Western and Chinese oil companies in Nigeria are key and defining episodes in the history of the oil industry in the African country. At any rate, the entry of Chinese NOCs marked a gravitational shift in the conventional method of awarding oil drilling rights. Chinese oil investment and infrastructure financing in Nigeria have stoked concerns in both interdisciplinary literature and policy circles. Given the plurality and distinctive nature of investors in Nigeria's oil industry, two distinct investors – Chinese NOCs and the US private transnational oil companies are problematized, for comparison. The two antitypical investors are used as analytical constructs to underscore the difference in the regulatory challenges raised by their Nigerian operations. The variegated modus operandi of the Chinese NOCs and US private transnational oil companies are differentiated.

In sum, the chief challenge that emerges is that the key actors and regulatory institutions in the Sino-Nigeria OFI investment arrangements are state actors who are part of the problem. What is more, there is an absence of a level-playing field and transparency in the award of oil and non-oil contracts. Therefore, in working towards an integrated and decentred approach to regulation, my task in the next chapter is to discuss my theoretical frameworks and their relevance to the oil industry and the Sino-Nigeria OFI investment arrangements.

Chapter 5: Legal Pluralism, Transnational Regulation, and Third World Approaches to International Law as Theoretical Frameworks of Analysis

Introduction

The previous chapter focused on the Sino-Nigeria OFI arrangements, the investment principles and policy frameworks, as well as various state actors that have shaped Beijing's economic engagements with Abuja. A decentred and co-regulatory approach that integrates non-state regimes and multi-stakeholder actors with the traditional state regulation in the Sino-Nigeria OFI arrangements is one alternative to the current regulatory system. As previous chapters have shown, the current regulatory system is ineffective and insufficient, especially given the levels of bribery and corruption. Clearly, an alternative regulatory approach is needed. So, what analytical frameworks might be possible and suitable to the OFI investment arrangements. In this chapter, I outline a triad of theoretical frameworks - legal pluralism, transnational regulation, and Third World approaches to international law (TWAIL). I engage with the essential theoretical arguments that my dissertation draws on. My goal is to provide the theoretical lenses for conceptualizing a decentred and co-regulatory approach that integrates non-state regimes and multi-stakeholder actors with the traditional state regulation in the Sino-Nigeria OFI investment arrangements. I begin by describing legal pluralism and analyzing its various manifestations in local and transnational spaces. A legal pluralist lens offers a valuable theoretical basis for understanding the interaction, convergence, and contestations of state and non-state normative orders and how they overlap and complement each other.

1. Legal Pluralism

In both colonial and post-colonial Africa, the state has never been the only locus of regulatory activity and authority. Indeed, from pre-colonial to post-colonial times in most regions of the continent, plural normative orders (such as customary, family, and religious laws) frequently existed concurrently and are invoked in the regulation of the conduct of individuals communities, and organized groups. In colonial and post-colonial Africa, non-state normative orders overlap and conflict with state-based laws.¹ In cases of conflict, however, the courts, as mechanisms of the state, are used to strike down the local laws that emanated from non-state sources for purportedly being repugnant to natural justice, equity and good conscience, and inconsistent with written law.² African communities and organized groups such as trade unions, age grades, and religious bodies have a long-standing tradition of electing to order their lives by “local legalities”³ or “community forms of ordering”⁴ that are not created by the state.

Legal pluralism as a socio-legal theory has gone through a state of historic flux and change. The intellectual odyssey of legal pluralism has moved from the scholarly recognition and study of local and autochthonous forms of law in remote African settings to debates about the pluralistic qualities of law under advanced capitalism.⁵ Beginning in the late 20th century, legal pluralism has been applied to the study of social and legal ordering in urban industrial societies in the

¹ See, for example, Tad Crawford, “Ghana: Marriage and Divorce” (1971) 3:4 *The Journal of Legal Pluralism and Unofficial Law* 27. See also Hooker, *supra* note 39. Socio-legal and historical studies have established that every society –developed and developing, has a plurality of normative orders. See H W Arthurs, “Without the Law”: Administrative Justice and Legal Pluralism in Nineteenth-Century England (Toronto: University of Toronto Press, 1985); Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (New York: Russell & Russell, 1962) at 25. Leopold J Pospisil, *Anthropology of Law: A Comparative Theory* (New York: Harper & Row, 1971) at 98. Tamanaha, “Understanding Legal Pluralism”, *supra* note 39.

² Omoniyi Adewoye, “Legal Practice in Ibadan, 1904-1960” (1986) 24 *J Legal Pluralism & Unofficial L* 57 at 60. Kwamena Bentsi-Enchill, “The Colonial Heritage of Legal Pluralism” (1969) 1:2 *Zam LJ* 1. Brian Z. Tamanaha has asserted that customary and religious laws often were more efficacious than state law in governing everyday social affairs but that the transformation and loss of their autonomous legal status from laws to norm had significant implications. See Tamanaha, “Understanding Legal Pluralism”, *supra* note 2 at 381.

³ Boaventura De Sousa Santos, “Law: A Map of Misreading - Toward a Postmodern Conception of Law” (1987) 14:3 *JL & Soc’y* 279 at 287.

⁴ Anne Griffiths, “Legal Pluralism” in Reza Banakar & Max Travers, eds, *An Introduction to Law and Social Theory* (Oxford: Portland, Oregon: Hart Publishing, 2002) 289 at 302.

⁵ Sally Engle Merry, “Legal Pluralism” (1988) 22:5 *Law & Society Review* 869.

West.⁶ The idea of legal pluralism was advanced by socio-legal scholars such as John Griffiths, Boaventura De Sousa Santos, Brian Z. Tamanaha, Sally Engle Merry, among others, who were not persuaded by the dominant, exclusivist, unified, and centralist conception of law as propounded by legal positivists.⁷ Legal pluralists are concerned with an empirical state of affairs in which legal orders that do not belong to a single system co-exist within a social group.⁸ The core theoretical postulate of legal pluralists is that the social field is a constellation of dual or multiple legal orders existing concurrently in local, national, and transnational spaces.⁹ Legal pluralism refers to a situation in which not all law is state law nor administered by a single set of state legal institutions, and in which law is, therefore, neither systematic nor uniform.¹⁰ John Griffiths has explained that the social order of a field can be said to exhibit legal pluralism when there is more than one source of law, more than one legal order observable in a social field.¹¹ The legal pluralist approach in contemporary society affirms the heterogeneity of law by acknowledging the relevance, usefulness, and influence of the legion of other normative orders derived from diverse sources. The sources include but are not limited to, IGOs, multi-stakeholder institutions, non-governmental organizations, transnational enterprises, trans-governmental networks, private regulatory and standard-setting bodies, and non-dominant and subaltern¹² local groups –all of

⁶ Sally Engle Merry calls the study of legal pluralism in colonial and post-colonial societies the “classic legal pluralism” and the study in advanced industrial societies in the West as the “new legal pluralism”. See *Ibid* at 872.

⁷ John Griffiths, “What Is Legal Pluralism” (1986) 24 *J Legal Pluralism & Unofficial L* 1. Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 3rd ed (Cambridge, United Kingdom: Cambridge University Press, 2020) [Santos, *Toward A New Legal Common Sense* 3]. Tamanaha, “Understanding Legal Pluralism”, *supra* note 39. Merry, *supra* note 12. *Ibid* at 8.

⁸ *Ibid* at 8.

⁹ *Ibid* at 2.

¹⁰ *Ibid* at 5.

¹¹ *Ibid* at 38.

¹² I use the term “subalternity” here in its Gramscian sense to denote the non-dominant, non-elitist, non-hegemonic, non-hierarchical, and less powerful local (Nigerian and African) regulatory and non-regulatory communities and organizations. See Dianne Otto, “Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference” (1996) 5:3 *Soc & Legal Stud* 337 at 338 & 361. The architecture of regulating the Nigerian oil industry, for example, has been ineluctably shaped by a popular subaltern movement in Nigeria, the Movement for the Survival of Ogoni People (MOSOP). MOSOP was founded in 1990 by the late Ken Saro Wiwa. It is a non-violent social movement that campaigns for environmental justice and good governance in the oil-producing Niger Delta region. It was instrumental in exposing the environmental degradation of the oil communities and corporate human rights violations by Shell and the Nigerian government. MOSOP has made representations to the Nigerian government and the UN Working Group on Indigenous Peoples in Geneva. On how social movements from Third World countries have shaped international legal institutions, see Balakrishnan Rajagopal, *International Law from*

which have increasingly played regulatory roles in different social, economic, and political spheres. As Santos has empirically demonstrated using the Brazilian state legal system, the legal field is a constellation of different legalities (and illegalities) operating in the local, nation-state, and global time-spaces, displaying a variety of configurations, making it increasingly hard to identify their limits.¹³

The state is generally believed to be the conventional source of lawmaking and unarguably plays pivotal roles in the enforcement process. However, this characteristic is not unique and exclusive to the state and its institutions. Some non-state, intergovernmental, and hybrid organizations develop norms and establish processes for their enforcement. For example, economic cartels such as OPEC and the international diamond syndicate have demonstrated their autonomous regulatory powers by regulating production and supply of commodities, sanctioning their members, and controlling the international prices of oil and diamonds. Legal pluralist scholarship critiques and rejects the monopoly of law-creation by the state and argues for the constitution of a pluralistic legal order.¹⁴ In contradistinction to legal positivists, the conception of law by legal pluralists is broad-based and inclusive. The study of legal pluralism, therefore, challenges scholars to re-evaluate and interrogate the orthodox and monist approaches in law-making and regulation. Legal pluralism provides a valuable framework to discuss the law in practice and its many manifestations in society.

However, legal pluralism has been a subject of epistemological and ontological differences. Legal

Below: *Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) [Rajagopal, *International Law from Below*]. See also Boaventura de Sousa Santos & César A Rodríguez-Garavito, "Law, Politics, and the Subaltern in Counter-hegemonic Globalization" in Boaventura de Sousa Santos & César A Rodríguez-Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005) 1; and Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces, and International Institutions* (Cambridge, UK: Cambridge University Press, 2007).

¹³ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 3rd ed (Cambridge, United Kingdom: Cambridge University Press, 2020) [Santos, *Toward A New Legal Common Sense* 3] at 99-100 (arguing that when we conceive the legal field in this manner, law consequently has both a regulatory, repressive, and an emancipatory potential).

¹⁴ Peter Muchlinski, "'Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community" in *Global Law Without a State* (Aldershot, England: Dartmouth Publishing, 1997) 79; Jean-Philippe Robé, "Multinational Enterprises: The Constitution of a Pluralistic Legal Order" in Gunther Teubner, ed, *Global Law Without a State* (Dartmouth: England: Aldershot Publishing, 1997) 45.

pluralists are rarely in harmony, resulting in what Tamanaha calls “a plurality of legal pluralisms”.¹⁵ The epistemological and ontological differences are because legal pluralism is invoked by scholars from diverse disciplines such as international law, anthropology,¹⁶ political science,¹⁷ sociology,¹⁸ international relations,¹⁹ indigenous law, and legal philosophy.²⁰ Moreover, legal pluralism covers a broad spectrum of scholarship and methodologies such as human rights, feminism, reflective empiricism, customary law, international trade, postmodernism and autopoiesis, to mention but a few.²¹ Consequently, the idea of legal pluralism is inherently riddled with insoluble conceptual ambiguity.²² Nevertheless, legal pluralists are unified in their claim that neither the legal landscape nor the idea of regulation is a uniaxial project.

Non-state actors in both African and Western societies have, over time, activated a wave of legal pluralism by developing their own rules and regulating their members’ behaviors and activities. Various private groups such as social clubs, trade unions, recreational centres, corporate institutions, NGOs, and universities have established internal mechanisms for addressing conflict independent of state laws.²³ When non-state regulation is governed by an association, founda-

¹⁵ Tamanaha, “Understanding Legal Pluralism”, supra note 2 at 392.

¹⁶ Merry, supra note 5; Sally Falk Moore, “Law and Social Change: The Semi-Autonomous Social Field As An Appropriate Subject of Study” (1973) 7:4 *Law & Society Review* 719; Sally Engle Merry, “Global Human Rights and Local Social Movements in a Legally Plural World” (1997) 12:2 *Can JL & Soc* 247; Merry, supra note 12. Keebet von Benda-Beckmann & Bertram Turner, “Legal Pluralism, Social Theory, and The State” (2018) 50:3 *The Journal of Legal Pluralism and Unofficial Law* 255. Sally Engle Merry, “An Anthropological Perspective on Legal Pluralism” in Paul Schiff Berman, ed, *The Oxford Handbook of Global Legal Pluralism* (Oxford, New York: Oxford University Press, 2020) 169.

¹⁷ Miriam Seemann, “Legal Pluralism and the Political Ecology of Water” in Miriam Seemann, ed, *Water Security, Justice and the Politics of Water Rights in Peru and Bolivia Environment, Politics and Social Change* (London: Palgrave Macmillan UK, 2016) 26; Claire Cutler, “Legal Pluralism as the ‘Common Sense’ of Transnational Capitalism” (2013) 3:4 *Oñati Socio-Legal Series* 719.

¹⁸ Boaventura De Sousa Santos, *Toward A New Common Sense: Law, Science, and Politics in the Paradigmatic Transition* (New York: Routledge, 1995); De Sousa Santos Boaventura, *Toward A New Legal Common Sense: Law, Globalization, and Emancipation*, 2nd ed (London: Butterworths, 2002).

¹⁹ Geoffrey Swenson, “Legal Pluralism in Theory and Practice” (2018) 20:3 *International Studies Review* 438.

²⁰ Margaret Davies, “Pluralism and Legal Philosophy” (2006) 57:4 *N Ir Legal Q* 577. Margaret Davies, “The Ethos of Pluralism” (2005) 27:1 *Sydney L Rev* 87. Emmanuel Melissaris, “The More the Merrier: A New Take on Legal Pluralism” (2004) 13:1 *Soc & Legal Stud* 57.

²¹ Tamanaha, “Understanding Legal Pluralism”, supra note 2 at 391.

²² The age-long and never-ending conceptual debate and challenges of legal pluralism centres primarily on what we mean by ‘law’ and how to distinguish ‘law’ from other normative orders.

²³ Tamanaha, “Understanding Legal Pluralism”, supra note 2 at 386.

tion, or a corporation, the key feature is membership.²⁴ Non-state regimes also use their internal established rules and customs to exercise effective punitive measures against their members.²⁵ Non-state normative orders command compliance through the imposition of fines, suspension and expulsion of its subjects, ostracization, naming and shaming, and boycotts. Of course, some non-state regulatory regimes have both internal and external²⁶ enforcement mechanisms. In the domain of internet regulation, for example, the Internet Corporation for Assigned Names and Numbers (ICANN) invoke its internal enforcement mechanisms derived from its by-laws by suspending, cancelling, or transferring user accounts.²⁷ In e-commerce, eBay regulates breach internally through warning, deletion of the offer, or exclusion of the user from the platform.²⁸ The enforcement power of non-state regimes is normatively based on freedom of contract and association.²⁹ The primary sources of authority in the enforcement of non-state regulatory regimes are private authority and consent. However, these non-state actors are not altogether immune from state regulation and oversight. In this connection, their punitive verdicts are, sometimes, subjected to state judicial review, thereby creating legal precedents that shape future conduct and activities.³⁰ There is in this sense a dynamic and useful convergence, interaction, and contestation between state legal orders and non-state quasi-legal orders as one exerts some degree of influence on the other.³¹

As discussed in the next section, there are current trends in transnational trade and investment

²⁴ Fabrizio Cafaggi, "Enforcing Transnational Private Regulation: Models and Patterns" in Fabrizio Cafaggi, ed, *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World* (Cheltenham, UK: Edward Elgar, 2012) 75 at 98.

²⁵ For a comprehensive account of the development of norms and institutions that have competed and rivaled state law in regulating the behaviour of people, see *Ibid* at 385-390.

²⁶ Non-state regulatory regimes that use external enforcement mechanisms through their certifiers or implementation of national members include Forest Stewardship Council, International Organization for Standardization, Global Good Agricultural Practices, the Marine Stewardship Council, and European Committee for Standardization. See Cafaggi, *supra* note 23 at 95.

²⁷ *Ibid*.

²⁸ *Ibid* at 104.

²⁹ *Ibid* at 96.

³⁰ For the various instantiations of the judicial review of private normative decisions and awards and how they overlap with legal pluralism, see Arthurs, *supra* note 39.

³¹ Moore, "Law and Social Change", *supra* note.

that evince the increasing relevance and usefulness of legal pluralism. This global context provides a useful lens to understand the manifestations of the potential of legal pluralism in both domestic and international spheres and its relevance to the oil industry.

1.1 Global Legal Pluralism in the Regulation of Transnational Trade and Investment

The wave of neo-liberal globalization of economic activities since the mid-1980s has enhanced and advanced the study and application of legal pluralism in the international and transnational landscapes. Economic-driven globalism such as cross-border trade, migration of people, and the establishment of regional and supranational financial and commercial institutions, among others, have resulted in a gradual shift of the locus of regulating global trade and investment from the state to non-state actors.³² The transnational arena is replete with normative systems and jurisdictional claims promulgated by a variety of state and non-state institutions.³³ Santos has observed that transnational capital has created an informal transnational legal space, a form of supra-state legality, and world law.³⁴ The central theme of global legal pluralism is that we live in a world of hybrid legal spaces, where multiple normative regimes may govern or strongly influence our activities and where authority tends to be relative, not absolute.³⁵ The concept of global legal pluralism addresses the multiplicity of national and international laws, legal institutions, and forms of dispute resolution and the interactions among them.³⁶

The regulatory influence and powers of the state, especially some states, on the global stage appear to be waning.³⁷ Global legal pluralism literature demonstrates that the international legal

³² For the different contexts of legal pluralism in transnational private regulation, see Walter Mattli & Ngaire Woods, eds, *The Politics of Global Regulation* (New Jersey: Princeton University Press, 2009). See also Gunther Teubner, "Global Bukowina: Legal Pluralism in the World-Society" in Gunther Teubner, ed, *Global Law Without a State* (Rochester, NY: Brookfield: Dartmouth, 1997) 3 at 4.

³³ Paul Schiff Berman, "Understanding Global Legal Pluralism: From Local to Global, From Descriptive to Normative" in Paul Schiff Berman, ed, *The Oxford Handbook of Global Legal Pluralism* (Oxford, United Kingdom: Oxford University Press, 2020) 1 at 5.

³⁴ De Sousa Santos, "Law", supra note 3 at 287.

³⁵ Berman, supra note 27 at 6.

³⁶ Sally Engle Merry, "International Law and Sociological Scholarship: Toward a Spatial Global Legal Pluralism" in Michael A Helfand, ed, *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge: Cambridge University Press, 2015) 59 at 66-7.

³⁷ For instance, Sol Picciotto has argued that "within states, there has been a trend towards the disintegration

system is internally pluralistic with a growing number of issue-based independent and private regulatory bodies.³⁸ This pluralism is because a blend of formal and informal regulatory instruments is increasingly being used to regulate the economic and private activities of national and transnational actors. Most commercial arbitration, however, relies on an international instrument –the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) –to enforce arbitral awards. The China International Economic and Trade Arbitration Commission (CIETAC), for example, as an independent arbitral institution, provides arbitration and mediation services for international investment disputes arising out of contracts (including the BRI contracts) and treaties between an investor and a state.³⁹ Non-state actors such as transnational companies and trade unions,⁴⁰ global financial institutions,⁴¹ apparel and footwear

of government and an increased delegation of regulatory authority and normative competence to professionals and specialists such as lawyers, accountants, economists, scientific experts. Thus, there has been a shift from government to governance, as the central political institutions of the state have found it increasingly difficult to resolve social conflicts or to reconcile the diversity of social interests...” [emphasis added]. See Sol Picciotto, “Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism” (1997) 17 *Nw J Int’l L & Bus* 1014 at 1018. See also Anne-Marie Slaughter, “Global Government Networks, Global Information Agencies, and Disaggregated Democracy” (2003) 24:4 *Michigan Journal of International Law* 1041 at 1046-7; Jurgen Habermas, *The Postnational Constellation: Political Essays* (Cambridge, Massachusetts: The MIT Press, 2001). Harry W Arthurs & Robert Kreklewich, “Law, Legal Institutions, and the Legal Profession in the New Economy” (1996) 34:1 *Osgoode Hall L J* 1. Robé, *supra* note 12 at 68.

³⁸ William Burke-White, “International Legal Pluralism” (2004) 25:4 *Mich J Int’l L* 963; Paul Schiff Berman, “Global Legal Pluralism” (2006) 80:6 *S Cal L Rev* 1155; Oren Perez, “Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law” (2003) 10:2 *Ind J Global Legal Stud* 25; Peer Zumbansen, “Transnational Legal Pluralism” (2010) 1:2 *Transnat’l Legal Theory* 141 [Zumbansen “Transnational Pluralism”].

³⁹ “China International Economic and Trade Arbitration Commission”, online: <<http://www.cietac.org/index.php?m=Page&a=index&id=34&l=en>>. <https://perma.cc/G2HM-UFK8>.

⁴⁰ The Accord on Fire and Building Safety in Bangladesh, for instance, is now a legally binding agreement between global brands, retailers, and trade unions aimed at building a safe Bangladeshi ready-made garment industry. It was signed on May 15, 2013 in the wake of the Rana Plaza Building collapse that recorded more than 3,000 casualties. “The Bangladesh Accord on Fire and Building Safety”, online: The Bangladesh Accord <<https://bangladeshaccord.org/>>. <https://perma.cc/6PHB-VD4N>. For an analysis of this initiative, see Victor V Ramraj, “International Institutional Bypasses and Transnational Non-State Regulation” (2019) 10:3–4 *Transnational Legal Theory* 295 [Ramraj, “Institutional Bypasses”].

⁴¹ For example, the Equator Principles is a risk management framework adopted by financial institutions for assessing and managing environmental and social risks in project finance. So far, 94 financial institutions located in 37 countries (including Nigeria) have adopted the Principles. “The Equator Principles –The Equator Principles”, online: <<https://equator-principles.com/about/>>. <https://perma.cc/TZ2L-AYY4>. See also John M Conley & Cynthia A Williams, “Global Banks as Global Sustainability Regulators?: The Equator Principles” (2011) 33:4 *Law & Policy* 542–575; Ramraj, *supra* note 783. In addition, the International Accounting Standards Board is an independent accounting standard-setting body that is responsible for developing International Financial Reporting Standards (IFRS) and promoting the use and application of the standards. See “IFRS - About Us”, online: <<https://www.ifrs.org/about-us/>>. <https://perma.cc/SA7S-TEZS>.

industries,⁴² international sports organizations,⁴³ the aviation industry and professional bodies are increasingly generating their own private normative orders without the state. In situations of dispute, many parties choose (or are required) to bypass state court systems seen as inefficient, unreliable, too costly, or too public, resorting instead to arbitration or private courts.⁴⁴ The Administrative Tribunal of the African Development Bank (ADB), for example, is an autonomous body of the ADB and its decisions are binding, final, and not subject to appeal.⁴⁵ The Tribunal's decisions are based on the internal laws of the ADB, principles of international administrative law, and the jurisprudence of similar international institutions.⁴⁶ The major characteristics of global governance in the current period is fragmentation into complex and multi-layered regulatory bodies and institutions interacting in ways that express rivalry and competition as much as cooperation and coordination.⁴⁷

In terms of the relevance of global legal pluralism in the petroleum industry, the corporate conduct of a global oil company can be regulated by plural legal orders from more than one jurisdiction and actor. In the Nigerian oil industry, aggrieved host communities and NGOs, relying on the principle of extraterritoriality of corporate conduct, prefer to by-pass national courts and litigate their matters before regional courts and Western national courts because of perceived inefficiency and 'partiality'⁴⁸ at home. For instance, the Alien Tort Statute (ATS) generally gives a claimant

⁴² The Fair Labor Association is a multi-stakeholder association of businesses, universities, and NGOs that sets labor standards for the apparel and footwear industries. "Fair Labor Association", online: <<https://www.fairlabor.org/>>. <https://perma.cc/L9PN-RRT5>.

⁴³ FIFAcom, "Who We Are - FIFA.com", online: www.fifa.com <<https://www.fifa.com/who-we-are/>>. <https://perma.cc/J7ZC-EWWR>. UEFAcom, "Updates | Inside UEFA", online: [UEFA.com](http://www.uefa.com) <<https://disciplinary.uefa.com/updates/>>. <https://perma.cc/RQ9L-CV3Z>. See also Basil Ugochukwu, "Global Governance in All Its Discrete Forms: The Game, FIFA, and the Third World" (2016) 33 *WindSOR YB Access Just* 199–228.

⁴⁴ Tamanaha, "Understanding Legal Pluralism", *supra* note 2 at 387.

⁴⁵ "Administrative Tribunal", online: African Development Bank Group <<https://www.afdb.org/en/about-us/organisational-structure/administrative-tribunal>>. <https://perma.cc/GTX2-Y5PN>. The Tribunal is vested with jurisdiction to hear cases brought by staff concerning terms of employment, fraud by employees, promotion, and termination of employment in the bank, payment of staff benefits, and performance evaluation, among other things.

⁴⁶ The similar international institutions include the World Bank Administrative Tribunal, the Administrative Tribunal of the International Labour Organization, and the Administrative Tribunal of the Bank for International Settlements.

⁴⁷ Picciotto, "Networks in International Economic Integration", *supra* note 16 at 1021.

⁴⁸ These Nigerian litigants also face the challenges of legal technicalities in European and American courts.

of any tortious claim in international law the right to seek redress in a US court. Regrettably, the hope of a Nigerian group of litigants to use a Western forum to regulate the extraterritorial human rights conduct of Royal Dutch Shell (RDS) was seemingly dashed in 2013 when the US Supreme Court held in *Kiobel's* case⁴⁹ that only legal actions against companies whose conduct sufficiently touches and concerns the US could be brought under the ATS. Furthermore, Nigerian oil communities have persuaded the UK and Dutch courts to apply the *lex fori* –the law of England and the Netherlands against RDS for alleged environmental harms done by the company's subsidiary.⁵⁰

The spheres of influence of global legal pluralism have expanded in recent times as evident in existing and emerging alternative trade and investment dispute resolution bodies. There is now an increasing wave of distinct and independent global dispute resolution institutions and legal orders. As Claire A. Cutler has observed, the global political economy is experiencing increasing pluralism and transnationalization of the institutions and processes of regulation, in which law has a central and specific part.⁵¹ The international trade finance network creates and administers its regulatory regimes, some of which have been integrated into national laws. *Lex mercatoria* –“the transnational law of economic transactions and an autonomous non-national body of law”⁵² is an example of a privately generated norm that governs international commercial activities.⁵³ Plural mechanisms for dispute resolution is a time-honoured practice in the oil and gas industry. In 2019, a London-based arbitration panel found that Nigeria breached a gas supply and processing

⁴⁹ *Kiobel v Royal Dutch Shell*, 2013 Supreme Court of the United States, 133 S. Ct. 1659.

⁵⁰ *Okpabi & Others v Royal Dutch Shell Plc & Another* [2021] UKSC.

⁵¹ Claire Cutler, “Legal Pluralism as the ‘Common Sense’ of Transnational Capitalism” (2013) 3:4 *Oñati Socio-Legal Series* 719 at 722.

⁵² Teubner, *supra*. See also Tamanaha, “Understanding Legal Pluralism”, *supra* note 2 at 388.

⁵³ There is no universally acceptable definition of *lex mercatoria*. However, *lex mercatoria* can be said to be a principle of private international law created and administered by the transnational business community based on trade customs and practice as well as general principles of law applicable in commercial contracts and arbitrations. It is used to resolve disputes between private parties, and private parties and states in transborder trade, commerce, and finance. See Stephan W Schill, “*Lex Mercatoria*” in Max Planck Encyclopedia of Public International Law (Oxford: Oxford University Press, 2014); See also Hans-Joachim Mertens, “*Lex Mercatoria: A Self-Applying System Beyond National Law*” in Gunther Teubner, ed, *Global Law Without A State* (Aldershot, England: Aldershot Publishing, 1997) 31. For a nexus between *lex mercatoria* and legal pluralism and their Asian historical manifestations and account, see Neilesh Bose & Victor V Ramraj, “*Lex Mercatoria, Legal Pluralism, and the Modern State through the Lens of the East India Company, 1600–1757*” (2020) 40:2 *Comparative Studies of South Asia, Africa and the Middle East* 277.

agreement it signed with Process & Industrial Development Limited. The panel awarded US\$6.5 billion (plus interest) against Nigeria.⁵⁴ The China International Commercial Court (CICC), which was created in 2018, is a hybrid dispute resolution mechanism that combines litigation, arbitration, and mediation for disputes related to the BRI.⁵⁵ The member states of the CICC come from diverse legal systems and are located along the belt and road. Furthermore, the International Chamber of Commerce created the Belt and Road Commission in March 2018 as a specialized court and arbitral institution to resolve disputes that arise from infrastructure projects and investment in China's BRI.⁵⁶ The setting up of these transnational alternative dispute resolution institutions also indicate China's efforts at establishing broad-based and diverse mechanisms to regulate globalized commerce. In the world of international trade and finance, private financial institutions such as banks and export credit agencies have developed practice-based norms that have been used by national courts to decide disputes on financial instruments.⁵⁷ In some cases, international

⁵⁴ *Process & Industrial Developments Ltd v The Federal Republic of Nigeria*, 2019 Business And Property Courts of England and Wales Commercial Court (QBD), EWHC 2241. <https://perma.cc/5JCY-2DWZ>. *Interocean Oil Development Company and Interocean Oil Exploration Company v Federal Republic of Nigeria*, 2020 International Centre for Settlement of Investment Disputes, ICSID ARB/13/20. <https://perma.cc/JP8C-PQ5J>. With the exception of the Sino-Nigeria bilateral investment treaty (BIT), BIT's between Nigeria and other foreign states usually vest jurisdiction for investment dispute resolution on arbitration tribunals that are located in the UK and France.

⁵⁵ Julien Chaisse & Xu Qian, "Conservative Innovation: The Ambiguities of the China International Commercial Court" (2021) 115 *AJIL Unbound* 17.

⁵⁶ "ICC's Belt and Road Presence", online: ICC - International Chamber of Commerce <<https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/icc-belt-and-road-presence/>>. <https://perma.cc/5QBC-TAH2>. Also, a fundamental paradigm shift has occurred in the cross-border dispute settlement framework with the recent signing of the UN Singapore Convention. Although the Singapore Convention is an intergovernmental-centred mechanism and state courts of signatory countries will assume jurisdiction, it nevertheless creates an alternative mediated settlement option in disputes arising from transnational commerce. See United Nations Convention on International Settlement Agreements Resulting from Mediation, 20 December 2018.

⁵⁷ For instance, the International Union of Credit and Investment Insurers (Berne Union) is an international trade association that represents the global export credit and investment insurance industry. Its members comprise government-backed export credit agencies (including SINOSURE, which I discussed in chapter 4), private credit and political risk insurers, and multilateral institutions from across the globe who provide insurance products, guarantees, and, in some cases, types of direct financing in the support of cross-border trade. Established in 1934, Berne Union finances 13 percent of the world's annual cross-border trade in goods and services. "Berne Union - About the Berne Union", online: <<https://www.berneunion.org/Stub/Display/8>>. <https://perma.cc/R85B-7TEC>. Another example is the Uniform Customs and Practice for Documentary Credits that establish transnational rules that commercial banks uniformly follow in their letter-of-credit practices. The rules are created by private bankers who congregate under the auspices of the Commission on Banking Technique and Practice of the International Chamber of Commerce to draft the rules and offer practice-based interpretations of their meaning. The Arrangement on Officially Supported Export Credits is a private rule developed within the OECD framework that aims to encourage a level playing field among exporters by regulating the use of export credits for infrastructure projects such as railways, electricity generation plants, renewable energy, etc. "OECD: Arrangement and Sector Understandings", online: Arrangement on Officially Supported Export Credits <<https://www.oecd.org/trade/topics/export-credits/arrangement-and-sector-understandings/>>. <https://perma.cc/4UTS-9THP>. See also Janet Koven Levit, "A Bottom-up Approach to International Law-

arbitration tribunals and national courts contend for jurisdiction over the same subject matter. The jurisdiction of an investment arbitration tribunal was invoked to contest a decision of the Supreme Court of Canada.⁵⁸ For example, an arbitration tribunal set the standard for a claimant to litigate patent disputes under international investment law where the Supreme Court of Canada had already rendered a decision on the same matter. However, the investment arbitration model is facing significant backlash.⁵⁹ My discussion earlier in this chapter about the dynamic interaction and contestation of state and non-state normative orders and how one shapes the development of the other at the domestic level is equally true, *mutatis mutandis* in global legal pluralism.

The various instantiations of the global and transnational paradigms of legal pluralism demonstrate the fluidity of law and how state and non-state normative orders compete and converge in national and transnational spaces. Nonetheless, the convergence, interaction, and contestations may be a strength and weakness at the same time. In the bustling area of commercial law, state institutions technically recognize and validate global legal pluralism. In some cases, there is a coalescence of state and non-state regimes that results in the enforcement of normative orders that emanated from the latter system. The Sino-Nigeria Bilateral Investment Treaty, for example, acknowledges and defers to an *ad hoc* arbitration tribunal in the event that a dispute arising from an investment between the two states cannot be settled through diplomatic channels.⁶⁰ However, given that international arbitral awards are not self-executing, especially when the award is contested by a party, the Nigerian state judicial apparatus is invoked, as a general rule, pursuant to the New

making: *The Tale of Three Trade Finance Instruments*" (2005) 30:1 *Yale J Int'l L* 125.

⁵⁸ A US corporation –Eli Lilly, for example, used an investment arbitration tribunal to contest the decision and interpretation of the Supreme Court of Canada on Canada's Patent Act. See *Eli Lilly and Company v The Government of Canada*, [2017] UNCT/14/2. Global Affairs Canada, "Eli Lilly and Company v. Government of Canada", (19 December 2017), online: Global Affairs Canada <<https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/eli.aspx?lang=eng>> Last Modified: 2017-12-19. <https://perma.cc/255Y-NYWY>.

⁵⁹ See, for example, *Profiting from Injustice: How Law Firms, Arbitrators, and Financiers Are Fuelling an Investment Arbitration Boom*, by Pia Eberhardt & Cecilia Olivet (Corporate Europe Observatory and the Transnational Institute, 2012). Malcolm Langford, Daniel Behn & Ole Kristian Fauchald, "Backlash and State Strategies in International Investment Law" in Tanja Aalberts & Thomas Gammeltoft-Hansen, eds, *The Changing Practices of International Law: Sovereignty, Law and Politics in a Globalising World* (UK: Cambridge University Press, 2018) at 70.

⁶⁰ *Bilateral Investment 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*, Art 8 & 9, entered into force 18 February 2010. <https://perma.cc/HP5X-N723>.

York Convention, to give effect to a determination of an arbitration tribunal.⁶¹

2. Transnational Regulation

Until now, I have been discussing the local and global manifestations of legal pluralism. I will now turn to the concept of transnational regulation. Whereas some varieties of transnational regulation are purely private,⁶² others are jointly developed by either intergovernmental institutions, trans-governmental networks, hybrid public-private or multi-stakeholder organizations. Thus, my discussion in this section is an ensemble of transnational state and non-state regulation. My discussion of transnational state and non-state regulation is important as it reinforces the claim by legal pluralists, not only that legal orders intersect but that the regulatory architecture is in a constant state of flux. The discussion also illuminates the relationship between legal pluralism and transnational regulation.

One of the major dilemmas facing the global community is the question of how to effectively regulate transnational investment and business conduct. The question of regulation is increasingly pressing, given that many Third World countries are rich in natural resources but yet have limited power to engage in international regulatory policy processes, or are rarely proactive and responsive to the regulatory challenges of cross-border trade and investment. The lack of responsive regulation, as I have noted in chapter 2 concerning Nigeria, is largely a result of dysfunctional governance and weak socio-political structures. The operations of private and state-owned multi-

⁶¹ In Nigeria, one of the ways that an arbitral award is enforced is by registration in a Nigerian court of competent jurisdiction. See Foreign Judgments (Reciprocal Enforcement) Act, Cap F35, Laws of the Federation of Nigeria 2004.

⁶² The typology varies in literature and across disciplines. See for example, David Vogel, "Taming Globalization? Civil Regulation and Corporate Capitalism" in David Coen, Wyn Grant & Graham Wilson, eds, *The Oxford Handbook of Business and Government* (2010) [Vogel, "Taming Globalization"]; Colin Scott, Fabrizio Cafaggi & Linda Senden, "The Conceptual and Constitutional Challenge of Transnational Private Regulation" (2011) 38:1 *JL & Soc'y* 1; Colin Scott, "Beyond Taxonomies of Private Authority in Transnational Regulation" (2012) 13 *German LJ* 1329 [Scott, "Beyond Taxonomies"]; A Claire Cutler, Virginia Haufler & Tony Porter, eds, *Private Authority and International Affairs* (Albany, New York: State University of New York Press, 1999); A Claire Cutler, "Constituting Capitalism: Corporations, Law, and Private Transnational Governance" (2009) 5:1 *St Antony's International Review* 99 [Cutler, "Constituting Capitalism"]; Ramraj, *supra* note 33; Victor V Ramraj, "Transnational Non-State Regulation and Domestic Administrative Law" in Susan Rose-Ackerman, Peter L Lindseth & Blake Emerson, eds, *Comparative Administrative Law*, 2nd ed (Cheltenham, UK: Edward Elgar Publishing, 2017) 582 [Ramraj, "Transnational Non-State Regulation"]; Benjamin Cashore, Graeme Auld & Deanna Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority* (New Haven: Yale University Press, 2004).

national business enterprises in various geographical locations have led to increasing regulatory interventions by a medley of state and non-state actors. The threat posed to, and harms done to transboundary challenges such as human rights, corruption, the environment, climate change, and labour practices by the business enterprises have contributed to the emergence of public-private, purely private, and multi-stakeholder regulatory schemes. A bevy of multi-disciplinary literature advances various reasons for the evolution of transnational regulation.⁶³ There is also a suggestion that economic globalization has created a structural imbalance between the size and power of global firms and markets, and the capacity or willingness of governments to adequately regulate them.⁶⁴ To effectuate practical changes in transnational investment and corporate conduct, many regulatory activities even beyond human rights, anti-corruption, the ozone layer, and labour practices⁶⁵ are concurrently being undertaken by both state and non-state institutions.

International and supranational organizations, as well as domestic and international NGOs have created various regulations and initiatives to address transnational corporate conduct in the ex-

⁶³ John Braithwaite, "Neoliberalism or Regulatory Capitalism?" (2005) 5 *Regulatory Institutions Network*, Canberra, online: </research/publications/3571/no-5-neoliberalism-or-regulatory-capitalism> The Australian National University; David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility*, 2d ed (Brookings, United States: Brookings Institution Press, 2006) [Vogel, "Market for Virtue"]; John Gerard Ruggie, "Taking Embedded Liberalism Global: The Corporate Connection" in David Held & Mathias Koenig-Archibugi, eds, *Taming Globalization: Frontiers of Governance* (Polity Press, 2003) 1 [Ruggie, "Embedded Liberalism"]; John Braithwaite & Peter Drahos, *Global Business Regulation* (Cambridge, UK: Cambridge University Press, 2000); Frederick Mayer & Gary Gereffi, "Regulation and Economic Globalization: Prospects and Limits of Private Governance" (2010) 12:3 *Business and Politics* 1; Andreas Georg Scherer & Guido Palazzo, "The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy" (2011) 48:4 *Journal of Management Studies* 899; David Vogel, "Private Global Business Regulation" (2008) 11:1 *Annual Review of Political Science* 261, [Vogel, "Global Business"].

⁶⁴ David Vogel, "The Private Regulation of Global Corporate Conduct" in Walter Mattli & Ngaire Woods, eds, *The Politics of Global Regulation* (Princeton; Oxford: Princeton University Press, 2009) 151, [Vogel, "Private Regulation"].

⁶⁵ As of 2007, approximately 300 non-state regulatory regimes governed most major global economic sectors including energy, minerals and mining, forestry, chemicals, textiles, apparel, footwear, sporting goods, project finance, and coffee and cocoa. See David Vogel, "Private Global Business Regulation" (2008) 11:1 *Annual Review of Political Science* 261, [Vogel, "Global Business"] at 262. For the evolution of non-state regulation or informal law-making in many other areas of activities, see the collection of articles in the following volumes: Thomas Hale & David Held, eds, *Handbook of Transnational Governance: Institutions and Innovations* (Polity Press, 2011); Walter Mattli & Ngaire Woods, supra. Barry Barton, et al, supra note 1; A Claire Cutler, Virginia Haufler & Tony Porter, eds, *Private Authority and International Affairs* (Albany, New York: State University of New York Press, 1999); Peter Utting, Darryl Reed & Ananya Mukherjee Reed, eds, *Business Regulation and Non-State Actors: Whose Standards? Whose Development?*, 1st ed (London: Routledge, 2014); Ayelet Berman et al, eds, *Informal International Lawmaking: Case Studies, Law of the Future Series No 3* (The Hague: Torkel Opsahl Academic EPublisher, 2012). <https://perma.cc/8UUW-FG6Z>. Marie-Laure Djelic & Kerstin Sahlin-Andersson, eds, *Transnational Governance: Institutional Dynamics of Regulation* (Cambridge, United Kingdom: Cambridge University Press, 2006).

tractive industries. From how concession and licensing rights are granted, to the willingness of foreign investors and host governments to disclose resource payments⁶⁶ and how the resource payments benefit the citizenry; the regulatory landscape of non-renewable resources has steadily metamorphosized. Indeed, regulatory powers that were once considered the exclusive prerogative of the nation-state have emerged in a form where they are exercised by actors distinct from national governments.⁶⁷ As the scope of the business operations of global extractive companies broadens and their approach becomes sophisticated, state and non-state regulatory regimes have been enacted and recalibrated to capture extra-territorial and transnational corporate conduct. Essentially, transnational investment regulation is being increasingly decentred from the traditional state institutions.

2.1 What Do We Mean by Transnational Regulation?

Transnational regulation is a type of rule-making or normative ordering that emanates either exclusively or to some degree from non-state actors and its creators and application transcend national frontiers. Academic literature on transnational regulation defines it as regulation by non-state actors with little or no state involvement.⁶⁸ This variety of normative ordering is transnational to the extent that either the norms they create or the conduct they seek to govern operate, at least in part, across formal international boundaries.⁶⁹ A distinctive feature of transnational regulation is that compliance depends on the voluntarily supplied participation, resources, and consensual

⁶⁶ Just as the year 2020 was about to end, the SEC bowed to pressure from the US extractive companies by voting in favour of easing up on the obligation on the companies to disclose payments made to foreign governments. If the new rule stands, the US extractive companies will only disclose payments made generally to federal and state foreign governments instead of specific contract-level sums. One of the adverse effects of the amendment is that it strips the Dodd-Frank Act, S.13 & 15(d) of the SEC Act, and the general public of their ability to flag natural resource-related corrupt practices by companies and their host governments. See Katanga Johnson, "U.S. SEC Relaxes Rules on Company 'Resource Extraction' Disclosures", Reuters (17 December 2020), online: <<https://uk.reuters.com/article/us-usa-sec-disclosure-resource-extractio-idUKKBN28Q2CQ>>. <https://perma.cc/UAC5-SLTW>. See also "SEC Adopts Final Rules for the Disclosure of Payments by Resource Extraction Issuers", (16 December 2020), online: US Securities and Exchange Commission <<https://www.sec.gov/news/press-release/2020-318>>. <https://perma.cc/BKU3-ZXD6>. For a discussion of the disclosure rules under the Dodd-Frank Act and how state-based regimes and their effectiveness may be weakened by regulatory capture, see chapter 3 in this dissertation.

⁶⁷ Scott, Cafaggi & Senden, *supra*.

⁶⁸ Ramraj, *supra*.

⁶⁹ *Ibid* at 297.

actions of governments and/or firms.⁷⁰ Transnational regulators perform regulatory functions associated with states acting alone or in concert with other states, especially when states are unwilling to or incapable of effectively regulating.⁷¹ The creation of some forms of transnational regulation does not strictly follow the procedures and processes of conventional state-made legislation. The output of transnational regulation, in some cases, is not a formal legislative enactment. In this context, transnational regulation that originates entirely from non-state actors results in the development of regulatory mechanisms such as a set of standards, declarations, guidelines, principles, practices, agenda-setting, codes of conduct, and policy instruments.

There are some forms of transnational regulation that exhibit a co-regulatory and multi-stakeholder composition and governance structure. Although transnational regulation emerges with or without government involvement, it is sometimes the case that governments stimulate and steer such regimes by giving them statutory recognition through legislative actions.⁷² For example, the EITI –a hybrid regulatory regime for the good governance of the extractive industries, which I discussed in chapter 3, is jointly developed by state and non-state actors but has a non-state global governance structure. Nonetheless, EITI implementing states such as Nigeria enacted national legislation to strengthen the enforcement of the global standard. In a similar but slightly different vein, the Partnering Against Corruption Initiative (PACI) is a hybrid public-private transnational regulation on anti-corruption proposed by the World Economic Forum in 2004.⁷³ It is an agenda-setting regulatory initiative jointly developed and agreed on by businesses, international organizations, governments, and civil society to address the supply side of corruption and unethical business practices.⁷⁴ PACI requires business enterprises to subscribe to a set of principles, commit to a zero-tolerance policy towards bribery and corruption, and establish an internal anti-corruption programme.

⁷⁰ Vogel, *supra* note 47 at 264.

⁷¹ Ramraj, *supra* note 33 at 296.

⁷² Scott, Cafaggi & Senden, *supra* note 50 at 8.

⁷³ <https://perma.cc/2KBZ-APC7>.

⁷⁴ As of November 2020, PACI has approximately 90 signatories from various sectors of the global economy, including Royal Dutch Shell, Total, Eni, Petrobras, and SNC-Lavalin. See *Ibid*.

The creation of some transnational regulatory regimes is inspired by issue-related and existing national, international, and hybrid regulations and based on globally accepted standards and values. The Business Principles for Countering Bribery (Business Principles), for example, that was produced by TI with the input and guidance of a multi-stakeholder Steering Committee, reflects the spirit and intent of the UNCAC. The Business Principles urges business enterprises to prohibit direct and indirect bribery and to develop and implement a comprehensive program to counter all forms of bribery. Similarly, the Santiago Principles is developed and implemented by the International Forum of Sovereign Wealth Funds.⁷⁵ The Santiago Principles are a voluntary global governance framework of investment and operational practices for sovereign wealth funds (SWFs) that are endorsed and applied by sovereign wealth holders and recipient countries around the globe.⁷⁶ The principles are created to enhance good governance, accountability, transparency, and prudent investment practices of SWFs. In Nigeria, for example, the Nigerian Sovereign Wealth Fund Act was enacted in 2011 to give effect to the standards and practices contained in the Santiago Principles.⁷⁷

From my discussions about legal pluralism and transnational regulation above, it is clear that both theoretical approaches together offer a helpful account of regulating the Sino-Nigeria OFI investment deals. However, there are limitations in a transnational regulation approach, specifically the tendency to privilege Western perspectives and concepts in its theorization. The Western-centricity of transnational regulation is telling in that it usually falls short of capturing the socio-legal, political, and economic institutions and values of Third World countries. In effect, transna-

⁷⁵ The International Forum of Sovereign Wealth Funds (IFSWFs) is a voluntary organization that sets globally accepted standards and helps global sovereign wealth fundholders and recipients to implement the Santiago Principles. With its secretariat in the UK, it serves as a forum for the creation and sharing of knowledge about SWFs, the global financial system, free flow of capital and investment risks. Although membership in the IFSWFs comprises states (including China Investment Corporation and Nigeria Sovereign Investment Authority), it regularly receives inputs and guidance from multilateral organizations and the private sector such as the OECD, the IMF, State Street Corporation, the Fletcher School of Law and Diplomacy, and Bocconi University. See “International Forum of Sovereign Wealth Funds”, online: <<https://www.ifswf.org/about-us>>. <https://perma.cc/6V4D-YKZS>.

⁷⁶ “Santiago Principles”, online: International Forum of Sovereign Wealth Funds <<https://www.ifswf.org/santiago-principles>>. <https://perma.cc/J345-5REF>.

⁷⁷ Nigeria Sovereign Investment Authority (Establishment etc) Act, 2011, s.4(1)(d).

tional regulation is not wholly responsive to the needs of Third World peoples.⁷⁸ Transnational regulatory prescriptions do not offer a complete theory of the state, of economic challenges facing Third World countries, or the role of law and politics.⁷⁹ Even when there is an attempt to capture the lived experiences of Third World peoples, the discourse is laden with racialized narratives that overlook the crippling effects of colonization, slavery, and Western-led neo-liberal economic policies⁸⁰ such as SAPs, which I discussed in chapter 2. As discussed earlier, the Nigerian oil industry, for example, developed in a colonial context and its regulation was shaped by British oil imperialism. Consequently, in what follows, I shift my analysis away from transnational regulation and instead adopt and engage with the framework of TWAIL. In doing so, I take up Peer Zumbansen's call for scholars to connect existing critique of the law by TWAIL scholars with current conversations around transnational law, regulatory networks, or global governance.⁸¹ For these reasons (and many more), international scholars and practitioners of Third World descent have developed TWAIL, a theoretical and methodological framework to address a multitude of socio-economic, political, and legal challenges confronting the peoples of Asia, Africa, and Latin America in the post-colonial era. Using this framework, these scholars advocate for fair, truly egalitarian, and non-hierarchical international legal and economic orders. In the following part, I draw on TWAIL to demonstrate how it is relevant to the Sino-Nigeria OFI investment arrangements, specifically because it provides an analytical framework with a panoramic view and allows for a more nuanced understanding of the Chinese resource-for-infrastructure investment deals in

⁷⁸ Writing in the context of international environmental law, Karin Mickelson argues that international environmental lawyers of Western extraction have failed to fully respond to the broader needs of the Third World by not addressing the broader economic, social, cultural, and historical contexts necessary to build an inclusive legal framework that represents their interests and perspectives. See Karin Mickelson, "South, North, International Environmental Law, and International Environmental Lawyers" (2000) 11:1 Yearbook of International Environmental Law 52 at 53. See also James Thuo Gathii, "The Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996–2019 as an Appendix)" (2020) 114 Proceedings of the ASIL Annual Meeting 165 at 173.

⁷⁹ James Thuo Gathii, "Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes between Markets and States" (2000) 45:5 Vill L Rev 971 [Gathii, Retelling Good Governance Narratives] at 972.

⁸⁰ For example, see William Pfaff, "A New Colonialism?" *Foreign Affairs* (1995), online: <<https://www.foreignaffairs.com/articles/africa/1995-01-01/new-colonialism>>. <https://perma.cc/3YBX-4APS>. William Pfaff, "Africa Needs Europe to Get Involved Again in a Different Spirit", *Int'l Herald Tribune* (15 August 1994), (arguing that the decolonization of Africa was premature). See also Boris Johnson, "The Boris Archive: Africa is a Mess, But We Can't Blame Colonialism" (13 July 2016), online: <<https://www.spectator.co.uk/article/the-boris-archive-africa-is-a-mess-but-we-can-t-blame-colonialism>>. <https://perma.cc/RR5E-NSVA>.

⁸¹ Zumbansen, *supra*.

Nigeria and Africa at large.

3. Third World Approaches to International Law

TWAIL is both a theory and methodology⁸² that addresses international law's inherent contours and structures of domination, plunder, marginalization, and subordination of Third World⁸³ peoples. In rejecting the egalitarian and universal notions of the international legal order as a mere political and socio-economic utopia, some TWAIL scholars posit that "neither universality nor its promise of global order and stability makes international law a just, equitable, and legitimate code of global governance for the Third World".⁸⁴ TWAIL is a critical international law approach that employs constructive intellectual criticisms aimed at dehegemonizing the international legal system and transforming it into a system based on justice, fairness, and equality rather than racialized hierarchies.⁸⁵ Scholars who embrace TWAIL critically trace and analyze international law and the ways that it uses global institutions to sanction the political and economic marginal-

⁸² Obiora Chinedu Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both" (2008) 10:4 Int'l Comm L Rev 371 [Okafor, "Critical Third World"]; (arguing that TWAIL is both an effective theoretical and methodological framework for analyzing international law and its institutions).

⁸³ In this dissertation, I use the geographical, economic, and political phraseology "Third World" advisedly. My use of the phraseology deliberately and after consideration is at the backdrop of the fact that there are persuasive arguments in law and international political economy literature to the effect that the category is no longer apposite in light of the widening gulf in industrialization and development between Asian countries such as China, Singapore, and Taiwan on the one hand and African and some Caribbean countries such as Mauritania and Jamaica on the other hand. Also, it has been argued that there is a "Third World" within the "First World" and that the converse is true. See, for example, James H Mittelman & Mustapha Kamal Pasha, *Out from Underdevelopment Revisited: Changing Global Structures and the Remaking of the Third World*, 1997th ed (Basingstoke: Palgrave Macmillan, 1996). On the argument for the continued relevance of "Third World", see Balakrishnan Rajagopal, "Locating the Third World in Cultural Geography" (1999) *Third World Legal Stud* 1 [Rajagopal, "Cultural Geography"] (weaving together a postmodern and postcolonial exegesis to argue, among other things, that decentering the Third World from its geography will enable us to focus on the various levels at which power operates to subjugate and silence the voices of the subalterns and to engage in oppositional practices that challenge those power structures and flows).

⁸⁴ Mutua & Anghie, *supra* note 20. One of the examples of the political and socio-economic utopian character of international law is the ill-fated claim to Permanent Sovereignty over Natural Resources by Third World states. For this and other telling instances, see Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2013) at 95-171.

⁸⁵ Rajagopal, *supra* note 19. Similar to some other theoretical and methodological paradigms, the TWAIL framework is not a rigid theoretical model but can be seen as "a chorus of voices that blend, though not always harmoniously, in attempting to make heard a common set of concerns in the international legal system. The TWAIL framework has methodological variants anchored in different approaches such as Marxism, post-structuralism, feminism, and constructivism. See Karin Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse" (1998) 16 *Wis Int'l LJ* 353 at 360. See also Obiora Chinedu Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective" (2005) 43:1 & 2 *Osgoode Hall LJ* 171 [Okafor, "Newness"].

ization of the Third World.⁸⁶ Scholars who use TWAIL implicate the regime and discourse of international law and its institutions in the exploitation of human and natural resources in the Third World.⁸⁷

It is the goal and methodological commitment of the TWAIL framework to, among other things, engage in an alternative historicization of the international legal system and global institutions. I refer to this methodological approach as the TWAILian historical paradigm. The TWAILian historical paradigm is crucial in that it broadens the knowledge base of international legal scholarship by providing a balanced (non-Anglo-American) account of the history and development of international law and their implications for transnational law. The TWAILian historical paradigm insists that there is an inextricable nexus between the past and the present.⁸⁸ The TWAILian historical paradigm therefore maps the continuities and discontinuities in the development of international legal norms, structures, and claims to enable us understand how they facilitate the serious disadvantages that Third World peoples now suffer.⁸⁹ TWAIL scholars oppose an ahistorical conception and narrative of the international legal order and a dehistoricization of the contributions of the Third World to international law by the West. The TWAILian historical paradigm helps to foreground the archival commercial and diplomatic contacts between African ancient kingdoms and the Europeans that are usually excluded by Western and mainstream narratives of international law.⁹⁰ In this context, TWAIL scholarship provides a counter-narrative of

⁸⁶ Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2004) [Anghie "Imperialism"] at 258-272. Ibrónke T Odumosu, "Locating Third World Resistance in the International Law on Foreign Investment" (2007) 4 *Int'l Comm L Rev* 427. Ibrónke T Odumosu, "The Law and Politics of Engaging Resistance in Investment Dispute Settlement" (2007) 26:2 *Penn St Int'l L Rev* 251.

⁸⁷ Sornarajah, *supra* note 67.

⁸⁸ Anne Orford, "A Jurisprudence of the Limit" in Anne Orford, ed, *International Law and its Others*, reissued (Cambridge: Cambridge University Press, 2009) at 1; Antony Anghie, "Time Present and Time Past: Globalization, International Financial Institutions, and the Third World" (2000) 32:2 *NYU J Int'l L & Pol* 243 [Anghie, "Time Present and Time Past"].

⁸⁹ Obiora Chinedu Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective" (2005) 43:1 & 2 *Osgoode Hall LJ* 171 at 178 [Okafor, "Newness"].

⁹⁰ For seminal works on the early commercial and diplomatic relations between African kingdoms/empires and the Europeans as well as the contributions of the Third World to the development of international law, see T O Elias, *Africa and The Development of International Law* (Leiden: A.W. Sijthoff, 1972); Charles Henry Alexandrowicz, *An Introduction to the History of the Law of Nations In the East Indies: (16th, 17th and 18th Centuries)* (Oxford: Clarendon Press, 1967); R P Anand, *New States and International Law* (Delhi: Vikas Publishing House, 1973); Basil Davidson, *The Lost Cities of Africa*, revised edition ed (Boston: Little, Brown

international law to demonstrate that the discipline has never been obscure in any era in the Third World. In this dissertation, the TWAILian historical paradigm provides illuminating insights into the regulatory ineffectiveness of the nation-state as well as the Western transnational capitalist actors and factors that have shaped the Nigerian petroleum sector, which I highlighted in chapter 2. It was not until ten years after independence that the Nigerian government assumed full control of the upstream operations of its oil industry. The historical paradigm is also important because TWAIL is a self-reflexive intellectual project that considers the complicity of Third World governments with Western transnational capitalists in the economic exploitation and plunder of the commonwealth of their peoples.⁹¹

One of the principal theses of the TWAIL framework is that there is an intimate relationship between capitalism, imperialism, and the international legal order, which accounts for the fact that the international legal order has always disadvantaged Third World peoples, especially its subaltern groups.⁹² Whereas the international legal order guarantees the equality of states and the right to self-determination, it advances the legacies of imperialism and colonial conquest through the relocation of the economic sovereignty of Third World states to international institutions.⁹³ The relocation of economic sovereignty of Third World countries is evident in the economic and policy prescriptions of international financial institutions, especially the World Bank and the International Monetary Fund (IMF), the two Bretton Woods Institutions.⁹⁴ More precisely, and as I noted in

and Company, 1970); Makau wa Mutua, "Why Redraw the Map of Africa: A Moral and Legal Inquiry" (1995) 16:4 *Mich J Int'l L* 1113 [Mutua, "Why Redraw the Map?"]; Cheikh Anta Diop, *Precolonial Black Africa: A Comparative Study of the Political and Social Systems of Europe and Black Africa, from Antiquity to the Formation of Modern States* (Chicago Review Press, 1988).

⁹¹ For a critique of TWAIL's theoretical propositions and tenets, see John D Haskell, "TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law" (2014) 27:2 *Canadian Journal of Law & Jurisprudence* 383 (arguing that no external ground exists to challenge hegemonic international law; that TWAIL scholars occupy the same terrain that it is opposing; and the TWAIL framework does not offer a feasible alternative international law); David P Fidler, "Revolt Against or From Within the West? TWAIL, The Developing World, and The Future Direction of International Law" (2003) 2:1 *Chinese J Int'l L* 29 (arguing that the TWAIL framework is a discordant and contradictory school of thought).

⁹² B S Chimni, "Capitalism, Imperialism, and International Law in the Twenty-First Century" (2012) 14 *Or Rev Int'l L* 17 [B.S. Chimni, "Capitalism"].

⁹³ *Ibid.* See also Anghie, *supra*.

⁹⁴ Anghie, *supra* note 73; Antony Anghie, "Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations" (2002) 34:3 *NYU J Int'l L & Pol* 513 [Anghie, "The Birth of International Institutions"].

chapter 2, the Bretton Woods Institutions' conditional lending to Nigeria thrust neo-liberal market reforms on the country and other African states - reforms that led to devastating economic and social outcomes. Furthermore, the current modus operandi of enforcement of the FCPA against the US oil companies operating in Nigeria for bribing government officials perpetuates economic marginalization and poverty in the source country. The huge fines imposed by the DOJ and SEC on the defendant companies for violating the FCPA provisions are kept by the US government. Except when the investigations are exclusively carried out by Nigerian authorities, the host country and communities that suffered direct and indirect economic damages and waste because of bribery and corruption are not compensated nor is any financial reparation made to these stakeholders when the huge fines are paid to the US government. As I will show momentarily, the DOJ and SEC's practice of keeping the fines paid by defendants for violating the FCPA is inconsistent with the provision of the UNCAC. In addition to the fines imposed on defaulting transnational oil companies and individuals, the exact funds used by the companies to bribe government officials should be retrieved by the DOJ and/or SEC. Upon a mutual agreement, a multi-stakeholder team involving the US and Nigerian governments (and an anti-corruption NGO as a watchdog) could be established and the funds used to improve social infrastructure in Nigeria.

The Bonny Island case that I discussed in chapter 3 provided a realistic opportunity for this method of the FCPA enforcement that I am suggesting given the huge amount of money that Western companies used to bribe officials and the deplorable state of infrastructure in the Niger Delta. Article 35 of the UNCAC urges state parties to provide for compensatory damages to victims of corruption such as states and local communities. Regrettably, neither the US courts nor the DOJ award damages to third parties or Nigerian communities that suffered economic harm. Although the normative practice of obtaining compensation for victims of bribery and corruption is at its fledgling stage,⁹⁵ nevertheless, the current method of enforcement of the FCPA-related offences

⁹⁵ Kevin E Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (New York, United States: Oxford University Press, 2019) at 9. For a fine-grained framework and practical ways of providing remedy to victims of foreign bribery in the Third World, see Samuel J Hickey, "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach" (2021) 21:2 *Chi J Int'l L* 367.

against the US oil companies in Nigeria is imperialistic. It enables and sustains the entrenched exploitation and domination of subaltern Third World peoples.

Chimni posits that international law and the international legal order were developed to serve the interests of Western countries and their companies,⁹⁶ leaving the systems vulnerable to Western corporate capture. The regulatory framework of transnational law has colonial origin as it was created to account for the emergence of multinational corporations and to regulate their foreign investment to the benefit of the global capitalists.⁹⁷ In this connection, Anghie has noted that the emergence of transnational law is particularly significant for Third World states because it is in those states that the operations of the private Western MNCs (and more recently, those of the SOEs) generated novel and complex regulatory challenges that required legal regulation.⁹⁸ Anghie critiques 'transnational law'⁹⁹ framework for being used by the West to further undermine the economic sovereignty of Third World states.¹⁰⁰ In transnational commercial arbitration, there is a manifestation of what Sundhya Pahuja calls "juridical monopoly still enjoyed by the international legal order".¹⁰¹ For example, in rendering arbitral awards in cross-border investment disputes, both transnational and international law rarely recognize or take into account the jurisprudence of Third World states. The legal orders of Third World states are sidestepped because they originate from 'uncivilized' people and are deemed insufficient to interpret complex commercial contracts.¹⁰² The Third World is not recognized as an epistemic site of knowledge production and of the practice of international law but as merely a site of reception of interna-

⁹⁶ Chimni, "Capitalism, Imperialism, and International Law in the Twenty-First Century".

⁹⁷ Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2004) at 222-3 [Anghie "Imperialism"].

⁹⁸ *Ibid* at 223.

⁹⁹ By "transnational law", I mean all law that regulates actions or events that transcend national frontiers, including public and private international law, as well as other normative systems emanating from corporations and organized groups such as civil society organizations. See Philip Jessup, *Transnational Law* (New Haven: Yale University Press, 1956) at 2-3.

¹⁰⁰ Anghie, *supra* note 78 at 224-5.

¹⁰¹ Pahuja, *supra* note 86 at 6.

¹⁰² *Ibid* at 225-35. See also M Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 1994). Amr A Shalakany, "Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism" (2000) 41:2 *Harv Int'l L J* 419 (arguing under the rubrics of disciplinary bias, institutional bias, and doctrinal bias, respectively; that the practice of international commercial arbitration is constantly configured to increasingly favour the economic interests of the West).

tional legal knowledge.¹⁰³ Transnational regulation tends to prescribe hegemonic standards to be applied beyond its Western origin. The legal framework of transnational regulation emphasizes the indispensability of private Western multinational corporations and leaves Third World states susceptible to economic exploitation, capture, and co-optation by the private actors, especially in natural resource investments.¹⁰⁴

As now apparent, TWAIL is a critical school of international legal scholarship that is both re-constructive and re-conceptual in its intellectual engagements with the challenges and lived experiences of subaltern Third World peoples. I refer to these engagements as the TWAILian subalternity thesis. TWAIL scholars are proponents of the full representation and inclusiveness of all interests and voices, particularly those non-state, non-governmental, rural, marginalized, and subaltern poor who predominate in the Third World.¹⁰⁵ The TWAILian subalternity thesis urges for the full democratization and pluralization of the structures of both national and international governance so that all voices can be heard.¹⁰⁶ A TWAIL framework urges for an integrated regulatory governance process and structure that incorporates marginalized actors such as NGOs and local community groups. Given that the regulation of the Nigerian oil industry has been largely state-centric (even before the entry of the Chinese NOCs), the TWAILian subalternity thesis is pertinent to this study in light of the decentered and integrated regulatory approach that it advances. TWAIL as a methodological and theoretical framework accentuates the importance of co-regulation of the Sino-Nigeria OFI arrangements. The TWAIL theoretical framework

¹⁰³ James Thuo Gathii, "The Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996–2019 as an Appendix)" (2020) 114 *Proceedings of the ASIL Annual Meeting* 165 at 166. For a practical analysis and guide on knowledge production as well as a theoretical and methodological framework to uproot the deep-seated hegemony of knowledge by the West, see Boaventura de Sousa Santos, *The End of the Cognitive Empire: The Coming of Age of Epistemologies of the South* (Durham: Duke University Press, 2018); arguing that the marginalized and excluded scholars from the global South - the anti-imperial South, should be allowed to represent the world as their own and in their own terms - that way, they will be able to effect changes in the world - changes that will be in accordance with the aspirations of the Third World).

¹⁰⁴ *Ibid* at 223. See also Gathii, "Retelling Good Governance Narratives on Africa's Economic and Political Predicaments", *supra* note 77 (rejecting the premise that transnational normative standards originating from the West are a necessary antidote to the egalitarianism that may flow from regulatory controls in the economy, and arguing that the promise of transnational good governance norms are overstated to the extent that they are revolutionary antidotes to the political and economic failed experiments in Africa).

¹⁰⁵ Mutua & Anghie, *supra* note 69 at 37. For an insightful analysis of the TWAILian subalternity focus concerning transnational social movements and human rights, see Rajagopal, *supra*.

¹⁰⁶ Mutua & Anghie, *supra* note 20.

underscores the fundamental need to draw on and mainstream the perspectives and regulatory inputs of national and transnational non-state actors and regimes. Given that transnational anti-corruption NGOs, which I discussed in chapters 3 and 4 are creating a strong dynamic for regulatory efficiency and a change of corporate conduct in bribery of foreign government officials, the TWAIlLian subalternity thesis is consistent with a co-regulatory and decentered regulation of the Sino-Nigeria OFI deals. Furthermore, a TWAIlL framework acknowledges and takes seriously the reality of the issue of power asymmetry in the economic relations between the Third World and the industrialized West. Scholars who embrace the TWAIlL framework are critical of Third World exploitation by Western MNCs and how the international legal institutions have enabled the exploitation.¹⁰⁷

But China is now an emerging economic powerhouse. Beijing, through SASAC, controls and supports its national companies—companies that are already seen to be engaging in exploitative relationships with communities and countries in the Third World. Beginning in 2001 when China acceded to the WTO, it has employed international law institutions and norms to enhance its emergence as an economic powerhouse. For example, in the area of transnational commercial dispute resolution and under the banner of the BRI, China has begun to use international law to boost the legitimacy of its domestic courts. I have identified power asymmetry as a possibility in the Sino-Nigeria OFI deals in chapters 2 and 4. However, However, TWAIlL scholars are not yet alert to the massive power asymmetry between China and many of the smaller countries in Africa and Asia. Thus, it is important to track the issues of shifting power flows, potential hegemony, investment dynamics, and economic interest alignments. Scholars who use TWAIlL need to recalibrate their critique of asymmetrical economic relations and exploitation by recognizing that it is not only Western MNCs that engage in oppressive and exploitative corporate practices in the Third World. I shall return to these issues later in this chapter. But in the meantime, suffice it to say that the TWAIlLian subalternity thesis is useful in addressing the potential power flows in the Sino-Nigeria OFI pacts through the advocacy and third-party scrutiny of local (Nigerian)

¹⁰⁷ Ibid. Sornarajah, *supra* note 67.

and transnational NGOs. Simply put, regulatory integration of non-state actors such as anti-corruption NGOs will be a means to limit the power flows in the Sino-Nigeria OFI deals.

As shown, there are two key strengths of TWAIL. First, TWAIL scholars advocate for an integrated regulatory governance process and structure that incorporates marginalized actors such as NGOs and local community groups.¹⁰⁸ Thus, it is evident that TWAIL scholars are open to transnational regulatory pluralism, particularly when NGOs and a variety of local stakeholders are involved in the regulatory process. Second, TWAIL scholarship leans in favour of subalternity by positing that the regulatory framework of the international and transnational legal order needs to be inclusive of non-state actors from the Third World.¹⁰⁹ The main limitation of TWAIL in this dissertation is the TWAILian refutation of transnational regulatory pluralism to the extent that transnational regulation advances the imperial project. Transnational regulation has been a target of TWAIL's critique because the supranational legal order privileges Western private corporate interests, and transnational regulation is susceptible to regulatory capture. TWAIL contends that transnational regulation gives too much power to private multinational companies.¹¹⁰ As was demonstrated through the Dodd-Frank rule amendments, multinational corporations affect the creation and implementation of transnational regulatory standards by influencing their home states.¹¹¹ Transnational regulatory standards originating from the West simultaneously empower the weak while protecting the powerful.¹¹²

¹⁰⁸ Odumosu, *supra*. Odumosu-Ayanu, *supra* note 62. Odumosu-Ayanu, *supra* note 63. James Gathii & Ibranke T Odumosu-Ayanu, "The Turn to Contractual Responsibility in the Global Extractive Industry" (2016) 1:1 BHRJ 69.

¹⁰⁹ Rajagopal, *supra*.

¹¹⁰ M Sornarajah, *The Settlement of Foreign Investment Disputes* (The Hague: Kluwer Law International, 2000) at 4.

¹¹¹ *Ibid*.

¹¹² Gathii, "Retelling Good Governance Narratives on Africa's Economic and Political Predicaments", *supra* note 82 at 972.

4. The Limitations of Plural and Transnational Normative Orders

To this point in this chapter, I have been discussing legal pluralism, transnational regulation, and TWAIL as theoretical and analytical frameworks. In this section, I turn my attention to how power relations and economic interest alignments animate and shape the creation and implementation of plural and transnational normative orders in international investment. I assess the impact that these dynamics have on the Sino-Nigeria OFI deals. I focus on the extractive industries to show how Chinese state-owned, and the US private oil companies might influence the substance of plural and transnational regulatory regimes. The discussion of power dynamics and economic interest alignments are necessary because, as Evaristus Oshionebo has noted, for any model of regulation to be effective, it must take cognizance of and mobilize countervailing forces and actors to those of the industry being regulated.¹¹³ In addition, theorizing power flows in the context of the legitimacy and enforcement potential of legal pluralism and transnational regulation deepens our understanding of Chinese overseas investment strategy, among other things. There are power dynamics and interest alignments in the regulatory process that can limit the efficacy of the three theories that I have discussed in the preceding sections. As it is clear in this chapter through the lenses of legal pluralism and transnational regulatory regimes, the regulatory ecosystem is increasingly undergoing metamorphoses and challenges in terms of sources, form, and substance. Power dynamics flow across the regulatory ecosystem as state and non-state actors interact in the creation and enforcement of regulatory regimes as well as in the development of international economic order. As I have noted, China's strategy of building and exercising power and economic influence includes the use of social connections and people-to-people exchanges under FOCAC for norm diffusion and knowledge production.¹¹⁴ Similarly, the appointment of four African

¹¹³ Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto, Canada: University of Toronto Press, 2009) at 10.

¹¹⁴ For an international relations perspective of how power flows in the global system through social capital and people-to-people connections, see Lina Benabdallah, *Shaping the Future of Power: Knowledge Production and Network-Building in China-Africa Relations* (Ann Arbor: University of Michigan Press, 2020), (arguing for the moving away from conceptualizing power only in the contexts of investments in natural resource extraction and infrastructure projects to the less visible and material types of investments such as social relations, network expansions, and human capital development so as to broaden our understanding of power dynamics in China-Africa relations).

jurists (including a Nigerian) by China's Supreme People's Court to the legal team for settling BRI disputes¹¹⁵ enhances power flows and economic interest alignments. Also, the Thematic Forum on Clean Silk Road that was established in 2019 to strengthen international cooperation on combating corruption under the BRI is equally significant in terms of norm creation and diffusion. These legal and judicial fraternities buttress how relational networks, expert knowledge production, and the creation of parallel transnational plural normative orders can be vectors for power flow in the Sino-Nigeria investment deals. The relational mode of power in these instances does not in and of itself manifest elements of domination. More importantly, these relational networks show that soft "power building"¹¹⁶ mechanisms might constrain the effectiveness and enforcement of plural and transnational regimes because they serve as propellants in the wheel of trade and investment relations. The creation and enforcement of plural and transnational regulatory orders produce forms of power dynamics between state and non-state actors as each party strives to protect its social, political, and economic goals and principles. Even non-state actors exercise normative powers not only by pressuring states and IGOs to create regulatory regimes that incorporate high ethical standards in business activities but by also using parallel or alternative private mechanisms to resolve commercial disputes. For example, TI's Business Principles are prototypical of the FCPA, UNCAC, and the OECD Anti-bribery Convention as it exhorts business enterprises to develop internal anti-bribery standards or to benchmark existing ones.

Power dynamics and interest alignments can limit the implementation of plural and transnational regulation of the Sino-Nigeria OFI deals particularly when they are weighed against national developmental interests. Western private transnational corporations and recently, Chinese SOEs, wield financial and technological powers that Nigeria and Third World countries at large depend on for their socio-political and economic developments. The financial and technological powers

¹¹⁵ "China Appoints Four Africans to Legal Team for Handling Belt and Road Disputes", South China Morning Post (15 December 2020), online: <<https://www.scmp.com/news/china/diplomacy/article/3113694/chinas-top-court-appoints-four-africans-legal-team-handling>>. <https://perma.cc/4ERR-R2T6>.

¹¹⁶ Ibid at 138.

are more pronounced in the extractive industries as these industries oxygenate many economies in Africa. Two Chinese NOCs –SINOPEC and CNPC - notably rank second and fourth, respectively, in the top ten largest companies in terms of revenue in 2020.¹¹⁷ That the huge investments in ultramodern geographic and seismic technologies that are required to find, develop, and drill oil wells can be provided only by the Chinese and Western oil companies give the foreign investors a powerful influence in Nigeria. The practical implication of the financial and technological capabilities of the Chinese and Western companies is that the oil companies are indispensable in the economic development of the host country. For example, the financial and technological capacities and expertise of the Chinese SOEs are crucial in the successful execution of the various huge oil and non-oil infrastructure projects in Nigeria that I discussed in chapter 4. Furthermore, the Chinese SOEs are critical in the realization of Beijing’s global economic expansion. These situations can define and limit the degree of implementation of plural and transnational regulation in the Sino-Nigeria OFI investment arrangements. The flow of power and alignment of sociopolitical and economic interests in the Sino-Nigeria OFI deals may be in the form of lowering ethical standards of business regulation by the Nigerian government to retain foreign investors. The Addax Petroleum case is a prototypical example of lowering the standards of business regulation and limiting the implementation of an existing regulatory regime.

National governments sometimes yield to the influence and interests of business enterprises that originate from their jurisdictions by attenuating the implementation effects of national and transnational regulation that impact the enterprises, thereby making even the most “powerful states captives of concentrated corporate interests”.¹¹⁸ Multinational enterprises lobby to influence the content and development of home state laws and policies that have extraterritorial application.¹¹⁹ In this context, I discussed how powerful US oil companies influence and manipulate state regulation by lobbying Congress and putting up a legal fight over the Dodd-Frank

¹¹⁷ “Fortune Global 500”, online: Fortune <<https://fortune.com/global500/2020/>>. <https://perma.cc/W5GN-JLCN>.

¹¹⁸ Braithwaite & Drahos, *supra* note 51 at 482.

¹¹⁹ Muchlinski, *supra* note 20 at 90-98.

Disclosure Rule. To recapitulate it briefly here, the Dodd-Frank Rule mandates every extractive company whose shares are traded on the US Stock Exchange to disclose payments made to both home and foreign governments for the commercial development of natural resources. However, at the end of 2020, the SEC adopted a diluted version of the rule that will conceal how much money resource-rich governments received from the US extractive companies in specific projects. Similarly, anti-corruption CSGs on two different occasions petitioned the EITI to remove from its Board the representatives of ExxonMobil and Chevron for their unethical roles in weakening the Dodd-Frank Disclosure Rule.¹²⁰ The unethical roles of the representatives consisted in their participation in lobbying meetings at the SEC with the American Petroleum Institute and the US Chamber of Commerce in late 2020. In this context, the 2020 version of the Dodd-Frank Rule fails to bolster normative regimes on transparency and good governance in the extractive industries (e.g., the EITI regime) by undermining the power of public scrutiny when foreign companies barter for host countries' natural resources or make independent payments to resource-rich governments for mining rights. It falls short of advancing the basic objectives of the Dodd-Frank Rule, namely, to counter the perennial inability of resource-rich countries such as Nigeria to transform their wealth into economic growth and development and obviate corruption and poor governance in the Third World. The current version of the rule is Janus-faced and hollow, and its hollowness invalidates the US claim of commitment to transparency and anti-corruption in global economic activities. The 2020 version of the Dodd-Frank Rule provides a hollow hope of transparency and good governance of extractive industries revenue.

Conclusion

The theoretical frameworks of legal pluralism and transnational regulation reveal a plethora of regulatory governance interplay and overlap in the global investment landscape. The state and

¹²⁰ "ExxonMobil Representative Should be Removed from Board of Global Transparency Initiative, say Watchdog Groups", (7 February 2021), online: Publish What You Pay US <<http://www.pwypusa.org/pwyp-news/exxonmobil-representative-should-be-removed-from-board-of-global-transparency-initiative-say-watchdog-groups/>>. <https://perma.cc/TN7H-EJ74>. See also "Civil Society Organizations Call on ExxonMobil and Chevron to be Removed from the EITI Board", (7 February 2018), online: Publish What You Pay US <<http://www.pwypusa.org/pwyp-news/civil-society-organizations-call-on-exxonmobil-and-chevron-to-be-removed-from-the-eiti-board/>>. <https://perma.cc/Q8BQ-8KSB>.

non-state regimes co-exist and compete in a pluralistic legal space. The co-existence opened normative fissures and fragmentation between state legal orders and quasi-legal orders. There are some indicia of a global legal pluralism trend in transnational trade and investment. In this context, pluralist and hybrid regulatory mechanisms ineluctably characterize oil and gas investment disputes. There are even more manifestations of the trend in human rights, the environment, intellectual property, and health, which are beyond the scope of this dissertation. With respect to transnational regulation, the global regulatory architecture has increasingly experienced fluidity and splintering from the traditionally dominant state. The increased creation and relatively wide acceptance of public-private and purely private transnational regulatory regimes are ripening into a standard barometer of ethical and responsible business conduct in transboundary activities. The array of transnational regulations and the required principles, standards, codes, and guidelines they set forth serve as primary bases for public assessment and evaluation of corporate conduct in international commercial activities. Transnational regulation has been relatively effective to the extent that the norms they embody have contributed to shaping corporate business conduct in cross-border commercial transactions. Transnational regulation raises promising possibilities in informing future policy directions and charting regulatory courses for the Sino-Nigeria OFI investment deals. Put differently, transnational regulation, as I will argue in chapter 6, has the potential to contribute to crucial policy and legal springboards that would lead to responsive regulation of the Nigerian oil industry. Drawing on the TWAIL framework, the enforcement of the FCPA is imperialistic and enables economic marginalization in Nigeria and the Third World.

Furthermore, legal pluralism and transnational regulation manifest elements of interlegality described by Santos in his postmodern conception of law. Legal pluralism and transnational regulation recognize that “our legal life is constituted by an intersection of different legal orders, that we live in an era of porous legality or legal porosity, and multiple networks of legal orders forcing us to constant transitions and trespassings”.¹²¹ The interconnectedness of legal pluralism and transnational regulation is evident from the description, analysis, and instantiations of the two

¹²¹ De Sousa Santos, “Law”, supra note 3 at 298.

theoretical frameworks in this chapter. In terms of their functionalist characters, legal pluralism and transnational regulation manifest attributes of polycentricity and plurality. From a variety of private and public commercial transactions to matrimonial relations; from refugee law to trade and investment relations; legal pluralism and transnational regulation are animated with vast normative orders that emanate from various sources and regulate different issues in international commercial activities. Although this dissertation engages with a triad of theoretical frameworks (legal pluralism, transnational regulation, and TWAIL), legal pluralism provides the analytical bulwark for most of its arguments.

My task in the next chapter is to explain what my dissertation means practically. What would a transnational, pluralistic, and integrated regulation look like? Who would be the key non-state actors? Are there examples of transnational regulators in other fields that non-state actors could emulate?

Chapter 6: Conclusion

China has and continues to play a key role in FDI in the Third World, especially in oil producing countries like Nigeria. While such investment is important and might bring much needed investment in infrastructure, such arrangements also run the risk of facilitating and supporting bribery and corruption in recipient countries. China and its SOEs (the NOCs and engineering and construction firms) provide an excellent example of such challenges. Nigeria's unstable nationhood that is traceable to British colonialism, military interventions, and history of savage internecine warfare has continued to adversely impact its regulatory institutions. The oil industry, regulatory institutions, and the Nigerian ruling class are sites and conduits for corruption, clientelism, nepotism, and patronage. Rent-seeking has been integral to carrying out petroleum operations by Western private oil companies in Nigeria. The current regulatory structure in Nigeria is inefficacious in regulating the risks associated with Chinese OFI investment. An effective form of regulation of the OFI investment deals and the concomitant award of the infrastructure contracts and execution is crucial to the potential gains of the investment arrangement. What then could be done to ensure that the Sino-Nigeria OFI investment arrangements do not exacerbate bribery and corruption and defeat the objective of using Nigeria's petroleum resource wealth to build and upgrade sustainable infrastructure for the benefit of the Nigerian people?

My dissertation has discussed the regulatory issues arising from the Sino-Nigeria OFI investment arrangements. The peculiarity of the investment deals and China's lack of enforcement of its anti-corruption laws at home, the historical incidences of corrupt practices in the Nigerian oil sector, and Nigeria's regulatory inefficiency of its oil industry - all of which make the regulation

of the investment arrangements challenging. My central question in this dissertation is how and to what extent could state and non-state actors and regimes be used as integrated and effective co-regulatory mechanisms in regulating the Sino-Nigeria OFI investment deals? The existing state-centered regulation of the Nigerian oil sector is inadequate and ineffective in regulating bribery and enabling transparency in oil mining licensing exercises. Thus, there is a need for state regulatory institutions to recognize and accept anti-corruption NGOs in the regulatory arrangement. I, therefore, propose an integrated pluralist and co-regulatory approach to the Sino-Nigeria OFI investment arrangements. In this context, the pluralist and co-regulatory model will be a combination of the NUPRC and anti-corruption NGOs such as Transparency International and Publish What You Pay.¹ A negotiation team for new Sino-Nigeria OFI investment deals, contract awards, and oil licensing exercises should comprise the host state and the anti-corruption NGOs that I mentioned. There are some potential normative strengths in the proposed co-regulatory model. The integrated and co-regulatory approach will forestall bribery and corruption, enable transparency and accountability, level the playing field, and may protect the interests of all stakeholders –including the Western private oil companies that were shut out of some of the oil licensing exercises from 2006-2008. The integrated and co-regulatory model will have the state as the pre-eminent but not the sole regulator of the Sino-Nigeria OFI investment deals. In other words, the state, if it is willing, could play a key role in steering the co-regulatory arrangement. To be clear, the integration of anti-corruption NGOs and non-state regulatory regimes should be supplemental to the traditional state-based regulation. The ownership of petroleum resources in Nigeria is vested in the federal government. Therefore, I am not unaware of the fact that the regulatory model that my dissertation has proposed might be seen by the Nigerian government as undue and external interference in the decision-making ecosystem of its hydrocarbon resources. Thus, the process of integrating non-state actors and regimes into

¹ For example, the Accountable Mining Initiative of Transparency International is created to improve transparency in extractive industries by focusing on when a host government grants mining permits and licenses, negotiate contracts, and makes agreements with oil companies. It partners with governments, business enterprises, CSOs, and communities to create a fairer, clearer, and cleaner licensing process in the extractive industries. “Accountable Mining Projects”, online: Transparency.org <<https://www.transparency.org/en/projects/accountable-mining>>

the regulation of the OFI investment arrangements should respect Nigeria's sovereignty over natural resources as contained in the United Nations' Resolution 1803 (XVII). The deference to Nigeria's sovereignty over its natural resources could be done by ensuring that the co-regulation is driven by the state. The state regimes that my proposed regulatory model refers to include the legislation enacted by the Nigerian, US, and Chinese governments, which I discussed in chapter 3. Similarly, the non-state regimes encompass purely private and multistakeholder instruments such as the Business Principles for Countering Bribery, Partnering Against Corruption Initiative, the UNCAC, and the OECD Anti-Bribery Convention. My research question has been answered through an examination and analysis of the contents or textual sources of the applicable regulatory instruments, government speeches, case laws, NGO reports, interdisciplinary scholarship, and non-legal academic commentaries. This approach makes this research project a socio-legal doctrinal study rather than a purely doctrinal study in the strict legal sense.

Given that Nigeria is enfeebled to effectively regulate the oil industry, the formal recognition, acceptance, and inclusion of non-state actors and regulatory instruments in the Sino-Nigeria OFI investment arrangements will also enhance regulatory expertise that will contribute to the good governance of the investment deals. The acceptance and integration of Transparency International and Publish What You Pay will enable the non-state actors to participate in the negotiation processes and scrutiny of the OFI investment contracts and Memorandum of Understanding to safeguard against the inclusion of unfair terms in the deals. A regulatory role by the anti-corruption NGOs will potentially ensure that the future of the Nigerian people is not mortgaged through unconscionable terms and conditions in the OFI agreements. It is to these extents that state and non-state actors and regimes could be used as integrated and effective co-regulatory mechanisms in regulating the Sino-Nigeria OFI investment deals. It is important to state that I do not, by any means, propose a pluralist and co-regulatory model as a complete solution to the challenges of regulating the Sino-Nigeria OFI pacts.

There are two reasons for proposing an integrated and co-regulatory approach in this disserta-

tion. First, the historical corrupt practices and embezzlement of oil revenue, as I highlighted in chapters 1 and 2, have characterized the oil industry. This is in part a result of a lack of regulatory input by non-state actors. Second, unless anti-corruption NGOs are incorporated into the regulatory structure, the regulatory architecture of the OFI arrangements will continue to be exclusively composed of state actors. What is more, there are inherently state-to-state relations of power, which I identified in chapter 4, that shape the investment arrangements. An integrated and co-regulatory approach will enhance transparency in the Sino-Nigeria OFI arrangements and strengthen global efforts against corruption.

Regulatory trends from one sphere of global economic sector or issue area could also usefully be adapted to apply to another. The integrated and co-regulatory model that I am proposing is working on some other national and global issues such as climate change. In the UN Sustainable Development Goals (SDGs), the state includes non-state actors in the governance process. SDG 17, for instance, emphasizes an effective multi-stakeholder partnership between governments, businesses, and NGOs as pivotal in the implementation of the SDGs.² Since the 19th century, there has been global environmental regulatory cooperation between state and non-state actors.³ The UN climate regime has formalized the role of non-state transnational actors as stakeholders and actors.⁴ In climate change governance, states, inter-governmental, and non-state actors are jointly playing key roles through cooperative regulatory mechanisms and initiatives. In a bid to reduce greenhouse gas emissions under the UN Framework Convention on Climate Change, a useful co-regulatory dialogue is increasingly happening between national governments, IGOs, environmental NGOs, and business enterprises.⁵ Under the Paris Agreement, transnational environmental NGOs, for example, scrutinize the national emissions and implementation of international pledges

² See, for example, "Multi-stakeholder Partnerships and Voluntary Commitments", online: United Nations: Department of Economic and Social Affairs - Sustainable Development <<https://sdgs.un.org/topics/multi-stakeholder-partnerships-and-voluntary-commitments>>.

³ Thomas Hale, "Transnational Actors and Transnational Governance in Global Environmental Politics"(2020) 23:1 Annual Review of Political Science 203 at 204.

⁴ Ibid.

⁵ Karin Bäckstrand et al, "Non-State Actors in Global Climate Governance: From Copenhagen to Paris and Beyond"(2017) 26:4 Environmental Politics 561.

of state governments.⁶ The regulatory structure of the Sino-Nigeria OFI investment can mirror the co-governance arrangement on climate change.

It is beyond the scope of this dissertation to specify the precise ways in which the regulatory structures of the transnational initiatives that I mentioned in the preceding paragraph could inform the definite structure of the Sino-Nigeria co-regulatory approach. Nevertheless, future policy-oriented research could consider whether a resource-rich country in Africa might need to enact legislation to recognize and accept the regulatory roles of NGOs in other issue areas. Additional research is needed concerning the governance structure, procedures, and best practices for the Sino-Nigeria OFI investment arrangements vis-à-vis the reporting mechanism on the progress made in implementing the terms and conditions of the deals. Also, future research on the OFI arrangements in Nigeria or other African countries could address issues around the Chinese investment practices in the areas of human rights, labour standards, technology transfer, and the environment. My research did not consider whether a pluralist and co-regulatory approach can be extrapolated to other countries in Africa such as Angola, Ghana, Zambia, Sudan, Gabon, and Chad where Chinese state-backed RFI investment is also gaining traction. Considering the heterogeneity of Africa, further research that is focused on these countries is therefore needed on the regulation of Chinese RFI investments in the mining sector (e.g., diamond, copper, and zinc).

I have foregrounded the imperativeness of a new form of regulation –a pluralist and co-regulatory regulatory model to the Sino-Nigeria OFI investment arrangements. I have recommended a normative and policy prescription for the improvement of the operation and governance of the Sino-Nigeria OFI investment deals. There is a dire need for a co-regulatory model for the atypical investment deals because the Sino-Nigeria oil investment relations will presumably experience continuous growth in times to come. The predicted continuous growth is likely to happen because of some economic and geopolitical interest alignments and complementarities. In this respect, China's need for energy security and Nigeria's rich hydrocarbon reserve, infrastructure gap, and

⁶ Robert Falkner, "The Paris Agreement and the New Logic of International Climate Politics"(2016) 92:5 *International Affairs* 1107 at 1122.

large population are plausible reasons for the expected continuous growth. What is more, the OFI arrangements is now a constituent part of the BRI, a flagship project of President XI Jinping and the CCP. The Sino-Nigeria OFI investment deals has resulted in the resuscitations of moribund railways, highways, and the ongoing construction of deep seaports and refineries. The completion of some of the infrastructure projects is an indicator that the Chinese government may be a reliable ally in support of Nigeria's investment needs in infrastructure and other non-oil sector developments. However, Western policy institutions as well as some civil society organizations are critical of and cynical about Chinese oil and non-oil investments in Nigeria and Africa at large. In addition, the Chinese investor-state and its NOCs have the potential to be hegemons and engage in corporate exploitative practices in the Nigerian oil industry. The location of the major decision-making of the OFI investment arrangements may be technically externalized to Beijing.

How then can the Nigerian government and people safeguard against these possibilities? The integrated co-regulatory model by state and non-state actors can help ensure that new oil drilling licenses and contracts under the OFI investment arrangements are not susceptible to opacity and bribery. There is a strong likelihood that the adoption of a co-regulatory approach will bring about openness, transparency, and due process in the investment arrangements. The proposed regulatory approach could also help ensure that oil licensing exercises and contract awards adhere to the equality of treatment principle and non-discrimination in public procurement. The externalization of the decision-making location could be remedied through the recognition and inclusion of non-state actors in the regulation of the OFI investment deals. The co-regulatory approach will sustain the benefits of the OFI deals and infuse it with some measure of legitimacy and credibility.

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