MANAGING FEDERAL FINANCE: CONSTITUTIONAL CHALLENGES OF THE NIGERIA SOVEREIGN INVESTMENT FUND*

Introduction

The Nigerian national parliament in 2011 enacted legislation to establish and manage the nation's sovereign wealth fund.[1] Due to the need to establish a "clear legal framework that specifies the institutional structure within which a sovereign entity (and its subsidiaries) operates and ensures that [the] objectives, role, scope, and responsibilities are clearly laid out,"[2] the act establishes the Nigeria Sovereign Investment Authority (NSIA) to administer the funds created under the act. Controversies have attended the establishment of the fund due largely to the fiscal framework of the federation which is "deeply embedded in the federalist spirit of its constitution."[3] At the heart of the controversy is whether the national government has the constitutional right to establish the fund? Correlated, does the fiscal arrangement in the federation permit it and would the exercise of the powers of the authority transgress the federalist principles in the constitution? These questions merely mirror the problem in federal relations in Nigeria where units of government place more emphasis on the distribution of scarce but allocable resources than in increasing the production of the resources to be shared,[4] resulting often in many disputes

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[1] The piece of legislation is the Nigeria Sovereign Investment Authority (Establishment, etc) Act, 2011. Laws enacted by the national parliament are referred to as "Acts" while those enacted by state parliaments are referred to as "Laws". The president gave assent to the law in line with the constitutional requirements on him. After much delay and controversies, the Nigerian Sovereign Investment Authority began operation in March 2013. The board of directors of the fund has been commissioned, with its managing director/chief executive officer appointed to begin operation.

[2] M. Allen, & J. Caruana, "Sovereign Wealth Fund-A Work Agenda." Sourced at on January 18, 2013.

[3] M. A. Musgrave, & P. B. Musgrave, Public Finance in Theory and Practice (5^{th} ed.), New York: McGraw-Hill Book Company, p. 23.

[4] J. I. Elaigwu, The Politics of Federalism in Nigeria, Jos-Nigeria: Aha Publishing House, 2005, p. 244.

and litigation before the courts.[5] While examining the argument for establishing the fund, we will address the questions raised, hoping to resolve some of the challenges in fiscal relations within the federal framework in Nigeria.

Nigeria's Federalism

Nigeria operates a federal government[6] tiers or units of government exist at the regional/state levels.[7] The states exercise legislative and executive powers over land areas defined in a written constitution, which is imperative not only for enumerating the powers of the component units, but to hold violators of those powers accountable.[8] The legislative powers of the states are vested in a unicameral legislature, the Houses of Assembly,[9] they could enact laws to ensure "peace, order and good government" for the respective states or any parts of the states.[10] Similar powers are vested in a federal legislative house, the National Assembly.[11] On the proposition that the constitution is supreme, no law made by the state or national legislature should be incompatible with the provisions of the constitution, otherwise such laws will be nullified by the courts.[12]

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[5] Some cases in which these disputes have been tried and the fiscal limits of tiers of government delimited include Attorney General Federation vs. Attorney General Abia State (2002) 6 NWLR, p. 764 & 542; Attorney General Adamawa State vs. Attorney General of the Federation (2005) 18 NWLR, p. 958, p. 581; and Attorney General Cross River State vs. Attorney General of the Federation & Another (2012) ALL FWLR, part 646, p. 408. The absence of military rule has removed previous restraints on the states that were shackled from asserting any residue of rights under the previous 1979 Constitution.

[6] Federalism generally presupposes the existence of a federal or national government and units of constituent governments as States or regions with each government having enumerated powers enshrined in a written Constitution. The allocation of functions and powers in a federal system entails relative independence in many facets (executive, legislative, and economic) of each unit. A State founded on such an arrangement is referred to as 'Federation' and the government of such a state as 'Federal Government'. The country has retained its federalist forms since 1954. The 1960, 1963, 1979, 1989 and 1999 were federal constitutions. From the abrogated three regions under the 1960 Constitution, the sub-national units increased to four regions (1963), Twelve States (1967), Nineteen States (1976), Twenty one States (1987), Thirty States (1991) and Thirty Six (1996). During the long years of military rule (1966-1979, 1983-1999) the country still operated a warped federal arrangement, with a national military government at the centre and delegated military administrators at the state levels; although the powers exercised by the latter were simply donated by the former and the States could never challenge the national military government in their exercise of legislative and executive functions.

[7] There are thirty six States in the federation. There is a federal capital territory, which is located in Abuja, the centre of the country. Within it are the area councils as administrative sub-units. Although not a tier of government, it is a territory where the federal government exercises executive, legislative and judicial powers. Nigerians from all states of the federation reside within the territory, although certain ethnic nationalities are regarded as indigenous to the territory.

[8] Unlike previous constitutions, "the constituent polities do not have their own constitutions...[but] the federal constitution sets out in separate parts of the same chapters provisions relating to the federal and state governments", J. A. A. Ayoade and Skan C. J. D., "Federal Republic of Nigeria", in J. Kinkaid, & G. A. Tarr, Constitutional Origins, Structure and Change in Federal Countries Vol. 1, Montreal & Kingston: Forum of Federations, 2005, 240 at p. 254.

[9] Section 4 (5 & 6) of the Constitution.

[10] Section 4 (7) of the Constitution.

[11] The National Assembly is established under section 4 (1) of the 1999 Constitution (herein the Constitution). It is bicameral, constituted by a senate and a representative house. The senate is made up of equal number of senators (three) representing a State. The House of Representative is made up of representatives in proportion to the population in their constituency.

[12] Section 1 (1 & 3) 1999 Constitution. This entrenched constitutional principle hinges on the ground that the constitution is the basic law of the federation setting out its philosophy, structure, government and granting basic rights to citizens. The courts have been unwilling to belittle the text of the constitution except to the extent permitted by the constitution itself. INEC vs. Musa (2003) FWLR, part 145, p. 729.

The executive powers of the federation are vested in the president;[13] in the same manner executive powers of the states are vested in the governor of each state to be exercised within the limits guaranteed and permitted by the constitution.[14] Local government councils (including Area Councils in the Federal Capital Territory, Abuja) are established in the Constitution; [15] although the establishment, structure, finance, composition and function of the local councils in the states, are matters for the states to determine.[16] Local government councils are entitled, along with the other tiers of government to a share of the commonwealth from the common pool, the Federation Account.[17]

An exclusive list scheduled in the constitution is the subject of the National Assembly's legislative powers. An invisible "residual list" reserves matters exclusively for the states.[18] A common shopping list, the "concurrent list", similarly scheduled in the constitution, could be acted on by both the national legislature and the state legislature, although where the former's legislation covers a particular field, the latter's legislation gives way.[19]

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[13] Section 5 (1) 1999 Constitution.

[14] Section 5 (2) 1999 Constitution.

[15] The sub-units within the Federal Capital Territory, Abuja (for administrative purposes) are referred to as Area Councils.

[16] Section 7 (1) of the Constitution. The constitution states in section 2 (2) that Nigeria as a federation consisting of States and a Federal Capital Territory. Similar provisions were contained in the S. 2 1963 Constitution, Nigeria; and S. 2(2) 1979 Constitution, Nigeria. Section 2 (1) of the 1999 Constitution also defines the Federation as the Federal Republic of Nigeria. There are seven hundred and sixty eight constitutionally recognized local councils in the Federation listed in the Constitution. The six Area Councils within the Federal Capital Territory are not regarded as Local Government Councils for the purpose of the section. S. 3(6) 1999 Constitution, Nigeria. The local government councils are not defined as tiers of government in the Federation. Most matters relating to local government are under the residual list and competence, except the constitutional right of the councils to a guaranteed share of the federation account; their structure, finance and function are supervised by state governments as fixed by national legislation. The Area Councils within the Federal Capital Territory are however under the sole control of the national government.

[17] Section 7 of the 1999 Constitution. The Supreme Court of the federation has affirmed the right of the state governments in most matters that relate to local governments and strictly limited the interference of the national government in matters of local governments. An author has argued that "[i]f local government is a creation of the state government and only the state government has the constitutional power to establish local government and to define its structure and functions, it clearly and necessarily follows that local government is not an independent and coordinate level of government, but only an agency or creation of the state government." See B. Nwabueze, Constitutional Democracy in Africa, Vol. 1 (Ibadan: Spectrum Books Limited, 2003) at p.160. However, in matters of revenue sharing and allocation, local government councils are constitutionally entitled to an independent share of revenue from the national purse, the Federation Account. The Federal government has 52.68 percent, the state government 26.72 percent, and local government councils 20.60 percent of the federation account. See the Allocation of Revenue (Federation Account, etc.)(Modification) Order 2002. Out of the 56 per cent, the order designates 7.5 per cent as "special funds" in support of certain programmes to be shared as follows-2 percent for alleviation of general ecological problems in Nigeria; 1 percent for development of the Federal Capital Territory, 1.5 percent as stabilisation, and 3 percent for development of natural resources. These deductions are less than 13 percent of derived revenue from natural resources of a state. The Area councils do not have separate direct allocation from the federation account, neither do the area councils within the territory. The allocation of the territory is only from the share of the federal government allocation.

[18] What is not contained in the exclusive list or the concurrent list is regarded as having been reserved for the states to legislate on.

[19] The doctrine has consistently been applied by the courts in Nigeria. It entails that where a matter legislated upon is in the concurrent list and the federal government has enacted a legislation in respect to it, where the State legislation is inconsistent with the legislation of the national government, the state law is of no effect for inconsistency. Where however, the legislation enacted by the State is the same as the one enacted by the national government, where the two legislations are in pari material, the State legislation is in abeyance and operative. If for any reason the national government legislation is repealed, the State legislation is revived and becomes operative until there is another national legislation that covers the field. See Attorney General, The Federation (1982) NSCC, 1, at 35; Attorney General Lagos State vs. Attorney General Federation (2003) 12 NWLR (Part 833) p.1. Recent judicial attitude derogates the concomitant exercise of powers over concurrent list, making its exercise further severable between the national and the state governments.

The enumeration of powers implies that tiers of government can only legislate over matters that are clearly enumerated and permitted by the constitution. Each layer of government is supreme with respect to the matters assigned to it and each is protected by the constitution from being destroyed by the other.[20] No tier of government could impose its will on the other; neither is one to undertake the obligations of the other without its permission. The twin concepts of autonomy of the component units and mutual non-interference in the sphere of operation of each unit of the federation (central themes in Nigeria's federalism) mean that the component states do not "play the role of errand boys."[21]

Powers of appropriating revenue between the tiers of government are explicitly demarcated between the national government and the constituent units.[22] Powers over taxation are only dimly demarcated in the constitution, because some federal constitutions (like Nigeria's), do not "specify many major fiscal features of the federation"[23] and such features must be worked through in day-to-day politics, which can be competitive as well as cooperative.[24] "Such powers are however incidental derivatives from the powers of legislation-the power to impose and collect taxes flows from a granted legislative power."[25]

Sovereign Wealth Funds

Sovereign Wealth Funds (SWFs) are increasingly becoming important in international finance. They are government-owned investment funds, set up for a variety of macroeconomic purposes and to meet certain

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[20] A. O. M. Bowman, & R. C. Kearney, State and Local Government (6th ed.), Boston: Houghton Mifflin Company, 2005, at p. 26.

[21] Per Tobi JSC, in Attorney General Abia State vs. Attorney General Federation (2006) at 647. The courts have expounded autonomy and mutual non-interference to mean that: "The president has no power or authority, save as may be clearly provided by the Constitution, to interfere with the powers or authority of a state governor. The governor also has no power or authority to interfere with the functions of the chief executive of the Federation. This same principle applies to the relationship of the National Assembly and a House of Assembly of a State in their respective powers of law making on other functions constitutionally assigned to them by the Constitution. The same principle of non-interference applies to the relationship of the judiciary of the Federation and the judiciary of a state in the exercise and control of judicial powers within the jurisdiction of the court established for the Federation and those for the State." Per Nasir JCA., in Federal Minister of Internal Affairs vs. Shugaba Darman (1982) 3 NCLR, 915.

[22] Sections 80 & 81 and sections 120 & 121 of the 1999 Constitution.

[23] G. Anderson, Fiscal Federalism: A Comparative Introduction, Ontario: Oxford University Press, 2010, p. 5.

[24] Ibid.

[25] Demarcation of tax jurisdictions in the constitution is few and sparse such as in stamp duties; and incomes, profits and capital gains; see Items 58 & 59 of part I, second schedule to the 1999 Constitution. However, item 68, provides that the National Assembly could legislate on "any matter incidental or supplementary to any matter mentioned elsewhere in this list" i.e the Exclusive list. Taxation and concomitant rules and penalties are examples of such incidental or supplementary matters. The national government could thus impose taxes on those matters allocated to it under the constitution.

objectives,[26] and commonly funded by the transfer of foreign exchange assets that are invested long term, overseas.[27] The investible revenue are often but not in all cases derived directly or indirectly from revenues from the export of natural resources.[28] Unable to absorb this revenue within the local clime, the surplus revenue is sterilized and invested in other economic jurisdictions. SWFs are emblematic of two recent trends in global economy-a redistribution of wealth from more developed and matured economies to less firmly grounded economies and an increasing role of governments in managing wealth and economic power.[29] Their rising presence and importance is because of "...high oil prices, financial globalization, and sustained, large global imbalances [due to] the rapid accumulation of foreign assets particularly by oil exporters..."[30] Areas in which SWFs invest include government or corporate securities, hedge funds, real estate, commodity producers and financial institutions.[31]

Countries that own and operate SWF include developed economies like the United States and Canada, and Japan; developing economies like Nigeria, Vietnam and Malaysia, and Monarchies like Saudi Arabia, Kuwait and Oman. Even sub-national units within some federations, such as Alaska's Permanent Fund in the United States, operate SWFs. The list has continued to grow. The International Working Group of SWFs has reached a consensus ("Kuwait Declaration") on April 6, 2009 in Kuwait City to establish the International Forum of Sovereign Wealth Funds,[32] with the purpose of meeting, exchanging views on issues of common interest, and facilitating an understanding of the Santiago Principles and SWF activities.[33]

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[26] Five basic purposes for setting the SWF are (i) stabilization for the primary objective to insulate the budget and the economy against commodity (usually oil) price swings; (ii) savings for future generations, which aim to convert nonrenewable assets into a more diversified portfolio of assets; (iii) reserve investment, whose assets are often still counted as reserve assets, and are established to increase the return on reserves; (iv) development, which typically helps fund socio-economic projects or promote industrial policies that might raise a country's potential output growth; and (v) contingent pension reserve, which provide (from sources other than individual pension contributions) for contingent unspecified pension liabilities on the government's balance sheet. Allen, M., & Caruana, J., op. cit.

[27] Ibid.

[28] E. M. Truman, Sovereign Wealth Funds: Threat or Salvation? Washington, DC: Peterson Institute for International Economics, 2010, p. 2.

[29] Ibid.

[30] M. Allen & J. Caruana, op. cit.

[31] Truman, op. cit, at p. 4.

[32] Sourced on January 15, 2013 at http://www.iwg-swf.org/misc/kuwaitdec.htm. The "Santiago Principles" on SWF were formulated in 2008 as voluntary guidelines for the operations of SWFs. These principles are: i. To help maintain a stable global financial system and free flow of capital and investment; ii. to comply with all applicable regulatory and disclosure requirements in the countries in which investment is made; iii. To invest on the basis of economic and financial risk and return-related considerations; and iv. to have in place a transparent and sound governance structure that provides for adequate operational controls, risk management, and accountability. Sourced at http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf on August 5, 2015.

[33] Ibid.

Background to Nigeria's SWF: Cooperative Federalism at Work?

In most federations, the management of the national economy is vested in the national government and "the key role of the federal government in macroeconomic management has never been questioned in Nigeria."[34] While there is no constitutional limitation to the spending and borrowing powers of the tiers of government, unbridled expenditure by them usually leads to inflation and dislocation in the national economy, hence the practice of setting budgetary benchmarks for revenue accruing from sales of petroleum and gas products.[35] In the last decade in Nigeria, there has been monumental rise in revenue accruing from the sale of oil and gas, beyond the absorptive capacity of the national economy.[36] To avoid the immediate consumption of this surplus revenue in the domestic economy and prevent inflation and waste, the national government, established in the Central Bank of Nigeria, the Excess Crude Account (ECA) in 2004 as a component of the country's external reserves.[37] The ECA saves what is above the budgetary benchmark in any given year.[38] This "excess" is the "differentials between projected revenue in the annual budgets and the actual revenue necessitated by ever-rising global oil prices."[39] For example,

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[34] M. Mered, "Nigeria" in T.Ter-Minassian, (ed.), Fiscal Federalism in Theory and Practice, Washington: IMF, 1977, p. 609. In Nigeria, the power of the national government in managing the macro-economy policies of the federation is derived from the legislative powers conferred on it in the exclusive list scheduled in part 1, second schedule to the 1999 constitution. These matters include bankruptcy and insolvency; banks, banking, bills of exchange and promissory notes; borrowing of moneys within or outside Nigeria for the purposes of the federation or of any state;commercial and industrial monopolies, combines and trusts; control of capital issues; copyright; currency, coinage and legal tender; customs and excise duties. The national parliament also appropriates expenditure for the national government the same way state houses of assembly, the state parliaments appropriate for the states. Sections 81 (1) & 82; and 121 (1) 122 of the Constitution.

[35] Oil and gas is the nation's largest source of revenue; revenue from oil and gas accounts for an estimated 80 per cent of revenue of government in the country.

[36] These were the periods between 2003 and 2006 when the price of oil rose from USD 25/barrel to USD 75/barrel. After some period of decrease, it rose up to USD 147/barrel in July 2008. It now ranges between USD 97/barrel to USD 109/barrel. Dandasua observed that "in all the years that the National Assembly has had to temper with the budget benchmark, there was never a time oil prices dropped below the benchmark proposed by the National Assembly." Dandasua, S.M., "The Benchmark for Revenue Accruing to the Federation Account from the 2006 Budget Estimates," Nigerian Journal of Legislative Affairs Vol. 1 No. 001, Abuja: Policy Analysis and Research Project, 2006, p 190.

[37] The establishment of the ECA was a "political solution" reached by the federal government and the governments of the component states in 2004 to deal with the attendant problems in immediate rise in oil revenues. Generally, the external reserves, though in foreign currency, aims at safeguarding the value of the domestic currency, meeting international payment obligations and managing unexpected economic shocks, serving as store of value to accumulate excess wealth for future consumption purposes and as fall-back to "rainy day." Sourced at www.cenbank.org on March 5, 2013. Before the ECA however, the Federal Stabilisation Fund/Account had served as conduit through which excess crude windfall revenue is sterilized and used to cushion deficits in government expenditure. Mered, M., op. cit., p 603.

[38] Dandasua, S. M., op. cit. Two reasons were advanced for saving the excess crude revenue. The first was to maintain a pool of funds on which the nation could fall back to in the case of a significant crash of prices at the international crude oil market. The second is that it would help in maintaining macro-economic stability, and keep inflation in check. The Minister of Finance of the federation reportedly stated that "we will make the account opened to the members of the public and that nobody would drastically draw from it unless by a consensus of all the tiers of government". See Ujah, E., Loc. Cit.

[39] "Oil Money Scam" Sourced at http://www.accnno.net on November 24, 2006. For example in the year 2004, the Federal Government had estimated that it would earned $25 per barrel from the sale of crude oil, but for most of the year, the price of crude oil, sold at least for $44.50 per barrel- Ujah, E., "Excess Oil Revenue : IMF, FG as Governors" sourced from http://www.vanguardngr.com on November 24, 2006. Similarly in 2006, the estimated budget was based on $33 per barrel of crude, but throughout the year, a barrel of crude sold at not less than $60 per barrel- Nwosu, S., "Oil Money Scam", sourced from http://www.accessmylibrary.com on the 25 November, 2006.

in the budgetary estimates for 2013, the benchmark price for oil is USD75/barrel, when the price is USD 111/barrel and the year's forecast is USD107/barrel.[40]

The federal government operates the ECA in two parts, one domiciled overseas and the other, domiciled in Nigeria,[41] with much revenue accruing into the accounts.[42] Managing the excess account has generated continuous conflict amongst the tiers of government, with the states accusing the national government of solely dictating the operation of the account and not transparent in operating it.[43]The ECA has the attendant handicap of being a product of a "political solution" lacking a clear constitutional and legal framework, especially in making it an investible fund.[44] The 1999 constitution had not provided or contemplated the ECA or any other account for saving or investing the commonwealth. These problems influenced the decision by the National Economic Council (NEC) on 20th April, 2013 to establish a SWF for the country.[45] By establishing its SWF, Nigeria follows a long line of other countries (including oil producing countries),[46] to "facilitate the saving and intergenerational transfer of proceeds from nonrenewable resources and help reduce boom and bust cycles driven by changes in commodity export prices."[47] The NEC is empowered under the constitution to advice the President concerning the economic affairs of the Federation and on measures that are necessary for the coordination of economic planning

[40] Budget Speech of Nigerian President, Goodluck Jonathan to the National Assembly on Wednesday 10th October, 2013- www.oil-price.net and www.budget office.gov.ng/2013 on sourced on 10th January, 2013.

[41] The overseas account receives payments in excess of budgeted benchmark for barrel of oil sold, as well as excess royalties; while the Nigerian account contains excess revenue derived from sales of crude oil to Nigerian National Petroleum Corporation.

[42] Various figures have continued to be peddled as the amount in the Excess Crude Oil Account. The controversy surrounding the exact figures in the account is due to the fact that it is solely operated by the Federal government through its agencies, which makes deposits in it, shares it, if and as it wishes, and also withdraws from it unilaterally without let or hindrance- Nwosu, Op. Cit, at p. 4. In December 2006, the Governor of the Central Bank stated that the Excess Crude Oil account was US $ 43 Billion; while the Excess Crude Oil Account was US $ 10 Billion. See The Day (Sunday) Newspaper, of December 3, 2006, 4. The amount increased from $5.4 Billion in 1999 to $41.2 in December 2006. See Ugwu, E., "External Reserves and Management Politics," Loc. Cit. Recently, it's been confirmed that the reserves now stands at USD 46. 090 in February, 2013. See "Nigeria's Ext. reserves hit $46" in THISDAY of Tuesday 5th February, 2013, sourced at www.thisdaylive.com on 5th March, 2013.

[43] The actual operation of the account is not transparent, but the sole prerogative of the Federal Government. The Federal Government handles its hand-out anyhow, any sum, to use the revenue in the account. Three of such withdrawals typify this fact-inaugural withdrawals were to settle the Paris Club Debt, the withdrawal of U S $ 1, 169, 364, 468 (between October and November, 2006) ostensibly to fund the National Power Holding Company Plants, and US $ 17.331 million for payment for a two-day extension of the 2006 National Headcount. These withdrawals were at the directive of the President, without the consent of the various State Governors, not to speak of the National Assembly and the advice of RMAFC. Usimen, D., "Fiddling with Foreign Reserves" Loc. Cit. When the Governors discovered the withdrawals, the President belatedly sent a bill to the National Assembly to regularize the excess on the withdrawals. See Oyelio, S. "Obasanjo seeks Special Fund," THISDAY of Tuesday August 23, 2006, 1.

[44] Proceeds of the ECA were meant to be distributed to the tiers of government in the federation in line with the parameters contained in section 162 of the 1999 Constitution.

[45] See "NEC meets, creates Sovereign Wealth Fund," sourced at www.nigeriafirst.org. on 14th March, 2013. This was merely an advisory decision. The legal framework for the SWF was enacted by the National Assembly in 2011.

[46] Other countries that have longed established SWF include Kuwait, United Arab Emirate, Saudi Arabia, Canada, Venezuela, and Malaysia.

[47] Allan & Caruana, op. cit.

efforts or programmes of the various governments of Nigeria.[48] This coordinating body partly charts the course of fiscal federalism of the country, and is symbolic of cooperative federalism which benefits the units of government to deal with problems of common concern.[49] Since the federation is one, units of government may cooperate to achieve set objectives in economic matters, even if the sphere of governmental influence is myriad.

The aims of cooperative federalism may be achieved through the establishment of institutions composed of the representatives of the tiers of government.[50] Thus, where there exist problems adversely affecting the whole federation (such as legislative efforts to tackle corruption), the Nigerian courts would permit a national legislation to address it, even if this appears to violate the legislative autonomy of the states, the courts premising this on the common interest and benefit of the federation.[51] This is nonetheless limited to the extent demarcated by the constitution-the operation of the institutions, their powers and functionaries must conduce to the tenour of the constitution. That debates the point if the NEC could establish the SWF since cooperative federalism must not go beyond the permissible limits in the constitution.[52] No institution would be allowed to exercise powers outside the parameters of the constitution. This is more so when in the past, the NEC had acted beyond its constitutional mandate, especially when sharing revenue.[53] The NEC's

[48] See Ss. 6 & 19 of Part I, Third Schedule to the 1999 Constitution, Nigeria.

[49] Cooperative federalism entails and permits of cooperation, mutual relationship and sharing of powers amongst tiers of government to achieve desired objectives and tackle common problems. Admittedly, disputes should be adjudged by courts on the facts of each case without predetermined position of jurists, but the federal compass should be more stable to guide federal actors on actions and omissions.

[50] The constitution creates many executive bodies to administer the powers granted to them. Such bodies are composed of both federal functionaries and the functionaries/representatives of the state governments. The Chairs of such bodies are usually appointed for a term at the discretion of the president. The state representations are also appointed by the president, although they could be scuttled by the states. Members constituting these bodies are in most cases confirmed by the senate of the National Assembly. Examples of such bodies relevant to our discourse are the Council of States, the National Economic Council and the Revenue Mobilization, Allocation and Fiscal Commission established under section 153 (1) of the constitution with their powers stated in part 1, 3rd schedule to the constitution.

[51] Attorney General Ondo State vs. Attorney General of the Federation (2002) 9 N.W.L.R. (part 772, p. 222. where the courts held that although "corruption is not a matter limited to the E.L., the court will grant jurisdiction on the national government by its pervasive nature and adverse effects on the federation, both the national government and the governments of the states could legislate to eradicate its effect. But while cooperative federalism may be helpful in a developing democracy like Nigeria by deescalating disputes and enhancing greater financing of local needs, it swells the dominance of the national government over the state governments, a vestige of military rule which had ruled the country for most of its years as an independent nation.

[52] Other institutions and organs of the various governments (the Re venue Mobilisation Allocation and Fiscal Commission) have responsibility for managing public revenue from the Federation Account which constitutes the major source of funding the SWF. External investments in other jurisdictions is a matter of foreign relations within the jurisdictional competence of the national government without the input or financing of the component state governments. See Attorney General Lagos State vs. Attorney General Federation & Ors (2003)12 NWLR (Part 833) p.1.

[53] For example, the creation and operation of the federation accounts by the National Economic Council and Council of State, which are constitutionally not mandated to share revenue in the federation. Lohor, J., "Excess crude oil for sharing this year" in THIS DAY NEWPAPER VOL. 11 NO. 3589 at P. 7 of Friday February 18, 2005. Such actions are a clear circumvention of the constitution, as both the National Economic Council and the Council of States do not have any statutory duty to recommend the terms and manner of sharing public revenue, a duty conferred on the Revenue Mobilisation Allocation and Fiscal Commission.

'advice' also does not automatically transmute to law. Any challenge would not necessarily be made on the advice, but the law reflecting the advice-to determine its constitutionality.

Nigeria's SWF: Structure, Power & Funding

The objects of Nigeria's SWF as stated in the 2011 law are to build savings base for Nigerians; enhance economic development of infrastructure; and to provide stabilization support in times of economic stress. To achieve its objectives, the NSIA could create diversified growth investment portfolio for the benefit of future generations of Nigerians, to assist the development of critical infrastructure in Nigeria, and for supplemental stabilization funding.[54] The act creates three funds-the Future Generations Funds (FGF);[55] the Nigeria Infrastructure Fund (NIF);[56] and the Stabilisation Fund (SF).[57] The NSIA has the functions and powers to receive, manage and invest any initial and future contributions on behalf of Nigerians into each of these funds, pursuant to the allocations of contributions of the federal government, state government, federal capital territory, local governments and area councils in the federation.[58] Other powers and functions of the authority include reinvesting the proceeds and profits of its investments to generate further risk-adjusted returns in the service of the federation and also to invest in, purchase, maintain, divest from and sell and realize assets and investments of any kind.

The act sets up a governing council with powers to provide advice and counsel generally to the board of directors, having regard to the objects of the authority.[59] The council consists of the president, who is its chairman and each of the governors of the states. Others are federal functionaries and individuals representing certain interests.[60] Representatives of the various interests in the council are appointed by the president, subject to legislative confirmation.[61] Local government councils have no representation even though they are contributors to the fund, perhaps because they are subsumed under state powers, who presumably represent them.[62] The power of the governing council to give

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[54] Section 1 (a, b, & c) of the Act.
[55] The FGF intends to achieve the objective of supporting through investment predicated upon financial returns development in Nigeria of basic, essential and efficient infrastructure in order to stimulate growth and diversification of the Nigerian economy and attract foreign investment and create jobs. Examples of these are in power generation, distribution and transmission, agriculture, dams, water and sewage treatment and delivery, roads, ports, rail, airport facilities.
[56] The NIF may be invested in unreserved sectors or regions of Nigeria.
[57] The SF is intended to stabilize federation revenues by utilizing assets and capital to supplement resources to stabilize the national economy.
[58] Part I of the act.
[59] Part II of the act.
[60] Part II of the act. These interests are the private sector, civil society, Nigerian youth and the academia.
[61] Ibid.
[62] Section 7 of the 1999 Constitutions make local government councils the subject of state regulation.

"advice and counsel generally" means that the engine-room of the authority is not in the council, but in the board of directors with responsibility for "attainment of the objects of the authority, the making of the policy and general supervision of the management and affairs of the authority." The board has the explicit powers of investment, realizing the investment, and distributing declared profits to contributors. The source of funding the authority is from two sources: an initial funding by voluntary contribution by the tiers of government,[63] and from residual funds from the federation account.[64] The initial funding is the Naira equivalent of the sum of USD 1 billion contributed by the federal government, the federal capital territory, the state governments and the local government/area councils of the federation. This initial funding is a percentage of each of the governments' share from the federation account in accordance with the distribution formula for sharing the account. The residual funding is also from the federation account to be paid to the authority monthly from any residual funds above the "budgetary smoothing amount" less the derivation portion of the account.[65] A minimum of 20 percent of the initial and subsequent funding is to be allocated into the FGF, the NIF, and the SF. The tiers of government jointly own the interest in the authority in proportion to the amount of contributions of each of these tiers of government.[66] However, the units of government do not have the power to transfer, redeem, assign, dispose of, sell, mortgage, pledge, or otherwise encumber any interest of any kind in the authority. Making the federal capital territory and the local government councils contributors and subsequent beneficiaries of the SWF when they are not tiers of government in the federation is contradictory of the federal set-up in the constitution.[67]The matters for which the NSIA could invest and venture in are tangential to the functions of local government councils listed in the fourth schedule to the constitution.

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[63] These contributors are the federal government, the governments of the states, the federal capital territory, the local government councils within the states, and the area councils within the federal capital territory.

[64] Part III of the Act.

[65] The "budgetary smoothing amount" is defined in the act to mean an amount equal to ten percent of monthly residual funding up to a cumulative maximum amount at anytime of 2.5 percent of the projected federation hydrocarbon revenue for the year of such funding. The derivation portion of the federation account is that amount derived from natural resources, which is payable to the states from where the natural resources is extracted; it is not a commonwealth for all the tiers of government of the federation and enjoyed only by the states from where such is derived from.

[66] These are federal government, the governments of the states, the federal capital territory, the local government councils within the states, and the area councils within the federal capital territory.

[67] The federal government is to bear the fiscal burden of the capital territory, Abuja. The territory does not derive independent revenue from the federation account, but is funded from the share of revenue of the federal government. Although the local governments in the federation are entitled to federal revenue, the distribution of such revenue and the weight for such distribution is determinable by the governments of the state. It then becomes complicated for the SWF act to prescribe the distribution of the local government revenue, such a function belonging to the state.

While the NSIA is immune from any and all taxes, fees, imports or similar fiscal regulations of the units of government in the federation, this directly challenges the constitutional right of these governments to legislate on taxes within their jurisdictional control.[68]

Does the SWF Violate the Fiscal Arrangement of the Federation?

The constitution does not clearly grant the power of external savings and investments (basic duties of the NSIA) on the national government, except if these are interpreted as being subsumed under the "trade and commerce" clause which is clearly granted the national government in the exercise of external economic relations of the federation.[69] Thus, "So far as the control of external trade and commerce is concerned it seems clear that the general governments...have in law full powers, although in practice these powers must be exercised moderately if the unity of the federation is not to be submitted to an excessive strain."[70]The power of the NSIA to invest in other jurisdictions is thus within the exercise of legislative powers of the national government. It becomes more complicated if this power is exercised within domestic state jurisdictions of the component units of the federation for "when we turn to consider economic life within the boundaries of the federation a more complicated situation is found"[71]and "...so far as economic affairs are concerned, if the federal principle is to operate at all, some control of economic affairs must remain with the regional governments."[72]

Although the national legislature under the constitution may make laws for the federation or any part of it with respect to the establishment of institutions and bodies for the promotion or financing of industrial,

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[68] The Taxes and Levies (Approved list for collection) Act, 2004 places within the bosom of each unit its jurisdictional sphere of legislating. Being a federal enactment, it debates the point if the SWF legislation could excuse the application of 2004 Act, which was not just first in time, but hinged on the constitutional right of the units of government to impose taxes.

[69] Item 62 part 1 of second schedule to the 1999 Constitution. If such are the responsibilities of the national government, it follows that the governments of the states had no duty to discharge them or make any monetary contributions towards such efforts.

[70] Wheare, K. C., Federal Government (3rd ed.), London: Oxford University Press, 132.

[71] Ibid.

[72] Wheare, op. cit., 150.

commercial or agricultural projects,[73] the right to do so for a state in Nigeria is vested in the House of Assembly of the State.[74] Regulation of trade and commerce by the national government does not extend within the domain of a state, and a legislation doing so may transgress the federalist principle.[75] Would investment by the NSIA in the boundaries of the component states for example, not transgress their economic activity? The possibility of this transgression exists, except where such venture is sanctioned by the permitting state.

The funding regime of the NSIA also goes against the tenour of the constitution. Asides granting the national, state and local governments in the federation fiscal powers over matters they could legislate in order to generate revenue,[76] the constitution similarly creates a special distributable pool account, styled the "Federation Account."[77]All revenues collected by the government of the federation are paid into the account.[78] The account is reservoir for all revenues, receipts, returns and income of the federation from any source, operation of any law, and interest or dividend of the government.[79] So, any amount standing to the credit of the account is distributed among the federal and state governments, and the local government councils in each state, on such terms and in such manner as may be prescribed by national legislation.[80]

Thus, the account is the:

> ...focus of the revenue allocation
> formula...If there is nothing in that

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[73] Item 17 (d), part II, second schedule to the 1999 Constitution.

[74] Items 18 & 19, part II, second schedule to the 1999 Constitution.

[75] Attorney General of British Columbia vs. Attorney General of Canada (1937) A.C. 377.

[76] Revenue collected by the states and the local government councils is not paid into the Federation account, but utilized by either to meet its expenditure requirements. It is the external source of funding these tiers of government that from the Federation Account that is shared by the Federal government, the State governments and the Local government councils.

[77] A similar account had existed under the 1960 and 1963 Constitutions of Nigeria, then known as the Distributable Pool Account (DPA). The DPA was an account into which federally-generated revenue and grants were shared to the regions using indices set out by the extant fiscal commission. The difference between the DPA and the Federation Account is that while the former had only paid into it a minute percentage of revenue for the States, the Federation is the reservoir of all revenues raised by the federation. The Aboyade Technical Committee (1977) set up to advice on the financial arrangement to be included in the 1979 Constitution, recommended the establishment of the federation account.

[78] The exceptions are proceeds from the personal income tax of officials of the armed services, the Police, the foreign/external affairs ministry, and the residents of the Federal Capital Territory.

[79] Section 162 (10) of the 1999 Constitution.

Specifically, the Federation Account holds revenue from the following sources - company income tax; import duties; export duties; petroleum profits tax; mining rents and royalties; earnings from direct sales of oil by the Nigerian National Petroleum Corporation; Pipeline licenses and other fees; and surpluses from the sales of gas. The excepted incomes from the Federation Account are the personal income tax of personnel of the armed services, the Nigerian Police, the residents of the federal territory and staff of the ministry responsible for the external affairs of the Federation. section 162 (1) of the 1999 Constitution.

[80] S. 162(3) of the 1999 Constitution, Nigeria. See also S. 149(2) 1979 Constitution, Nigeria. The terms and manner have come to be seen as the principles, indices and weights employed in the sharing of the revenue from the Federation Account.

> account there will be nothing to share...Sharing what accrues into that account fairly and justly is the bottom-line of the nation's fiscal federalism.[81]

The content of the account commonly belongs to all the tiers of government. Although the national government is its custodian and trustee, it could not use the contents of the account until it is shared. Only after is it shared amongst the three beneficiaries, could each beneficiary use the receipted sum to meet its expenditure obligations, thus distinguishing it from the consolidated revenue funds in the constitution.[82] Funds in the account are shared periodically between and amongst the federal, the states and local government councils in the federation, using weights and principles for the sharing.[83] By granting a fiscal equity commission the power to monitor accruals to and disbursement of revenue from the account, the constitution, along with other legislation places the control and benefits of the account in the bosom of the national government. [84]

In a number of disputes decided by the Supreme Court,[85] the court has annulled the funding of projects of the national government from the

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[81] Report of the RMAFC, 2002, p. 214.

[82] Section 80 (1) 1999 Constitution. The Federation Account is different from the Consolidated Revenue Fund of the Federation. The latter is formed for the purpose of ensuring that all revenue or other money raised or received by the federation is paid into it. This revenue belongs exclusively to the Federal government and is not to be shared between the other layers of government, unlike the revenues in the Federation Account. In fact the share of the Federal government revenue from the Federation Account is to be paid into the Consolidated Revenue Fund of the Federation. The revenue in the Consolidated Fund is not to be used or withdrawn by the Federal government except to meet expenditure charged on the fund by the Constitution or where the expenditure is appropriated by an Act of the National Assembly.

[83] However, none of the tiers of government in the Federation has the right to charge or appropriate the revenue in the Federation Account for its use prior to allocation to the tiers of government in the Federation.

[84] A monthly meeting of the Federation Account Allocation Committee is held. The Committee is composed of the following members-the Federal Minister of Finance as Chairman, the Commissioner for Finance of each State in the Federation, two persons to be appointed by the President, and the Accountant General of the Federation. The main function of the committee is to "ensure that allocations made to the states in the Federation are promptly and fully paid" into the treasury of each Stateon the basis and terms prescribed. The Committee is also required to report annually to the National Assembly in respect of sis main functions of allocation of revenue to the States. The principles and indices employed in sharing the account include popul ation, equality of states, internal revenue generation, landmass, terrain, and population density. The principle of derivation shall continue to be reflected in any revenue allocation formula and is not to be less than 13 per cent of the revenue accruing to the Federation Account which is derived from natural resources found in State. While the foregoing principles are laid out in the Constitution, they are not immutable, rather, the National Assembly can legislate other principles of sharing not so listed. Section 162 (2) of the Constitution.

[84] The Constitution retains the revenue mobilization, allocation and fiscal commission earlier established in 1990 to manage the sharing of revenue in the federation and also retains most of its powers. Other bodies involved in sharing of public revenue are the Federation Account Allocation Committee and the National Assembly. The fiscal commission and the allocation committee are dominated by the appointees of the President, who act as the chairs of the bodies. In the working of these bodies, the states and local councils have accused them of pandering to the wishes of the national government especially in the face of glaring abuses of management of accruable revenues into the federation account.

Federation Account holding such funding unconstitutional.[86] First line charge on the Federation Account to finance the ventures of the national government was held a violation of the federal principle under the constitution since the funds of one tier could not be used to finance the responsibility of the other.[87] Thus, in fiscal and economic affairs, tiers of government should be left to handle their affairs. No unit of government should be forced to undertake ventures it was not obliged by the constitution to do. Even the judiciary, which from a textual reading of the constitution appears a beneficiary of the account, has been ousted as such recipient.[88]It is only after the tiers of government earn revenue from the account that organs of those units receive their appropriated sums. The NSIA legislation which obliges the initial and subsequent funding of the NSIA from the Federation Account goes against the enunciated principle of the constitution (that is, the operation of the Federation Account). To mandate such funding would amount to a re-introduction of the practice of first line charge on the Federation Account, which had severally been outlawed by the Supreme Court.[89] The court had noted that "in view of the fact that the Constitution does not mention any first or second or charges ad infinitum ..."[90] any attempt to do so "...cannot sail through the Constitution."[91]Further, local government funds from the Federation Account are not intended to go directly to them, but through the states, which could set the terms and manner for redistributing the revenue to the local government councils.[92] If part of the local government funds goes to the NSIA, rather than the states for

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[85] The court is established by section 230 of the 1999 Constitution. It has original jurisdiction over any dispute between any State of the Federation and the national government and also between two or more States, in so far as that dispute concerns the existence or extent of a legal right. section 232 (1). This has been interpreted to mean real life issues, not merely hypothetical or academic questions-Attorney General Federation vs. Attorney General Abia State & Others (2002) 6 NWLR (Part 764) p. 542, at p.729; cases in which the court has annulled the financing of projects directly from the Federation Account include Attorney General Federation vs. Attorney General Abia State & Others (2002).

[86] Some actions and projects of the national government annulled by the apex court are the funding of the NNPC/Joint Venture contracts and priority projects, special funding; and servicing of external debts via first line charge on the Federation Account. Being constitutional functions of the national government, financing them could only be from the share of revenue of the national government but not from the joint share of the tiers of government.

[87] Attorney General Federation vs. Attorney General Abia State & Others (2002), op. cit.

[88] Section 162 (9) appears to grant to the judiciary a direct share of the federation account. Not being a tier, but only an organ of government, the Supreme Court has vitiated that section.

[89] First line charges are initial deductions (before sharing the Federation Account between the units of government in the Federation) by the Federal Government to take care and pay for certain programmes of the Federal Government such as servicing of external debts and payments on Nigerian National Petroleum Joint Venture Projects- Danjuma, T.Y. (1994) "Revenue Sharing and the Political Economy of Nigerian Federalism," in Elaigwu, J.I., et al (eds.) Federalism and Nation Building, Op. Cit, pp. 87-115. In the case of Attorney General Federation vs. Attorney General Abia State and Others (2002) p. 542, the Supreme Court held that first line charges on the Federation Account to fund the judiciary, to service external debts, to fund Joint Venture Contracts and Nigerian National Petroleum Corporation priority projects were unconstitutional as these obligations are the responsibility of the national government.

[90] Niki Tobi, JSC in Attorney General Abia State vs. Attorney General Federation (2006) ALL FWLR. (Part 338) p. 604 where the court held that section 7(2) of the Monitoring of Revenue Allocation to Local Government Act, 2005 which prescribed that the

[91] Ibid

redistribution, a clause in the constitution which removes financial relations between the local government councils and the national government is thus undermined.

Conclusion

We have looked at the need for establishing the SWF for Nigeria, along with the attendant advantages which we have highlighted. Its establishment and funding is however confronted by the fiscal arrangement within the federation which is set out in the constitution. The legal framework for operating the fund has offended some provisions in the federal constitution. Some clauses of the law establishing Nigeria's SWF stand the risk of inconsistency with the constitution and being annulled. A national legislature cannot impose duties on states in the absence of securing their direct consent in pursuance of mutual cooperation in the federal family; it is debatable whether the National Economic Council is such organ where the consent could be secured. It is important that in seeking to achieve common objectives within the federation and for the benefits of its parts, violence should not inure to the constitution otherwise such efforts will fail.

A federation which is constantly at war with itself will be retarded. Some cooperation for the common benefit of the federating units is required. The fact that the Governors of the federating states in Nigeria have continued to express reservations and grievances in the establishment of the SWF raises doubts about the credibility of the cooperation secured in the NEC in establishing the SWF. The fear is not merely in the usurpation of autonomous powers of the states, compared with the fear of non-accountability in managing the SWF which is dominantly governed by appointees of the national government. To remove these fears and the potential of a legal challenge to the SWF, the national parliament may consider amending the constitution to vest in the NEC the power of determining the operation of the Federation Account in line with the objectives the NSWF seeks to achieve. The NSIA should also be made to operate in a transparent and accountable manner, considering its dominance by federal appointees who will be tempted to follow the will of the national government. Short of constitutional and legislative amendments to address the queries raised, these queries constitute clogs in the operation of SWF.

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[92] Section 162 (8) 1999 Constitution.