

# LEGAL AND CONSTITUTIONAL EVALUATION OF THE NIGERIAN SOVEREIGN WEALTH FUND

Solomon E. Ekokoi \*

## ABSTRACT

The central aim of this paper is to examine the constitutionality of Nigeria's sovereign wealth fund (SWF) which was established in August 2012, pursuant to the Nigeria Sovereign Investment Authority (Establishment etc) Act 2011 (the NSIA Act). The paper reviews and discusses how questions on the constitutionality of a sovereign wealth fund have been dealt with in other jurisdictions with similar legal and governmental structures. It reviews practices in the United States and Canada, where the establishment of SWFs conform to their federal constitutional designs; and in Australia and Russia, where the law and practice of SWF are similar to the extant regime in Nigeria.

This paper argues that questions on the constitutional basis of the SWF alone should not affect the establishment of a national SWF in Nigeria and therefore recommends a constitutional amendment to clear the grey areas. It discusses the importance of the law and development approach in resolving the identifiable setbacks in the Nigerian NSIA Act bearing in mind the potentials of the SWF in the socio-economic development of the Nigeria.

**Keywords:** Sovereign wealth fund, constitution, stabilization

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\* LL.M (Uyo) (Barrister & solicitor of the Supreme Court of Nigeria; lecturer in law, Department of Public Law, Faculty of Law, University of Uyo, Nigeria. E-mail: ekokoisolomon@yahoo.com). I owe a special debt to Prof. Kanitye Ebeku, Dean, Faculty of Law, University of Port Harcourt (formerly Dean, Faculty of Law, University of Calabar) and Prof. Nsongurua Udombana, Faculty of Law, University of Ibadan (formerly Dean, Faculty of Law, University of Uyo) for their encouragement. I also thank the anonymous reviewers whose invaluable comments helped in shaping the final draft of this paper.

## 1. INTRODUCTION

There appears to be a low level of understanding of the concept of sovereign wealth fund (SWF) in Nigeria, which is partly owing to the paucity of literature on the subject. Those who have a general idea of the concept associate it with a kind of stabilization fund – a sovereign savings fund.<sup>1</sup> While this is to some extent correct, the concept of SWF goes beyond a stabilization fund. The Sovereign Wealth Fund Institute has comprehensively described SWF as:

[S]tate-owned investment fund composed of financial assets such as stocks, bonds, real estate, or other financial instruments funded by foreign exchange assets. These assets can include: balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, governmental transfer payments, fiscal surpluses, and/or receipts resulting from commodity exports. Sovereign wealth funds can be structured as a fund, pool, or corporation. The definition of sovereign wealth fund exclude, among other things, foreign currency reserve assets held by monetary authorities for the traditional balance of payments or monetary policy purposes, [S]tate-owned enterprises (SOEs) in the traditional sense, government-employee pension funds (funded by employee/employer contributions), or assets managed for the benefit of individuals.<sup>2</sup>

In line with the foregoing description, the International Working Group of Sovereign Wealth Funds (IWG) has defined SWFs as ‘special purpose investment funds or arrangements, owned by the government.’<sup>3</sup>

Three key elements stand out in the above definition of SWFs. The first is the ownership element. SWFs are owned by the government, which includes

1 This is the intendment of the Excess Crude Account (ECA). However, the concept of SWF goes beyond a government budget stabilization fund which is resorted to in times of drop in commodity (oil) prices.

2 Sovereign Wealth Fund Institute ‘Public release: 2nd quarter transparency result’ (April – June 2011) <[www.swfinstitute.org/what-is-a-swfi/](http://www.swfinstitute.org/what-is-a-swfi/)> accessed 30 July 2011; see also International Working Group of Sovereign Wealth Funds, *Sovereign Wealth Funds: Generally Accepted Principles and Practices* (Santiago Principles) International Working Group of Sovereign Wealth Funds 2008 3.

3 Santiago Principles (n 2) 27.

both central government and regional governments. The second is investment element: the investment strategies of SWFs include investments in foreign financial and domestic assets (infrastructures). The third is purpose and objective element: the government establishes SWFs for macroeconomic purposes. SWFs are created to invest government funds to achieve fiscal and socio-economic objectives, and may have liabilities that are only broadly defined, thus allowing SWFs to employ a wide range of investment options with a medium to long-term time frame. They are also created to serve objectives other than, for example, reserve portfolios held only for traditional balance of payments purposes.<sup>4</sup> It is important to make three observations concerning SWFs. First, the commodity from which foreign exchange assets or surpluses may be earned for the purpose of funding an SWF include both oil and non-oil commodities. That is to say, the policy initiative for an SWF need not be necessarily based on receipts from oil commodity; as it may be receipts from a variety of non-oil commodities. This means that non-oil producing countries may elect to establish SWFs.

Second, a SWF may be established even without the availability of a commodity. Foreign exchange assets or assets *simpliciter* may be derived for the purpose of funding SWF from fiscal surpluses, which are consequences of conscious and deliberate government policy capable of reflecting positively on macroeconomic outlook.<sup>5</sup> Third, SWF assets are separate and different from official reserves managed by monetary authorities of the States, which establish them.<sup>6</sup>

In order to understand the philosophy behind the concept of SWF, it is important to ask the question: What does the modern State owe its citizens? The answer is simply to provide unmet needs which are central to the socio-economic obligations of the State to its citizens – basic obligations such as access to food and drinkable water, health care, decent housing, qualitative education, social and personal security, et cetera. These socio-economic obligations are not the subjects of discourse in this paper, rather the constitutionality of a national SWF for Nigeria is. As this paper will later show, Nigeria's SWF passes the two constitutional tests for the validity of its establishment. However the issue of the funding of the SWF from the

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4 *ibid.*

5 S Griffith-Jones and JA Ocampo 'Sovereign wealth funds: A developing country perspective' (paper presented at the workshop on Sovereign Wealth Funds, London, February 2008) 8; see also DK Das 'Sovereign-wealth funds: The institutional dimension' (2009) 56(1) *Intl Rev Econ* 85, 87- 8.

6 See generally, US Department of the Treasury *Semiannual Report on International Economic and Exchange Rate Policies* (June 2007).

federation account may pose a constitutional problem for Nigeria's SWF to the extent of denying the citizens of the much needed socio-economic goods which the SWF may afford. For as rightly noted by Keenan, SWF is expected to serve two masters with private and public agenda.<sup>7</sup> When used as an investment vehicle in the international financial market place, it is expected to operate as a private business only interested in profits, but at the domestic level (in the State where it is created), an SWF is 'purely an instrument of public policy whose chief justification is to improve social welfare in the [S]tate. To citizens, a well-run SWF should become a reliable source of income that drives economic and social development.'<sup>8</sup> By addressing the socio-economic needs of its citizens, the State may well claim to have met its 'contractual' obligations to the citizens irrespective of whether socio-economic rights are constitutionalized or not, while at the same time upholding human rights, considering that one of the concerns of international law is for States to respect, fulfill and protect human rights using appropriate legal instruments.

It has been argued that in situations where the State fails in its obligations, social debt is in arrears<sup>9</sup> and needs to be paid. Therefore, it may also be argued, and rightly so, that the motivation for the establishment of Nigeria's SWF is to satisfy the social debt which the Nigerian State owes its citizens. And if this is the case, it then follows that the legal or constitutional issues affecting the establishment of the SWF in Nigeria should not be allowed to derail the smooth and proper implementation of its programmes or policies.

This paper examines Nigeria's SWF – the conception process, the constitutive law and related issues and policy objectives – in section 2. In section 3, the constitutionality of Nigeria's SWF is examined with the argument that whereas the federal government, through the National Assembly, has the power to legislate for the good governance of the country as exhibited in the establishment of a national SWF, the issue of funding the SWF from the federation account is unconstitutional. In other words, the NSIA Act or the SWF cannot be said to be unconstitutional except to the extent that any provision of the NSIA Act is in conflict with the Constitution. Section 4 explores the concept of SWF from a comparative perspective using four jurisdictions where federalism is practiced as a form of government, to highlight

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7 P Keenan 'Sovereign wealth funds and social arrears: Should debts to citizens be treated differently than debts to other creditors?' (2009) 49(2) *Virginia Journal of International Law* 431, 432.

8 *ibid* 433.

9 *ibid* 455.

the potentials of an efficiently managed SWF. It then concludes in section 5 with proposals for legislative action by the National Assembly in order to set Nigeria's SWF on a sound legal foundation.

## 2. NIGERIA'S SOVEREIGN WEALTH FUND

In 2004, the administration of former President Olusegun Obasanjo established the Excess Crude Account (ECA) into which oil revenues sold above budgetary benchmark were paid. The ECA was not backed by law; consequently since its establishment there has been a raging controversy between the federal government and the 36 state governments over the legality and constitutionality of the ECA.<sup>10</sup> Not surprisingly, in 2008, and more recently in 2011, the 36 state governments instituted legal actions to prevent the federal government from operating the ECA and making unilateral deductions from the account.<sup>11</sup> It is pertinent to note that in 2011, the federal government withdrew the USD 1 billion, used as seed money for the newly established SWF, from the ECA.<sup>12</sup> And despite the legal controversy surrounding the establishment of a national SWF, the federal government proceeded to constitute the management of the Nigeria Sovereign Investment Authority, which is responsible for managing the SWF.<sup>13</sup>

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10 According to Ike-Okoh, '[t]he excess crude account had existed at the Central Bank [of Nigeria] since the [General] Babangida administration. In fact, it was that account that came to be popularly referred to as the 'Gulf War Windfall', which later became a subject of a probe panel headed by Pius Okigbo. Notwithstanding, the uproar over the account, the succeeding military administrations of General Sani Abacha and General Abdulsalami Abubakar continued to maintain it as it served as a kind of slush fund for extra-budgetary expenditures of the federal government at the pleasure of the Head of State. In 1999, President Obasanjo inherited the account, whose existence was also in breach of section 162 of the Constitution but nonetheless, the federal government maintained and operated it with the only difference being that occasionally, fund was drawn from it to augment the budgets of all the tiers of government on the approval of the president.' C Ike-Okoh 'Facts You Can't Ignore About the Excess Crude Account, Consolidated Revenue Fund' (28 November 2011) <<http://businessdayonline.com/NG/index.php/business-intelligence/30200-facts-you-cant-ignore-about-the-excess-crude-account-consolidated-revenue-fund>> accessed 18 August 2012.

11 Presently, there are multiple suits between the states and the federal government at the Supreme Court of Nigeria seeking judicial pronouncements on the unconstitutionality of the ECA and the SWF.

12 An additional USD 550 million dollars from accruals of the over-subscribed USD 1 billion Eurobond issued by the federal government of Nigeria in 2013 was injected into the SWF in 2014. See N Francis, 'FG injects \$550m into sovereign wealth fund' *This Day Live* (Lagos, 11 February 2014).

13 See 'FG picks management team for sovereign wealth fund' *Business Day* (Lagos, 28 August 2012).

## The conception process

In 2010, while the legal battle in respect of the ECA instituted by state governments was still pending at the Supreme Court of Nigeria, the National Economic Council (NEC)<sup>14</sup> approved a plan to replace the ECA with a national SWF. However, the state governors (six of whom were members of a committee set up to work out the legal framework of the SWF) were unyielding as to the source of funding for the SWF. Despite the failure to unanimously agree on the source of funding the proposed SWF, on 10 September 2010, President Jonathan sent a Bill to establish the SWF to the Senate. And on 26 May 2011 (after the Bill was passed by the Senate and the House of Representatives on 11 May 2011 and 19 May 2011 respectively), the president signed the Nigeria Sovereign Investment Act (NSIA Act), which established the national SWF, into law. In October 2011, the 36 state governments returned to court to stop the federal government from withdrawing USD 1 billion from the ECA to the Authority as ‘seed money’ for the national SWF.

After failing to stop the state governments from proceeding with the lawsuit, the federal government decided to enter its defence in the case. However, when the matter came up for hearing at the Supreme Court in March 2012, the federal government pleaded with the Court to allow it seek out-of-court settlement with the plaintiffs (state governments). It is important to note, at this point, that the federal government has continued to operate the ECA side by side with the SWF.<sup>15</sup>

The underlying philosophy for the policy of a national SWF is basically necessitated by the need to prudently utilize the revenues derived from oil and gas to meet the needs of the present and future generations as well as provide economic stabilisation for government.<sup>16</sup> Besides the need for prudent utilisation of oil revenues, the establishment of Nigeria’s SWF appears to provide an opportunity for the federal government to introduce some form of legality, accountability and transparency in the management of the country’s oil revenues. With the ECA, the management of oil revenues was

14 The National Economic Council is one of the federal executive bodies established in s 153(1) (h) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) Cap C23 Laws of the Federation of Nigeria 2004 (the 1999 Constitution or the Constitution). It comprises the vice president as chairman, state governors, and the governor of the Central Bank of Nigeria – see item 18 of the third schedule to the 1999 Constitution.

15 The state governments were dissatisfied with this and immediately instituted a suit at the Supreme Court of Nigeria to restrain the federal government from further doing so. They have also asked the Court to declare both the ECA and SWF unconstitutional.

16 O Aganga quoted in A Monk ‘Deep thoughts by Olusegun Aganga’ (Oxford SWF Project, University of Oxford, 10 March 2011).

prone to illegality, abuse and shrouded in secrecy. So much so that it was ‘used to pay for phantom contracts. [And served as] a ready source for extra budgetary spending which circumvent due process and constitutionalism.’<sup>17</sup> Some known cases of illegal withdrawals from the ECA include part of the USD 12.4 billion paid to the Paris Club creditors to eliminate Nigeria’s debt between October 2005 and April 2006; routine payments totaling over USD 3.9 billion in 97 tranches for non-performing contracts under the National Integrated Power Projects (NIPPs) between December 2005 and June 2007; and the additional funding for two days extension of the 2006 census to the tune of USD 17.3 million in March 2006.<sup>18</sup>

Most sovereign investment funds invest in inter-generational schemes or projects as their resources are derived mainly from non-renewable assets. This is an important and relevant point, which Nigeria’s SWF managers must bear in mind, as successive Nigerian governments have used ill-conceived policies and projects – which provide mostly short-term benefits – as gateways to personalize State assets.<sup>19</sup> It is rather regrettable that it took the Nigerian State 53 years (1958 – 2011) to realize the need for a development fund intended to benefit the present and future generations of citizens. While the state governors are tackling the federal government over the establishment and funding of a national SWF, Ghana, even before selling the first drop of oil enacted a piece of legislation detailing what was to be done with its oil earnings. Ghana’s Petroleum Revenue Management Act of 2011 (in principle conceived as an SWF) provides for the establishment of a Petroleum Holding Fund for the deposit of all petroleum receipts, a Stabilisation Fund to cushion the effects of revenue volatility through smoothing of the budget and a Heritage Fund to ensure inter-generational equity and create an alternative source of income for future generations.<sup>20</sup>

## The enabling law: Issues and challenges

The legal framework for Nigeria’s SWF is the Nigeria Sovereign Investment Authority (Establishment, etc) Act No 15 of 2011.<sup>21</sup> The NSIA Act was signed into law in May 2011 by former President Jonathan, after it

17 J Akintunde, ‘Sovereign Wealth Funds, IMF and Nigeria’s Excess Crude Account’ *Financial Nigeria* (Nigeria, 8 April 2008) <[www.financialnigeria.com/development/development-report\\_category\\_item\\_detail.aspx?categoryid=3&item=90](http://www.financialnigeria.com/development/development-report_category_item_detail.aspx?categoryid=3&item=90)> accessed 17 June 2015.

18 *ibid.*

19 See for example J Campbell, *Nigeria: Dancing on the Brink* (Bookcraft 2010) 14-7.

20 See Petroleum Revenue Management Act 2011 (Act 815), ss 2, 9 - 11; see also Open Oil ‘Petroleum Revenue Management Act 2011 (14 February 2012).

21 Cap N166 Laws of the Federation of Nigeria 2004; [the NSIA Act].

was passed by both Houses of the National Assembly. Nigeria and Angola are the latest members of the Organisation of Petroleum Exporting Countries (OPEC) to establish a SWF.<sup>22</sup>

### *Governance issues*

The NSIA Act establishes the Nigeria Sovereign Investment Authority (the Authority) as a permanent corporation with legal capacity to sue and be sued in its name; and to be independent of the control of any person or authority in the management of the three funds established under the NSIA Act.<sup>23</sup> The Authority is clothed with a wide range of investment powers within and outside Nigeria.<sup>24</sup> The overall governance of the Authority is the joint responsibility of the Governing Council, the Board of Directors and the Executive Management. This gives the Authority the structure of both a public as well as a private corporation.

While the Governing Council reflects the public character of the Authority (State ownership), the Board of Directors and Executive Management portray it as a business entity. The reasons for the structure may not be unconnected with the type and nature of the SWF – being an oil-based SWF, the State's dominant position in the oil industry as well as the need for prudence in the management of funds set aside for the SWF may have influenced the structure of the Authority. And in order to give a sense of ownership to the constituent governments within the federation, and assuage their opposition to the establishment of the SWF, have been incorporated into the governance of the Authority. However, the local governments, which are also recognised as co-owners of the fund are not represented on the Governing Council.<sup>25</sup>

While it is the duty of the Governing Council to provide advice and counsel of a general nature to the Board of Directors in relation to the objectives of the Authority,<sup>26</sup> it is the responsibility of the Board to realize the objectives, make policies and supervise the management of the Authority's

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22 *cf* A Monk 'Nigeria should commit to commitment' (Oxford SWF Project, University of Oxford, 2 July 2010).

23 NSIA Act, s 1(1) and (2).

24 *ibid* s 5.

25 *ibid* s 29(b), *cf* s 8 which provides for the membership of the Governing Council to include: the president, state governors, the minister of finance, the minister of National Planning Commission, governor of the Central Bank of Nigeria, chief economic adviser to the president, chairman of the Revenue Mobilisation, Allocation and Fiscal Commission, four persons representing the private sector, two representatives of civil society organisations, two youth representatives and four academics.

26 *ibid* s 7(2).

affairs.<sup>27</sup> The Board also has the power to appoint the secretary of the Authority.<sup>28</sup> It is made up of a non-executive chairman, a managing director, two executive directors and five non-executive directors (one of whom must be a legal practitioner with not less than 10 years post qualification experience), all of these appointments shall be made by the president of Nigeria on the recommendation of the NEC.<sup>29</sup> The executive management, headed by the managing director/chief executive officer, has the responsibility of executing policies formulated by the Board and the day-to-day administration of the Authority.<sup>30</sup>

In as much as the governance structure of the Authority exhibit potentials for transparency and accountability, it appears to be unnecessarily ridden with bureaucratic huddles not befitting of a fund intended to be of international standard and to deliver efficient social services to the Nigerian people. It is believed that to have a Governing Council of the type established by the NSIA Act with powers to advice and counsel the Board of Directors on general policy issues relating to the objects of the Authority is a recipe for political and overbearing influence on the smooth management of the affairs of the Authority. This remains to be seen as Nigeria's SWF is rated 9 on the Linaburg-Maduel Transparency Index.<sup>31</sup> At a glance, the law establishing the Authority and Nigeria's SWF appears to be more business-like with greater concern on return on investments and less on meeting the deficit social needs.

### *Ownership and funding*

As the name implies, Nigeria's SWF is a national fund. Therefore all ownership interests in the Funds established under the SWF is to be held by all tiers of government, including the Federal Capital Territory (FCT), Abuja, in trust for the people of Nigeria.<sup>32</sup> No government in the federation is allowed to 'transfer, redeem, assign, dispose of, sell, mortgage, pledge, or otherwise encumber any interest of any kind in the Authority.'<sup>33</sup> This implies that no tier of government is allowed to borrow against the assets of the SWF.

27 *ibid* s 15.

28 *ibid* s 22.

29 *ibid* s 16(1) and (2).

30 *ibid* s 21(b).

31 Nigeria Sovereign Investment Authority 'NSIA rated Transparent by Sovereign wealth institute' (16 July 2014); SWF Institute 'Nigeria sovereign wealth investment authority' <[www.swfinstitute.org/swfs/excess-crude-account/](http://www.swfinstitute.org/swfs/excess-crude-account/)> accessed 17 August 2014.

32 NSIA Act, s 32(2).

33 *ibid* s 32(3).

As a result of the foregoing, the initial funding for the national SWF was deemed to have been contributed by the federal, state and local governments as well as the FCT in consonance with the existing revenue allocation formula pursuant to the decision reached by the NEC to be managed by the Authority. In 2011, the amount designated as seed money was USD 1 billion. Another USD 550 million was transferred by the federal government to the Authority in 2014. And subsequent funding is to be derived from the federation account. By the provisions of the NSIA Act, each of the tiers of government including the FCT will contribute to the Authority in accordance with their percentage share from the federation account – as provided in the Allocation of Revenue (Federation Account, etc) Act – on a monthly basis. Section 30 of the NSIA Act provides that:

- (1) Subsequent funding shall be derived from residual funds from the federation account transferred to the Authority ... provided that derivation portion of the revenue allocation formula shall not be included as part of this funding.
- (2) Promptly upon revenues being received into the federation account each month, the Authority shall be funded from all amounts of residual funds above the budgetary smoothing amount.

Since the enactment of the NSIA Act, which established Nigeria's SWF, the ownership and funding provisions of the Act have caused disagreements between the federal and state governments. These disagreements are based on constitutional issues, which shall be examined in section 3 of this paper.

## Policy objectives and implementation

The objects of the Authority are to build a savings base for the Nigerian people, to enhance the development of infrastructure and to provide budgetary stabilization during times of economic down turn.<sup>34</sup> The provisions of the law establishing the SWF structure it structured both as a fund and a corporation.<sup>35</sup> Consequently, the NSIA Act creates three investment vehicles namely: the Future Generations Fund (FGF), the Nigeria Infrastructure Fund (NIF) and the Stabilization Fund. The initial and subsequent funding of the Authority shall be allocated to each of the three funds by resolution of

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34 *ibid* s 3.

35 *ibid* ss 1, 29 and 30; pts IV, V and VI.

36 *ibid* s 31.

the Board of Directors in accordance with the provision of the NSIA Act.<sup>36</sup>

The Authority is required to develop a rolling five-year investment plan for the FGF annually. This is aimed at providing future generations with a solid savings base in preparation for such a time when Nigeria's oil reserves may have been exhausted and with due regard to macroeconomic factors.<sup>37</sup> The Authority is empowered to reinvest all realized proceeds and dividends on portfolio investments of the fund into new or existing assets. The NIF is aimed at investing specifically in the development of critical infrastructure such as power generation, distribution and transmission, agriculture, dams, water and sewage treatment and delivery, roads, port, rail, airport facilities and similar assets in order to stimulate the growth and diversification of the Nigerian economy and create jobs for the Nigerian people.<sup>38</sup> The Authority is empowered to reinvest the funds of the NIF pending investments in infrastructure. The Stabilization Fund is established to promote a sound and responsible fiscal policy, while reducing the effects of the 'boom and bust' commodity cycle of oil on the Nigerian economy. The Stabilization Fund is intended to avail government access to funds to apply in stabilizing the revenue streams of the federation.<sup>39</sup> The Authority may invest in or sell all such assets, and use such derivative instruments for the purposes of hedging or efficient asset management, as may serve such objective of the fund.<sup>40</sup>

### 3. THE CONSTITUTIONALITY OF NIGERIA'S SOVEREIGN WEALTH FUND

The decision to establish a national SWF is by far one of the most (if not the most) significant decisions taken by the Nigerian government in a long time. Albeit, the controversy surrounding the decision has again thrown up issues bordering on the vertical separation of powers and functions between the various tiers of government in Nigeria. These issues are, indeed, constitutional in nature. Therefore, this section examines Nigeria's SWF in relation to the 1999 Constitution.

There are fundamental issues relating to the process leading to the establishment of a national SWF and what it portends for the constituent units of the Nigerian State. Hence, it is imperative to pose the following questions: Was the process that led to the establishment of the SWF democratic

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37 *ibid* s 39(1).

38 *ibid* s 41(1).

39 *ibid* s 47.

40 *ibid* s 47(1).

to the extent that all the tiers of government were on board during the decision-making process? Is the end product (the SWF) of the process constitutional? As to the first question, it appears to be a straightforward one as it is evident that all three tiers of government in Nigeria did not go with the idea to establish a national SWF. Neither did each tier of government given the opportunity to choose its preferred type of SWF, as is the case in other jurisdictions such as the states of Texas and Alaska in the United States (US) where their SWFs are creations of the express provisions of their constitutions.

In Alabama its SWF was established after a public referendum, and the decision for a SWF for North Dakota was approved in a statewide ballot (see section 4). Despite failing to carry the other two tiers of government along in the establishment of the national SWF, the NSIA Act refers to all tiers of government as co-owners and funders of the SWF.<sup>41</sup> More so, the state governments who are represented on the NEC (a federal executive body that approved the establishment of an SWF) by the governors do not support, at least in principle, the SWF. This is basically because of the concerns that the monthly mandatory ‘deductions’ to be made from the states’ and local governments’ allocations will reduce their revenue profile, which is mainly accruable from the federation account.

The second question which involves the constitutional issue that has come up because of the establishment of a national SWF by the federal government borders on section 162 of the 1999 Constitution which provides in subsections 1 and 3 thus:

- (1) The [f]ederation shall maintain a special account to be called ‘the federation account’ into which shall be paid all revenues collected by the [g]overnment of the [f]ederation, except the proceeds from the personal income tax of personnel of the armed forces of the [f]ederation, the Nigeria Police Force, the ministry or department charged with responsibility for the foreign affairs and the residents of the Federal Capital Territory, Abuja.
  
- (3) Any amount standing to the credit of the federation account shall be 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 the National Assembly.

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41 See ownership and funding of Nigeria’s SWF above.

This has generated a debate as to the intendment of the above constitutional provisions *vis-à-vis* Nigeria's SWF. In this section, the arguments for and against the national SWF are examined and the constitutional justification for its establishment is also made.

### **Sovereign wealth fund: The Constitutional permissibility argument**

One legal writer, a proponent of the national SWF, has argued that since the Constitution is silent on the issue of a dedicated Fund such as the SWF, any attempt to facilitate the realization of the broader intendment of the Constitution is permissible. Accordingly he queries as follows:

Does the Constitution expressly prohibit the existence of a [F]und, a subsidiary account, however called, administered and distributed among the three-tiers of government as envisaged per sections 80(2) & (3), as well as 162(3)? The better view is that the Constitution is silent on prohibition by not prescribing one and only one account. Where a provision is silent on a specific issue, any act not likely to defeat the broader objective of the provision but rather help to facilitate its fuller realization is permissible. The broad objective of Section 162 of the Constitution is the ownership, management and distribution of national revenue to the three tiers of government.<sup>42</sup>

The present writer agrees with the above submission only to the extent that where a provision of the Constitution is silent on a specific issue, any act likely to promote the broader objective of the Constitution is permissible. However, to a large extent, the argument made by Odiadi is flawed. First of all, section 80 of the 1999 Constitution provides for a consolidated revenue fund, a federal government account into which all federal revenues or moneys are to be paid and appropriated in accordance with an Act of the National Assembly. In the same way, section 120 of the 1999 Constitution provides for a consolidated revenue fund for states of the federation into which all revenues or moneys raised or received by a state are to be paid and appropriated in accordance with a law of the state House of Assembly. It is therefore argued that sections 80 and 120 of the 1999 Constitution envisage or contemplate the establishment of a dedicated fund such as the SWF by the federal and or state governments, which should be funded from its/their own revenues or moneys.

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42 T Odiadi, 'The constitution and sovereign wealth fund: Matters arising' *The Guardian* (Lagos, 7 August 2012).

Secondly, in section 162(3), specific mention of the beneficiaries (federal, state and local government councils) of the amounts standing to the credit of the federation account is made. It is pertinent to note at this point, that in the construction of a statutory provision, where a statute mentions specific things or persons, it is intended that those things or persons not mentioned are excluded. The Latin maxim is *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another). Conversely, it is also termed *inclusio unius est exclusio alterius*.<sup>43</sup> Accordingly, the purpose of section 162 is to establish a trusteeship of some sort in which the federal government collects revenues on behalf of all the governments of the federation.<sup>44</sup> Therefore, a conjunctive reading of sections 80, 120 and 162(3) of the Constitution provides a broad objective,<sup>45</sup> which is founded on a shared responsibility principle of federalism.<sup>46</sup> Moreover, it has been variously held by the Supreme Court of Nigeria that where words used in a statute are clear and unambiguous their ordinary, literal and natural meaning should prevail.<sup>47</sup>

### Sovereign wealth fund and the federalism argument

For some who oppose the policy and law establishing a national SWF for Nigeria, they have argued that it offends the principles of federalism and that since only the federal government is responsible for determining what will constitute budgetary price of crude oil in any fiscal year, the excess moneys from the sale of crude oil is determinable only by the federal government. For others, the SWF is a violation of the principle embedded in section 162(3) of the Constitution. According to Ojameruaye, Nigeria's SWF, like the ECA, offends section 162(3) of the 1999 Constitution, '[b]y not sharing all the excess oil revenue among the three tiers of government, at least instantaneously, the excess oil revenue is akin to a withdrawal or a first-line charge on the [f]ederation [a]ccount which the Supreme Court

43 See BA Garner (ed) 'Legal Maxims' *Black's Law Dictionary* (8th edn, St Paul: Thomson West, 2004) 1717; see also the cases of *Ogbuaryinya & 5 ors v Okudo & 2 ors* [1979] ANLR 105; *Udoh & 2 ors v. Orthopaedic Hospital Management Board & Anor* [1993] 7 NWLR (pt 304) 139, 148.

44 *A-G Federation v A-G Abia State* (No 2) [2002] All NLR 72.

45 *Awolowo v Sarki* [1966] 1 All NLR 178 (SC); *Olanrewaju v Governor of Oyo State & ors* [1992] 9 NWLR (pt 265) 335, 362 '[i]n construing the provisions of a statute it is important to have in mind the clearly defined objectives of such a statute' (Karibi-Whyte JSC).

46 *Attorney-General of Bendel State v Attorney-General of the Federation & 22 ors* [1981] ANLR 85.

47 *Abioye v Yakubu* [1991] 5 NWLR (pt 190) 130, 146; *Amokeodo v IGP & ors* [1999] 6 NWLR (pt 607) 467, 488.

declared unconstitutional in its 2002 judgment on the offshore/onshore oil dichotomy case'.<sup>48</sup>

In as much as it is not difficult to agree with the above position from the viewpoint of section 162(3) of the 1999 Constitution, it is important to note that the Supreme Court of Nigeria has set the legal precedent for the application of practicality in the interpretation of the Constitution. In *Adesanya v President of the Federal Republic*, the Court held that when interpreting the Constitution, the courts should look at the Constitution as a whole and 'construe its provisions in such a way as to justify the hopes and aspirations of those who have made the strenuous effort to provide us with a Constitution for the purpose of promoting the good government and welfare of all persons of our country on the principles of freedom, equality and justice...'.<sup>49</sup> Also, in the case of *Awolowo v Sarki*, the Supreme Court of Nigeria held that a provision in a constitution cannot be read in isolation when such provision is qualified by some other consideration.<sup>50</sup> In the present situation, it may be argued that the holistic interpretation of the 1999 Constitution in respect of the establishment of an SWF may be derived from the provisions of section 16 and item 60(a) of the second schedule to the Exclusive Legislative list of the 1999 Constitution. Above all, the consideration for establishing a national SWF may be based on the need to promote good governance and the welfare of the citizens by salvaging the socio-economic crisis in Nigeria.

## Constitutional doctrines and constitutional validity of Nigeria's SWF

**H**aving considered, in brief, the constitutional arguments for and against the establishment of a national SWF, it is pertinent to examine the SWF policy and law using two constitutional doctrines which determine the validity or otherwise of the acts of governments in a federal system. These are the doctrines of *ultra vires* and mutual non-interference. It has been suggested that, in a federal system, it is hasty and simplistic to concede to either side of the debate that is examined in this section (ie the constitutionality of a national SWF), without first considering whether the governmental action

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48 E Ojameruaye 'Resolving the Nigeria sovereign wealth fund debacle' (31 May 2012) <<http://chatafrik.com/articles/nigerian-affairs/item/963-resolving-the-nigeria-sovereign-wealth-fund-debacle.html>> accessed 10 August 2012. The decision referred to was given in the case of *A-G Federation v A-G Abia State* (n 44).

49 [1981] ANLR 1, 25 (Fatai-Williams CJN).

50 [1966] 1 All NLR 178.

in issue passes the *ultra vires* and mutual non-interference tests. According to Nwabueze, it is important to ascertain:

[F]irst whether the act is within powers granted by the constitution; if it is not, then, it is unconstitutional and void as being *ultra vires*; second, whether the exercise of the power is such as, in its practical effect, impedes, frustrate, stultifies or otherwise unduly interferes with another government's management of its affairs. In the latter case, the act is unconstitutional and void, not because it is *ultra vires*, but because the frustration or stultification of, or interference with, another government's management of its affairs would result in the federal system itself being abolished in all but name.<sup>51</sup>

Therefore, in order to determine whether the establishment of a national SWF by the federal government of Nigeria is constitutional, the questions to ask are: Does the Constitution grant the federal government the power to establish a national SWF? Will the exercise of such power by the federal government have a negative effect, impede and interfere with the management of the affairs of the constituent governments of the federation?

It would appear that the opponents of the national SWF have confused the powers of the National Assembly to make laws for the country on matters contained in the Exclusive Legislative List with the powers to fund a national agency or programme with the funds meant for the three tiers of government which is dealt with in section 162(3) of the 1999 Constitution. It is important to make a distinction between the powers to establish an SWF and the powers to fund it from the federation account. This is because there is a clear distinction between the powers of the federal government, through the National Assembly, to establish a national SWF and the funding of the SWF as contained in section 30 of the NSIA Act. In situations that involve acts such as the former, the federal government did not act (and will not be acting) *ultra vires* the Constitution. However, this cannot be said to be the case in the latter situation (and will not be), by funding the national SWF from the federation account, as was decided by the Supreme Court of Nigeria on the issue of funding the Joint Venture Contracts and the NNPC

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51 B Nwabueze, *Constitutional Democracy in Africa: Structures, Powers and Organising Principles of Government* (1<sup>st</sup> edn, Spectrum Books 2003) 94.

priority projects from funds meant for the three tiers of government.<sup>52</sup> With this distinction made and bearing in mind the constitutional permissibility argument as discussed in section 3.1 above, the answer to the first question is in the affirmative to the extent that the establishment of the national SWF is permissible under the Constitution.

It is important to note that the essence of the federal system as enshrined in the 1999 Constitution is not only to distribute government powers and functions among the various governmental centres but also to preclude the exercise of arbitrary power.<sup>53</sup> This is a testament to the fact that there is bound to be frictions among the various governmental units in the course of the operation of a federal constitution. However, it is expected that the tenets of the constitution should always prevail.

For example, in 2010, the Patient Protection and Affordable Care Act (Obama Care) generated so much political friction in the US between the federal government and many state governments on the one hand and the Obama administration and the opposition Republican Party on the other hand, after Congress, with a slim Democratic Party majority, passed the Obama Care to increase the number of Americans to be covered by health insurance. (This was an executive bill sponsored by the Obama administration). One key provision of the law is the individual mandate, which requires most Americans to maintain minimum essential health insurance coverage. For individuals who are not exempt, and who do not receive health insurance through an employer or government programme, the means of satisfying the requirement is to purchase insurance from a private company. The law provides that beginning in 2014, those who do not comply with the mandate must make a shared responsibility payment to the federal government. Another key provision of the law is the Medicaid expansion. The previous Medicaid programme offered federal funding to the states to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. The

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52 *A-G Federation v A-G Abia State* (n 44) 130 (Ogundare JSC) (emphasis added): 'I have discussed earlier in this judgment the question of repayment of the debts of the [g]overnment of the [f]ederation; the repayment is to be charged not on the federation account, but on the revenue and assets of the [g]overnment of the [f]ederation. I have also discussed the constitutional validity of section 1(d)(i) of Cap 16 (as amended) [a legislation authorising the deduction of moneys from the federation account for sundry matters] and found it to be inconsistent with section 162(3) of the Constitution. Funding of Joint Venture Contracts and the Nigerian National Petroleum Corporation (NNPC) priority projects cannot by any stretch of construction, come within section 162(3) of the Constitution which provides for the distribution of the federation account among the three tiers of government that is federal, states and local governments. All these charges on the federation account are inconsistent with the Constitution and are, therefore, invalid [and unconstitutional].'

53 *Myers v United States* [1926] 272 US 52, 293.

Act expands the scope of the Medicaid programme and increases the number of individuals the states must cover. Consequently, the core principles of the legislation were challenged up to the US Supreme Court by 26 states. The following questions were presented for determination:

1. Does Congress exceed its enumerated powers and violate basic principles of federalism when it coerces States into accepting onerous conditions that it could not impose directly by threatening to withhold all federal funding under the single largest grant-in-aid program, or does the limitation on Congress's spending power that this Court recognized in *South Dakota v. Dole*, 483 U.S. 203 (1987), no longer apply?
2. May Congress treat states no differently from any other employer when imposing invasive mandates as to the manner in which they provide their own employees with insurance coverage, as suggested by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), or has *Garcia's* approach been overtaken by subsequent cases in which this Court has explicitly recognized judicially enforceable limits on Congress's power to interfere with state sovereignty?
3. Does the Affordable Care Act's mandate that virtually every individual obtain health insurance exceed Congress's enumerated powers and, if so, to what extent (if any) can the mandate be severed from the remainder of the Act?<sup>54</sup>

In essence, the case was a challenge to the constitutionality of the individual mandate and the insurance provisions, the Medicaid expansion and the employer mandates provisions of the Patient Protection and Affordable Care Act.

In its judgment, the US Supreme Court held that '[t]he language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated. "[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."<sup>55</sup> Therefore the Court struck down the in-

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<sup>54</sup> *Florida & ors v United States Department of Health and Human Services & ors, consolidated into National Federation of Independent Business and other v Sebelius, Secretary of Health and others Human Services & ors* [2012] 567 (US).

<sup>55</sup> *National Federation of Independent Business and other* (n 54) (Roberts CJ).

dividual mandate and the Medicaid expansion and upheld other provisions of the Act by deciding that the Affordable Care Act is constitutional in part and unconstitutional in part because, as it construed, what Congress did was to increase taxes on those who earned a certain amount of income, but elected to go without health insurance. For the Court, such legislation is within Congress' power to tax. However, as for the Medicaid expansion, the Court decided that 'that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. *[Therefore] Congress has no authority to order the states to regulate according to its instructions. [However] Congress may offer the states grants and require the states to comply with accompanying conditions, but the states must have a genuine choice whether to accept the offer.* The states are given no such choice in this case'.<sup>56</sup>

As for the second question – whether the establishment of a national SWF will have a negative effect, impede and interfere with the management of the affairs of state governments, it may be argued that this is very unlikely. This is because the SWF is to be funded by residual funds from the federation account, being amount above the budgetary benchmark from the monthly sale of crude oil.<sup>57</sup> This means that the SWF is effectively to be funded from excess budgetary amount. Also, section 30(1) of the NSIA Act significantly reduces the financial contributions to be made by the states and local governments as derivation revenues are not to be charged for the purpose of funding of the SWF. Furthermore, the mandatory contributions to be made by all tiers of government may just be the needed impetus to introduce some measure of financial discipline in resource allocation in states where financial wastage (which in many instances give rise to corrupt enrichment of public officials) is prone. As a purposeful and prudently managed SWF has the potential to improve the management of the country's resources in the long run, while also enhancing the socio-economic outlook of the country as will be shown in section 4 (which undertakes a comparative evaluation of sovereign wealth fund). It should be pointed out, at this point, that only few states of the federation have enacted the equivalent of the Fiscal Responsibility Act, which could embolden citizens to hold governments at the state and local government levels to account for the allocation and appropriation of financial resources.<sup>58</sup>

<sup>56</sup> *ibid* 58-9 (emphasis added).

<sup>57</sup> NSIA Act, s 30(2).

<sup>58</sup> In *Nkereuwem Udofia Akpan v Executive Governor of Abia State & 38 ors* (Suit No: FHC/ABJ/CS/753/2010), counsel to the Governor of Akwa Ibom State used this lacuna in the law in his defence to the suit brought by Nkereuwem Akpan against the 36 state governors on the issue of security votes.

#### 4. A COMPARATIVE PERSPECTIVE SOVEREIGN WEALTH FUND

At present, there are about 62 SWFs in 36 countries of the world. They cut across different political orientations/cultures – strong democracies, factional democracies, paternalistic autocracies, predatory autocracies and reformist autocracies.<sup>59</sup> This section examines SWF from a comparative viewpoint. The essence is to identify the law and practice of SWF in the selected jurisdictions. The choice of the four jurisdictions – Australia, Canada, Russia, and the US, is informed by the similarity in the federal governmental systems of these countries. It is believed that the selection of these jurisdictions will help show that with the efficient application of the SWF, the Nigerian State can promote good governance through accountability and transparent management of a sizeable portion of its oil revenues and attain to the welfare needs of its citizens by salvaging the dwindled socio-economic infrastructures in Nigeria.

##### The law and practice in the United States

In the US there is no national SWF. However, each state is at liberty to establish its own SWF. For the purpose of the present discourse, only SWFs funded by oil and gas proceeds will be examined.

##### *Texas permanent school fund*

The Texas Permanent School Fund is the oldest SWF in the US. A legislative body created it in 1854. It was initially funded by an appropriation of USD 2 million and was for the benefit of public schools in state of Texas. The relinquishing of its claims to lands and the payment of USD 10 million by the US government resulted in the establishment of the fund. Key sources of funding for the SWF are its investment returns, oil and gas and mineral royalty payments and leases from land. According to the Constitution of the state of Texas, the fund is permanent and perpetual. The constitution also provides that the proceeds are to be used to complement taxes in financing public education. Also, the fund's assets are held in a trustee capacity for the benefit of public schools and distributed annually using a total return

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59 KU Ekwere, 'Sustainable development of oil and gas in the Niger Delta: Legal and political issues' (PhD dissertation, the Law of the Sea and Maritime Law Institute, University of Hamburg 2009) 154-7.

methodology. The fund's financial assets are managed by the state Board of Education (SBOE), comprised of fifteen elected members. Administrative duties related to these assets reside with the fund's Investment Office, a division of the Texas Education Agency (TEA), which is under the guidance of the commissioner of education, an appointee of the governor of the state.<sup>60</sup>

### *Alabama trust fund*

In 1986, the Alabama Trust Fund (ATF) was established by the state of Alabama following a public referendum in 1985. Initially a permanent fund, it is now a special revenue fund, which allows for the spending of an amount equal to the previous year's unrealized gains. The funding of the ATF is derived from royalty from oil and gas firms. In fact, 99 per cent of royalty payments is allocated to the ATF and the remaining one per cent goes to the Department of Conservation Land Division of the state of Alabama. External managers chosen by the Board of Trustees manage the ATF. In 2008, some legislators pushed for an amendment in the law to allow the government to tap from the trust fund savings to build roads, rescue pre-paid tuition plan and to plug budget holes. However, the money so used is repaid to the fund in future years.<sup>61</sup> The Alabama Trust Fund is rated 6 on the Linaburg-Maduell Transparency Index.<sup>62</sup>

### *Alaska permanent fund*

Shortly after the oil from Alaska's North Slope entered the market, the Alaska Permanent Fund was established by the Constitution of the state of Alaska in 1976<sup>63</sup> (the creation was made possible by an amendment to the

60 SWF Institute 'Texas permanent school fund' <[www.swfinstitute.org/swfs/texas-permanent-school-fund/](http://www.swfinstitute.org/swfs/texas-permanent-school-fund/)> accessed 12 August 2012.

61 SWF Institute 'Alabama trust fund' <[www.swfinstitute.org/fund/alabama.php](http://www.swfinstitute.org/fund/alabama.php)> accessed 12 August 2012.

62 According to the SWF Institute, the 'Linaburg-Maduell transparency index was developed at the Sovereign wealth fund institute by Carl Linaburg and Michael Maduell. The Linaburg-Maduell transparency index is a method of rating transparency in respect to sovereign wealth funds. Pertaining to government-owned investment vehicles, where there have been concerns of unethical agendas, calls have been made to the larger 'opaque' or non-transparent funds to show their intentions. This index is based off ten essential principles that depict sovereign wealth fund transparency to the public. ... The index is an ongoing project of the Sovereign Wealth Fund Institute. The minimum rating a fund can receive is a 1. However, the Sovereign Wealth Fund Institute recommends a minimum rating of 8 in order to claim adequate transparency. Transparency ratings may change as funds release additional information. There are different levels of depth in regards to each principle, judgment of these principles is left to the discretion of the sovereign wealth fund institute.' See <[www.swfinstitute.org/statistics-research/linaburg-maduell-transparency-index/](http://www.swfinstitute.org/statistics-research/linaburg-maduell-transparency-index/)> accessed 4 February 2015.

63 art 9, s 15.

constitution which hitherto forbade the establishment of a dedicated fund; it provides for an investment of at least 25 percent of proceeds from oil and gas sale or royalties). The Alaska Permanent Fund Corporation (APFC) manages the assets of both the Permanent Fund and other state investments, but spending from the fund is determined by the state legislature. The corporation is responsible for maximum prudent returns, a measure basically expected to take away direct political control of oil revenue – many Alaskans believe the legislature too quickly and too inefficiently spent the USD 900 million bonus the state received in 1969 after leasing out the oil fields. The fund's assets grew from an initial investment of USD 734 thousand in 1977 to the current sum of approximately USD 40.3 billion as of July 2012. This growth has been due to good and efficient management, some to inflationary re-investment, and others due to legislative decisions to deposit extra income during boom years. The fund's realized earnings are split between operating expenses, alternative investments, and the annual Permanent Fund Dividend. It is rated 10 out of 10 on the Linaburg-Maduel Transparency Index.

The fund has a Board of six trustee members (responsible for policy) of the APFC. The governor of the state of Alaska appoints them. Alaska law provides that the APFC Board be comprised of four public members, the commissioner of revenue and one additional cabinet member of the governor's choosing. Public members serve staggered four-year term. Most importantly, the Board is responsible for the review, adoption and monitoring of asset allocation that achieves a five percent real (above inflation) rate of return in accordance with the Prudent Expert Rule. The Prudent Expert Rule charges fiduciaries to act with discretion and intelligence, to seek reasonable income, preserve capital, and, in general, avoid speculative investments. To reduce risk exposure, APFC diversifies assets as well as management style.<sup>64</sup>

Since 1982 every person who has been a resident of Alaska for the previous year and indicates an intention to remain gets a Permanent Fund Dividend (PFD) cheque from the state government. Everyone receives an equal share of the appropriation from the earnings of the Alaska Permanent Fund with parents responsible for the cheques of their children.<sup>65</sup> In 2000, the government distributed USD 1.172 billion in cheques of USD 1,963

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64 SWF Institute, 'Alaska permanent fund corporation' <[www.swfinstitute.org/fund/alaska.php](http://www.swfinstitute.org/fund/alaska.php)> accessed 18 June 2014.

65 S Goldsmith 'The Alaska permanent fund dividend program' (paper presented at the conference on Alberta: Government Policies in a Surplus Economy, University of Alberta, Edmonton, Alberta, 7 September 2001) 1.

to 597,000 Alaskans, which means that 95 per cent of the 627 thousand Alaskans shared in the distribution of the dividend. The fund paid out USD 1,281 to 611,522 residents, totaling USD 783.4 million in 2010 (the 2010 US Census put Alaska's population at 710,231) and in 2011 it paid out about USD 760.2 million in cheques of USD 1,174 to 647,549 Alaskan residents who were deemed eligible to receive dividends.<sup>66</sup> At inception, many politicians argued against this way of spending the oil revenue, however, the following argument for the dividend scheme as highlighted by Goldsmith prevailed:

It is the most equitable way to distribute the benefits from oil development. Billions have been spent operating state government, building infrastructure, loaning money for housing, education, and business development, and other purposes. The economic benefits of all these programs [,] impact only a portion of the population. It creates a constituency to protect the Permanent Fund from raids on its principal. It compensates Alaskans for the high cost of living and the economic hardships residents endured before the discovery of oil. It produces a larger economic impact, measured by jobs, than any other use of the earnings. Individuals know better than the government how to use that money. State ownership of the oil fields means that the people own the resource and the revenues from its sale should be distributed to the owners as a dividend.<sup>67</sup>

### *North Dakota legacy fund*

The voters of North Dakota approved of the Legacy Fund idea in a state-wide ballot held on 2 November 2010. A total of 63.6 per cent voted in favour of the North Dakota State Legacy Fund Establishment, Measure 1 of 2010<sup>68</sup> to approve a constitutional amendment which provides that 30 per cent of oil and gas gross production and oil extraction taxes on oil and gas produced after 30 June 2011, be transferred to the Legacy Fund. The principal and earnings of the Legacy Fund may not be spent until after 30 June 2017, and any expenditure of principal after that date requires a vote of at least two-thirds of the members elected to each house of the legislative assembly. The state's Investment Board is responsible for investment of the principal funds of the Legacy Fund.<sup>69</sup> The first deposit into the fund was

66 B Bohrer 'Alaska Permanent Fund Dividend: \$1,174' (20 September 2011).

67 Goldsmith (n 65) 2.

68 See <[http://ballotpedia.org/wiki/index.php/North\\_Dakota\\_State\\_Legacy\\_Fund\\_Establishment,\\_Measure\\_1\\_\(2010\)](http://ballotpedia.org/wiki/index.php/North_Dakota_State_Legacy_Fund_Establishment,_Measure_1_(2010))> accessed 14 June 2014.

69 Constitution of North Dakota, art X, s 26.

USD 34.3 million. As a policy measure, ‘the Legacy Fund was created, in part, due to the recognition that state revenue from the oil and gas industry will be derived over a finite timeframe. The Legacy Fund defers the recognition of 30 per cent of this revenue for the benefit of future generations. The primary mission of the Legacy Fund is to preserve the real, inflation-adjusted purchasing power of the monies deposited into the [f]und.’<sup>70</sup>

## Approach to sovereign wealth fund in Canada

As is the case in the US, there is no national SWF in Canada. However, Alberta Province has the Alberta Heritage Fund (an oil-based SWF) while Quebec Province has the *Caisse de Depot Placement du Quebec* (a non-commodity SWF). For the purpose of this discourse, only the Alberta Heritage Fund will be examined.

### *Alberta heritage fund*

The Alberta Heritage Fund was enacted under the Alberta Heritage Savings Trust Fund Act of 1976. Initially the fund received 30 per cent of the royalties from non-renewable resource of the province of Alberta. After 1987, resource royalty revenues were no longer added to the Fund. Originally, the Heritage Fund had three objectives, which were designed for the purpose of economic development – to save for the future generation, to strengthen or diversify the economy, and to improve the quality of life of Albertans. However, in 1997, the Heritage Fund was restructured so that the government could no longer directly use funds from it to invest in economic and social development, but primarily for long-term savings and investment fund.

During the early 1980s, the fund made loans to other provincial governments in Canada. Later the fund’s money was used for capital infrastructure projects. Currently it is being managed by the Alberta Investment Management Company (AIMC), which was established in 2008. The AIMC was formerly part of the Ministry of Finance of Alberta before transforming into a provincial crown corporation, providing investment management to a variety of public sector institutions.<sup>71</sup> The fund is rated 9 on the Linaburg-Maduel Transparency Index. According to the Alberta Treasury Board and Finance, since the establishment of the AIMC, ‘the fund has generated

70 North Dakota Legacy Fund Investment Policy Statement <[www.legis.nd.gov/assembly/622011/docs/pdf/lbs090611appendixc.pdf](http://www.legis.nd.gov/assembly/622011/docs/pdf/lbs090611appendixc.pdf)> accessed 19 June 2014.

71 SWF Institute ‘Alberta heritage fund’ <[www.swfinstitute.org/swfs/alberta-heritage-fund/](http://www.swfinstitute.org/swfs/alberta-heritage-fund/)> accessed 14 June 2014.

more than USD 34 billion in investment income that has improved the quality of life in the province.<sup>72</sup>

### Australia's future fund

The SWF of Australia, established by the Future Fund Act of 2006, is a pension reserve fund known as the Australian Future Fund, into which the government deposits its budget surpluses. It is independently managed, free from executive influence, by the Board of Guardians. The purpose of the fund is to hold yearly budgetary surplus for the payments of pensions.<sup>73</sup> Chile's Pension Reserve Fund, Ireland's National Pensions Reserve Fund, New Zealand's Superannuation Fund, and the Russian Federation's National Welfare Fund are based on the same principle. In 2008, the Australian government announced its intention to establish three new funds to be tied to the management of the Future Fund (the Building Australia Fund, the Education Investment Fund and the Health and Hospitals Fund).<sup>74</sup> The Nation-building Funds Act of 2008 subsequently established these funds.<sup>75</sup>

The roles and responsibilities of the Future Fund Board of Guardians (the Board) are set out in the enabling legislation. The Board is collectively responsible for the investment decisions relating to the special purpose public funds and is accountable to the government for the safekeeping and performance of those assets. As such, the Board's primary role is to set the strategic direction of the investment activities of the fund in line with the investment mandates. The Board is supported in its functions by the Future Fund Management Agency. The Agency is responsible for the development of recommendations to the Board on the most appropriate investment strategy for each fund and for the implementation of strategies. All administrative and operational functions associated with the management of the funds are undertaken by the Agency.<sup>76</sup> The Future Fund is listed on the highest scale of 10 on the Linaburg-Maduel Transparency Index.

72 Alberta Treasury Board and Finance 'Heritage fund: Historical timeline' (28 June 2012).

73 SWF Institute 'Future fund' <[www.swfinstitute.org/swfs/future-fund/](http://www.swfinstitute.org/swfs/future-fund/)> accessed 13 July 2014.

74 W Swan, *2008-09 Budget Speech* (Parliament House, Canberra, 13 May 2008).

75 Future Fund 'Facts at a glance' (3 February 2012) <[www.futurefund.gov.au/](http://www.futurefund.gov.au/)> accessed 18 August 2012.

76 Future Fund, 'Future fund board of guardians' (2 April 2012) <[www.futurefund.gov.au/about\\_the\\_future\\_fund/future\\_fund\\_board\\_of\\_guardians](http://www.futurefund.gov.au/about_the_future_fund/future_fund_board_of_guardians)> accessed 18 August 2014.

## Russia's national welfare fund

The National Welfare Fund (NWF) is also known as the National Prosperity Fund or the National Well-being Fund. Prior to the establishment of the NWF, there was the official stabilisation fund known as the Reserve Fund, set up in 2004. Its main purpose was to stimulate economic development by means of reducing inflationary pressure and insulating the national economy from volatility in the prices of non-renewable resources. In 2008, the fund was split in two; one managing the official government reserves and the other became the SWF. The main purpose for its establishment is to guarantee the long-term sustainability of the pensions system and payment of pension to citizens, as well as to balance the budget of the Pension Fund of the Russian federation.<sup>77</sup> The fund is mostly managed by the Russian Ministry of Finance and is rated 5 on the transparency index of the SWF Institute.

## 5. CONCLUSION AND RECOMMENDATIONS

The emphasis placed on the sharing of proceeds of oil wealth rather than on fashioning an effective production system in Nigeria has attracted criticisms from within and outside the country. The rationale for the establishment of SWF is predicated on the premise that oil is a non-renewable resource – an imperative for SWF, which will ensure that excess revenues from oil are invested in socio-economic infrastructures for the benefit of the present and future generations. From the literature, it has been shown that SWFs state objectives in financial terms by hoping for strong investment performance. Most SWFs are long-term oriented and are mainly concerned with investment safety. This means that SWFs are expected to outperform certain benchmark portfolios in terms of the overall relationship between risk and returns. However, it is important for a SWF to be concerned with the impacts of its activities and performance on the country of origin. Some of the benefits that flow from such activities and performance include the creation of wealth for future generations; stability of the domestic economy, the ability to fund projects at home and earn returns beyond those traditionally earned on foreign currency reserves (for example, investments in education, health and other socio-economic infrastructures with direct relationship with citizens welfare). In addition, an SWF is one means of diversifying the economy of the country of origin.

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77 Ministry of Finance of the Russian Federation 'National welfare fund: Mission' <[www1.minfin.ru/en/nationalwealthfund/mission/](http://www1.minfin.ru/en/nationalwealthfund/mission/)> accessed 17 August 2012.

It has been argued in this paper that while the power to establish a national SWF is not an express provision of Nigeria's constitutional text, the establishment of the SWF by the federal government is not unconstitutional and will not stultify the management of the affairs of the constituent governments. Most importantly, a SWF will encourage the effective and prudent management of oil revenues. And besides the point that Nigeria is long overdue for an infrastructural investment vehicle such as the SWF, the need to invest in the socio-economic sectors of the economy has attained a critical priority level. And the choice made to address the situation as embodied in the enactment of the NSIA Act, which establishes the SWF is a demonstration of the belief in the linkage between human needs, socio-economic policies and law.<sup>78</sup> The enactment of the NSIA Act, which establishes the SWF, understandably, generated a legal debate basically because of the source of funding the SWF. This aspect of the NSIA Act has been identified in this paper as unconstitutional. However, this problem is solvable through constitutional amendment and it is here recommended in order to enable the SWF to be applied as a policy tool to reduce the socio-economic vulnerability in Nigeria. Having identified the funding provisions in section 30 of the NSIA Act to be inconsistent with the provision of section 162(3) of the Constitution, it is recommended that section 162(3) of the Constitution be amended to read thus:

Any amount standing to the credit of the federation account shall be distributed among the federal and state governments, and local government councils in each state and the sovereign wealth funds established under the Nigeria Sovereign Investment Authority (Establishment, etc) Act, Cap N166 LFN, on such terms and in such manner as may be prescribed by the National Assembly.

It is also recommended that the legal framework for the SWF (the NSIA Act) should be re-enacted by the National Assembly, by realigning the provisions of the NSIA Act with the socio-economic needs of the citizens. For example, Angola, a member of OPEC and a major oil producer in sub-Saharan Africa, established its SWF in 2011 to invest the nation's wealth domestically and abroad. The Fund, *Fundo Soberano de Angolano* (FDSEA), has a mandate to promote the socio-economic development of Angola and generate wealth for the country's future generations. Angola's SWF has a

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78 JO Adésinà, 'Social Policy and the Quest for Inclusive Development: Research Findings from Sub-Saharan Africa' (May 2007) Social Policy and Development Programme Paper No 33, United Nations Research Institute for Social Development, iii.

broad mandate to invest in the real sector of the economy and provides for a social charter to tackle certain identified socio-economic problems of that society such as healthcare, clean drinking water and skilled and technical education. Nigeria's SWF, on the other hand, has the mandate to undertake investments in low-yielding assets/infrastructure, which may not have direct impact on the socio-economic wellbeing of citizens. Herein lies the need for a change in the legal framework for Nigeria's SWF.