SUB-NATIONAL INVOLVEMENT IN NIGERIA'S FOREIGN RELATIONS LAW: AN APPRAISAL OF THE HETERODOXY BETWEEN THEORY AND PRACTICE

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Nations, in their interaction with the international system, usually have in place a legal regime governing the external exercise of the powers of the State. This regime Curtis Bradley describes as the foreign relations law (FRL) architecture of a State. In a conventional FRL system, plenary powers for the conduct of international relations reside with the central government. For countries operating a federal system of government, the centripetal and centrifugal dynamics inherent in this system of government pose a serious challenge to this orthodoxy. More so, catalysed by globalisation, sub-national governments (SNGs) in federal systems are increasingly affecting the reception and operation of international norms and acting as 'paradiplomatic' actors in the foreign relations sphere. This emergent trend has led to a growing body of scholarship that considers individual and comparative case studies across different jurisdictions. Focusing on Nigeria as a case study, this paper evaluates recent empirical evidence that shows an increase in external interactions by Nigeria's SNGs in the FDI sector since 1999. The paper argues that these external interactions by Nigeria's SNGs are a deviation from the conventional constitutional configuration of Nigeria's FRL setup wherein plenary powers for foreign relations have been allocated to the Federal Government (FG).

I. INTRODUCTION

Since the return to democracy in 1999, several of Nigeria's subnational governments (SNGs)[1] have engaged in activities and adopted policies which have (in)direct foreign relations implications for the Nigerian Federation. However, these external interactions by Nigeria's SNGs have received little attention within the burgeoning literature on subnational (paradiplomatic) foreign relations. Reason for this includes the fact that in Africa, paradiplomacy (i.e. sub-state diplomacy) is still considered young.[2] Also, the external activities by Nigeria's SNGs have so far been sporadic and mainly focused on attracting Foreign Direct Investment (FDI) into their respective jurisdictions.[3] Although nuanced and still at the formative stage, this emerging practice must be identified and interrogated across Africa to facilitate a more robust comparative analytical framework for the practice of sub-national foreign relations

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1 In the context of this paper, SNGs refers to the second tier of government under the Constitution of the Federal Republic of Nigeria 1999 (as amended) (CFRN 1999). See section 3 (1) - (2) and the First Schedule Part I of the CFRN 1999.

2 See R. Tavares, *Paradiplomacy - Cities, and States as Global Players* (Oxford University Press, 2016) 224; A. Lecours, 'Political Issues of Paradiplomacy: Lessons from the Developed World' (Discussion Papers in Diplomacy, Netherlands Institute of International Relations 'Clingendael', December 2008) 8.

3 According to Rodrigo Tavares, 'single themed paradiplomacy' by SNGs encompases trade and investment promotion, and trans-border cooperation on specific or sectoral issues. See Tavares, *supra,* note 2, 28-40. This type of paradiplomacy is one of the different expressions of subnational foreign relations that Tavares refers to in his typology of SNG external relations. Others include: ceremonial paradiplomacy; global paradiplomacy; and soverign paradiplomacy.

in Africa and the rest of the world as it evolves. As such, this paper aims to contribute to the existing literature by appraising the heterodoxy in the constitutional dynamics which governs Nigeria's interaction with the rest of the world.

The core argument of this paper is that there has been an increase in external interactions by Nigeria's SNGs in the FDI sector since 1999. More importantly, the paper argues that these external interactions by Nigeria's SNGs in the FDI sector are a deviation from the conventional constitutional configuration for Nigeria's foreign relations law (FRL). This is because this emerging trend contradicts the extant constitutional position in Nigeria, which allocates plenary powers for foreign relations to the Federal Government (FG). These arguments will be contextualised with empirical evidence which tracks an emerging pattern of SNG foreign relations in the FDI sector since 1999.

Structurally the paper is divided into six sections. Immediately after this introduction, part two presents a brief overview of FRL as an analytic frame.[4] Part three discusses the role of SNGs within the conventional FRL setup of a nation-state, with particular emphasis on the response of international law to the external activities of SNGs in federal countries. Part four presents the existing constitutional configuration of FRL in Nigeria. Part five goes on to evaluate the patterns of external interactions by Nigeria's SNGs in the FDI sector which represent a deviation from the status quo. In part six, the paper reconciles the divergence between theory and reality in the context of Nigeria's FRL regime.

II. FOREIGN RELATIONS LAW

McNeil defines foreign relations law (FRL) as '…the law governing the external exercise of the public power of the State within the domestic polity.'[5] Bradley's definition is similar; according to him, FRL is 'the domestic law of each nation that governs how that nation interacts with the rest of the world.'[6] From both definitions, it can be deduced that the FRL architecture of a state outlines the processes, actors, institutions and policies relating to how a nation interacts with the rest of the world.[7]

Also, it can be inferred from the definitions above that the prevailing constitutional law and conventions influence the interactions between processes, actors, institutions and policies

4 Foreign relations law (FRL) will be used as an analytic frame to interrogate the shifting forms of international interactions by Nigeria as characterised by emerging patterns of SNG external relations in the FDI sector since 1999.

5 L. McNeil, 'The Revolution in Foreign Relations Law in the UK and other Commonwealth Jurisdictions' (2014) Report of the Arthur Watts Public International Law Seminar Series, 2, available at https://www.biicl.org/documents/412_final_event_report_-_the_revolution_in_foreign_relations_law_-_7_oct-2014.pdf?showdocument=1 (accessed 10 October 2019).

6 C. A. Bradley, 'What Is Foreign Relations Law?' (2017) Duke Faculty Scholarship, 1, available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6435&context=faculty_scholarship (accessed 20 January 2020).

7 FRL also governs the interactions between a nation and the citizens or residents of other nations and international institutions. See Bradley, *supra,* note 6.

within a country's FRL regime.[8] Statutory law, administrative regulations, and judicial decisions also play a crucial role in shaping the dynamics within a country's FRL regime.[9] For example, in the USA[10] and Canada[11] at different points in history, judicial decisions have played a critical role in defining the parameters for external relations by SNGs under the respective FRLs of both federations. In the context of Nigeria, the gamut of FRL would include constitutional provisions,[12] constitutional doctrines (e.g. the doctrine of covering the field,[13]as well as statutory provisions,[14] and judicial pronouncements.[15]

For this paper, the focus is on the constitutional allocation of competence for external relations in the Nigerian Federation,[16] i.e. the constitutional dynamics of Nigeria's FRL framework. This bias is because the power dynamics at play in the Constitution of a federal system present a unique challenge for the structure and operations of FRL.[17] Figure 1 below captures the conventional power dynamics in the context Constitution of a federal state. Evident from it is the fact that traditionally, SNGs of a federal state do not have the constitutional

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8 For a definition of constitutional conventions as well as its relationship with constitutional law and effectiveness, see generally M. Vetzo, 'The Legal Relevance of Constitutional Conventions in the United Kingdom and the Netherlands', 14 (1) *Utrecht Law Review* (2018), 143.

9 Bradley, *supra,* note 6.

10 In the USA, a flurry of judicial pronouncements, especially in the 19th and 20th centuries were pivotal in entrenching the federal governments' exclusive powers for the conduct of foreign affairs. See generally *Knox v Lee 79 US 457 (1870) 555; Missouri v Holland 252 US 416 (1920); United States v Curtiss – Wright Export Corps 299 US 304 (1936); United States v Belmont 301 US 324 (1937); and Zschernig v Miller 389 US 429 (1968).*

11 In Canada, the decision of the Canadian Supreme Court in the *Reference re: Weekly Rest in Industrial Undertakings Act (the 'Labour Conventions' case [1937] AC 326,* was pivotal in defining the limits of the Canadian central government to implement agreements it had negotiated in areas of provincial jurisdiction. Judicial interventions of this nature have also acted as a catalyst for Provincial/Ottawa cooperation over the years. See *Citizens Insurance Company v. Parsons (1881) 7 App Cas 96*. See also C. Kukucha, 'Dismembering Canada? Stephen Harper and the Foreign Relations of Canadian Provinces', 14(1) *Review of Constitutional Studies* (2009), 27; and F. Morrissette, 'Provincial Involvement in International Treaty Making: The European Union as a Possible Model', 37(2) *Queen's Law Journal* (2012), 583.

12 See section 12 CFRN 1999 examined infra in section iv (FRL IN NIGERIA: THE CONSTITUTIONAL POSITION). Also consider the *African Charter on Human and Peoples' Rights* 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM. 58 (1982) in the context of section 6(6) CFRN 1999.

13 The doctrine espouses that the law enacted by the central government is supreme if the central government has concurrent law-making powers with the non-central government (i.e. the states) on a subject. It further holds that such state-made law is inconsistent and void as a result of the existence of one made by the central government. See generally *Attorney General Ogun State v Attorney General Federation* (1982) 13 NSCC 1; *INEC v Alhaji Abdulkadir Balarabe Musa* (2003) 2 NWLR (Pt 806) 72 (SC); *Hon. Minister for Justice and Attorney General of Federation v Honourable Attorney General of Lagos State* (2013) 12 TLRN 55.

14 See sections 3(1)(a) and 3(2)(a) *Treaties (Making Procedure, etc.) Act*, Cap. T1 LFN 2004 (TMA) pursuant to which any agreements which govern international relationship and co-operation in any area of endeavour as well as has the effect of altering or modifying existing legislation or the powers of the National Assembly would only be binding when enacted into law by the National Assembly.

15 See *Abacha v Fawehinmi* (2000) 6 NWLR (Pt 660) 228.

16 The emphasis on this dimension of FRL is because the existing political system of a state influences the constitutional allocation of authority (i.e. authority to engage in foreign relations) between political actors within a nation as well as the manifestations of its FRL.

17 See Bradley, *supra,* note 6, 1-2. See J. Kincaid, 'The International Competence of US States and their Local Governments', 9 (1) *Regional & Federal Studies* (1999), 111, 113 where he opined that in the context of the United States, this situation is the consequence of the framers of the constitution not explicitly resolving all matters associated with power and jurisdiction allocation in the federation, but instead leaving some to the political process and the vagaries of history. For Hayes, the federal distribution of powers is in state of flux as it is constantly evolving. See E. T. Hayes, 'Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments within their Territories', 25 *North Western Journal of International Law and Business* (2004) 1, 4.

authority to engage directly with actors in the international system. This conventional position is the premise for the two sets of relationship, i.e. the horizontal and vertical relationships. The horizontal relationship depicted in *figure 1* below is indicative of interactions between the federal government and the international system. Conversely, the vertical relationship captures the internal interactions between the federal government and SNGs. This vertical relationship also determines the parameters for SNGs to access the international system.

Figure 1: Conventional position on power dynamics for external relations in federal systems

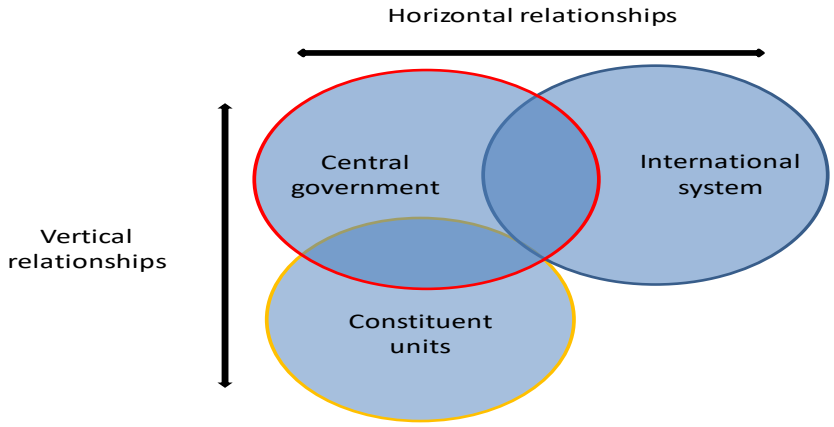

Figure 1 above is typical of the international system in the Westphalia era of statehood,[18] where the orthodox position (in both federal and non-federal systems) is to give plenary powers for foreign affairs to the central government (predominantly the Executive arm of government).[19] This configuration and allocation of power is termed 'central exclusivity.'[20] Proponents of central exclusivity advice against shared foreign affairs competence between a central government and SNGs because it has the potential to undermine the credibility of the nation-state in international circles.[21]

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18 It is instructive to point out that in the pre-westphalia dispensation of the international system, cities/city-states were dominant foreign relations players. For example for over 400 years, the Hanseatic League Cities, played a major role in shaping economies, trade and politics in the North Sea and Baltic Sea. See generally https://www.hanse.org/en/hanse-historic/the-history-of-the-hanseatic-league/ (accessed 20 JApril 2020). The Vatican City-State was another prominent foreign relations player which occupied a supranational role in the pre-westphalia dispensation of the international system. See K. Suter, *Global Order and Global Disorder: Globalization and the Nation-state* (Praeger Publishers, 2003) 41.

19 See M. Schaefer 'Federal States in the Broader World', 27 *Canada-US Law Journal* (2001), 35, 35-36.

20 This terminology is adopted from the work of Spiro. See P. J. Spiro, 'Federalism and Immigration: Models and Trends', 53 (167) *International Social Science Journal* (2001), 67, 71. This concept is also referred to as 'foreign affairs exceptionalism' or 'foreign affairs orthodoxy' by Matthew Schaefer. See Schaefer, *supra,* note 19, 35.

21 *Holmes v. Jennison* 39 US 570 (1840) para 557; Schaefer, *supra,* note 19, 37-39. An alternate point of view is the revisionist which seek to modify or question previously accepted norms or historical accounts of international relations (as well as FRL). See S. Balfour, 'The Concept of Historical Revisionism: Spain since the 1930s', 21 (3) *International Journal of Iberian Studies* (2008), 179, 181-183; Schaefer, *supra* note 19, 36. Noteworthy is that proponents advocate shared (concurrent) competence between central governments and subnational government on matters of foreign relations, policy and law. A consequence of this is the fact that concurrency would bring about the infusion of international law into the mechanics and affairs of subnational governments as well as directly link

That said, the incontrovertible conclusion is that federalism influences FRL. At the same time, the latter affects the reception and operation of international law in that country as well as the country's interactions with other members of the comity of nation. Again, Bradley affirms this assertion thus:

> Foreign relations law can influence how nations form treaties and what they agree to in treaties, and it can also affect the state practice that forms the foundation for rules of customary international law. In addition, by regulating allocations of domestic authority, foreign relations law can affect a nation's compliance with international law because different domestic institutions may have differing levels of commitment to (or capacity for) ensuring compliance.[22]

The preceding elucidation from Bradley emphasises a 'complementary' relationship between international law and the FRL of a nation-state. In effect, the way a country constitutionally sets up its FRL architecture has consequences and implications in international law as well as for the extant FRL in that nation-state. More importantly, the response of international law to the participation of SNGs in the FRL of a country presents a unique challenge; this is the focus of the next section.

III. THE RESPONSE OF INTERNATIONAL LAW TO SNG ENGAGEMENT IN FOREIGN RELATIONS LAW

The participation of SNGs (especially from federations) in the international scene conventionally brings about unease in international law and amongst the comity of nations.[23] The reason being that their engagement in foreign relations is perceived as unpredictable and in some instances, disruptive of the existing status quo.[24] For example Blatter et al. argue that the activities of SNGs in the international scene perforate the boundary between domestic and international politics and undermine the gatekeeper position of national governments between these two spheres.[25] Also, Schaefer speaking in the context of the USA argues that the fact that

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them to the international system. See P. J. Spiro, 'Foreign Relations Federalism', 70 *University of Colorado Law Review* (1999), 1223, 1225 – 1226; C. A. Bradley, 'A New American Foreign Affairs Law?', 70 *University of Colorado Law Review* (1999), 1089. However, situated between central exclusivity and pure revisionism is the cooperative perspective to foreign relations (and law). R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009) 116. At the core of this thought is the argument that different levels of government should complement each other and/or jointly participate in the context of foreign relations, policy and law. See C. K. Bader, 'A Dynamic Defence of Cooperative Federalism', 35 (No. 2) *Whittier Law Review* (2014), 161, 163.

22 Bradley, *supra,* note 6, 3.

23 See K. C. Wheare, *Federal Government* (Oxford University Press, 1963) 183- 186; I. Bernier, *International Legal Aspects of Federalism* (Longman, 1973) 1-6.

24 See P. J. Spiro, 'Globalisation and the (Foreign Affairs) Constitution', 63 *Ohio State Law Journal* (2002), 649, at 667.

25 J. Blatter, M. Kreutzer, M. Rentl and J. Thiele, 'Preconditions for Foreign Activities of European Regions: Tracing Causal Configurations of Economic, Cultural, and Political Strategies', 40 (1) *Publius*: *The Journal of Federalism* (2009), 171. See also A. El-Dessouki, 'Domestic Structure and Sub-National Foreign Policy: An Explanatory Framework', 3 (3/4) *Review of Economics and Political Science* (2018), 102-118.

the actions of SNGs can negatively impact on the whole nation is the rationale for their exclusion from foreign affairs.[26]

As such, under international treaty practice, actions taken by SNGs is classified as 'wholly internal/domestic affairs'.[27] In this traditional Westphalian conceptualisation of foreign relations and statehood, central governments are held responsible for the conduct of their constituent parts[28] and are obligated to ensure conformity with international norms.[29]

The international trade regime under the auspices of the World Trade Organisation's *General Agreement on Tariffs and Trade (GATT)* exemplifies this conventional position. Specifically, the 'federal clause' - art XXIV:12 states that:

> Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.[30]

The above stipulation is mirrored in Article 27 of the *Vienna Convention on the Law of Treaties*[31] which provides that '[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'[32] The above provisions epitomise the conventional dichotomy in international law between internal and external affairs of a nation-state.[33]

The above position has held sway for over a century and has given birth to a general scepticism in international law and relations towards SNG participation in foreign affairs. It has also influenced, to a large extent, the prevalent constitutional and institutional arrangements for FRL amongst nation-states in the international system. This is especially the case with federal systems such as the USA[34] and Nigeria where central exclusivity is constitutionally entrenched in the FRL system.

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26 See Schaefer, *supra,* note 19, 38. In the USA, the perception about the potential disruptive impact of SNG participation in foreign relations is captured in *Zschernig v Miller* 389 US 429 (1968). In that matter, the Supreme Court struck down an Oregan State law which deprived an East German national of his right to inheritance on the basis that nationals of countries which lacked a reciprocal right for US citizens to take property on the same terms as their citizens were denied such rights under the law. The reasoning of the court was that the law effectively intruded into the federal realm of foreign affairs though the it did not conflict with any federal treaty or statute.

27 See J. Kincaid, 'The International Competence of US States and their Local Governments', in F. Aldecoa and M. Keating (eds), *Paradiplomacy in Action: The Foreign Relations of Sub-National Governments*, (Routledge, 2013) 111-133.

28 See generally Spiro, *supra,* note 24, 667; T. Meyer, 'Local Liability in International Law' 95 (2) *North Carolina Law Review* (2017), 261, 267.

29 See Hayes, *supra,* note 17, 4; Meyer, *supra,* note 28, 267 – 268.

30 See art XXIV: 12 GATT 1994. There are similar provisions across the GATT/WTO agreements which are modelled after art XXIV: 12 of the GATT. For example, Art 2.2 Agreement on Subsidies and Countervailing Measures (1994); art XVI (4) Marrakesh Agreement Establishing the WTO; art 13 Agreement on the Application of Sanitary and Phytosanitary Measures (1994); arts 3.1, 3.4; 3.5 Agreement on Technical Barriers to Trade (1994); art 1.3(a) General Agreement on Trade in Services (1994).

31 1155 UNTS 331, 8 ILM 679.

32 See also art 29 Cf art 46 *Vienna Convention on the Law of Treaties (VLT).*

33 Hayes, *supra,* note 17, 20.

34 See *Holmes v Jennison* (n 16) 541 where it was stated that '[T]he framers of the [US] Constitution manifestly believed that any intercourse between a state and a foreign nation was dangerous to the Union; that it would open a

However, in the latter part of the 21st century, the orthodox position has gradually been eroded by forces of globalisation.[35] As Habegger puts it, in today's realities, it is now counterintuitive to set a clear division between the domestic and the foreign policy sphere of governance.[36] Evidence from several federal countries (in developing and developed countries alike) such as Argentina, Australia, Austria, Belgium, Canada, Germany, India, Malaysia, South Africa, Spain, Switzerland, and the United States, corroborate Habegger's point.[37]

Furthermore, as the purview of international relations expands to cover issues that are *intermestic* in nature (e.g. environmental pollution, human rights, immigration, monetary and trade instabilities, and sustainable development etc.), it is increasingly challenging to exclude SNGs from the international relations sphere.[38] SNGs, which have traditionally exercised authority over these policy areas that now dominate international deliberations, have developed strong incentives and varying capacities to engage in international relations in pursuit of their domestic mandates. In recognition of these developments, the *Initial Draft Text of a World Charter of Local Self-Government* reiterates the importance of strengthening the capacity of SNGs to engage in international cooperation.[39]

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door of which foreign powers would avail themselves to obtain influence in separate states'. Se also *United States v. Pink* 315 U.S. 203, (1942) where Justice Frankfurter said '[I]n our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states'; also in *Zschemig v. Miller* 389 U.S. 429 (1968) (state probate statute struck down because it was found to interfere with foreign relations). *Cf* M. J. Glennon and R. D. Sloane, *Foreign Affairs Federalism: The Myth of National Exclusivity* (Oxford University Press, 2016) 284 (footnote 31); E. T. Swaine, 'Does Federalism Constrain the Treaty Power?', 103 (3) *Columbia Law Review* (2003), 403 where the author gives examples of mutliple voices from the US with regard dealings with the outside world.

35 See A. Slaughter, 'The Real New World Order', 76 (5) *Foreign Affair* (1997), 183, 184. Also see J. T. Matthews, 'Power Shift', 76 (1) *Foreign Affairs* (1997), 50 where this emerging trend was described as the dissagregation of traditional governance structures in the international system. Also see Hayes, *supra,* note 17, 8.

36 See B. Habegger, 'Participation of Sub-National Units in the Foreign Policy of the federation', 274, available at http://www.forumfed.org/libdocs/IntConfFed02/StG- ws-Habegger.pdf (accessed 17 January 2020).

37 A study of the changing constitutional and institutional role of federal SNGs in foreign interactions was conducted in 2007 by the Forum of Federations. 12 federal systems were selected for appraisal (Argentina, Australia, Austria, Belgium, Canada, Germany, India, Malaysia, South Africa, Spain, Switzerland, and the United States). See H. J. Michelmann (ed.), *A Global Dialogue on Federalism: Foreign Relations in Federal Countries* (McGill-Queen's University Press, 2006).

38 T. H. Cohn and P. J. Smith, 'Subnational Governments as international actors: Constituent Diplomacy in British Columbia and the Pacific Northwest', (1996) No. 10 *British Columbia Studies*, 26.

39 See *Article 12* of the *Initial Draft Text of a World Charter of Local Self-Government,* available at http://www.gdrc.org/u-gov/charter.html (accessed 20 April 2020). More so, fallouts from the ratification process of the Canada-EU Comprehensive Economic and Trade Agreement (CETA) epitomises the growing agency of SNGs in the foreign relations equation of nation-states. In the case of the CETA, Wallonia, a Belgian SNG disrupted the ratification of the trade deal within the EU by exploiting the internal constitutional mechanism for FRL under the 1994 Constitution of Belgium which requires domestic approval for treaties by all levels of government concerned. See *Article 167* of the Belgian Constitution 1994, available at https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf (accessed 21 April 2020). For in-depth discusions on the objections to the CETA by Begian SNGs see generally O. Omiunu, 'The Evolving Role of Sub-national Actors in the Mechanisms for International Trade Interactions: A Comparative Analysis of Belgium and Canada', 6 (2) *Global Journal of Comparative Law* (2017), 105-137 and O. Omiunu, 'The Evolving Role of Sub-national Actors in International Economic Relations: A Case Study of the Canada-European Union CETA', in F. Amtenbrink, D. Prévost, and R. Wessel (Eds.), *Shifting Forms and Levels of Cooperation in*

That said, in the next section, attention would be drawn to the orthodoxy in the context of the central exclusivity model existing in Nigeria. The analysis in this section will set the foundation for then articulating the areas of the growing divergence between what the Nigerian Constitution provides and what is happening in reality.

IV. FRL IN NIGERIA: THE CONSTITUTIONAL POSITION

As it has been previously highlighted, statutory provisions, judicial pronouncements and doctrines are in addition to the CFRN 1999 part of the gamut of Nigeria's FRL.[40] However, the CFRN 1999 determines the trajectory of the FRL framework. For example, at independence, Nigeria's 1960 and 1963 constitutions provided mechanisms for direct and collaborative participation of Nigeria's SNGs (then regions) in the sphere of external relations.[41] Thus, it is the CFRN 1999 as the *grund norm,*[42] that provides the foundation for FRL in Nigeria. An examination of Nigeria's FRL as it pertains to the role of SNGs through the lens of the CFRN 1999 shows that there are three dimensions or perspectives to SNG (non)participation in foreign affairs; of interest in this paper is dimension three, but the other two dimensions would be reviewed to lay a proper foundation for subsequent analysis.

A. Dimension one

The first dimension focuses on the participation of Nigerian SNGs in foreign policy via elected representatives in the National Assembly. For example, Nigeria operates a dualist system for

International Economic Law: Structural Developments in Trade, Investment and Financial Regulation, 48 *Netherlands Year Book of International Law*, (T.M.C. Asser Press, 2017), 173-203.

40 See Bradley, *supra,* note 6, 2. More specifically, for example, sections 3(1) (a) and 3(2) (a) TMA, *supra,* note 14, pursuant to which any agreements which govern international relationship and co-operation in any area of endeavour as well as has the effect of altering or modifying existing legislation or the powers of the National Assembly would only be binding when enacted into law by the National Assembly. Judicial precedents that impinge on FRL in Nigeria include *Shell Nigeria Exploration and Production & 3 others v FIRS & Anor.* (Unreported, Appeal No. CA/A/208/2012. Delivered 31 August 2016) where the court held that the effect of section 251 of the CFRN 1999 is that disputes relating to or touching on government revenue are not arbitrable. The effect of this decision in the context of FRL is the where such matters are arbitrated (e.g. under the auspices of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI)), the consequential award would not be enforceable in Nigeria by virtue of this intepretation of the section 251 of the CFRN 1999. For a discussion of the origins of the MLI, scope and effect, see *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS,* available at https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (accessed 20 January 2020); D. Kleist, 'The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS - Some Thoughts on Complexity and Uncertainty', (1) *Nordic Tax Journal* (2018), 31-48. Finally constitutional doctrines such as 'covering the field', espouses that the law enacted by the central government is supreme if the central government has concurrent law-making powers with the non-central government (i.e. the states) on a subject. It further holds that such state-made law is inconsistent and void as a result of the existence of one made by the central government. See generally *Attorney General Ogun State v Attorney General Federation* (1982) 13 NSCC 1; *INEC v Alhaji Abdulkadir Balarabe Musa* (2003) 2 NWLR (Pt 806) 72 (SC); *Hon. Minister for Justice and Attorney General of Federation v Honourable Attorney General of Lagos State* (2013) 12 TLRN 55.

41 For a discussion on the evolution of Nigeria's foreign economic relations within the precinct of Nigeria's constitutional evolution see O. Omiunu and I. A. Aniyie, 'Evolution of Foreign Economic Relations in Nigeria', 25 (3) *South African Journal of International Affairs* (2018), 365-392.

42 See section 1 CFRN 1999.

implementing international law.[43] In this regard, legislators who are elected representatives from the 36 SNGs are charged under section 12 (1) of the CFRN 1999 with the responsibility of ratifying any treaty falling under the Exclusive Legislative List (ELL). The mandate also extends to the ratification of treaties which would amount to a law for the governance of interstate relationships and cooperation or have the effect of altering or modifying existing legislation or affect the powers of the National Assembly concerning an item under the ELL.[44]

From this perspective, it could be argued that the treaty domestication process provides ample opportunity for SNGs participation in Nigeria's international relations. This argument is premised on the logic that members of the National Assembly (i.e. the parliamentarians) are democratically elected representatives from the 36 SNGs.[45]

B. Dimension two

Furthermore, as part of the treaty-making process, SNGs as a result of the constitutional prerogative accorded to legislators of the State Houses of Assembly can block treaties relating to matters within the Concurrent Legislative List (CLL) and Residual List. Section 12 (2) and (3) of the CFRN 1999 provides that:

> (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the exclusive legislative list for the purpose of implementing a treaty.
> (3) A bill for an Act of the National Assembly passed pursuant to the provisions of sub-section (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

Concerning the above, Akindele and Oyediran opined that the domestication process under section 12 (2) and (3) was designed to protect the constituent units in a federal system by giving them a mechanism to scrutinise the treaty implementation process under the constitutional legislative list system.[46] They further argue that giving SNGs the constitutional prerogative to

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43 Under the dualist theory, foreign and domestic legal commitments exist on entirely separate planes, and international treaties signed by states operating a dualist system do not have legal effect until they are incorporated into national law via the passage of parallel domestic legislation. In *Abacha v Fawehinmi, supra,* note 15, the Nigerian Supreme Court held that the effect of section 12 of the CFRN 1999 is that for a treaty entered into by Nigeria to become binding, have force of law and be justiciable in Nigeria, such treaty must first be enacted into law by the national assembly and thereafter assented to by the President of the Federal Republic of Nigeria. See also *Medical Health Workers Union of Nigeria v Minister of Health and Productivity & Others* (2005) 17 NWLR (Pt. 953) 120, 155-157 were the foregoing was affirmed by the Court of Appeal. The latter held that the provisions of the International Labour Organisation Convention cannot be invoked and applied in Nigerian Courts notwithstanding the fact that there is evidence that Nigeria is a signatory until it has been enacted into law by an Act of the National Assembly. See generally, D. M. Aaron, 'Reconsidering Dualism: The Caribbean Court of Justice and the Growing Influence of Unincorporated Treaties in Domestic Law', 6 (2) *Law & Practice of International Courts & Tribunals* (2006), 233.

44 See section 3(2)(a) TMA.

45 RA Akindele and O. Oyediran, 'Federalism and Foreign Policy in Nigeria', 41 *International Journal* (1985), 600, 610-611ff, 614. See also I. A. Gambari, 'Federalism and the Management of External Relations in Nigeria: Lessons from the Past and Challenges for the Future', 21 (4) *Publius: Jorunal of Federalism* (1990), 113, 117.

46 Akindele and Oyediran, *supra,* note 45, 609.

block the implementation of a treaty of the above nature is an essential bargain in a federal arrangement because it ensures that '…the duties, powers, functions and responsibilities which the national Constitution denies the central government should not be assumed, enjoyed and exercised by the central government through treaty-making and treaty-implementation.'[47] Although there is no record of this prerogative being utilised by SNGs under the 1979 Constitution,[48] under the CFRN 1999, there have been some objections by several SNGs to the domestication of international treaties on children's rights and environmental rights.[49]

C. Dimension three

The third dimension of Nigeria's FRL focuses on the mandate for foreign relations accruing to the federal government to the exclusion of SNGs. Schaffer writing in the context of the USA argues that this mandate is a dominant feature of the conventional foreign affairs doctrine and its exclusive delineation to the federal government amounts to the denial of concurrent powers to the SNGs irrespective of whether the federal government is utilising that power or not.[50] In the context of Nigeria, the authority of the federal government in the area of foreign affairs originates from the legislative list system in the CFRN 1999. The legislative lists categorise the subject matter that each level of government in the Federation is competent to act on. Under this system, the federal government (comprising the executive and legislative arms) are designated as the competent authorities to manage Nigeria's foreign policy mechanism via the ELL. Specifically, item 26 of the ELL provides that issues relating to international relations are within the competence of the federal government. Also, item 20 empowers the federal government (the executive) to send and receive diplomatic, consular and trade representation. Item 31 of the ELL provides for the federal government's (the legislature and executive) powers to implement treaties relating to matters on the ELL.[51] Furthermore, item 62 of the ELL provides that 'Trade and commerce, and in particular - (a) trade and commerce between Nigeria and other countries including import of commodities into and export of commodities from Nigeria, and trade and commerce between the states…' is within the competence of the federal government.[52]

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47 *Ibid*.

48 Gambari, *supra,* note 45, 117.

49 For analysis of how Nigerian SNGs have impeded the ratification of children and environmental related treaties see O. S. Akinwumi, 'Legal Impediments on the Practical Implementation of the Child Right Act 2003', 37 (3) *International Journal of Legal Information* (2009), 1-13; D. Ogunniyi, 'The Challenge of Domesticating Children's Rights Treaties in Nigeria and Alternative Legal Avenues for Protecting Children', 62 (3) *Journal of African Law* (2018), 447–470; E. Egede, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria', 51 *Journal of African Law* (2007), 249.

50 Schaefer, *supra,* note 19, 36 – 37. In *United States v Belmont 301 US 324 (1937),* it was held that: '…government power over external affairs is not distributed, [between the national government and several states] but is vested exclusively in the national government' (para 330).

51 Cf: section 12 of the CFRN 1999 discussed earlier which provides a platform for SNGs to participate in the ratification of international treaties between Nigeria and other countries.

52 Also, section 16 of the CFRN 1999 identifies the national economy, including external economic relations as an objective of the Nigerian state to be discharged by the federal government.

Although the subject matters enumerated in the ELL is within the mandate of the federal government (i.e. the executive and legislature), beyond the safeguard mechanisms associated with the implementation of treaties examined under dimension 1 and the existence of legislative committees on foreign affairs, the federal executive wields the majority of powers in this regard.[53] The dominance of the federal executive to engage in international relations on behalf of Nigeria is not expressly derived from the Constitution.[54] Instead, as Nwabueze points out in the context of the Nigerian 1979 Constitution, (a forerunner to the CFRN 1999) the executive's mandate to drive foreign policy is inherently derived from the President's status as a representative of an independent, sovereign State vested with powers to act on its behalf.[55]

V. THE HETERODOXY: THE EVOLVING ROLE OF SNGS IN NIGERIA'S FRL

The previous review highlights the fact that the existing constitutional framework for Nigeria's FRL limits SNG participation in international interactions to only the processes relating to the domestication of treaties (dimension 1 and 2). However, despite, the lack of constitutional allocation of competence for direct involvement in Nigeria's foreign economic relations to SNGs (dimension 3), they have progressively engaged in the policy space. This assertion is not without premise. Gambari, writing in 1990, identified the potential for Nigeria's SNGs in a civilian democratic dispensation to engage in foreign relations. He attributed this shift in the dynamics of international relations to globalisation and predicted an increase in the foreign activities of subnational actors in Nigeria.[56] In 1998, Elaigwu writing more broadly about Africa, recognised the changing dynamics of international economic interactions and its impact on federal systems in Africa. He advocated for a federally-derived compromise 'to manage the tensions between supranational self-determination and national self-determination, which takes cognisance of sub-national demands for self-determination [in federal systems].'[57]

With the preceding as background, this section provides further (or more recent) evidence of the activities of Nigeria's SNGs in the foreign economic relations space. With a specific focus

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53 See Omiunu and Aniyie, *supra,* note 41, 365-392 for a discussion on the evolution of Nigeria's foreign economic relations within the precinct on Nigeria's constitutional evolution.

54 See C. Nwapi, 'International Treaties in Nigerian and Canadian Courts', 19 *African Journal of International and Comparative Law* (2011), 38, 40.

55 See B. O. Nwabueze, *Federalism in Nigeria under the Presidential Constitution* (Sweet & Maxwell, 1985) 76, ff 78. A similar position was expressed in the landmark case of *United States v Curtiss – Wright Export Corps 299 US 304 (1936)* per Justice Sutherland who argued that the power of the USA federal government to conduct foreign policy was an external power accruing to the federal government rather than from the American Constitution.

56 See Gambari, *supra,* note 45, 122-124.

57 See generally J. I. Elaigwu, 'Federalism, Regionalisation and Globalisation Africa', 1 *The Federalist* (1998), 72, available at http://www.thefederalist.eu/site/index.php?option=com_content&view=art&id=219&lang=en&Itemid=27 (accessed 16 January 2020).

on FDI, the types of external interactions by Nigeria's SNGs which have emerged in the fourth republic can be categorised into seven categories of expression:[58]

i. Engaging in foreign trade promotion activities.
ii. Establishment of FDI-focused state-owned enterprise (SOEs)
iii. Establishment of FDI-focused ministries, departments and agencies (MDAs)
iv. Signing Memoranda of Understanding (MoUs) with foreign entities and MNEs company executives from multinational companies
v. Introduction of bespoke policy incentives to attract FDI
vi. Accessing foreign aid and loans
vii. Other paradiplomatic activities

The list of indicators above is not exhaustive. However, it is a practical categorisation of tangible expressions of FDI-related activities embarked upon by Nigeria's SNGs and having foreign economic relations implications. Omiunu and Aniyie have argued that this (i.e. the incursion of Nigerian SNGs into the policy space for international relation) is mainly to attract foreign investment to meet their (economic) development needs.[59] The table below summarises information on the documented FDI-related activities embarked upon by the 37 SNGs in Nigeria since 1999,[60] which comes within one of the seven categories of external economic relations. The data was collated from internet versions of Nigerian newspapers as well as other online resources. The information is presented in binary form with '1' and '0' as indicators of evidence and absence of at least one online reference to the expressions in newspaper reports or otherwise.

58 See Omiunu and Aniyie, *supra,* note 41, 379-381 for a discussion focused on four of the expressions. The ramification of the seven is extensively discussed in O. Omiunu and I. A. Aniyie, 'Inadvertent Decentralisation: Evidence of Emerging Patterns in Nigeria's FDI Regime', (2020) *forthcoming* (hereafter referred to as Omiunu and Aniyie, *forthcoming*).

59 See Omiunu and Aniyie, *supra,* note 41, 379.

60 Pursuant to section 299, CFRN 1999, the Federal Capital Territory (FCT) has the status of a state of the federation. Hence the legislative, judicial and executive powers that are vested respectively in the House of Assembly, the courts of a state and the governors of state, rests on the National Assembly, the courts established for the FCT and the designate of the President of the Federation of Nigeria appointed as Minister of the FCT.

Table 1: The Incidence of FDI-Related Activities by Sub-national governments in Nigeria (1999-2019)[61]

Subnational governments in Nigeria (B)	Foreign Economic Relation Expression (FERE) Options (c)							SNG FERE Score (D)
	Engagement in foreign trade promotion activities	MOUs with foreign entities and/or MNE	Introduced bespoke policy incentives to attract FDI	Foreign loans and/or aids	Established FDI focused MDA	Established FDI focused SOE	Other paradiplomatic activities	
Abia	1	1	1	1	0	1	1	6
Adamawa	1	1	0	1	0	0	1	4
Akwa Ibom	1	1	1	1	0	1	1	6
Anambra	1	1	1	1	1	0	1	6
Bauchi	1	1	1	1	1	1	1	7
Bayelsa	1	1	0	1	0	0	1	4
Benue	1	1	1	1	0	0	1	5
Borno	1	1	0	1	0	0	1	4
Cross River	1	1	1	1	1	0	1	6
Delta	1	1	1	1	1	0	1	6
Ebonyi	1	1	0	1	0	0	1	4
Edo	1	1	1	1	0	0	1	5
Ekiti	1	1	0	1	0	1	1	5
Enugu	1	1	0	1	1	0	1	5
FCT	1	1	1	1	1	1	1	7
Gombe	1	1	0	1	0	0	1	4
Imo	1	1	0	1	1	0	1	5
Jigawa	1	1	1	1	1	0	1	6
Kaduna	1	1	0	1	1	0	1	5
Kano	1	1	1	1	1	0	1	6
Katsina	1	1	1	1	1	0	1	6
Kebbi	1	1	0	1	0	0	1	4
Kogi	1	1	1	1	0	0	1	5
Kwara	1	1	0	1	0	0	1	4
Lagos	1	1	1	1	1	1	1	7
Nasarawa	1	1	0	1	0	0	1	4
Niger	1	1	0	1	0	0	1	4
Ogun	1	1	1	1	0	1	1	6
Ondo	1	1	0	1	1	1	1	6
Osun	1	1	0	1	0	1	1	5
Oyo	1	1	0	1	1	1	1	6
Plateau	1	0	0	1	0	1	1	4
Rivers	1	1	1	1	0	0	1	5
Sokoto	1	1	1	1	0	0	1	5
Taraba	1	1	0	1	0	0	1	4
Yobe	1	1	1	1	0	0	1	5
Zamfara	1	1	0	1	0	0	1	4

The evidence recorded for each SNG in the table above does not reflect the frequency, intensity or scope of these FDI-focused policies. It is, however, indicative of the overall prevalence of such policies across the country. The table shows that each of Nigeria's 37 SNGs has manifested a minimum of 4 out of the 7 categories of the foreign economic relations expressions since 1999.

Under category 5 of the table above, we found that 14 out of 27 SNGs have introduced FDI-related MDAs and with the same encroached into the foreign affairs space constitutionally allocated to the FG. Notable examples under this category are the purported establishment of a

61 Culled from Omiunu and Aniyie *forthcoming, supra,* note 58.

Ministry of Foreign Affairs by the Governor of Cross Rivers State in 2019.[62] This is undoubtedly the most daring attempt by any Nigerian SNG to institutionalise its foreign relations objectives. Before this, Lagos in 2015 established the Lagos Office for Overseas Affairs (Lagos Global).[63] Lagos Global has the mandate to pursue the FDI objectives of the State, while the General Duties division coordinates the foreign relations activities of the State.[64] These examples demonstrate the extent to which Nigerian SNGs are going in pursuit of their FDI objectives in the international sphere. More importantly, this raises the question of the constitutionality of the actions of the SNGs, i.e. are these FDI focused policies/institutions infringements on the constitutional powers of the federal government? Although there is enough clarity in the CFRN 1999 about the central government's supremacy over issues of foreign relations,[65] the emerging empirical evidence reveals a different picture which deviates from the existing constitutional position. For example, under category 6 of the table above, the use of SoEs by Nigerian SNGs is on the increase. The legality SoEs at the sub-national level in itself is not unconstitutional. If anything, SoEs which operate across a wide range of sectors has become a popular tool for governments across the world to pursue socio-economic goals. Focus is on the proliferation of SoEs by Nigeria's SNGs because these enterprises inevitably engage with foreign investors and foreign dignitaries.[66] Thus, it is the nature and scope of activities engaged in by these SNGs, not their legal status, which potentially raises issues in light of the existing constitutional framework for Nigeria's FRL discussed earlier.

Furthermore, under category 2 in the table above, we see that 36 out of 37 SNGs have signed at least one Memorandum of Understanding (MoU)[67] with a foreign entity. The latter includes agencies of other sovereign nations, international organisations, multinational

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62 C. Ukpong, 'Governor Ayade creates Foreign Affairs Ministry for Cross River', *Premium Times* (online, December 26 2019), available at https://www.premiumtimesng.com/regional/south-south-regional/369967-governor-ayade-creates-foreign-affairs-ministry-for-cross-river.html (accessed 28 December 2019).

63 See official website of the Lagos Office for Overseas Affairs (Lagos Global), available at http://lagosglobal.org/ (accessed 12 January 2020).

64 See for details of the General Duties division of the Lagos Global Office visit http://lagosglobal.org/our-divisions/ (accessed 12 January 2020).

65 The foregoing is affirmed by the decision in *Attorney general of Ogun State v. Aberuagba (1985) 1 NWLR [pt. 3] 395* where the Supreme Court held *inter alia* that the trade and commerce policies of SNGs which contradicts federal law and polices are null and void.

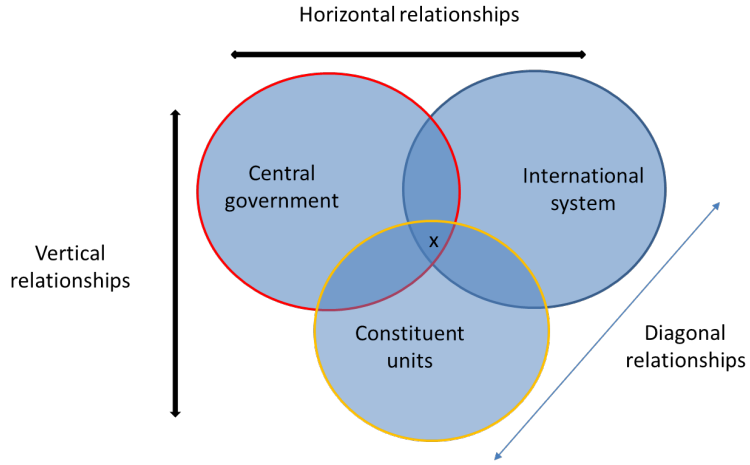
66 For example in December 2019, the Political Officer and Political Specialist, United States Consulate General, Lagos - Jillian Itharat and Arnold Abulime, respectively paid courtesy visits to the Director-General of DAWN Commission - Mr Seye Oyeleye. See official website of the DAWN Commission, available at http://dawncommission.org/united-states-consulate-to-partner-dawn-commission-on-development/ (accessed 12 January 2020).

67 A Memorandum of Understanding is a flexible legal instrument used by parties to articulate non-binding commitments. In a strict sense, MoUs are meant to serve as a precursor to a formally binding agreement between parties (i.e., MoUs signify an intention of parties to work together in future). MoUs are also popular in international relationships between States and non-state actors. In this context, where parties seek to avoid the formalities of a treaty, MoUs are usually a preferred option. See generally Foreign and Commonwealth Office, *Treaties and Memoranda of Understanding (MoUs) Guidance on Practice and Procedures* (2014) 1-2, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/293976/Treaties_and_MoU_Guidance.pdf (accessed 28 January 2020).

corporations and state-owned enterprises (SoEs) which wield strong state influence. The proliferation of MoUs is interesting and worrying for several reasons. The first is the question of their legality and the obligations they create in the context of international law. The second question is whether there is in place a governance and regulatory framework to guide the proliferation of these MoUs between agencies of Nigeria's SNGs and foreign entities. Also, in the absence of the preceding, the implication on the national economy further make this orientation interesting.

In effect, the constitutional clarity on the matter does not give a full picture of the reality on the ground. This adds a further layer of complexity to Nigeria's FRL mechanism. Figure 2 below captures the State of affairs concerning the recent interactions in Nigeria. Of interest in Figure 2 is point *x* as well as the diagonal relationship between Nigeria's SNGs and the international system. The latter comes into being when SNGs go outside of the orthodoxy (i.e. the relationship represented in Figure 1 above which mirrors the status quo under the CFRN 1999) to connect and engage with actors in the international system without regard to the constitutional provisions of Nigeria's FRL. Point *x* is indicative of a situation where the SNGs' expressions (and incursion in the foreign relations space) are coordinated by the central (i.e. federal) government as is required by international law. The activities of Lagos and Cross Rivers states highlighted above[68] are classic examples of expressions which fall outside point *x* as they were engaged in without the coordination of the federal government.[69]

Figure 2: Changing Dynamics of Nigeria's Foreign Relations



Thus, the conclusion is that the FRL regime in Nigeria is no longer derived solely from the existing constitutional framework where the federal government holds sway in every facet of

68 See footnotes 62 and 63 above.

69 The exchange of information for tax purposes with other jurisdictions comes within point *y* as SNGs request for information from other jurisdiction is coordinated by the Federal Minister of Finance as copetent authority. See I. A. Aniyie, 'Nigeria', in C. Evans et al., *Improving Tax Compliance in a Globalised World*, IBFD (2018), 610-611 for an analysis of the exchange of information procedure in Nigeria.

foreign relations with the SNGs performing subsidiary roles.[70] The complexity of the Nigerian leads to a situation where the policies of SNGs run parallel to, complement or conflict[71]with those of the federal government. Also, it is the basis for some questions amongst which is that of how effective and efficient are the coordination mechanisms of the federal government for situations which come within point *y*? This question is pertinent in all aspect of foreign relations, especially as it relates to the attraction of FDI by the constituents of the Nigerian Federation.[72]

VI. CONCLUSION: RECONCILING THE DIVERGENCE BETWEEN THEORY AND REALITY IN NIGERIA'S FRL REGIME

From the preceding, the situation in Nigeria as it relates to its FRL is a case of social change preceding constitutional ones.[73] This is because the current reality (i.e. the difference between the situations captured by *Figure 1* and *Figure 2*) is heterodox, i.e. one characterised by the divergence between theory and reality. However, it is beyond conjecture that the current FRL does not justify the existing socio-economic order.[74] As such, the conclusion is that Nigeria's FRL is not in sync with the evolving practice and is capable of creating a schism that could be detrimental to the Federation's interaction with international law and relations. The experience from older federal systems (e.g. the USA and Canada) show the possibility of conflicts arising between the central government and SNGs due to divergent foreign policies.[75] This potential for conflict has necessitated an active judiciary to mediate between the levels of government as they seek to assert their mandates to engage in the foreign policy space.[76] More worrisome is the fact that the tension between the central government and the federated units over foreign policy mandates have the propensity to spill into the political arena, thereby impacting on the overall stability of the Federation. For example, Alberta's challenge of the central governments' authority over the Kyoto Protocol[77] was a legitimate exercise of their mandate under the

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70 See O. Omiunu, 'Nigeria must wake up to the changing role of State Governments', *The Conversation Africa,* available at https://theconversation.com/nigeria-must-wake-up-to-the-changing-role-of-state-governments-103269 (accessed 27 December 2019).

71 There is no recorded conflict yet between the SNG and the central government over the incursions of SNGs into the foreign affairs sphere. However, there were conflicts between the central and regional governments during the first republic over Nigeria's relationship with Isreal. See Omiunu and Aniyie, *supra,* note 41, 371.

72 See OECD, *OECD Investment Policy Reviews: Nigeria* (OECD Publishing, 2015) 50-51 where it was pointed out that reform efforts to improve the investment climate in Nigeria requires a clearly defined model that would drive strong coordination between the federal and state governments.

73 Schütze, *supra,* note 21, 1.

74 *Ibid*.

75 For example, in Canada during the implementation of the Kyoto Protocol, the Province of Alberta challenged the authority of the central government in Ottawa to enter into international commitments that affected subject matters under the constitutional jurisdiction of the provinces. See C. J. Kukucha, 'From Kyoto to the WTO: Evaluating the Constitutional Legitimacy of the Provinces in Canadian Foreign Trade and Environmental Policy', 38 (1) *Canadian Journal of Political Science* (2005), 129.

76 See *AG Ogun v Aberuagba* supra note 65, for an example of the judiciary's resolution of a SNG incursion into an area constitutionally mandated for the FG.

77 Supra, note 75 for exposé on this.

Canadian Constitution. However, Kukucha has argued that Alberta's actions were politically motivated and not influenced by legitimate concern about the Kyoto protocol.[78]

The analysis in this paper indicates an evolution in the trajectory of SNG foreign relations engagement in Nigeria which the existing constitutional framework for its FRL does not cater for. This trend is in keeping with emerging developments across the world, (i.e. the progressive shift towards sub-state engagement in international relations) not captured by conventional constitutional provisions. In this regard, there is no doubt that the monopolisation of foreign relations power via the Westphalian system of international relations is no longer tenable. Given these developments, the idea that sub-states, especially in federal countries, play a role in international relations is no longer outlandish. However, it is unclear if we are on a path to a pre-Westphalian model of international relations characterised by the dominance of cities and city-states. This is because the processes and mechanisms by which sub-states engage in this policy space are still varied across jurisdictions. Hence, the focus on individual case studies such as has been presented in this paper is vital for mapping the nature, scope and underpinning theory driving the involvement of sub-states in international relations.

It may be somewhat early to take a stand as to whether the incursions by Nigeria's SNGs into the foreign policy space would mature to the level found in other federal and decentralised political systems within and outside Africa. However, it should be noted that the deviation from the formal constitutional parameters for Nigeria's FRL creates both opportunities and challenges that can no longer be ignored. For example, the most active Nigerian SNGs in the foreign relations sphere are mainly motivated by a need to meet their economic development needs.[79] Given this motivation, it was only a question of time before Nigerian SNGs start exploiting foreign investment opportunities by themselves. It could even be argued that this is a welcome development considering that SNGs are better positioned to drive the development of their constituencies. However, capacity variance among Nigeria's SNGs makes these actors unpredictable and unreliable for sustainable economic planning. More so, corruption and lack of technical competence could lead to regulatory in-inefficiency, increased overhead costs of governance etc. These new forms of interactions also pose potential risks to Nigeria's involvement in international law if not properly coordinated. For example, the policies of

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78 *Ibid*, 147. Also, although the USA Nullification Crisis of the 1830s does not directly relate to foreign policy competence, it is another example of how conflicts and tensions between the central government and sub-states over a policy space can lead to significant political consequences for the Federation. Historians believe that the confrontation between the state of South Carolina and the federal government in 1832–33 over powers of the latter to collect taxes was one of several contributing factors to the American Civil War. See generally D. F. Ericson, 'The Nullification Crisis, American Republicanism, and the Force Bill Debate', 61 (2) *The Journal of Southern History* (1995), 249-270.

79 See F. N. Nganje, 'The Developmental Paradiplomacy of South African Provinces: Context, Scope and the Challenge of Coordination', 9 (2) *The Hague Journal of Diplomacy* (2014), 119-149 where similar trends occuring in South Africa were described as 'developmental paradiplomacy'.

Nigeria's SNGs in the FDI sector could lead to a breach of Nigeria's obligations under bilateral, regional and multilateral trade or investment agreements. More so, as it currently stands, the non-recognition of the growing heterodoxy in Nigeria's FRL architecture puts these actors in a position to operate under the radar, acting as 'sovereignty free actors' thereby reducing their accountability for creating barriers to trade or complicating the implementation of Nigeria's foreign economic policy.