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1

MAKING CASE FOR THE CONTINUING EXISTENCE OF SOVEREIGN WEALTH FUND IN NIGERIA

By
Fagbemi, S.A.*
A. R. Akpanke**

Abstract

It is no longer news that the Excess Crude Account established by Chief Olusegun Obasanjo administration in 2004 is today co-existing with the Sovereign Wealth Fund established by Dr. Goodluck Jonathan administration in 2011 pursuant to the enactment of Nigeria Sovereign Investment Authority (Establishment etc) Act. The continued existence of the two accounts have come under intense criticisms and in particular the constitutionality of the two accounts as well as moral and economic justification for withdrawal and expenditures from the accounts since their establishment leading to calls for the discontinuance of the two accounts. While this paper support the calls for closure of Excess Crude Account, it makes case for the continued existence of Sovereign Wealth Fund. The issues which the paper interrogates amongst others are: What are the objectives of Excess Crude Account and Sovereign Wealth Fund? Whether the two accounts are constitutional, or put in another way, what is the legal frameworks for the operation of the two accounts in Nigerian? Is there any justification for the two accounts to co-exist together as part of Nigerian fiscal policy? The paper argues that there is no moral and or economic justification for the co-existence of the two accounts. The paper recommends the closure of the Excess Crude Account with a call for continue existence of the Sovereign Wealth Fund subject to the amendment of enabling statute - Sovereign Investment Authority (Establishment etc) Act - to bring its provisions in conformity with Nigerian Constitutional provisions on the appropriation of the nation funds.

Key words: Case, Existence, Constitution, Excess Crude Account and Sovereign Wealth Fund

1. Introduction

The Excess Crude Account (ECA) was conceived and birthed by the Obasanjo led government in 2004 to save revenues in excess of the budgetary benchmark oil prices for the rainy day with the aim of protecting future budget shortfalls. At the time, the motive for the establishment of ECA was praise worthy and most political figures in the country commended the President for having the foresight to save for the nation during a difficult

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time. The primary objective of ECA was to protect Nigeria's planned budgets against shortfalls caused by the volatility of crude oil prices. By detaching government expenditures from oil revenues, the Excess Crude Account is intended to insulate the Nigerian economy from external economic shocks. It sought to protect public expenditure from being patterned on the boom-and-bust cycle of the international oil market.¹ However, over the years, the ECA has consistently been subject of allegations of mismanagement, along with a barrage of lawsuits challenging its constitutionality and legality.² Moreover, the Excess Crude Account has been accused of acting as a slush-fund for high-rolling government executives to pilfer when they were broke, ill, or needed an indulgent vacation.³ Apparently in view of the noted anomalies in the operation of ECA, the Nigeria's National Economic Council in 2011 approved a plan to replace the Excess Crude Account with a national Sovereign Wealth Fund (SWF) to ameliorate the controversies surrounding the ECA's legality. On its establishment, the SWF is to address three main objectives namely: to create Future Generations Fund that will provide for future generations of Nigerians a solid savings base for such time as the hydrocarbon reserves of Nigerian are exhausted;⁴ provides fund for the Nigeria Infrastructure for the creation of essential and efficient infrastructure such as power generation, distribution and transmission, agriculture, dams, water, and sewage treatment and delivery, roads, ports and airport facilities and similar assets to attract foreign investment and job creation⁵ and creates Stabilization Fund to make fund available to stabilize federation revenues during the period of financial distress.⁶

A closed look at the objectives of SWF reveals identical, or at least similar objectives with ECA, which was the original Excess Crude Account. The main differences is that the sovereign wealth fund is structured to ensure more productivity and transparency; and it was established by statute,⁷ so unlike the Excess Crude Account, it does not carry the burden of illegality characteristics of ECA. Apart from controversies that surround the legal status of ECA, the nation was taken aback sometime in April 2018 when about US\$469 was withdrawn by Federal government from the ECA to purchase Ten Tucano air crafts to fight insurgency.⁸ This withdrawal came after the National Economic Council⁹ was claimed to

¹ Chen, J Excess Crude Account (September 18, 2018) <<http://www.investopedia.com/terms/e/excess-crude-account.asp>>. accessed on May 30, 2019 at 6.23pm.

² See for instance the case of *Attorney General Federation v Attorney General Abia State* (2002) 6 NWLR (Part 764) 621.

³ Chen, J (n.1)

⁴ Oshionebo, E. 'Sovereign Wealth Funds in Developing Countries: A Case Study of the Ghana Petroleum Funds' (2018) 36 (1) *Journal of Energy & Natural Resources Law*, 33-59, Oleka, D. C, Ugwuanyi, B. U and Ewah, E. B. 'Sovereign Wealth Fund and Economic Growth in Nigeria: An Empirical Analysis' (Jul-Aug. 2014) 4 (5) *IOSR Journal of Economics and Finance (IOSR-JEF)*, PP 03-20; Adinde, S. C. 'The Political Economy Of Oil Stabilisation Funds In Nigeria' (November 2018) <https://www.researchgate.net/publication/329571934> accessed on June 10, 2019 at 12.34pm and NEITI Occasional Paper Series, 'The Case for a Robust Oil Saving Fund for Nigeria, <<https://eiti.org/document/case-for-robust-oil-saving-fund-for-nigeria>> accessed June 6, 2019 at 5.12pm

⁵ Nigeria Sovereign Investment Authority (Establishment etc) Act 2011 s 41 (1)

⁶ Ibid s 47 (1)

⁷ Sovereign Investment Authority (Establishment etc) Act 2011

⁸ Nigeria has been burdened with extreme and deadly terrorism in the North Eastern part of the country in the form of "Boko Haram" and the farmers/ herders clashes that has let to many loss of lives

have purportedly granted approval to the President to spend a billion dollars from Excess Crude Account to fight insurgency in the country. The withdrawal was followed by public outburst by some Governors of the Federating States of Nigeria especially under the opposition party of the Peoples' Democratic Party (PDP) on the ground among others that their approval or consent were never sought and obtained before the withdrawal of the money for the purchase of the air crafts. The Nigerian National Assembly consisting of the Senate and House of Representatives also queried the transaction and tagged the withdrawal and expenditure illegal. It was contended that the power of appropriating expenditures lies with them and that they never appropriated any money for the purchase of any aircraft.

To cure the seeming anomaly by the presidency of Nigeria, correspondence from the Presidency was sent to the National Assembly to give retrospective approval to the expenditure. This gesture further angered some members of parliament with threat to impeach the President for breaching the constitution by unilaterally withdrew funds from the ECA and paid for the aircrafts without proper appropriation.¹⁰ In response, the loyalists and apologists of the Presidency had a contrary opinion and argued that the Presidency needed no approval for the expenditure as he acted under a doctrine of necessity.¹¹ Without prejudice to the differ positions taken by the president loyalists and member of the public on the legality or otherwise of the establishment of ECA and later SWF, the aim of this paper is to make case for the continued existence of Sovereign Wealth Fund in Nigeria. In doing this, the issues which the paper interrogates amongst others are: What are the objectives of Excess Crude Account and Sovereign Wealth Fund? Whether the two accounts are constitutional? Or put in another way, what is the legal frameworks for the operation of the two accounts in Nigerian? Is there any justification for the two accounts to continue to co-exist together as part of Nigerian fiscal policy? To address these issues, the paper is divided into five sections. Following this introduction, the paper analyses the objectives of the two accounts. In section three, the paper addresses the constitutionality and legal frameworks for the existence of the two accounts. Section four examines the justification or otherwise for the co-existence of the two accounts as presently is the case in Nigeria as a prelude to making case for the continued existence of Sovereign Wealth Fund in Nigeria. Section five concludes with recommendation among others for the closure of Excess Crude Account, while Sovereign Wealth Fund should be allowed to continue to exist subject to the amendment of enabling statute – National Sovereign Investment Authority (Establishment etc.) Act- to bring its provisions in tandem with the provisions of the Nigerian Constitution on the appropriation of the nation funds.

⁹ National Economic Council is charged with the responsibility of guarding the President on his economic policies and comprises amongst others the 36 state governors, past Nigerian leaders and CBN Governor etc.

¹⁰ Impeach Him. Lawmakers at War with Buhari for planes purchase <[www.https://allafrica.com/view/group/main/main/id/000605.html](https://allafrica.com/view/group/main/main/id/000605.html)> accessed on June 4, 2019

¹¹ This position was canvassed by the President's campaign organization spokesman Festus Keyamo SAN on a Channel's television interview on Sunday night. See Kazeem Tunde, Buhari can Spend \$496m Without NASS Approval – Aide, May 1, 2018. The same position was maintained by the President Senior Special Assistant on National Assembly Matters (Senator Ita Enang the 29th April 2015.

2. Objectives of Excess Crude Account and Sovereign Wealth Fund

Sovereign Wealth Fund has been described as 'state-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.'¹² In principle, the SWF account is usually derived from central bank reserves which accumulate because of budget and trade surpluses, official foreign currency operations, money from privatizations, governmental transfer payments, fiscal surpluses and revenue generated from the exporting of natural resources. It is a fact that SWFs have steadily gained importance in the global financial system over the last decade and especially during the financial crisis period.¹³ According to Wagner, they currently have almost \$6 trillion assets under management which is more than the assets of Private Equity and Hedge Funds (HF) together. Although their roots go back to the 1950s, SWFs became the subject of greater public focus from 2006-2007. The main reason for this is due to increase in SWF funding since 2000 and the successive increase of investments in listed companies. Currently, the SWF Institute lists over 71 SWFs in 47 countries.¹⁴ In line with the established objectives of SWF and as stated earlier, the Nigerian government under the leadership of Chief Olusegun Obasanjo in 2004 established Excess Crude Account.¹⁵ This account was created for the purpose of saving excess revenue from the oil benchmark price rather than being shared by the tiers of government that make up the federation with the intent to cushioning the effect of fluctuation in oil revenue especially in rainy days.¹⁶ This was the motive behind the account that was opened that year. Attempts have been made at defining the Excess Crude Account. For instance, the Investopedia defines excess crude account as '[a] Nigerian government account used to save oil revenues above a base amount derived from a defined benchmark price'.¹⁷ The Investor words on its part defines the excess crude account as 'Nigerian Government account that established savings

¹² Ekokoi, S. E. 'Legal and Constitutional Evaluation of the Nigerian Sovereign Wealth Fund' (2015) 5 (1) *Afe Babalola University: Journal of Sustainable Development Law and Policy*, 102; Twin, A 'Sovereign Wealth Fund (SWF)' (2019) <<https://www.investopedia.com/terms/s/sovereign-wealth-fund.asp>> accessed on 5 June, 2019 at 9.00am; and Dixon, A. D. 'The Rise, Politics, and Governance of African Sovereign Wealth Funds' (June 14, 2016) *The Brown Capital Management Africa Forum* 6

¹³ Wagner, D. 'Sovereign Wealth Funds: Investment Objectives and Asset Allocation Strategies' (2014) 3 (2) *Journal of Governance and Regulation*, 1

¹⁴ Ibid. see also The SWF Institute is a global organization designed to study SWFs and other public investors.

¹⁵ Usually the SWFs is created through commodity exports, either taxed or owned by the government or from non-commodities through transfers of assets from official foreign exchange reserves. However, the ECA was probably created to save revenue from oil due to the fact that Nigeria is monolithic economy whose only major source of foreign earning is from the export of crude oil. When the account was established, there was no law backing it up save the Executive power of the President. Hence, the account was a product of administrative whims and caprice. The absence of enabling law for the establishment of ECA has generated and will continue to generate controversy unless the account is closed to give way for independent operation of SWF in Nigeria.

¹⁶ See April 2015 editorial on legalizing the excess crude account on <www.punchng.com/legalising-the-excess-crude-account/> accessed on 6 June, 2019 at 4.00pm.

¹⁷ Chen, J. (n 1)

levels from the crude oil sales, the account was intended to insulate the country from severe price shocks'.¹⁸

The Excess Crude Account (ECA) and the Sovereign Wealth Fund (SWF) were created to protect planned budget against shortfalls due to the volatile crude oil price at the international market.¹⁹ The ECA was created outside constitutional provision as a short-term instrument designed to cushion shortfalls effect in oil revenue that may emanate from low production, oil theft or fall in crude oil price at the international market.²⁰ Therefore, the build-up in the ECA had become very handy in ensuring that whatever shortfall in revenue is adequately taken care of. The government had to draw from the ECA to deal with the unanticipated losses due to output and price variation and to act as a stabilization fund against budget deficits arising out of oil price volatility and to potentially fund domestic infrastructure investments.²¹ Sovereign Wealth Fund, on the other hands, was created as a long-term instrument. One of its primary objectives like that of ECA is to stabilize the economy of the country through diversification and generate wealth for future generations. According to Edom²² Nigeria's Excess Crude Account (ECA) is the same as the Sovereign Wealth Account, meaning they're both one and the same. This account was created to provide a financial backup for the Nigeria's economy if ever the country's primary sources of income (oil) dwindles or experiences distress just as the 2015 fall in oil prices shook the country or if the tax revenues generated at any point in time are far lower than expected.²³ In summary, the objectives of ECA and SWF are identical and the same. The two accounts were created to stabilize Nigerian economy by ensuring that oil rents are being saved and managed prudently against periods of economic downturn. The ten benefits of ECA and SWF according to Bassey *et al*²⁴ are as follows:

1. To adopt a saving policy in the interest of the present and future generations of Nigeria;
2. To act as stabilization tools at such times when oil prices fall below the projected sum for any fiscal year;
3. To serve as the engine room for the infrastructural development in Nigeria;

¹⁸ Excess Crude Account <www.investorwords.com/17221/excess-crude-account.html>, accessed on June 6, 2019 at 4.05pm

¹⁹ Bassey, A. B and Alobari, C. M and Naenwi, M-Epabari, O and Dimoji, F. A and Onwuneme, L.O. 'Excess Crude Account and Sovereign Wealth Fund as Strategic Tools for Sustainable Development in Nigeria' (2014) 5 (2) *Journal of Economics and Sustainable Development*. 57

²⁰ Ibid, Budina, N and Sweder van Wijnbergen (24 March, 2008). *Managing Oil Revenue Volatility in Nigeria: The role of Fiscal Policy* <siteresources.worldbank.org>Resources> accessed on June 5, 2019 at 5.00pm

²¹ Oluawunmi, T. and Ailemen, T. (2013) Excess Crude Account: Governors to seek final Resolution from Supreme Court <pointblanknews.com> accessed on June 5, 2019 at 4.00pm

²² Edom, S. 'Difference between Excess Crude Account, Sovereign Wealth Fund, And The CBN's External Reserve' (January 26, 2018) <startuptipsdaily.com> accessed on June 10, 2019 at 1.42pm

²³ Obiliki, N. 'Understanding the difference between the Excess Crude Account (or sovereign wealth fund) and a Central Bank's External Reserves <nonsoobiliki.wordpress.com> accessed on June 10, 2019 at 1/49pm

²⁴ Bassey, A. B and Alobari, C. M and Naenwi, M-Epabari, O and Dimoji, F. A and Onwuneme, L.O. 'Excess Crude Account and Sovereign Wealth Fund as Strategic Tools for Sustainable Development in Nigeria' (2014) 5 (2) *Journal of Economics and Sustainable Development*. 58

4. Protect and stabilize the budget and economy from excess volatility in revenue/exports;
5. Diversifying from non-renewable commodity exports;
6. Earn greater returns than foreign exchange reserves;
7. Assist monetary authorities dissipate unwanted liquidity;
8. Fund social and economic development;
9. Sustainable short term and long term capital growth for target for national development;
10. Increase savings for future generations²⁵

In view of the above similar objectives of ECA and SWF, Selassie,²⁶ had concluded that there have been two Sovereign Wealth Funds in Nigeria. There has been the Excess Crude Account (ECA), and the Nigeria Sovereign Investment Authority (NSIA). While assessing the performance of the two accounts, Selassie opined further that the NSIA has been run transparently on standard best practices and it has been doing a good job in line with the Santiago principle.²⁷ But the concern that we have is about the ECA, because if you recall that the ECA economically was set up to save resources when oil prices are high, and to be drawn on when oil prices are low. We do not think that the ECA has been doing effectively enough job that way.²⁸ In view of this remark, one may conclude that there is no justification for the two accounts to co-exist as it were in Nigeria. This issue is addressed in section four of this paper.

3. Constitutionality and Legal Framework for ECA and SWF Accounts in Nigeria

The issue of constitutionality of the establishment of ECA and SWF in Nigeria has generated a lot of controversies among vary interests starting with State Governors in Nigeria and later by members of National Assembly as well as in academic discussions among Writers.²⁹ This section addressed the issue of constitutionality and legal framework for the establishment of ECA and SWF in Nigeria. To start with, the Constitution of the Federal Republic of Nigeria 1999 (as amended) has a special provision for what should happen to revenues that accrue to the federation of Nigeria. In this context, section 162 of the 1999 Constitution provides thus:

The Federation shall maintain a special account to be called "the Federation Account" into which shall be paid all revenues collected by the Government of

²⁵ Ibid P.59

²⁶ Selassie, A. A. (13th April, 2019) 'Nigeria Lacks Transparency in Excess Crude Account Management – IMF' <https://www.sunnewsonline.com/nigeria-lacks-transparency-in-excess-crude-account-management-2/> accessed on June 5, 2019 at 12.45pm. Abebe Aemro Selassie is the Director of Africa Department of the IMF.

²⁷ Santiago principle is the principle that promote transparency, good governance, accountability, transparency and prudent investment practices whilst encouraging a more open dialogue and deeper understanding of SWF activities. See International Forum of Sovereign Wealth Funds (October 2008) < <https://www.ifswf.org/Santiago-principles> > accessed on 10th June, 2019 at 600pm

²⁸ Ibid

²⁹ See Ekokoi, E. S (n 12); Chen J (n 1); Ojibara, I. O. 'Sovereign Wealth Fund in Nigeria: Problems, Prospects and Challenges' (2017) VIII (I) *Afro Asian Journal of Social Sciences*, 1-22 and Ojameruaye, E. 'Resolving the Nigeria Sovereign Wealth Fund debacle', (2012) <<http://www.gamji.com/article9000/NEWS726.htm>> accessed on June 5, 2019 at 3.00pm.

the Federation, except the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the Ministry or department of government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja.

The above provision, without doubt, takes into consideration the Federal nature of Nigeria with several federating units having shares in how the economy of the country including issue of fiscal policy is being run. Federalism presupposes that each government within the federation exist not as an appendage of another government but as an autonomous entity in the sense of being able to exercise its own will in the conduct of its affairs, free from direction by another government.³⁰ By virtue of section 162 of the 1999 Constitution, Nigeria can only maintain one account which is called a "Federation Account" by which all revenues of the Federation must be paid into for the benefit of the entire country, except where limited exceptions are identified in the sub section to include personal income taxes of personnel of Armed Forces, Police, the Foreign Affairs Ministry and the Federal Capital Territory. To determine revenue of the Federation, section 162 (10) of the Constitution defines 'revenues to mean

Any income or return accruing to or derived by the government of the federation from any source and includes, (a) any receipt however, from the operation of any law, (b) any return however described arising from or in respect of any property held by the Government of the federation. (c) Any return by way of interest on loans and dividends in respect of shares or interest held by the government of the federation in any company or statutory body

Premised on the above provisions, the question that comes to mind is 'whether an account for the purpose of saving oil revenue without legal backing should be allowed to exist in Nigeria? As noted earlier, ECA was established in 2004 for the purpose of saving revenue accruing from proceeds of crude oil over and above budget price albeit by official fiat without enabling law. The Nigerian Constitution being the supreme law in Nigeria regulates the federal structure of Nigeria.³¹ To this end if the constitution which is supreme law recognizes only one 'federation account' for the purpose of depositing all revenues from oil,

³⁰ Fagbemi, S. A. 'Analysis of the Federal, State and Local Governments Responses to Environmental Issues and Management in Nigeria' (November, 2015) 5 *University of Ibadan Law Journal*, 23-34: 32; see also Orifowomo, O. A 'Understanding Local Government Council's Legislative Standing Orders (2011) 6 *University of Ibadan Journal of Private and Business Law*, 165

³¹ The supremacy of Nigerian constitution is emphasized in section 1 (1) of the Constitution to the effect that the Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria. The supremacy of the Constitution was further re-echoed in many decided cases. For instance, in the case of *Saraki v FRN*. (2016) 65 NSCQR 79, where the Supreme Court stated as follows: 'The constitution is the supreme law of the land. It is the groundnorm i.e it is the basic law from which all other laws of the society derive their validity. Section 1(1) of the 1999 constitution (as amended) provides: this constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. (3) if any other law is inconsistent with the provisions of this constitution, this constitution shall prevail and that other law shall, to the extent of the inconsistency be void' see further the case of *Ebele Okoye v C.O.P.* (2015) 64 NSCQR 1153 at 1249, it was held *inter alia* that 'the constitution is the groundnorm and fundamental law of the land which is supreme over all other laws'.

therefore the existence and operation of any account in the name of ECA without enabling law is illegal. However, the same cannot be said of SWF. The SWF was a product of NSIA. It was enacted into law by the Nigerian National Assembly in May 2011. In order to foreclose any doubt about the application of the Act, the preamble to the Act reads as follows:

An Act to establish the Nigeria Sovereign Investment Authority to receive, manage and invest in a diversified portfolio of medium and long-term revenue of the Federal Government, State Government, Federal Capital Territory, Local Government and Area Councils to prepare for the eventual depletion of Nigeria's bi-carbon resources for the development of critical infrastructure in Nigeria that attract and support foreign investment, economic diversification, growth and creation in Nigeria and for related matters.

The Nigerian Constitution expressly confers on the National Assembly, consisting of the Senate and House of Representatives legislative powers. Also to avoid conflict of law in the Nigerian federation, the Constitution further created three Legislative Lists namely: Exclusive Legislative List, Concurrent Legislative List and Residual Legislative List with the Exclusive Legislative List being the preserve of the National Assembly.³² A cursory look at the Exclusive Legislative List shows that the power to make law for the trade and commerce in Nigeria falls on the National Assembly. In addition, the National Assembly is further conferred with the power to make law for the division of public revenue between the Federation and the States, among the States of the Federation, between the States and Local Government Councils and among the local government council in the states.³³ Hence, the power of the National Assembly to make law for public revenue is constitutionally guaranteed irrespective of whether or not the state has share in the revenue concerned or not. Granted the foregoing, the National Assembly in 2011 with the approval of the National Economic Council enacted NSIA with the above preamble. Section 1 (1) of NSIA established National Sovereign Investment Authority to manage the sovereign wealth fund in Nigeria in order to reduce the vulnerability of the economy to external shocks and ensure intergenerational equity and serves as a catalyst for attracting investment for Nigeria's critical infrastructure.³⁴

Premised on the emergence of NSIA as a national law, it is submitted that the criticisms from various quarters that the SWF account lacks constitutional basis cannot hold water.³⁵ To borrow words from

³² Section 4 (2) of the 1999 Constitution provides thus: The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in the Part I of the Second Schedule to this Constitution.

³³ See Item 1 of the Concurrent Legislative List.

³⁴ By virtue of section 1 of NSIA Act, Nigeria Sovereign Investment Authority is 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. The Authority is clothed with a wide range of investment powers within and outside Nigeria. 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.

³⁵ Ekokoi, E.S. (n. 12); Ojameruaye, E. 'Resolving the Nigeria sovereign wealth fund debacle' (31 May 2012)

Ojibara,³⁶ the establishment of the Nigeria SWF is in consonance with the current international best practices specifically among the oil producing countries. For instance, resource rich countries used the SWFs to save revenue accrued from the natural resources and invest the revenue in other sectors of the economy, thereby diversifying the economy and solving the problem of the “resources curse” that is mostly identified with countries with abundance natural resources.³⁷ However, the same cannot be said of the ECA account. For instance, while the ECA was a short term instrument to cushion the shortfalls in oil revenue³⁸ that could arise due to price volatility or low production, the SWF was established as a long-term investment Authority and its fund comes from budget surplus³⁹ not limited to oil revenue. The major role of SWF is to stabilize the economy and generate wealth for infrastructural development of the country as well as generating fund for intergeneration equity.⁴⁰

In view of the foregoing, we are of the strong view that ECA is illegal and therefore should cease to exist in Nigeria. Having resolved the legal status of ECA and SWF, the next issue which this paper will attempt to resolve is whether there is justification for the two account to co-exist. In addition, the next section will also address the issues of withdrawal and expenditure of money from the two accounts without proper appropriation by the National Assembly to determine how far the expenditures from the two accounts have taken care of the interest of Federating units in Nigeria for which the two accounts were purportedly opened.

4. Justification for the Co-Existence of ECA and SWF Accounts

This section is devoted to address the justification or otherwise of the ECA and SWF accounts in Nigeria. In doing this, the section discusses the issue of withdrawal of money and expenditures from the accounts. The purpose of this is to provide information for the closure of ECA while SWF should be allowed to continue in existence due to some of its advantages over ECA. In practice, the source of the monies deposited into Nigerian ECA and SWF accounts are majorly from the revenues earned from crude oil above the budgetary planned. Oil proceeds is one of the major sources of revenue for the federation. This source of revenue falls within the meaning ascribed to revenue in section 162 (10) of the 1999 Constitution and it is not listed as an exception to the source of revenue that may not be paid into the Federation Account. The issue of revenues and its treatment in section 162 of the constitution

<<http://chatafrik.com/articles/nigerian-affairs/item/963-resolving-the-nigeria-sovereign-wealth-fund-debacle.html>> accessed June 10, 2019 at 12. 08pm. see also the case of *A.G. Ogun State v A.G. Federation* 2012) 18 NWLR (Pt. 798) 232

³⁶ Ojibara I. O (n 28)

³⁷ WBG, (2013) *Finance for Development Post 2015*, pp 1-54 and Truman, E.M. ‘Sovereign Wealth Funds: Threat or Salvation?’ (2010) *Peterson Institute for International Economics, Policy Brief No. PB08-3*, Washington DC, 2.

³⁸ Bassey, A. B and others. ‘Excess Crude Account and Sovereign Wealth Fund as Strategic Tools for Sustainable Development in Nigeria’ (2014) 5 (2) *Journal of Economics and Sustainable Development*, 58

³⁹ *Ibid*

⁴⁰ *Ibid*

were part of the issues submitted for court determination in the case of *A.G. Ogun State v A.G. Federation*⁴¹ as follows:

A declaration that the Federal Government is mandatorily obliged by the combined effect of Section 162(1) and (4) of the Constitution of the Federal Republic of Nigeria 1999 to pay into Federation Account all the proceeds and income, save those exempted under Section 162(1), accruing from the privatisation of government enterprises, from stamp duties, capital gains and other income accruing to or derived by Federal Government from any other source.

A declaration that it is unconstitutional and illegal for the defendant whether by itself, its office agents, privies, or otherwise howsoever to withhold and not pay into the Federation Account proceeds and/or income, save those exempt under Section 162(1), accruing from privatization of government enterprises and other income accruing to or derived by the Federal Government from any other source.

A declaration that the deduction of funds from the Federation Accounts by the defendant, to fund and maintain a Stabilization Account is illegal and unconstitutional.

A declaration that it is illegal and unconstitutional for the defendant to deduct any sums of money from the Federation Account for the purpose of servicing foreign or external debts incurred by the Government.

Although, the Supreme Court appeared to have put a stamp of authority on the sacredness of section 162(1) of the constitution when it emphasized that except where the constitution itself exempted some revenues from being depositing in the federation account, all other revenues as defined in sub (10) must be paid into the federation account regardless of any law enabling it in that regards.

As previously stated, the ECA was established without legislative instrument but by an administrative action of the Obasanjo administration in 2004. Attempts to legalize the existence of the account was made in 2007 when the Fiscal Responsibility Commission Act of 2007 attempted to do so by making provisions for savings in a separate account which was to be deposited at the Central Bank of Nigeria. Section 35 (1) and (2) of the Act provides thus:

Where the reference commodity price rises above the predetermined level, the resulting excess proceeds shall be saved in accordance with the provisions of subsection (2) of this section. The saving of each government in the federation ...shall be deposited in a separate account which shall form part of the

⁴¹ (2012) 18 NWLR (Pt. 798) 232

respective governments' consolidated revenue fund to be maintained at the Central Bank of Nigeria by each government.

The NSIA on its part was enacted in 2011 by the National Assembly apparently in a bid to replace the ECA which from inception lacked any legal standing. However, what remains disturbing is the continuous existence of the ECA several years after the introduction of the SWF. It is due to continuous existence of ECA that enabled the Buhari administration to make withdrawals from it in 2018. This is several years after the SWF was introduced to replace ECA. One would have thought that if the intention of the SWF was to replace the ECA the account should have been closed at the commencement of the SWF. Be that as it may, it is our position that while ECA is illegal having being established without any Act of the National Assembly and therefore unconstitutional. However, the establishment of SWF was legal being the product of the Act of the National Assembly and therefore constitutionally guaranteed. Also, as previously stated, the ECA and SWF were intended to operate as stabilization accounts to reduce the vulnerability of the economy to external shocks, ensure intergenerational equity and serves as a catalyst for attracting investment for Nigeria's critical infrastructure. Although the Supreme Court in the case of *A.G. Ogun State v A.G. Federation*⁴² had the opportunity to pronounce on the constitutionality of a stabilization account and correct the impression of the plaintiff on the rationale for the establishment of such account in Nigeria has done in other climes.⁴³ However, the Supreme Court missed the point by concentrating on the constitutionality of ECA without further education of the need for such account in Nigeria. The position of the Supreme Court was captured as follows:

On stabilization account, it is submitted that there is clearly no constitutional warrant for creation of such account as a charge on the federation Account. This is because whatever account the Federal Government wishes to keep, plaintiff argued, can only be lawfully operated with funds emanating from her own share of the amount in the Federation Account subsequent to the distribution among the 3 tiers of government. To do otherwise as is presently being done, it is argued, is contrary to section 162(3) of the constitution. Clearly, as has been argued, the provisions of the law i.e Revenue Act, supporting the creation and maintenance of a Stabilization Account, is unconstitutional. Here again, this argument is flawless and is incontrovertible.

⁴² (supra)

⁴³ For instance, many historians credit the Republic of Texas with the first SWF. In 1845, through the annexation of Texas by the United States, the Federal Government gave the new state \$2 million to be set aside for the establishment of a fund to support public schools in Texas. This SWF, which became known as the Texas Permanent School Fund, now also gets some revenue from oil rights off the coast of Texas. The first SWF started by a National Government was Kuwait in 1953. Funded by oil profits, it was founded to help the economy through times of down oil prices. A few other commodity-reliant countries followed suit, especially learning from the 70s and the Oil embargo: Kiribati (1956), Abu Dhabi (1976), Canada (1976), and Oman (1980). From 1953 - 1990, nine countries established SWFs. Since then there has been a rapid increase in the number of SWF globally. Currently, there are 78 SWF in about 65 countries. See Chambers, K. (October, 2016) 'Sovereign Wealth Funds: A New Global Investment Power' <<https://www.headwater-ic.com/topics>> accessed on June 7, 2019 at 3:59pm

With due respect to the Noble Justices of the Nigerian Supreme Court, the above holding was a clear indication that the Justices of the Supreme Court are not abreast of the happening globally on the establishment of Sovereign Wealth Fund by most countries that depends on oil and other commodities revenues such as Brunei Darussalam, Saudi Arabia, Oman, Chile, Libya, United States of American, Russia, South Korea, Kuwaiti, Ireland, Norway, Singapore, Iran, Algeria, Malaysia and Australia etc for the purpose of providing stabilization fund to cushioning financial crisis whenever it arises. Having taken this position, it should be noted that if there is justification for the establishment of SWF, the same thing cannot be said about the modality for the withdrawal and expenditure from ECA and SWF accounts in Nigeria. It was observed that the manner in which money are withdrawn from these accounts had generated controversies in Nigeria. For instance, the controversies and accusations were to follow suit when the federal government started spending from the two accounts rather than allowing it to be a cushioning account for the rainy days, which the accounts were originally intended. The administration defrayed monies from the account to settle the country's foreign debts. It also withdrew substantial sums for investment in the public power infrastructure that was tagged by the administration as the 'independent power projects'. Prior to this withdrawal, the country saved more than US\$20 billion in 2008 in the account. However, by June 2010, the savings in ECA had been depleted below US\$4 billion⁴⁴ because withdrawals were in addition made to cater for budget deficits. The result was that Nigeria was not badly affected by the global financial crisis that hit the world between the periods of 2008 - 2009. Due to the above incidents, most Governors become uncomfortable with the manner funds were withdrawn and spent from ECA contending that the account was illegally despite its intended motive that was at the time thought to be beautiful. The Governors' position was later followed by accusation and counter accusations of illegal withdrawals from the account. While reacting to one of the accusations leveled by the then Governor of Edo State Adams Oshiomole, that US\$30 billion was stolen from the ECA, the then Minister of Finance Okonjo Iweala responded thus:

The widely published comment by Governor Adams Oshiomole alleging that 30 billion dollars is missing from the ECA is shocking and totally untrue. The comments reflect, once again the unfortunate tendency of some political players to politicize the management of the economy on the basis of half-truths and sundry distortions. This is not good for the country... there is no 30 billion dollars missing from the ECA as alleged by Governor Oshiomole.⁴⁵

Similar accusations of missing funds from the account were also leveled by the Nigerian Governors forum at different times, alleging that as much as US\$20 billion was missing. However, the Finance Minister again was to deny all such accusations. Another serious accusation against the ECA was that there was no accurate figure of inflow/outflow as well as the accurate figure of money spent from the account. The result was contradictory figure

⁴⁴ Rilwan 'Excess Crude Account ... and the controversy lingers' (6 July, 2015) <www.thenationonline.net/excess-crude-account-and-the-controversy-lingers> accessed June 6, 2019 at 3.14pm

⁴⁵ *Ibid.*

between the office of ministers of finance and a Premium Times Centre for Investigative Journalism (PTCIJ). For instance, PTCIJ report revealed that Nigeria earned US\$109.37 billion, approximately ₦15.274 trillion, as excess crude money between 2004 and 2018. According to PTCIJ, in the last fifteen years, the Nigerian government has spent at least US\$107.4 billion (the equivalent of ₦15.46 trillion) from the Excess Crude Account (ECA) under the administrations of Olusegun Obasanjo, Umaru Musa Yar Adua, Goodluck Jonathan and incumbent President Muhammadu Buhari. This assertion was made after a careful review of the document obtained from the Cash Management Office (CMO) of the Ministry of Finance through the FOI mechanism.⁴⁶

It is recalled that the accusations and counter accusations on the inflow/outflow as well as expenditures from ECA in the past led the Nigerian Governors Forum to institute a suit against the Federal Government. However, the case was ultimately withdrawn and settled out of court without a pronouncement on the issue by the court. An analysis of the Excess Crude Account (ECA) spending by categories showed that in the last fifteen years, distribution to the three tiers of government, at the highest, was US\$61.86 billion. Spending on oil subsidy in the same period was US\$12.06 billion, debt financing took US\$15.42 billion and investment on power projects US\$8.71 billion. The empowerment project popularly known as Sure-P got US\$5.74 billion while the stabilization fund, through payments to Sovereign Wealth Fund, was only US\$1.25 billion. Additionally, the NNPC pipeline and joint ventures operations on gas took US\$1.51 billion. The other expenditures from the ECA were Security, Transportation and Sundry Contingencies with US\$496.37 million, US\$250 million and US\$100.38 million respectively. It is noted that the Excess Crude Account is a special account established to warehouse excess revenues from the prevailing crude oil price at the international market. Income generated above the approved crude oil benchmark price in the annual budget is saved in the account. Also withdrawal from the account is statutorily subject to the approval of the three tiers of government and the Executive Council of the Federation (FEC). These earnings are meant to be used for the development of the country and serve as a buffer in times of grave economic conditions. However, due to the issue surrounding the establishment of ECA, which make it prone to abuse. Nigeria has failed to transform decades of oil earnings into sustainable development, despite being the largest producer and exporter of petroleum in Africa and one of the ten largest producers in the world.⁴⁷

While reviewing the manner in which funds were withdrawn from ECA account, Chen⁴⁸ further opined that 'what is worrisome about the Excess Crude Account in this context is that there exist no records of money-in/money-out — the normal tracking of a fund's operations. Over the years, officials have expressed concern because the ECA's balances seem to change at will without any corresponding evidence of withdrawals or approvals of such withdrawals. The Excess Crude Account's absence of rules governing deposits, withdrawals, and

⁴⁶ Olufemi, J and Akintunde, B. 'Nigeria's four seasons of lavishness with N15.46 trillion Excess Crude Fund. Premium Times (13 February 2019) <<https://allafrica.com/starting/201902130176.html>> accessed on 5 June, 2019n at 12.58pm

⁴⁷ *ibid*

⁴⁸ Chen, J (n 1)

investments led to the Natural Resource Governance Institute ranking Nigeria as the most poorly governed fund among 33 resource-rich nations in a 2017 report. As currently constituted, the Excess Crude Account will continue to be regarded internally with suspicion given its lack of legal backing, proper structures, and exigent withdrawals. Hence, the need to close the account to allow SWF function properly without parallel account.

The Nigerian constitution has clear provisions on how public revenue is to be expended. This is clearly outlined in section 80 of the Constitution for federal expenditures and section 120 for expenditures that concern the federating States. Section 80 of the Constitution provides that:

- (1) All revenues or other moneys raised or received by the Federation (not being revenues or other moneys payable under this Constitution or any Act of the National Assembly into any other public fund of the Federation established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund of the Federation.
- (2) No moneys shall be withdrawn from the Consolidated Revenue Fund of the Federation except to meet expenditure that is charged upon the Fund by this Constitution or where the issue of those moneys has been authorized by an Appropriation Act, Supplementary Appropriation Act or an Act passed in pursuance of section 81 of this Constitution.
- (3) No moneys shall be withdrawn from any public fund of the Federation other than the Consolidated Revenue Fund of the Federation unless the issue of those moneys has been authorized by an Act of the National Assembly.
- (4) No money shall be withdrawn from the Consolidated Revenue Fund or any other public fund of the Federation, except in the manner prescribed by the National Assembly.

From this Section it is abundantly clear that no funds shall be withdrawn and expended from any public fund of the federation, unless the monies have been authorized by an Act of the National Assembly.⁴⁹ What however appears confusing from this section is the mention of another distinct type of fund which is called the “consolidated revenue fund of the federation”. If this revenue fund is reconciled with section 162 (1) of the constitution which mentions “federation account”, there is a tendency to think that another kind of revenue fund is created for the federation in section 80. This line of thinking may not be illogical. However, a correct understanding of this consolidated revenue fund mentioned in section 80 could be interpreted that Nigeria is a federation, with component states.⁵⁰ The federation and the states each have its own power allotted by the constitution.⁵¹ The consolidated revenue fund for the federation mentioned in section 80 is therefore in our reasoning related to an account meant for the federal government. This is even made clearer when there is an

⁴⁹ Constitution of the Federal Republic of Nigeria 1999 (as amended) s.80 (3).

⁵⁰ For instance, section 318 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) defines ‘Federation’ to mean ‘the Federal Republic of Nigeria.

⁵¹ Constitution of the Federal Republic of Nigeria 1999 (as amended) s. 2 (2).

understanding that a similar consolidated revenue fund of the states has been created by the constitution in section 120 which provides:

- (1) All revenues or other moneys raised or received by a State (not being revenues or other moneys payable under this Constitution or any Law of a House of Assembly into any other public fund of the State established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund of the State.
- (2) No moneys shall be withdrawn from the Consolidated Revenue Fund of the State except to meet expenditure that is charged upon the Fund by this Constitution or where the issue of those monies has been authorized by an Appropriation Law, Supplementary Appropriation Law or Law passed in pursuance of section 121 of this Constitution.
- (3) No moneys shall be withdrawn from any public fund of the State other than the Consolidated Revenue Fund of the State unless the issue of those moneys has been authorized by Law of the House of Assembly of the State.
- (4) No moneys shall be withdrawn from the Consolidated Revenue Fund of the State or any other public fund of the State except as prescribed by the House of Assembly.⁵²

This section is a replica of section 80 only that it establishes a consolidated revenue fund for the state in the same way section 80 establishes a consolidated revenue fund for the federation. In summary, it therefore means there is a federation account which is an all-inclusive account for both the federation and the states for which all revenues are paid into preparatory to sharing to other components of the federation and there is a consolidated revenue funds for the federation and a consolidated revenue fund for the state. This position is justified when the judgment of the Supreme Court in *A.G Federation v A.G. Abia State*⁵³ is considered. The court clearly distinguished the various accounts *inter alia* ‘...I think a charge to the revenue of the federation or the revenue of a state simply means a charge to the consolidated revenue of the federation or the consolidated revenue of a state into which monies received from the federation account are credited’

It is therefore expected that no withdrawals shall be made from the consolidated revenue fund of the federation or any other public fund except as authorized by the National Assembly. If it is agreed that there is a separate federation account, which is all inclusive account for both the federation and states from which all revenues are paid into preparatory to sharing to other components of the federation, then the ECA and SWF accounts are the extension of such account. Hence, any expenses from the two accounts must be duly appropriated and authorized by the National Assembly before expenditure. To do otherwise is unconstitutional and derogatory of the preamble to the NSIA which presents the Act as law inures for the

⁵² *Ibid* s. 120.

⁵³ (2002) 6 NWLR (Pt. 764) 542

benefit of the entire country. The accounts should therefore operate like a true federation account such that money in the accounts should be shared by all the tiers of government in Nigeria.

Furthermore, beyond the legality of the expenditure from the ECA and SWF accounts, there is also the moral and economic question of the rationale for the expenditure. The two accounts on record was established as a stabilization funds. This was supposed to be savings for the rainy day, the days when the price of crude falls beyond the budgeted price benchmark. Ironically, the evidence that exists will suggest that the purpose for establishing the account was jettisoned. While between 2005 and 2015 oil continued to be sold beyond the budgeted price benchmark, yet expenditures were made from the accounts for the subheads already itemized above. These expenditures for such subheads become even illegal and against the express provision of the Fiscal Responsibility Act of 2007 that required that access shall not be had of stabilization account except the budgeted commodity price falls below the benchmark for three consecutive months. For purposes of completeness the Fiscal Responsibility Act provides:

No government in the federation shall have access to the savings made in pursuance to the sub section (2) of this section, unless the reference commodity price falls below the predetermined level for a period of three consecutive months.⁵⁴

The withdrawals were not made when oil prices fell below the projected benchmark and the purposes or items of these expenditures cannot be classified as stabilization. This in itself has defeated the essence of the creation of the ECA and SWF accounts. The reason for this wanton expenditure, it is observed, were due to lack of a clear and robust legal framework establishing the account from the very beginning. The absence of this legal framework had the effect of subjecting the accounts to the whims and caprice of the President from inception and it became difficult stopping that lacuna even with the passage of the Fiscal Responsibility Act. One major issue also identified with the operation of that account is that expenditures from the account were never subjected to the payment of the 13% derivation principle in favour of the states, which produce the crude oil.⁵⁵ The Account was immune from the operation of so many laws touching on how revenues are to be treated.⁵⁶ It was a clever way of exempting revenues from constitutional and other legal provisions. There is therefore the need to clear the ambiguities surrounding the operation of SWF account once the ECA account has been closed.

5. Conclusion

As discussed in this paper, the motive for the creation of the ECA and SWF is to save for the rainy day. This motive is commendable, as no nation or individual can make any significant sustainable progress without it. This becomes even more important when the source of the

⁵⁴ Fiscal Responsibility Act.2007 s.35 (5)

⁵⁵ Odje, A. M. 'Excess Crude Oil Account: 1999 Constitution and the Rule of Law' <www.nigerianlawguru.com/articles/...> accessed on June 5, 2019.

⁵⁶ Constitution of the Federal Republic of Nigeria 1999 (as amended) s.162(2)

revenue for the country is oil, which is a non-renewable resource. It is trite that when a motive, no matter how commendable begins to conflict with the constitution, then it calls for concern. This paper has revealed that the administrative and legal frameworks that provided authority for the ECA is clearly inconsistent with the Constitution of Nigeria. However, the SWF has to some extent conformed with the Nigerian Constitution provisions for the enactment of law. One of the reasons for the establishment of SWF is to ameliorate the controversies surrounding the ECA legal status. There is no doubt that till date, the sovereign wealth fund has yielded good results, but the co-existence of the two accounts will continue to generate controversy until ECA gives way for the SWF to operate as a true sovereign wealth fund for the entire nation. This paper also addressed the manner in which money are withdrawn and spent from ECA and SWF and resolved that expenditures from the two account are unconstitutional.

In view of the fact that there is no moral and economic justification to manage the two accounts concurrently in view of lack of legal backing for ECA as oppose to sovereign wealth fund with legal backing, organized structure, and wider scope as oppose, it is hereby recommended that the Excess Crude Account should be subsumed into the SWF Account, while SWF should continue to exist in Nigeria. Furthermore, NSIA Act should be amended to provide in details the requirements for withdrawal and expenditures from the SWF account. The proposed new NSIA must specifically recognize the power of the National Assembly to appropriate all expenditures from SWF account. Finally, all expenditures from the account must take into consideration the interest of the three tiers of government in Nigeria to avoid controversy that currently bedeviled expenses from SWF account.