

**UNIVERSITY OF CAPE TOWN
FACULTY OF LAW
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**TOWARDS A MORE EFFECTIVE LEGAL FRAMEWORK FOR INVESTOR-STATE
ARBITRATION IN NIGERIA**

(Dissertation submitted in partial fulfilment of the conditions for the award of the degree of Master of Laws (LLM) in Commercial Law)

**SUPERVISORS: PROFESSOR LISE BOSMAN
MR. FAADHIL ADAMS**

BY

STUDENT NAME: ADEBOWALE ALUKO
STUDENT NUMBER: ALKADE002
(LLM in Commercial Law)

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DECLARATION

Research Dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LL.M. in Commercial Law in approved courses and Minor Dissertation. The other part of the requirement for this qualification was the completion of a program of courses.

I hereby declare that I have read and understood the regulations governing the submission of LL.M. in Commercial Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and this dissertation conforms to those regulations.

Signed by candidate

.....
Adebowale Aluko

.....
November 2020

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ABSTRACT

There has been a backlash against the Investor State Dispute Settlement (ISDS) system in recent times. Amongst other complaints, critics have argued that the ISDS whittles down the regulatory powers of states in favour of private adjudicators. These criticisms are premised on the fact that unlike commercial arbitration, investment arbitration awards may have far reaching effects on states. In response to these concerns, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III and other similar bodies have been tasked to carry out reforms to address some of these issues. In spite of ongoing reforms, criticisms have continued with some countries abandoning the investor-state arbitration mechanism altogether.

In Nigeria, the state of crisis in the judiciary has necessitated the need for a viable alternative to litigation. The ISDS framework therefore remains the preferable option for the resolution of investment disputes. There have been recent attempts to amend the Arbitration and Conciliation Act 11 of 1988. Also, the Nigerian Investment Promotion Commission recently announced plans to reform the country's investment law framework. It is in the light of these developments that this research has been undertaken to examine the flaws in Nigeria's investment arbitration framework and reforms that may be introduced to address them.

In making a case for the retention of the ISDS framework in Nigeria, this study critiques Nigeria's investment arbitration framework and explores a number of recommendations towards addressing current challenges. It is argued that the proposed solutions will improve the effectiveness of Nigeria's investment arbitration framework especially with respect to the legal framework for the consent of the Nigerian government to ICSID arbitration and in the area of court assisted measures and post-arbitral award litigation.

ABBREVIATIONS

All NLR	All Nigerian Law Reports
Arb Int'l	Arbitration International
BIT	Bilateral Investment Treaty
BOT	Build, Operate and Transfer
CBN	Central Bank of Nigeria
CLRN	Commercial Law Reports of Nigeria
EWCA	England and Wales Court of Appeal Civil Division
FHC	Federal High Court
ICC	International Chamber of Commerce
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for the Settlement of Investment Disputes
IISD	International Institute for Sustainable Development
ISDS	Investor State Dispute Settlement
J' Int Arb	Journal of International Arbitration
LCIA	London Court of International Arbitration
LPELR	Law Pavilion Electronic Law Reports
MIT	Multilateral Investment Treaty
NAFTA	North American Free Trade Association
NWLR	Nigerian Weekly Law Reports
PCA	Permanent Court of Arbitration
PPP	Public Private Partnership
SC	Supreme Court
TDM	Trade Dispute Management
WRN	Weekly Reports of Nigeria

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CHAPTER ONE

INTRODUCTION

I. BACKGROUND

This dissertation is set against the background of the recent backlash against the Investor State Dispute Settlement (ISDS) system¹ and the ongoing reforms to address it.² In the light of these reforms and recent developments in Nigeria, especially efforts to amend the Arbitration and Conciliation Act 11 of 1988 (Arbitration Act)³ and reform the country's legal framework for investment protection,⁴ this dissertation argues that the investor-state arbitration mechanism ought to be retained by Nigeria.

The premise for the above position is that, in the light of the crisis in the Nigerian judiciary and the attendant erosion of confidence in the court system,⁵ the investment arbitration mechanism remains the preferred mechanism for the resolution of investment disputes in Nigeria.⁶ In making a case for the retention of the ISDS framework in Nigeria, a number of important reforms are proposed to address current inhibitions and provide a more efficient investor state arbitration framework.

The recommendations in this dissertation are measures that should be adopted in the Nigerian context, in addition to the reforms being undertaken at the international level by bodies such as the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on ISDS Reform, among others.

¹ CL Lim, Jean Ho & Martins Paporinskis *International Investment Law and Arbitration: Commentary, Awards and Other Materials* (2018) 479-95; Yves Derains & Josefa Sicard-Mirabel *Introduction to Investor-State Arbitration* (2018) 13-16. See page 5 below for a more detailed discussion.

² See the draft working papers of the UNCTIRAL Working Group III on Investor State Dispute Settlement Reform last available at https://uncitral.un.org/en/working_groups/3/investor-state, last accessed on 23 September 2020.

³ See the Amendment Bill to the Arbitration and Conciliation Act 11 of 1988.

⁴ See Kingsley Alu 'Nigeria begins reforms of international investment agreements' *Leadership* 9 August 2020 available at <https://leadership.ng/2020/08/09/nigeria-begins-reforms-of-international-investment-agreements/>. accessed on 7 September 2020.

⁵ Pages 9-12 below.

⁶ According to a recent survey by the Queen Mary School of International Arbitration and White & Case on the Investor State Dispute Settlement (ISDS) system, the respondents expressed a preference for arbitration in comparison to other methods of dispute settlement like negotiation, mediation and litigation in the host state. See Queen Mary School of International Arbitration and White & Case '2020 International Arbitration Survey: Investor-State Dispute Settlement (ISDS)' available at <http://www.arbitration.qmul.ac.uk/research/2020-isds/> last accessed on 1 October 2020.

This study therefore evaluates Nigeria's investor-state arbitration framework in order to propose recommendations to address some of the criticisms against the ISDS framework and create a more effective legal framework in the Nigerian context.

II. EVOLUTION OF INVESTOR STATE DISPUTE SETTLEMENT

Prior to the development of the current system of investor state dispute settlement (ISDS), disputes relating to investment were resolved by gunboat diplomacy⁷ and later diplomatic espousal and diplomatic settlement.⁸ An aggrieved foreign investor looked to his home state to take up his cause and obtain relief on his behalf. The Permanent Court of International Justice in the case of *Mavrommatis Palestine Cession (Greece v UK)* expressed the idea as follows:

‘...it is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels.’⁹

Diplomatic espousal entailed the peaceful resolution of a dispute through diplomatic means. In essence, the government of a foreign investor had to seek redress for the wrong done by a host state. The underlying philosophy behind this method is best explained by the dictum of de Vattel, that whatsoever injures the national injures the state itself.¹⁰ This method of dispute resolution later developed into a system which saw states submitting disputes to international tribunals especially mixed international commissions, national commissions, and modern claims settlements on behalf of their nationals.¹¹ These modes of dispute settlement, sometimes plagued with uncertainties regarding how they may be invoked and the applicable laws,¹² eventually gave way to arbitration as the preferred mode of dispute settlement between investors and their host states.¹³

Investor-state arbitration, which has become the principal mode of dispute resolution, entails a foreign investor instituting a claim for breach of a treaty standard or protection, investment law, or customary international law obligations of a host state. Investment treaties¹⁴

⁷ Nigel Blackaby, Constantine Partasides, Alan Redfern et al *Redfern & Hunter on International Arbitration* 6 ed (2015) para 8.01.

⁸ Lim et al op cit note 1 at 2-9; Christopher Dugan, Don Wallace, Jr, Noah Rubins, et al, *Investor-State Arbitration* (2008) 27-31; Derains & Sicard Mirabel op cit note 1 at 6-7.

⁹ (1924) PCIJ Rep. Series A No. 2, 12.

¹⁰ E de Vattel *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns* (1916), vol III, 136.

¹¹ See Maximilian Koessler ‘Government espousal of private claims before international tribunals’ (1946) 13 *Chicago Law Review* 180-1.

¹² Lim et al op cit note 1 at 10-24.

¹³ *Ibid* at 87.

¹⁴ See for example Articles 2-6 of the UK-Nigeria and Articles 3-7 of the South Africa-Nigeria BIT.

and legislation¹⁵ typically provide foreign investors with approximately six measures of protection. These are: (a) no expropriation except in the interest of the public and in accordance with due process of law with adequate compensation; (b) fair and equitable treatment of investors; (c) full protection and security in respect of foreign investment; (d) no arbitrary or discriminatory treatment or measures towards investors (e) national or ‘most favoured nation’ treatment in ensuring that a foreign investor is not subjected to treatment less favourably than citizens of the host state or nationals of other foreign countries; and (f) free transferability of funds relating to investment.¹⁶

The establishment of the International Centre for the Settlement of Investment Disputes (ICSID) by the World Bank in 1966¹⁷ marked a major milestone in the growth of the investor state arbitration. As a neutral ISDS institution, ICSID provides a mechanism with the following outstanding features: (a) a valid submission to the jurisdiction of the ICSID Centre is irrevocable;¹⁸ (b) the unavailability of a challenge mechanism in respect of ICSID awards apart from the ICSID annulment process, thereby ensuring that ICSID awards are not subject to the varying laws of seats of arbitration as is the case with commercial arbitration;¹⁹ and (c) binding awards and the obligation of ICSID states to recognise ICSID awards in the same manner as final judgments of their national courts.²⁰

The ICSID Centre has become the most popular forum for the resolution of investment disputes and currently handles the majority of known investment disputes.²¹ For its part, Nigeria ratified the Convention promptly,²² enacted the ICSID Enforcement of Awards Act 1967, and designated the state-owned oil company, the Nigerian National Petroleum Corporation (NNPC), as a constituent agency pursuant to Article 25 (1) and (3) of the Convention.

¹⁵ See for example sections 24 and 25 of the Nigerian Investment Promotion Commission Act which provide for the guarantee of free transferability of funds relating to investment and the guarantee against expropriation without compensation, respectively.

¹⁶ Campbell McLachlan, Laurence Shore & Matthew Weiniger *International Investment Arbitration: Substantive Principles* (2008) ch.7; Rudolph Dolzer & Christoph Schreuer *Principles of International Investment Law* (2008) Ch VII; Derain & Sicard-Mirabel op cit note 1 at Ch. 6.

¹⁷ Lim et al op cit note 1 at 26-27.

¹⁸ Article 25(1) of the ICSID Convention.

¹⁹ Ibid Article 53.

²⁰ Ibid Article 54.

²¹ See <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics> last accessed on 13 November 2020.

²² Nigeria ratified the Convention on 23 August 1965, becoming the first African state to do so.

Investor-state arbitration — which for the purposes of this dissertation is broadly categorised into the ICSID and non-ICSID mechanisms — largely addresses the need of investors for a neutral dispute resolution mechanism being a vital investment protection guarantee as an alternative to the national court of the host state.²³

Furthermore, having regard to the widespread adoption of ICSID Convention,²⁴ and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention),²⁵ the advantage of enforceability of arbitral awards in a wide range of jurisdictions makes arbitration a preferable option. In contrast, foreign court judgments are usually subject to more stringent conditions and unclear legal requirements in Nigeria.²⁶ A neutral and impartial dispute resolution framework which helps an investor avoid the pitfalls and flaws of the court system is a vital component of maintaining a healthy investment climate.²⁷

Some scholars have canvassed the view that, there is a direct link between investment protection laws and treaties, and the attraction of foreign direct investment(FDI).²⁸ However, other scholars disagree and argue that BITs and investment protection laws may not significantly affect the attraction of FDI and that economic and political factors are more vital.²⁹ In view of this, there is no consensus among scholars about whether the existence of

²³ Carlos G Garcia ‘All the other dirty little secrets: Investment treaties, Latin America and the necessary evil of investor-state arbitration’ (2004) 16 *Florida Journal of International Law* 301 at 322-25,27.

²⁴ As at the time of writing, the ICSID Convention has 154 member states.

²⁵ As at the time of writing, New York Convention has 166 members.

²⁶ See Adewale Olawoyin ‘Enforcement of foreign judgments in Nigeria: Statutory dualism and disharmony of laws’ (2014) 10(1) *Journal of Private International Law* 129

²⁷ JL Staats & G Biglaiser ‘The effects of judicial strength and rule of law on portfolio investment in the developing world’ (2011) 92(3) *Social Science Quarterly* 609 at 611-15

²⁸ Peter Egger and Michael Pfaffermayr ‘The impact of bilateral investment treaties on foreign direct investment’ 2004 32(4) *Journal of Comparative Economics* 788 at 800-1; Eric Neumayer and Laura Spess ‘Do bilateral investment treaties increase foreign direct investments to developing countries?’ 2005 33(10) *World Development* 1567 at 1582; Lindsay Oldenski ‘What do the data say about the relationship between investor-state dispute settlement provisions and FDI?’ Trade and Investment Policy Watch of the Peterson Institute of International Economics Trade and Investment Policy Watch 11 March 2015 available at <https://www.piie.com/blogs/trade-investment-policy-watch/what-do-data-say-about-relationship-between-investor-state> accessed on 24 September 2020. See also Dorothy Ufot ‘The influence of the New York Convention on the development of international arbitration in Nigeria’ (2008) 25 *J. Int'l Arb.* 821.

²⁹ Jason Webb Yackee ‘Do bilateral investment treaties promote foreign direct investment? Some hints from alternative evidence’ (2011) 51(2) *Virginia Journal of International Law* 397 at 409-10,426-9,431; See also Mary Hallward Driemeier ‘Do bilateral investment treaties attract foreign direct investment? Only a bit and they could bite’ Policy Research Working Paper 3121 of The World Bank Development Group Investment Climate August 2003

treaty protection or a viable ISDS framework alone directly affects the inflow of investment to a jurisdiction.³⁰

It is therefore preferable to view measures to reform the investment arbitration regime in a jurisdiction as efforts towards creating a healthy investment climate rather than one that will necessarily attract investments. Furthermore, in the Nigerian context, as shall be seen in chapter 2 of this dissertation, the government has made concerted efforts to enact laws that are favourable to foreign investors, essentially making a deliberate departure from a legal regime which imposed a policy of indigenisation on foreign-owned enterprises in the 1970s³¹ to one which seeks to actively promote foreign investments in most major areas of the economy.³²

III. RECENT BACKLASH AGAINST THE ISDS SYSTEM

Recently, the current system of investor-state arbitration has been criticised for several reasons.³³ A key criticism of the ISDS system is that these disputes often arise from the regulatory or decision-making process of the government and investment arbitration entails the resolution of disputes with the government and public authorities through a non-judicial dispute resolution mechanism.

These concerns are premised on the view that actions which usually lead to investor-state arbitration proceedings often stem from the exercise of sovereign powers and damages are usually paid out of taxpayers' fund by the government or its agencies, where the investor succeeds in such proceedings. For this reason, the implications of an ISDS award are usually more far-reaching.³⁴ Other concerns include the inconsistency in awards, the lack of a system

³⁰ Jan Peter Sasse *An Economic Analysis of Bilateral Investment Treaties* (2011) 69-72; See also Susan D Franck 'Foreign direct investment, investment treaty arbitration and the rule of law' (2006) 19(2) *Pacific McGeorge Global Business & Development Law Journal* 337 at 348-52.

³¹ See section 5(1) of the National Enterprise Promotion Decree 4 of 1972 which was informally known as the Indigenisation Decree. Section 4 of the Decree proscribed the participation of 'aliens' in certain sectors of the economy listed at Schedule 1 of the Decree.

³² The Nigerian Investment Promotion Act 16 of 1995.

³³ Derains & Sicard Mirabel op cit note 1 at 13-16; Lim et al op cit note 1 at 479-494; Maria Laura Marceddu and Pietro Ortolani 'What is wrong with Investment Arbitration? Evidence from a set of behavioural experiments' (2020) 31(2) *European Journal of International Law* 405; George Kahale III 'Is Investor-State Arbitration Broken?' (2012) 7 *TDM* ; Thomas Dietz, Marius Dotzauer and Edward Cohen 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' (2019) 26(4) *Review of International Political Economy* 749; Olivia Chung 'The lopsided international investment law regime and its effect on the future of investor-state arbitration' (2007) 47 *Virginia Journal of International Law* 953 at 962-69.

³⁴ George Kahale III 'Rethinking ISDS' (2018) 44 *Brooklyn Journal of International Law* 11 at 22.

of precedent in arbitration generally,³⁵ and perceived reverse discrimination against domestic investors.³⁶

The extension of the principle of confidentiality, which is a feature of commercial arbitration to investment arbitration, has also been questioned.³⁷ This is because unlike commercial arbitration which usually concerns business disputes between private business entities,³⁸ investment arbitration entails the exercise of the state's sovereign powers and potentially, the disbursement of taxpayers' funds in satisfaction of a final award that may be handed down at the end of the process.

In 2010, in a paper to the Council of the European Parliament, the European Economic and Social Committee and Committee of the Regions³⁹ outlined the Commission's vision on the creation of a European investment policy by incorporating investment protection disciplines essentially building on the foundation of the disciplines that had been earlier negotiated by the EU member states in various free-trade agreements (FTA) or in individual investment agreements. Consequently, the recent free-trade agreements concluded between the European Union and Canada, Mexico, Singapore, and Vietnam include provisions for the settlement of disputes by a future investment court.⁴⁰ It has been reported that the EU intends to adopt this model in its future negotiations with Australia, Chile, China, Indonesia, Myanmar, New Zealand, the Philippines, and Tunisia.⁴¹

The decision of the Court of Justice of the European Union (CJEU) in *Slovak Republic v Achmea BV*⁴² on the incompatibility of the intra-EU BITs with EU law may be an indication of where the EU is headed regarding BITs as the basis for investment arbitration within the

³⁵ Unlike the principle of stare decisis in litigation especially in legal systems based on the English common law.

³⁶ Lim et al op cit note 1 at 483-85

³⁷ Derains & Sicard Mirabel op cit note 1 at 26; Dugan et al op cit note 8 at 706-07. Daniel Barstow Magraw Jr & Niranjali Amerasinghe 'Transparency and public participation in investor state arbitration' (2009) *ILSA Journal of International & Comparative Law* 337 at 346. It has been argued that the award in the sum of US\$6.6 billion granted in the *Process and Industrial Developments Ltd (P&ID) v Nigeria* case would not have been awarded if the proceedings had been transparent especially in view of the allegations against Nigeria's legal team and the manner in which it handled the country's representation. See Kate Beioley and Neil Munshi 'The \$6bn judgment pitting Nigeria against a London court' *Financial Times* 12 July 2020 available at <https://www.ft.com/content/91ddb53-a754-4190-944e-d472921bb81e> accessed on 12 July 2020.

³⁸ Confidentiality should be excluded in commercial arbitration proceedings which involve the state-owned corporations because of the principle of transparency in public affairs.

³⁹ The European Commission 'Towards a comprehensive European International Investment Policy' Brussels, 7.7.2010 COM (2010) 343 final.

⁴⁰ Derains & Sicard-Mirabel op cit note 1 at 15.

⁴¹ International Centre for Trade and Sustainable Development 'EU's Malmstrom makes global investment court pitch to stakeholders' available at <https://ictsd.iisd.org/bridges-news/bridges/news/eus-malmstr%C3%B6m-makes-global-investment-court-pitch-to-stakeholders> accessed on 7 September 2020.

⁴² *Slowakische Republik (Slovak Republic) v Achmea BV*, CJEU Case No. C-284/16, Judgment of 6 March 2018

EU. In the *Slovak Republic v Achmea BV* case, the CJEU held that the arbitration provisions in the BITs concluded between the EU member states are incompatible with EU law. The CJEU took the view that the BIT's establish a mechanism for settling disputes between an investor and a member state by an arbitral tribunal which falls outside the judicial system of the EU and as such cannot ensure the full effectiveness of EU law if such a dispute were to require the interpretation or application of EU law.⁴³

Although the decision in *Slovak Republic v Achmea BV* deals with BITs within the EU, there are other indications of the attitude of policymakers towards BITs as the basis of investment arbitration. Arguably, the proposal for the creation of a multilateral investment court to replace international investment arbitration within the EU is an additional indicator that the investor-state arbitration mechanism may further decline in popularity in Europe.⁴⁴

The United States government has repeatedly sought to rewrite its model BIT, beginning in 2004 with the introduction of its 2004 Model BIT.⁴⁵ The 2004 Model BIT reverses the minimum standard of treatment to be afforded to investors in the earlier Model BIT enacted in 1994. Whereas the 1994 BIT provided that the investment of the contracting parties is to be accorded fair and equitable treatment and in no case less favourable treatment than that required under customary international law, the 2004 Model BIT departs from this.⁴⁶ The 2004 Model BIT provides that each party shall accord to foreign investments no more than 'treatment in accordance with customary international law including fair and equitable treatment and full of protection and security.' As one author put it, what was the floor has now become the ceiling.⁴⁷

The United States, however, appears to address some of the criticisms of the ISDS system in its 2012 Model BIT, especially those relating to the concerns about the whittling down of state's sovereign powers in favour of foreign investors.⁴⁸ Article 12 of the Model BIT provides that the provisions of the BIT are subordinate to the environmental laws of the state.

⁴³ Ibid para 56-60.

⁴⁴ Lim et al op cit 1 at 504-507; Thomas Dietz, Marius Dotzauer and Edward Cohen 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' (2019) 26(4) *Review of International Political Economy* 749.

⁴⁵ Judge SM Schwebel 'A critical assessment of the US Model BIT', Keynote Address, Twelfth ITF Public Conference, London, *British Institute of International Law and Comparative Law* 15 May 2009.

⁴⁶ The US government has sought to address the problem of interpretation which has arisen from the lack of consensus among scholars about the minimum standards of treatment in customary international law in the 2012 Model BIT.

⁴⁷ Schwebel op cit note 45.

⁴⁸ It is not clear if the US Model BIT cited at Derains & Sicard-Mirabel op cit note 1 at 126 note 66 is an earlier version of the said BIT. This version provides that the taking of alien property without compensation in execution of tax laws, maintenance of public order, health, or morality etc shall not be considered wrongful.

However, the BIT does not expressly exclude the right of an affected investor to compensation where the enforcement of environmental laws violates investment guarantees. Article 13 of the BIT contains a similar provision regarding labour laws and states that the parties may not derogate from or waive labour laws to encourage investments. Significantly, Article 29 of the BIT addresses the issue of transparency and provides that both the documents relating to the arbitral process and hearing shall be made open to the public.

In other jurisdictions such as Australia⁴⁹ and New Zealand,⁵⁰ efforts are being made to exclude compulsory ISDS. Latin American countries such as Bolivia, Ecuador, and Venezuela have denounced the ICSID Convention,⁵¹ while South Africa terminated its BITs with countries in the EU following several disputes regarding a breach of treaty protection.⁵²

Some of the criticisms of the ISDS framework are being addressed at the international level by institutions such as UNCITRAL and also at national levels.⁵³ UNCITRAL's Working Group II began to examine transparency in ISDS around 2008.⁵⁴ In 2013, the UNCITRAL Rules on Transparency in treaty-based investor-state arbitration were adopted in respect of treaties concluded on or after 1 April 2014. These rules apply to investor-state arbitration conducted under the UNCITRAL Rules. UNCITRAL also allocated to Working Group III⁵⁵ the task of undertaking a careful analysis of the complaints to generate possible reforms.

As part of measures to address the complaint about tribunals composed of private individuals adjudicating matters involving the regulatory powers or actions of sovereign states, ICSID and UNCITRAL's Working Group III published a comprehensive draft Code of

⁴⁹ Leon Trakman 'Choosing domestic courts over investor state arbitration: Australia's repudiation of the status quo' (2012) 35 *UNSWLJ* 979 at 981,983; Jurgen Kurtz 'Australia's rejection of investor-state arbitration: causation, omission and implication' (2012) 27 *ICSID Review* 65

⁵⁰ See Derains & Sicard-Mirabel op cit note 1 at 15.

⁵¹ Lim et al op cit note 1 at 479. Jurisdictions like Indonesia have also terminated their BITs. See Nicholas Lingard and Lexi Menish 'Indonesia BIT Termination: not the end of the story' available at <https://globalarbitrationreview.com/article/1148998/indonesia%E2%80%99s-bit-terminations-not-the-end-of-the-story> accessed on 3 October 2020

⁵² Department of Trade & Industry of South Africa 'Bilateral Investment Treaty Policy Framework: Government Position Paper' June 2009; Jennifer Reed 'South Africa revolutionizing foreign investment protection system' (2014) 6 *Year Book of Arbitration and Mediation* 295 at 298-9; Nicholas Peacock and Hanna Ambrose 'South Africa terminates its bilateral investment treaty with Spain: Second BIT terminated, as part of South Africa's planned review of its investment treaties.' *Arbitration Notes* 21 August 2013 available at <https://hsfnotes.com/arbitration/2013/08/21/south-africa-terminates-its-bilateral-investment-treaty-with-spain-second-bit-terminated-as-part-of-south-africas-planned-review-of-its-investment-treaties/> accessed on 25 September 2020; Jackwell Ferris, Challenging the Status Quo – South Africa's Termination of its Bilateral Trade Agreement *DLA Piper International Arbitration Newsletter* Dec 10 2014.

⁵³ US Model BIT 2012; Lim et al op cit note 1 at 495-500.

⁵⁴ See A/CN.9/712- Report of the Working Group II (Arbitration and Conciliation) on the work of its fifty-third session available at <https://undocs.org/en/A/CN.9/WG.II/WP.160> last accessed on 26 September 2020

⁵⁵ See https://uncitral.un.org/en/working_groups/3/investor-state accessed on 6 January 2020

Conduct for Adjudicators in ISDS in May 2020 to regulate the conduct of adjudicators and to address issues such as pre- and post-appointment obligations of adjudicators, repeat appointments, double-hatting etc.⁵⁶

Given the efforts highlighted above and ongoing reforms to address the complaints about the system, the ISDS framework is preferable particularly in view of the challenges associated with litigation in the Nigerian courts. Furthermore, unlike the EU which seeks to replace the ISDS system with a judicial system,⁵⁷ the decline in confidence in the Nigerian court system⁵⁸ makes arbitration a preferable option in the Nigerian context until the reforms necessary to restore the Nigerian judiciary to its past glory are undertaken.

IV. STATE OF CRISIS IN THE NIGERIAN JUDICIARY AND THE PREFERENCE FOR ARBITRATION IN NIGERIA

Arguably, one of the strongest justifications for the retention of ISDS in the Nigerian context is the state of crisis in the Nigerian judiciary.⁵⁹ First, the quality of the bench has diminished owing to a flawed judicial appointment process, with allegations of the appointment of inexperienced and unqualified judges in some instances.⁶⁰ Moreover, the courts have been

⁵⁶ See Draft code of conduct for Adjudicators in Investor-State Dispute Settlement available at <https://uncitral.un.org/en/codeofconduct> last accessed on 26 September 2020. See also Laura Pereira and Zara Desai 'A Binding Code of Conduct for Adjudicators: A Step Forward?' available at <http://arbitrationblog.practicallaw.com/a-binding-code-of-conduct-for-adjudicators-in-investor-state-disputes-a-step-forward/> last accessed on 4 September 2020.

⁵⁷ One of the grounds of Kahale's criticism of the ISDS system is that, while the judicial systems of the countries kicking against the ISDS system are not perfect, they make more effort than arbitral tribunals in the interpretation of laws and agreements. See Kahale op cit note 34 at 20.

⁵⁸ See pages 9-12 of this dissertation.

⁵⁹ Okechukwu Oko 'Seeking justice in transitional societies: An analysis of the problems and failures of the judiciary in Nigeria' (2005) 31(1) *Brooklyn Journal of International Law* 9 at 24-35; Ademola Jonathan Bamgbose *Towards a Suitable Domestic Arbitration Practice in Nigeria* (unpublished PhD thesis, University of Warwick, 2016) 20-34.

⁶⁰ Bamgbose ibid at 38-9; Tobi Soniyi 'Lawyers ask Buhari to reject NJC's nominees as FCT judges' *Thisday* 8 May 2020 available at <https://www.thisdaylive.com/index.php/2020/05/08/lawyers-ask-buhari-to-reject-njcs-nominees-as-fct-judges/>; Halima Yahaya 'Controversy as NJC recommends relatives of Supreme Court judges, others for appointments' *Premium Times* 8 May 2020 available at <https://www.premiumtimesng.com/news/headlines/391898-controversy-as-njc-recommends-relatives-of-supreme-court-judges-others-to-buhari-for-appointments.html> last accessed on 26 September 2020. The *Thisday* and *Premium Times* news reports relate to the nomination of unqualified candidates to the High Court of the Federal Capital Territory. The lawsuit filed to prevent the appointment of these unqualified candidates was dismissed on 30 September 2020 by the Federal High Court on the ground that the non-government organization which filed the suit lacked the locus standi to institute the action. See <https://www.premiumtimesng.com/news/more-news/417638-court-dismisses-suit-challenging-buharis-appointment-of-judges.html> See s/; Bolanle Olabimtan 'Osinbajo: Appointment of Judges in Nigeria influenced by Elites' *The Cable* 8 August 2020 available at https://www.thecable.ng/osinbajo-appointment-of-judges-in-nigeria-is-influenced-by-the-elite?fbclid=IwAR1S17PqrQ5kEqIX3iWSyUfx3UhBGOP3UFBY7p1UI44mHQZPUGLy2D06TpA_ last accessed on 8 August 2020.

known to hand down contradictory decisions even at the Supreme Court level.⁶¹ There have been displays of incompetence and ineptitude and recently the question of how arbitration-friendly Nigeria is was posed following a Lagos High Court decision which was manifestly contrary to well-known arbitration principles.⁶²

Secondly, allegations of corruption have also emerged and become rife.⁶³ Corruption – together with the snail speed of the proceedings - have led to a loss of confidence in the judiciary. The dysfunction in Nigeria’s judicial system was highlighted succinctly by Abdulai as follows:

‘That the nation’s judiciary is currently passing through a difficult and traumatic phase in its annals is quite obvious and certainly not in doubt. It is phase which is inevitably marked by deep loss of faith in the judicial process and the courts. Claims of ethnic lop-sidedness in the constitution of the Federal judiciary, serious allegations of corruption, ineptitude, laziness, incompetence against judicial officers, charges of abuse of office even against the Supreme Court judges.’⁶⁴

⁶¹ See for instance, the contradictory decisions of the Supreme Court on the issue of the admissibility in evidence, of a registrable land instrument which has not been registered, in the cases of *Abdullahi v Adetutu* 2019 LPELR 47384 (SC) and *Benjamin v Kalio* 2018 (15) NWLR (part 1641) 38 (SC). See also the conflicting decisions of the Supreme Court on the applicability of sections 96-98 of the Sheriffs and Civil Process Act. 40 of 1945 to originating processes of the Federal High Court where such processes are to be served out of the state of issue, in the cases of *Izeze v INEC* 2018 LPELR 44284 (SC) and *John Hingah Biem v SDP & 2 others* (SC) unreported case SC/341/2019 of 14 May 2019. See further Enefiok Essien ‘Conflicting rationes decidendi: The dilemma of the lower courts in Nigeria (2000) 12 *African Journal of International & Comparative Law* 23; E.Q Okolie ‘A Critical Review of Conflicting Judgments of the Appellate Courts in Election Matters <http://www.globalacademicgroup.com/journals/knowledge%20review/A%20CRITICAL%20REVIEW%20OF%20CONFLICTING%20JUDGEMENTS.pdf> accessed on 7 August 2020.

⁶² See the decision of the High Court of Lagos State in *Global Gas and Refining Limited v The Shell Petroleum Development of Company Nigeria Ltd* unreported case no LD/1910GCM/2017 of 25 February 2020 where the unsuccessful claimant challenged the President of the arbitral tribunal on the grounds of bias. This allegation of bias was because the president acted as an expert witness at the quantum phase in a litigation involving a related entity of the respondent and testified about the position of Nigerian law on the assessment of damages. The Claimant took the view that the president might have been inclined to ‘compensate’ the respondent having previously testified against a related entity. The court, however, refused to consider the arguments relating to whether such an incident fell within the degrees of affinity that required disclosure under IBA Guidelines on Conflicts of Interests in International Commercial Arbitration 2004 and took the view that once an arbitrator is challenged, such an arbitrator must resign. See also Funke Adekoya ‘Global gas and refinery limited and Shell Petroleum Development Company Limited: Is Nigeria pro or anti-arbitration? The Lagos High Court says that when challenged, an arbitrator should just resign’ available at http://arbitrationblog.kluwerarbitration.com/2020/05/16/global-gas-and-refinery-limited-and-shell-petroleum-development-company-is-nigeria-pro-or-anti-arbitration-the-lagos-high-court-says-that-when-challenged-an-arbitrator-should-just-resign/?print=print&doing_wp_cron=1596829884.0590689182281494140625 accessed on 7 August 2020.

⁶³ Gafar Idowu Ayodeji & Samuel Ibidapo Odokoya ‘Perception of judicial corruption: assessing its implications for democratic consolidation and sustainable development in Nigeria’ (2014) 16(2) *Journal of Sustainable Development in Africa* 67; A.O Enofe, B.O Ezeani and O.M Eichie ‘Perceptions of corruption in the Nigerian Judiciary’ (2015) 1(8) *Journal of Political Science and Leadership Research* 86.

⁶⁴ Ibrahim Abdulai ‘Independence of the judiciary in Nigeria: A myth or reality’ 2014 2(3) *International Journal of Public Administration and Management Research* 55-6; See also Bamgbose op cit note 59 at 21-3

Solutions to the problems in the Nigerian judiciary can only be achieved in the long term. The remedy must entail far-reaching institutional reform including the entrenchment of a transparent appointment process that ensures that only deserving candidates make it to the bench and the phasing out of the corrupt and incompetent judges. These measures will likely take a long time to attain in the light of current realities.

From all indications, Nigeria has not even begun the process of reforming the appointment process.⁶⁵ Therefore, Nigeria cannot dispense with the ISDS framework for now. Indeed, the former Chief Justice of Nigeria, Justice Aloma Muktar, has recognised the negative impact that the crisis in the judiciary could occasion for the inflow of foreign investments into the country.⁶⁶ On this premise, Nigeria should retain the ISDS framework.

Regarding the ICSID process, this dissertation considers measures to improve the efficacy of the process such as providing express consent to the ICSID Centre in legislation in addition to the existing treaties,⁶⁷ the enforcement of provisional measures in aid of ICSID arbitration, and possibly improving the position of successful parties in ICSID Additional Facility arbitration by extending the application of the ICSID (Enforcement of Awards) Act to ICSID Additional Facility awards, in exercise of state legislative powers, rather than in fulfilment of Nigeria's obligations under Article 54 of the ICSID Convention, in order to improve the efficacy of ISDS process in Nigeria.

These measures will ensure that a wider range of potential disputants have access to the ICSID system being a neutral and effective dispute resolution framework, thereby avoiding litigation in the Nigerian courts with its attendant challenges as discussed above. The outcome of such a dispute resolution mechanism, i.e. a final arbitral award, where there are no grounds

⁶⁵ See notes 59-60 above.

⁶⁶ Bamgbose op cit note 59 at 22.

⁶⁷ It is preferable for consent to ICSID arbitration to be included in national legislation because Nigeria only has BITs with 15 countries but hosts investments from a number of important countries with which it has no BIT, chief among which are the United States and India. See United States Department of State 'US Relations with Nigeria' available at <https://www.state.gov/u-s-relations-with-nigeria/#:~:text=The%20United%20States%20is%20the,destination%20in%20Sub%2DSaharan%20Africa> last accessed on 13 November 2020; Nigeria Investment Promotion Commission 'Indian Investments in Nigeria exceeds 15 billion dollars, says High Commissioner' 28 January 2020 available at <https://nipc.gov.ng/2020/01/28/indian-investments-in-nigeria-exceed-15-billion-dollars-says-high-commissioner/> last accessed on 30 September 2020. See also the UK Department for International Development 'Nigeria Investment Guide 2020' available <https://www.tralac.org/documents/resources/by-country/nigeria/3091-nigeria-investment-guide-january-2020/file.html> at page 19 last accessed on 3 October 2020. Also, as shown in Chapter 3 of this work, several regional treaties either contain no provisions or unclear provisions for investor-state arbitration. In other words, Nigeria's treaty framework is inadequate as the basis for consent to ICSID⁶⁷ or even UNCITRAL arbitration because of the wide range of investors who do not have treaties with Nigeria. See Chapter 3 of this dissertation.

upon which same may be annulled, is enforceable directly at the Supreme Court,⁶⁸ thereby avoiding the delay associated with post-arbitral award litigation⁶⁹ in Nigeria.⁷⁰

The non-ICSID investment arbitration mechanism includes ad-hoc arbitration, usually under the UNCITRAL Arbitration Rules and institutional arbitration rules such as those of the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), etc. A number of important reforms are required in respect of the non-ICSID mechanism being outside the self-contained ICSID process, especially in the area of court-ordered measures and post arbitral award litigation, i.e. applications for the setting aside and the recognition and enforcement of arbitral awards.

In essence, even where a dispute is to be resolved by arbitration, a party may require the aid of the courts for measures such as interim relief and enforcement or post arbitral award proceedings; hence, the courts are not always dispensable. The unique problems with enforcement mechanism under the New York Convention in Nigeria, together with other procedural problems in the Nigerian context, require reforms.⁷¹ This dissertation therefore examines reforms to make the ISDS system more effective in Nigeria.

V. RELEVANCE OF THE RESEARCH

This research is relevant for three key factors: (a) Questions have arisen about Nigeria's investment climate recently having regard to a number of notable incidents; (b) Nigeria seeks to diversify its economy by attracting FDI and weaning itself off its overdependence on oil revenues; and (c) the ongoing efforts to amend the Arbitration Act and reform the country's investment protection framework.

(a) Questions about Nigeria's investment climate in recent times

Foreign Direct Investment (FDI) is important to the economic growth of developing countries like Nigeria.⁷² In recognition of this, by the mid-1990s, Nigeria gradually shifted its policy from that of indigenisation and nationalisation of foreign-owned business ventures⁷³ to one

⁶⁸ See section 1 of the ICSID (Enforcement of Awards) Act.

⁶⁹ Post arbitral award litigation refers to court proceedings relating to the enforcement and setting aside of arbitral awards.

⁷⁰ See section IV(b) of Chapter 4 below.

⁷¹ See Chapter 4 of this dissertation

⁷² Ogunleye Oyin *The Effect of Foreign Direct Investment: Case Study Nigeria* (Msc Thesis, University of Oulu, 2014) 30, 39-46.

⁷³ See sections 4 and 5 of the Nigerian Enterprise Promotion Decree 4 of 1972 which was infamously dubbed the Indigenisation Decree; See also Paul Collins 'The political economy of indigenization: The case of the Nigerian enterprise promotion decree' (1974) 4(4) *African Review* 494 and Ismaila Mohamed *The Nigerian Enterprises*

which strives to create an enabling environment for investment protection.⁷⁴ Lately, however, Nigeria's commitment to investment protection has been questioned due to certain developments. Three key incidents which have led to these concerns are worthy of discussion.

The first of these incidents relates to the attempts by the government to adjust the revenue-sharing formula of the production-sharing contracts in the oil and gas industry - the most important sector of Nigeria's economy - without due process of law. The oil-producing states wanted the federal government to increase its share of revenue under the various production-sharing contracts (PSC) with international oil companies (IOCs) in the oil and gas industry, with the ultimate objective of ensuring that the states receive a greater revenue allocation from the Federal Government. This increment was sought in accordance with section 16(1) of the Deep Offshore and Inland Basing Production Sharing Contracts Act 26 of 1999 (the PSC Act), which provides that the PSC Act shall be amended to adjust the revenue-sharing formula between parties to various PSCs, once the price of crude oil in the global market exceeds US\$20 per barrel. The said adjustment is to be made to initiate an upward review of the government's share of profits oil under the PSCs while the IOCs' share of profit will be consequently reduced.

However, instead of seeking legislative amendment at the National Assembly to effect the amendment of the PSC Act, the Attorney-Generals of the oil-producing states instituted action at the Supreme Court to compel the executive arm of government to amend the PSC Act to increase the government's share of the revenue under the PSC.⁷⁵ Subsequently, the parties to the action reached an out of court settlement agreement on the interpretation of the relevant provisions of the PSC Act and for the government's shares of revenue to be adjusted accordingly. Following the execution of the settlement agreement, the parties successfully applied to the Supreme Court for this settlement agreement to be entered as a consent judgment.⁷⁶

Promotion Decrees (1972 and 1977) and Indigenization in Nigeria (unpublished PhD Thesis, University of Warwick, 1985) 58-65.

⁷⁴ See the preamble to the Nigerian Investment Promotion Commission Act 16 of 1995 and generally, the Foreign Exchange Monitoring and Miscellaneous Provisions Act 17 of 1995.

⁷⁵ See *Attorney General of Rivers & Others v Attorney General of the Federation* 2019 (1) NWLR (part 1652) 53(SC). The suit was commenced at the Supreme Court in the original jurisdiction of the court pursuant to section 232(1) of the Constitution of the Federal Republic of Nigeria 1999 which confers original jurisdiction on the Supreme Court in respect of disputes between the states and the federation. As a result of this, other interested parties in the suit were unable to join.

⁷⁶ *Ibid.* A consent judgment is one entered by a court pursuant to an agreement reached by the parties to a dispute and constitutes a final judgment of court which may only be appealed with leave of court. See section 241(2)(c)

Because of the potentially adverse effect of this action on their commercial interests, the IOCs⁷⁷ applied to join the suit on the ground that they would be affected by the outcome.⁷⁸ They also contended that the suit ought not to be heard in the original jurisdiction of the Supreme Court because hearing of the suit by the Supreme Court in the exercise of its original jurisdiction would potentially lead to the exclusion of interested non-government parties, as the original jurisdiction can only be exercised in respect of disputes between the state governments or a state government and the federal government.⁷⁹ The Supreme Court however rejected this application and proceeded to enter the consent judgment.⁸⁰

This attempt to unilaterally amend the terms of the PSCs led to the commencement of ad hoc arbitration proceedings by the IOCs.⁸¹ The move was perceived as an attempt by the government to increase the share of revenues due to it under the PSCs in the oil and gas industry without due process of law⁸² for several reasons.

First, the legal correctness of the Supreme Court is questionable.⁸³ Secondly, the unilateral amendment of the contract to increase the share of government revenues retrospectively appeared to be an act of indirect expropriation especially where the government's previous conduct indicated that it had elected not to amend the PSC Act. There was therefore a legitimate expectation that it had waived its potential increased earnings for those years.

The second key incident appeared to be a breach of the guarantee of free transferability of funds relating to investment. A dispute arose as to whether MTN Nigeria Communications Plc (MTN) had repatriated funds to South Africa between 2007 and 2015 in contravention of regulatory requirements in the financial sector. Consequently, the Central Bank of Nigeria

of the Constitution of the Federal Republic of Nigeria 1999 (as amended); See also *Afegbai v Attorney General of Edo State* 2001 (33) WRN 29(SC).

⁷⁷ The IOCs applied to join the suit through the Lagos Chamber of Commerce and Industry.

⁷⁸ *In Re Lagos Chamber of Commerce & Industry* 2019 (1) NWLR (part 1652) 91.

⁷⁹ Section 232(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

⁸⁰ See *Attorney General of Rivers & Others v Attorney General of the Federation* 2019 (1) NWLR (part 1652) 53 at 71 (SC); *Re Lagos Chamber of Commerce & Industry* 2019 (1) NWLR (part 1652) 91 at 95-6 (SC).

⁸¹ This started with suits commenced for interim orders of protection pending the commencement of arbitration. See for instance *CNOOC Exploration and Production Limited & Anor v NNPC & Others* (FHC) unreported case FHC/L/CS/158/2019.

⁸² See for example Templars 'A coup against PSC contractors? Re: Attorney General of Rivers State & 2 Others v Attorney General of Federation: Impending Review of Nigeria's PSC Act' available at <https://www.templars-law.com/a-coup-against-psc-contractors-re-attorney-general-of-rivers-state-2-others-v-attorney-general-of-the-federation-impending-review-of-nigeria-psc-act/> last accessed on 3 October 2020.

⁸³ This is because it is the duty of the court to interpret statutes especially mandatory provisions of same, hence it is submitted that parties to a dispute cannot enter into an agreement as to how a court should interpret a statute, especially one which confers a duty on a public authority.

(CBN) directed MTN to repay the repatriated funds into its Nigerian bank accounts.⁸⁴ The CBN subsequently realised that it had reached its decision erroneously and reversed same.⁸⁵

Thirdly, at the regional level, the Lagos State government imposed a ban on motorcycle taxis (locally known as okadas) in several important local government areas in the state⁸⁶ only months after the government had announced that such transportation solutions would be incorporated in developing a holistic transportation framework to address the transportation challenges in the state.⁸⁷ The move negatively affected motorcycle start-up companies, including some foreign-owned ones like Gokada, and raised questions about the investment climate in Nigeria, especially after the Lagos State government had by its conduct encouraged the motorcycle start-ups to invest in the state and given assurances that the motorcycle taxi solution would be incorporated into the state's transportation system.⁸⁸

(b) Decline in oil prices and urgent need for diversification of the economy

Nigeria plunged into a deep economic recession in 2016 following the crash in global oil prices.⁸⁹ Oil is Nigeria's most important export and primary source of foreign revenue hence the crash of oil prices from US\$115 in June 2014 to about US\$31 in January 2016, led to a devaluation of the naira with attendant economic problems.⁹⁰ At the time, there was little hope

⁸⁴ MTN Group eventually reached a settlement with the Central Bank of Nigeria on the issue. MTN provided additional document which persuaded CBN to agree that MTN was no longer required to repatriate the transferred funds as initially directed. See Carin Smith 'MTN settles with Nigerian central bank on \$8.1bn dispute' *Fin 24* 27 December 2018 available at <https://www.fin24.com/Companies/ICT/mtn-settles-with-nigerian-central-bank-on-81bn-dispute-20181227> accessed on 27 December 2019 at 16:52; See also Babatunde Ogunleye 'The Dynamics of Foreign Investment Flows in Nigeria' *Steers Business* 1 May 2018 available at <https://www.steersng.com/article/the-dynamics-of-foreign-investment-flows-in-nigeria> last accessed on 27 September 2020.

⁸⁵ Ibid.

⁸⁶ Oluwatosin Adeshokan 'Lagos motorcycle ban hits digital ride firms, chills investor climate' *The Africa Report* 3 February 2020 available at <https://www.theafricareport.com/22846/lagos-motorcycle-ban-hits-digital-ride-firms-chills-investor-climate/> accessed on 8 August 2020.
<https://www.bbc.com/news/world-africa-51353665>

⁸⁷ Nzekwe Henry 'MAX.ng reveals how govt broke its its own law and promises with recent Okada ban which could tank E-Hailing start-ups' *Weetracker* 30 January 2020 available at <https://weetracker.com/2020/01/30/max-ng-faults-lagos-okada-ban/> accessed on 8 August 2020.

⁸⁸ Ibid. See also the Speech of Governor Babajide Sanwo Olu of Lagos State at *The Platform Nigeria* on 1 October 2019 available at https://www.youtube.com/watch?v=f3qzMw_CcfU last accessed on 3 October 2020.

⁸⁹ Godwin Emefiele 'From Recession to Growth: The Story of Nigeria's Recovery from the 2016 Economic Recession' paper delivered at the Special Convocation of the University of Nigeria, Nsukka, on May 17, 2019

⁹⁰ Ibid, the country's economic projections and budgetary plans are usually dependent on the price of crude oil in the global market hence fluctuations in price often directly affect the economy. See Ibrahim Alley, Ayodele Asekomeh, Hakeem Mobolaji et al 'Oil Price Shocks and Nigerian Economic Growth' (2014) 10(19) *European Scientific Journal* 375 at 381,387; Adeleke Omolade, Harold Ngalawa & Adebayo Kutu 'Crude oil price shocks and macroeconomic performance in Africa's oil-producing countries' (2019) 7(1) *Cogent Economics & Finance* 1607431 13-14 1607431 available at <https://www.tandfonline.com/doi/pdf/10.1080/23322039.2019.1607431?needAccess=true> accessed on 10 August 2020.

that oil prices would rise again in the near future because of the abundant supply of crude oil in the global market. It became apparent that the government could not continue to defer the requisite steps because of the need to diversify the economy. The COVID-19 crisis has further deepened the country's economic woes.⁹¹

A shift from the overdependence on crude oil cannot not be achieved overnight. The diversification of the economy is a long-term solution.⁹² The country is, however, yet to fully recover from the resultant economic problems of the recession, especially the depreciation of the naira. The COVID-19 pandemic and its effects have further deepened the country's economic woes.⁹³ The immediate solutions appear to be the attraction of foreign direct investment and the amendment of tax statutes to increase tax revenue.⁹⁴

In demonstrating a commitment towards attracting foreign direct investment (FDI), a state needs to create an enabling environment for the protection of such investment. The following remarks by Akinsanya state the point of view of the investor quite succinctly:

‘...private investors invest to make profits and not for reasons of benevolence. Thus, if they make profits, they expect albeit not unnaturally to keep them, subject to payment of appropriate taxes to the local authorities; if they acquire property, they expect to be entitled to keep it. The feeling of insecurity in these respects is perhaps the major deterrent to the flow of direct foreign investment in less developed countries.’⁹⁵

The concern highlighted in the above quote cannot be overstated as the country seeks to attract FDI. These concerns are further magnified when one considers the mixed signals from the government of Nigeria. On the one hand, in its bid to attract foreign investment, President Muhammadu Buhari established the Presidential Enabling Business Environment Council (PEBEC) to remove ‘bureaucratic constraints to doing business in Nigeria and make the

⁹¹ The World Bank Press Release No: 2020/154/Afr *Nigeria's economy faces worst recession in four decades, says New World Bank Report* available at <https://www.worldbank.org/en/news/press-release/2020/06/25/nigerias-economy-faces-worst-recession-in-four-decades-says-new-world-bank-report> accessed on 8 August 2020.

⁹² PWC ‘Nigeria's economic recovery Defining the path for economic growth’ November 2017. Available at <https://www.pwc.com/ng/en/press-room/nigerias-economic-recovery.html> accessed on 8 August 2020.

⁹³ The World Bank Press Release No: 2020/154/Afr *Nigeria's economy faces worst recession in four decades, says New World Bank Report* available at <https://www.worldbank.org/en/news/press-release/2020/06/25/nigerias-economy-faces-worst-recession-in-four-decades-says-new-world-bank-report> accessed on 8 August 2020.

⁹⁴ The government amended various tax statutes by the enactment of the Finance Act 1 of 2019. See also Dike Onwuamaeze & Nume Ekeghe ‘Nigeria: No going back on aggressive tax drive, govt insists’ *Thisday* 23 September 2019 available at <https://www.thisdaylive.com/index.php/2019/09/23/no-going-back-on-aggressive-tax-drive-fg-insists/> accessed on 8 August 2020.

⁹⁵ Adeoye Akinsanya, ‘International protection of direct foreign investment in the third world’ (1987)36 *Int'l Comp. L Q* 58.

country a progressively easier place to start and grow a business'.⁹⁶ Also, the President signed the new Companies and Allied Matters Act - which contains a number of innovations to improve the ease of doing business in Nigeria - into law on 7 August 2020. On the other hand, the Nigerian government has previously taken actions like closing the borders to regional trade and the attempted to increase its revenue in the oil and gas industry through what can be described as the 'backdoor' as explained above.

(c) The need for a more effective investment dispute resolution framework

The inefficient judicial system and unreliable dispute settlement mechanisms in Nigeria have been cited as barriers to FDI in Nigeria.⁹⁷ The improvement of the legal framework for the resolution of investments is therefore an important step in creating a healthy investment climate.⁹⁸ In view of the recent incidents which have called into question the friendliness of Nigeria's investment climate, country-specific reforms to the ISDS framework to enhance the dispute resolution process in Nigeria will be instrumental in creating a healthy investment climate.

Obstacles inhibiting the efficacy of the arbitral process, especially at the enforcement stage in Nigeria, are worth exploring. This is because the arbitration process in Nigeria, especially outside the ICSID mechanism, is often the first stage of what is usually a two-stage dispute resolution process which entails both arbitration and litigation in instances where the unsuccessful party in the arbitration decides to challenge the award or resist the enforcement of same. In essence, even where a dispute has been submitted to arbitration, arbitration is typically the first stage of the two-stage process. The parties participate in arbitration as the first stage, and then litigate the second stage by way of enforcement and or setting aside proceedings with the attendant problems. Enforcement and setting aside proceedings are not exempt from the delays other litigation matters have been known to suffer.⁹⁹

⁹⁶ See PEBEC Website <https://easeofdoingbusinessnigeria.com/about-us/the-mandate> accessed on 6 January 2020.

⁹⁷ Nordea 'Nigeria: Investing in Nigeria' available at: <https://www.nordeatrade.com/en/explore-new-market/nigeria/investment#:~:text=According%20to%20the%20UNCTAD%202020,98%2C6%20billion%20in%202019.> accessed on 9 August 2020.

⁹⁸ O.A Odiase-Alegimenlen 'An appraisal of foreign investment promotion and protection measures operating in Nigeria' (2002) 3(2) *Journal of World Investment* 345 at 353,361-2.

⁹⁹ Olatinuolawa Fagboyegun *Enforcement of Foreign Investment Awards in Nigeria: A Case Study of the Oil and Gas Industry* (unpublished LLM dissertation, University of Pretoria, 2016) 52-4.

The Amendment Bill to the Arbitration Act, which was passed by the Nigerian Senate in 2018, addresses some of the inadequacies with Nigeria's arbitration framework.¹⁰⁰ Other issues such as the enforcement of provisional measures in support of ICSID arbitration, small investment claims, and delay in enforcement proceedings among others are explored to propose solutions that ensure that potential disputants are afforded an effective ISDS framework.

While this dissertation argues that arbitration process is preferable to litigation in Nigeria, the courts are often indispensable in the dispute resolution process. The reason for this seemingly contradictory position is that even where arbitration has been chosen, a party may require the assistance of a court in the arbitral process for measures such as the enforcement of interim relief and preservation of evidence. Furthermore, at the conclusion of the arbitration, a successful party may have to apply to court for the recognition and enforcement of the award where the losing party does not comply with the award willingly. However, in granting such remedies, the court is less involved with the consideration of the merits of the dispute than it would be if the dispute was submitted to it, hence the position may not be as diametrical as it may appear.

VI. OBJECTIVES OF THE RESEARCH

The primary objective of this research is to examine Nigeria's investment arbitration framework to identify the key challenges inhibiting the efficiency of the system in the Nigerian context and making proposals to address same. This dissertation examines key aspects of the statutes, conventions, and treaties relating to both the ICSID and non-ICSID investment arbitration framework especially as it relates to court-ordered measures, post-arbitral award litigation,¹⁰¹ and other innovations aimed at improving the ISDS framework in Nigeria.

VII. RESEARCH QUESTION

In light of the issues highlighted in the background to the study, what are the inadequacies in Nigeria's current ISDS framework and what possible reforms can be made to provide a more efficient legal regime?

¹⁰⁰ The president is yet to sign the bill into law.

¹⁰¹ Arguably, reforms in these areas will also improve the effectiveness of Nigeria-seated institutional investor-state arbitration under rules such as the ICC, LCIA etc.

VIII. RESEARCH METHODOLOGY AND THE STRUCTURE OF THE RESEARCH

The dissertation uses a doctrinal methodology examining primary and secondary sources. While the primary sources include statutes, treaties, arbitration rules, official documents of key institutions, and participants in the process and cases, the secondary sources comprise of books, journals, newspaper articles, conference papers, working papers, speeches, lectures, webinars, and relevant internet sources.

This work is divided into six chapters as follows: Chapter 1 provides an introductory study of the concept of investor-state arbitration and the background of the study. This chapter also contains the research question and the objectives of the dissertation. Chapter 2 contains a detailed discourse of the statutory framework for the conduct of investor-state arbitration in Nigeria. This chapter examines important legislation primarily the NIPC Act, ICSID Act, and the Arbitration Act. Chapter 3 discusses the treaty framework for ISDS in Nigeria. Chapter 4 identifies key inadequacies of Nigeria's ISDS legal framework while Chapter 5 contains proposals that should be adopted in dealing with the challenges identified in the preceding chapter. Finally, Chapter 6 concludes and summarizes the entire research.

CHAPTER TWO

THE STATUTORY FRAMEWORK FOR INVESTOR-STATE ARBITRATION IN NIGERIA

I. INTRODUCTION

This chapter examines the statutory framework for the conduct of investor-state arbitration in Nigeria. Like commercial arbitration, the jurisdiction of investment disputes is based on the consent of the parties.¹⁰² Apart from treaties and investment agreements, the consent of the government to the process is sometimes contained in statutes. Where the consent of the government is based on statutes, such consent is often expressed in the form of a standing offer which the investor may accept by filing a claim.¹⁰³

An important component of Nigeria's statutory framework for investor-state arbitration is Nigeria's consent to the ICSID Centre as contained in statute. This chapter also evaluates important statutes relating to the non-ICSID process, especially ad hoc arbitration, judicial measures in support of the arbitral process, and the enforcement of final awards. The principal investment arbitration legislation¹⁰⁴ are discussed in this chapter: (i) the NIPC Act; (ii) the ICSID (Enforcement of Awards) Act; and (iii) the Arbitration and Conciliation Act.

II. THE NIGERIAN INVESTMENT PROTECTION COMMISSION ACT 16 OF 1995

a. Objectives of the NIPC Act

The Nigeria Investment Promotion Commission Act 16 of 1995 (the NIPC Act)¹⁰⁵ was enacted by the Federal Military Government in 1995 to create a legal framework for investment protection and promotion in Nigeria and to establish the Nigerian Investment Promotion Commission as a statutory body for the regulation of foreign investment in the country. The

¹⁰² See for instance *Giovanni Alemanni and others v Argentina* ICSID Case No. ARB/07/8 Decision on Jurisdiction and Admissibility 17 November 2014, para 305. See also Andrea Marco Steingruber *Consent in International Arbitration* (2012) ch.11; Derain & Sicard-Mirabel op cit note 1 at 42-3; Dugan et al op cit note 8 at 219-20.

¹⁰³ Jan Paulsson 'Arbitration without privity' (1995) 10(2) *ICSID Review- Foreign Investment Law Journal* 232 at 234-35.

¹⁰⁴ There are also a number of sector-specific statutes such as the Petroleum Act 51 of 1969, which provide that disputes in those sectors shall be resolved by arbitration and the Nigeria LNG (Fiscal, Guarantees and Assurances) Act 39 of 1990 which contains Nigeria's consent to arbitration in disputes in the liquified natural gas sector. Those statutes are excluded because they are industry specific and do not usually give rise to much controversy.

¹⁰⁵ This was originally enacted as the Nigerian Investment Promotion Decree 16 of 1995. By sections 6(6)(d) and 315(1)(b) of the Constitution of the Federal Republic of Nigeria 1999, decrees passed by the Federal Military Government remain valid following the return of democracy in 1999 and assumed the status of Acts of the National Assembly.

NIPC Act remains one of the most important pieces of legislation for investment arbitration in Nigeria, despite the flaws contained in its dispute resolution provisions.

b. Scope and application of the Act

The NIPC Act applies to both local and foreign investment. It also sets out a negative list of sectors in which investors may not invest.¹⁰⁶ Notably, the Act contains investment guarantees such as unconditional transferability of funds relating to investment,¹⁰⁷ and non-expropriation of enterprise except for public purposes and with the prompt payment of compensation.¹⁰⁸

However, the NIPC Act is not a comprehensive investment protection statute as four of the usual investment guarantees - fair and equitable treatment, full protection and security, national treatment, and most favoured nation treatment - are absent.

The NIPC Act removes the restrictions on the ownership of shares in Nigerian enterprises imposed by previous statutes.¹⁰⁹ The legislation also seeks to regulate foreign investment by prescribing what enterprises of the Nigerian economy foreign investors are eligible to participate in,¹¹⁰ although most key sectors of the economy are open to foreign investors.

The NIPC Act provides that no foreigner may participate in business in Nigeria unless such an enterprise is incorporated or registered with the Corporate Affairs Commission (CAC) in Nigeria.¹¹¹ In turn, such companies with foreign participation must register with the Nigeria Investment Promotion Commission.¹¹² Furthermore, section 31 defines an enterprise with foreign participation as one duly registered with the NIPC.

Registration with the NIPC is vital. Arguably, only foreign owned enterprises duly registered can take advantage of the protection afforded by the Act. Furthermore, if a company

¹⁰⁶ Sections 18 and 31 of the NIPC Act. These are sectors not generally open to the public eg the production of arms, ammunition, military uniforms etc.

¹⁰⁷ Ibid at Section 24.

¹⁰⁸ Ibid at Section 25.

¹⁰⁹ This is in contrast to the Nigerian Enterprise Promotion Decree which contained a list of a commercial ventures exclusively reserved for Nigerians. Expatriates were however allowed to invest in those business activities if the nominal share capital of the company was N20,000,000 or more. See generally Khrushchev Ekwueme 'Nigeria's principal investment laws in the context of international law and practice' 49 (2) *Journal of African Law* 179.

¹¹⁰ Sections 17, 18 and 31 of the NIPC Act.

¹¹¹ See section 19(1) of the NIPC Act.

¹¹² Section 20 of the NIPC Act.

is not registered with the NIPC, such an enterprise would be carrying on business in Nigeria illegally and therefore ineligible to take advantage of the guarantees provided by the Act.¹¹³

c. Definition of ‘foreign investor’

The NIPC Act does not define who a foreign investor is for the purposes of section 26 (2) and (3) of the NIPC Act. One possible drawback of this lacuna, especially in view of the dispute resolution provisions of the NIPC Act, is that a company with a majority Nigerian shareholding and only a negligible foreign shareholding may seek to take advantage of the ICSID mechanism pursuant to section 26(2),(b),(c) and (3) because it is a foreign investor.

Having regard to the provision of sections 20 of the NIPC Act which makes registration with the NIPC compulsory for companies with foreign participation, it is arguable that a foreign investor for the dispute resolution provisions of the NIPC Act is a Nigerian registered company with majority foreign shareholding and duly registered with the NIPC.

Furthermore, if this contention arises before an ICSID tribunal, the tribunal would likely adopt a purposive interpretation of Article 25(2)(b) of the ICSID Convention¹¹⁴ and resolve the question by inquiring into the controlling interest of the company.¹¹⁵

d. Definition of ‘investment’

It is also important to consider what qualifies as an investment under the NIPC Act because of its significance for jurisdiction. An investment claim can only be brought in respect of a dispute relating to an ‘investment’ as defined by a treaty, investment agreement or an investment

¹¹³ Compliance with an investment legislation which imposes conditions precedent is important because in investment arbitration practice, jurisdictional objections have been raised against investor-state arbitral proceedings on the ground of non-compliance with domestic law. See for instance, *Fraport AG Frankfurt Airport Services Worldwide v Philippines*(II) ICSID Case No. ARB/11/12, Award dispatched on 10 December 2014, para 444, 461-468, where the tribunal dismissed Fraport’s claim for being inadmissible on the ground that it breached a constitutional rule and the Anti-Dummy Law of the Philippines which restricted the operation of public utilities to Philippine citizens or Philippine corporations with at least 60 per cent of the share capital owned by Philippine citizens.

¹¹⁴ Article 25(2)(b) of the ICSID Convention contemplates two definitions of nationality in respect of juridical persons for the purpose of filing an ICSID claim. The first relates to juridical persons who had the nationality of a contracting state other than the State party against which the claim has been filed. The second, which is relevant here, is that which states that ‘any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another contracting state for this Convention.’ The NIPC Act recognises that companies registered with the NIPC are companies with foreign participation and by incorporating the ICSID mechanism at section 26(3) of the NIPC Act, it is arguable that the Nigerian government recognises such companies may possess possessing the nationality of other ICSID Convention states.

¹¹⁵ See for example *National Gas SAE v Egypt* ICSID Case Arb/11/7, award dispatched on 3 April 2004, para 122-149, where the tribunal upheld an objection that an Egypt incorporated claimant could not be treated as a foreign investor due to the foreign control clause in Article 25(2)(b) of the ICSID Convention because the company in question was controlled by an Egyptian national.

protection statute.¹¹⁶ Moreover, an ICISD tribunal will only assume jurisdiction over an investment dispute rather than a commercial one.¹¹⁷

The definition of investment in the NIPC Act is unclear and tautological. ‘Investment’ is defined in the NIPC Act as: ‘investments made to acquire an interest in an enterprise operating within and outside the economy of Nigeria’. Reading the above definition of investment together with the definition of ‘enterprise’ provides more clarity as to what would qualify as ‘investment’ under the Act. Section 31 defines ‘enterprise’ as:

‘...an industry, project, undertaking, business to which this Decree applies or an expansion of that industry, undertaking, project or any part of that industry, undertaking, project or business and, where there is foreign participation, means such an enterprise duly registered with the Commission.’

The effect of the combined reading of the definitions of enterprise and investment as contained in section 31 of the NIPC Act is that the definition of ‘investment’ in the NIPC Act is broader than the ambit of investment as expounded in several landmark cases.¹¹⁸

ICSID tribunals have sought to give a narrow definition to the concept as the ICSID Convention itself does not define the term.¹¹⁹ Although these definitions as contained in arbitral awards are not binding on subsequent tribunals because of the absence of *stare decisis* in arbitration, they serve as a guide in defining the concept¹²⁰ and indeed, the test has been followed by many tribunals.¹²¹

Perhaps the landmark case on this issue is *Salini Construttori SpA and another v Morocco*,¹²² where the tribunal considered the question of whether a construction contract could be considered an ‘investment’ within the contemplation of Article 25(1) of the ICSID Convention. A government-owned company, Societe Nationale des Autoroutes du Maroc

¹¹⁶ Felix Okpe ‘The definition of investment and the ICSID convention: matters arising under the Nigerian investment promotion act and international investment law’ (2017) 18(2) *Afe Babalola University: Journal of Sustainable Development Law and Policy* 134 at 149-51.

¹¹⁷ See *Salini Construttori SpA and Anor v Morocco* ICSID Case No. Arb/004/4. Decision on jurisdiction 23 July 2001.

¹¹⁸ *Salini v Morocco* (supra); *Consorzio Groupement LESI Dipenta v People’s Democratic Republic of Algeria* ICSID Case No. Arb/03/8; *Phoenix v Czech Republic* ICSID Case No. ARB/06/5.

¹¹⁹ One of the drafts leading to the final version of the Convention had proposed a definition of ‘investment’ as follows: ‘any contribution of money or other or other assets of economic value for an indefinite period or, if the period be defined, for not less than five years.’ See Christoph Schreuer, Loretta Malintoppi, August Reinisch et al *The ICSID Convention: A Commentary* 2 ed (2009) 115.

¹²⁰ Derains & Sicard-Mirabel op cit note 1 at 25-27 and Lim et al note 1 at 211-30 explain the distinction between the subjective and objective approaches to the meaning of protected investments.

¹²¹ See *Salini v Morocco* decision on jurisdiction 23 July 2001 para 44-64; *Consorzio Groupement LESI-Dipenta v Republic of Algeria* ICSID Case No. ARB/03/8. decision on jurisdiction, 10 January 2005 para 13-15.

¹²² ICSID Case No. ARB/00/4.

(‘ADM’) acting on behalf of the Moroccan government had concluded a concession agreement with the claimants, two Italian-owned companies, Salini and Italstrades SpA for the construction of a highway between Rabat and Fes. Upon conclusion of the construction project, ADM refused to make the final payments due to the claimants as a result of which the arbitration was instituted.

The Italian government objected to the jurisdiction of the ICSID tribunal on the ground that the claims were for breach of contract and that same did not arise out of a violation of a BIT and did not relate to an investment as contemplated by Article 25(1) of the ICSID Convention. While noting that there had been few instances in which a controversy had arisen on the question of whether a venture amounted to an investment,¹²³ the tribunal considered a number of factors namely: (a) contributions; (b) a certain duration of performance of the contract; and (c) participation in the risks of the transaction and a contribution to the economic development of the host state. The tribunal found that all these elements were present in this case and accordingly held that the claims amounted to an investment as contemplated by Article 25 of ICSID Convention and the relevant BIT.¹²⁴

In view of the wide language employed by the NIPC Act in its definition of the concept of investment, the NIPC Act appears to offer an investor a wider protection in respect of activities that would qualify as investments than what is typically contained in treaty. This position may give rise to controversy especially where the tribunal has to determine the question of whether the dispute relates to an investment on the basis of the NIPC Act because there is no treaty between the home state of the investor and Nigeria.¹²⁵

The employment of such broad wording to include activities which may qualify as commercial transactions in defining the term, ‘investment’ was the subject of controversy in

¹²³ The tribunal noted that with the exception of the decision of the Secretary General of ICSID refusing to register a request for arbitration in respect of a dispute which arose out of a simple sale, previous awards had rarely dealt with the question of investment. See IFI Shihata and AR Parra ‘The Experience of the international Centre for Investment Disputes’ (1999) 14(2) *ICSID Review: Foreign Investment Law Journal* 308. Note, however, the case of *Fedax N.V v The Republic of Venezuela* ICSID Case No. ARB/96/3 where the tribunal observed that an investment is characterised by ‘a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host state’s development’.

¹²⁴ Schreuer et al op cit note 119 at 128 identify five tests for ascertaining whether a venture qualifies as an ‘investment’ namely: (a) the duration of the venture or enterprise, (b) regularity of profit and return, (c) assumption of risk, (d) substantial commitment of resources, and (e) significance for the host state’s development. It is also important to note that the Salini test has not always been followed. See Lim et al op cit note 1 at 222-23

¹²⁵ See for example the case of *Romak v Uzbekistan* PCA Case No. AA280, where the tribunal observed that a state may deem any form of asset or economic transaction including one-off sales contracts as investments, provided the wording of the relevant instrument leaves no doubt as to the intention to designate such commercial ventures as investment. See also Schreuer et al op cit note 119 at 122.

Malaysia Historical Salvors SDN BHD v Malaysia.¹²⁶ In this case, the claim was brought on the basis of the UK-Malaysia BIT. Article 1(1)(a) of the BIT defines ‘investment’ and includes the following items:

Every kind of asset and in particular, though not exclusively, includes:

- ...
- (iii) Claims to money or to any performance under contract having a financial value;
- (iv) Intellectual property rights and goodwill;
- (v) Business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

The investor brought the claim for payment due under a marine salvage contract. Malaysia challenged the jurisdiction of the tribunal on the ground that such a contract did not constitute a protected investment under Article 1(1)(a) of the BIT. Without referring to the said provision, the arbitrator found that the marine salvage contract did not possess the characteristics of a protected investment.

The investor applied to annul the decision on jurisdiction.¹²⁷ The annulment committee annulled the award on the ground that the sole arbitrator failed to consider the definition of investment under Article 1(1)(a) of the BIT. The committee explained that notwithstanding the applicability of Article 25 of the ICSID Convention, Article 1(1)(a) of the BIT was the primary consideration for determining whether the marine salvage contract was a protected investment.

It will therefore appear that the definition of investment in a treaty or statute may be upheld by a tribunal even if it falls short of the *Salini* test. This position is preferable and accords with the obligations of a state to honour its treaty obligations and domestic laws. Conversely, a state may choose to restrict the scope of its submission to ISDS, to only investment claims as defined in *Salini* to avoid opening the floodgates to sundry commercial claims.

While it has been said that the definition of investment in treaty provisions will override that of national investment legislation,¹²⁸ the availability of a more favourable definition in legislation that does not contradict a treaty may not pose any problems. In the light of decisions such as *Romak v Uzbekistan* and *MHS v Malaysia*, it is likely that a tribunal may give effect to a wider definition like the one in section 31 the NIPC Act which may be more favourable to a potential claimant.

¹²⁶ ICSID Case No. ARB/05/10. Award on jurisdiction 17 May 2007 para 146.

¹²⁷ *MHS v Malaysia*, decision on the Application for Annulment, 16 April 2009, para 80.

¹²⁸ See Okpe op cit note 116 at 149.

Furthermore, where the home state of an investor has a BIT with Nigeria which contains an umbrella clause,¹²⁹ it may be argued that such an umbrella clause may have the effect of extending the category of ventures that would qualify as an investment to include those that fall within the broader definition of section 31 of the NIPC Act. This is because umbrella clauses typically extend the obligations of the government beyond treaty protection to include a requirement to honour contractual and other obligations;¹³⁰ the duty of government to honour legitimate obligations includes abiding by its own laws. However, where there is a less favourable definition in legislation than what a treaty provides, by Article 27 of the Vienna Convention on the Law of Treaties 1969, the provision of the treaty ought to prevail.

If a foreign investor brings a claim which lacks the attributes of an investments as defined in cases like *Salini* against Nigeria on the basis of the NIPC Act, an ICSID tribunal may assume jurisdiction depending on how such a tribunal interprets the broad definition of investment contained in section 31 of the NIPC Act. In taking a position against such broad definitions, it has been held that there is a limit to how much parties can define the concept of investment for the purpose of ICSID jurisdiction.¹³¹ However, having regard to the lack of *stare decisis* in arbitration, it is uncertain if a tribunal will always be swayed by the prevalent position of ICSID jurisprudence on the definition of investment in Article 25(1) of the ICSID Convention.

e. Dispute resolution provisions

Section 26 of the NIPC Act provides for dispute resolution between the investor and the State. Section 26(1) generally provides that where a dispute arises between an investor and the Federal Government of Nigeria, such a dispute shall be resolved amicably. The provision of section 26(1) applies to both local and foreign investors.

Section 26(2) provides for the procedure to be adopted if parties fail to reach an amicable resolution of an investment dispute. Section 26(2)(a) contains Nigeria's express consent to domestic arbitration in respect of local investors. Section 26(2)(b) and (c) deal with

¹²⁹ See for example Article 3(5) of the Netherlands-Nigeria BIT.

¹³⁰ Lim et al op cit note 1 at 349-350. Article 3(5) of the Romania-Nigeria BIT which provides that 'each contracting party shall observe any obligation it has assumed regarding investments in its State territory by investors of the other Contracting Party' Interestingly Article 3(4) provides that 'if State Legislation of either Contracting Party entitles investment by investors of the other Contracting Party to treatment more favourable than is provided for by this Agreement, such legislation shall, to the extent that it is more favourable, prevail over this Agreement'.

¹³¹ *Joy Mining v Egypt* ICSID Case No. ARB/03/11, Award on jurisdiction 6 August 2004, para 50

the resolution of disputes between foreign investors and the Nigerian government. Section 26(2)(b) and (c) provide as follows:

(2) Any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions, may be submitted at the option of the aggrieved party to arbitration as follows:

(b) in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties; or

(c) in accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties.

It is clear from section 26(2)(b) and (c) that where a bilateral or multilateral agreement or treaty exists between the Federal Government and the home state of an investor, recourse will be made to the dispute resolution clause of such a BIT or MIT in resolving a dispute between the investor and Nigeria. Such a dispute resolution clause may provide for ICSID arbitration or UNCITRAL arbitration as a number of Nigeria's treaties do. When there is a treaty that provides for ICSID arbitration, the provision of such a treaty may be treated as Nigeria's standing offer to the jurisdiction of the ICSID Centre as contemplated by Article 25(1) of the ICSID Convention.

It is also important to note that while Article 25(1) of the ICSID Convention only requires consent to the jurisdiction of ICSID to be in writing, an ICSID tribunal has held that consent to ICSID jurisdiction must be explicit and not to be deduced or construed from the conduct of the parties in a given situation,¹³² hence questions may arise as to the adequacy of the conditional consent of the Nigerian government to the ICSID Centre as contained in section 26(3) of the NIPC Act. Section 26(3) of the NIPC Act provides as follows:

...where in respect of any dispute, there is disagreement between the investor and the Federal Government of Nigeria as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Disputes Rules shall apply.

From the above, it is clear that section 26(3) of the NIPC Act does not contain Nigeria's express consent to the jurisdiction of the ICSID Centre but one which is conditional upon a disagreement between a foreign investor and Nigeria as to the mode of dispute resolution. In essence, where there is an investment treaty between the home state of the investor and Nigeria, or other agreement which provides for the resolution of disputes through other means apart from ICSID, the Nigerian government may contend –and rightly so, it is submitted –that parties

¹³² See for instance *Cable Television of Nevis Ltd and Another v St. Kitts and Nevis* ICSID Case No. ARB/95/2 Award, 13 January 1997; See also Schruer et al op cit note 119 at 191.

have agreed on how to resolve their disputes and that there is no disagreement as to the mode of dispute resolution so as to trigger the conditional consent contained in section 26(3) of the NIPC Act.

This position may have practical relevance to Chinese investors who have significant investments in Nigeria but whose BIT with Nigeria does not provide for ICSID arbitration. In the absence of an investment agreement which provides for ICSID arbitration, a Chinese investor who desires to resolve his dispute through the ICSID mechanism because of the advantage of direct enforceability of awards at the Supreme Court if successful, amongst other advantages, will be unable to do so. This is because in such an instance, there is an agreement – i.e. the China-Nigeria BIT– between the parties on the resolution of disputes hence the condition for the applicability of section 26(3) is absent.

In essence, once there is a treaty between parties on the resolution of disputes, or some other investment agreement, by section 26(2)(b) and (c), recourse will be had to such a treaty or agreement and the conditional consent in section 26(3) will not be available. This argument may be extended to any investor whose home state is a party to an investment treaty with Nigeria, which provides for the resolution of investment disputes but makes no provision for ICSID arbitration.

The question of whether the provisions of section 26(2) and (3) of the NIPC Act amount to the consent of the Nigerian government to the ICSID Centre, arose in the case of *Interocean Oil & Development Company and Interocean Oil Exploration Company v Federal Republic of Nigeria*.¹³³ The respondent raised an objection to the jurisdiction of the ICSID Centre on the ground, inter alia, that mere reference to the ICSID rules at section 26(3) of the NIPC Act does not necessarily signify the consent of the Nigerian government to the ICSID Centre.

However, this objection was unsuccessful because the tribunal held that it was not ‘plausible in law or in practice’ to read the reference to the ICSID Rules at section 26(3) of the NIPC Act, as only indicative of the procedural rules to be applied. The tribunal further held that although section 26(3) merely refers to the ICSID Rules, there are no standalone ICSID Rules and that the ICSID Convention, ICSID Arbitration Rules, ICSID Institution rules, and

¹³³ ICSID Case No. ARB/13/20.

ICSID Administrative and Financial Regulations govern different stages and aspects of ICSID proceedings.¹³⁴

The position of the tribunal in *Interocean* above is convincing for a number of reasons. First, in the absence of a BIT or MIT between the US and Nigeria, which provides for dispute resolution, that the claimant, an American owned company, could have relied on to commence arbitration against Nigeria¹³⁵ further to section 26(2)(b) or (c) of the NIPC Act, they were qualified candidates eligible to take advantage of the conditional consent at section 26(3) of the NIPC Act.

It is however important to point out that the provisions of section 26(2)(b) and (c) alone do not amount to consent to the jurisdiction of the ICSID Centre as contemplated by Article 25 of the ICSID Convention. This is because while section 26(2)(b) provides that a dispute shall be resolved within the framework of any bilateral or multilateral agreement on investment protection to which the federal government and the investor's home state are parties, such a general reference to treaties and conventions which does not make a specific reference to the ICSID Centre or Convention is insufficient for ICSID jurisdiction. This is because membership of the ICSID Convention alone is insufficient as consent to ICSID jurisdiction; a separate agreement to submit to the jurisdiction of the ICSID Centre is required.¹³⁶

Secondly, the tribunal rightly rejected the respondent's contention that mere reference to the ICSID Rules does not amount to a submission of the ICSID Centre, as reference to the rules of an institution in an arbitration agreement or in the instant case, national law, likely signifies an intention to conduct institutional arbitration by the rules of that institution.¹³⁷ This is because Article 25(1) of the ICSID Convention does not distinguish between arbitration and conciliation.

In addition to this, by Rule 1 of the ICSID Rules of Procedure for Institution of Conciliation and Arbitration Proceedings, a claimant, at the point of submitting the claim, is at

¹³⁴ See para 75 of the decision of jurisdiction on preliminary objections on 29 October 2014.

¹³⁵ It is important to draw a distinction that may be drawn between treaties that allow an individual investor or corporate entity to seek redress and those which only provide for inter-state dispute settlement such as those of the World Trade Organization (WTO).

¹³⁶ Schruer et al op cit note 119 at 190.

¹³⁷ Nigel Blackaby et al advise against the approach of adapting institutional rules for use in an ad hoc arbitration or the use of the rules of an institution in an arbitration before a different institution. See Blackaby et al op cit note 7 para 1.144, note 154. It is, however, noteworthy that such clauses have been upheld in the Singaporean cases of *Insignia Technology Co Ltd v Alstom Technology Ltd* (2008) SGHC 134 (SC) and *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* (2013) SGHC 5 (HC).

liberty to choose between conciliation or arbitration. In essence, once there is a valid submission to the ICSID Centre, the argument that the statute which contains the consent does not specify the mode of dispute resolution is of no moment.¹³⁸

It is clear from the above that section 26(3) does not contain Nigeria's express consent to ICSID but rather consent which is conditional upon a disagreement between parties as to the mode of dispute resolution for the resolution of an investment dispute. This conditional consent may give rise to controversy and may be unavailable to a number of foreigners who hold substantial investments in the country.

III. ICSID (ENFORCEMENT OF AWARDS) ACT 49 OF 1967

Article 54 of the ICSID Convention provides that contracting states shall recognise an ICSID award as binding and enforce the pecuniary obligations imposed by such an award within its territories as if it were a final judgment of a court in that state. The ICSID (Enforcement of Awards) Act 49 of 1967 (the ICSID Act) was accordingly enacted to give effect to Nigeria's obligations under Article 54.

In giving effect to Article 54 of the Convention, section 1(1) of the ICSID Enforcement of Awards Act provides that an ICSID award shall be enforced as a final judgment of the Supreme Court. Thus, where a party seeking to enforce an award made by ICSID has filed a copy of such an award certified by the Secretary General of ICSID at the Supreme Court, the award shall be enforced like an award contained in a final judgment of the Supreme Court.

In essence, a party seeking to enforce an ICSID award in Nigeria is only required to file the award at the Registry of the Supreme Court. Upon the filing of the award, the award becomes binding like a judgment of the Supreme Court. It is important to note that no formal application is required, hence the court does not need to make any order or pronouncement for the award to become enforceable. Perhaps more importantly, no appeal can lie against an order enforcing such an award.

Section 1(2) of the ICSID Act provides that the Chief Justice of Nigeria may make rules of court or may adapt any rule of court necessary to give effect to this section. As at the time of this writing, the Chief Justice of Nigeria is yet to make any rules pursuant to section 1(2). Article 55 of the ICSID Convention provides that Article 54 is not to be interpreted as derogating from the laws of a contracting state granting immunity to that state or any foreign

¹³⁸ Schreuer et al op cit note 119 at 89.

state from execution. There is no law which grants immunity to Nigeria nor any foreign state from the execution of an ICSID award in Nigeria.

The ICSID (Enforcement of Awards) Act is an impressive statute because it affords a successful ICSID claimant speedy enforcement of his award by removing the possibility of prolonged enforcement proceedings. Also, it was enacted at a time when there was only one layer of appeal in the superior courts' hierarchy of Nigeria.¹³⁹ A possible practical inhibition in enforcing an ICSID award under the ICSID Act is where a claimant seeks to enforce such an award through garnishee proceedings. In such an instance, a party would require the consent of the Attorney General of the Federation. This is because by section 84 of the Sheriffs and Civil Process Act 40 of 1945, funds in the custody of a public officer can only be attached by garnishee proceedings with the consent of the Attorney General. This issue will be discussed in more detail later in this dissertation.¹⁴⁰

IV. THE ARBITRATION AND CONCILIATION ACT 11 OF 1988 AND THE AMENDMENT BILL

(a) The Arbitration and Conciliation Act 11 of 1988

The Arbitration Act was enacted as the primary federal statute for the regulation of commercial arbitration in Nigeria. The Arbitration Act is largely modelled after the UNCITRAL Model Law of 1985 and applies to both domestic and international arbitration.¹⁴¹ The Arbitration Act also applies to both domestic and international investment disputes¹⁴² and is an important component in Nigeria's ISDS framework as several of Nigeria's BITs contain the government's consent to arbitration under the UNCITRAL Arbitration Rules.¹⁴³

Section 54 of the Arbitration Act incorporates the New York Convention,¹⁴⁴ hence non-ICSID awards including ICSID Additional Facility Awards are enforced under the New York Convention. The Arbitration Act restricts the applicability of the New York Convention to awards relating to international commercial arbitration and those from contracting states which

¹³⁹ At the time of the enactment of the ICSID Enforcement of Awards Act, the Court of Appeal was yet to be established and appeals from the High Court went directly to the Supreme Court.

¹⁴⁰ See section V of Chapter 4 below.

¹⁴¹ See section 58 of the Arbitration Act.

¹⁴² See section 26(2)(a) of the NIPC Act. Non-ICSID awards are enforced under the Arbitration Act and New York Convention in Nigeria.

¹⁴³ See for instance, Article 9(2)(d) of the Finland-Nigeria BIT and Article 12(2)(b) of the Spain-Nigeria BIT

¹⁴⁴ The New York Convention is attached as Schedule 2 to the Arbitration Act.

have reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention.

While the wording of the Arbitration Act seems to afford an unsuccessful party two options to challenge an award, i.e. the filing of an application to challenge such an arbitral award or resisting the recognition and enforcement of same upon being served with an application for enforcement, the courts have held that once an award is not challenged, an application for enforcement cannot be resisted.¹⁴⁵ This view appears rather odd having regard to the clear wording of the Arbitration Act.

Section 52 of the Arbitration Act provides for the circumstances¹⁴⁶ in which the Nigerian court may refuse the recognition and enforcement of a foreign arbitral award.

(b) *The Arbitration and Conciliation Act (Amendment Bill) 2017*

Several important amendments are being proposed to Nigeria's arbitration regime by the Arbitration and Conciliation Act (Amendment) Bill (the Amendment Bill). Through the Amendment Bill,¹⁴⁷ the National Assembly seeks to reform the following aspects of arbitration practice in Nigeria:

(i) *Limitation period*

Section 8(1)(d) of the Limitation Law of Lagos State¹⁴⁸ sets a time limit of six years for the enforcement of arbitral awards where the contract which gave rise to the arbitration was not under seal. In interpreting this provision, the Nigerian courts have held that the limitation period begins to run from the date that the original cause of action accrued rather than the date the award was issued.¹⁴⁹ The result of this position is that a claimant may be denied the right to enforce an arbitration award by a statute of limitation where arbitration proceedings were not commenced on time, either for reasons of negotiations or any other cause or where the arbitral proceeding itself has dragged on for a long time.

¹⁴⁵ See *United Nigeria Insurance Co v Adene* (1971) NSCC 159 (SC); *Hon Emmanuel Oseloka Araka v Ambrose Nwakwo Ejeagwu* 1999 (2) NWLR (part 589) 107 (CA).

¹⁴⁶ Similar to those contained in Article V of the New York Convention.

¹⁴⁷ The Amendment Bill, which is based on the UNCITRAL Model Law 2006, was passed by the Senate on 1 February 2018 but is yet to be signed by the president.

¹⁴⁸ This provision is *in pari materia* with the relevant provisions of the Limitation Law of the many of the states in Nigeria.

¹⁴⁹ See *City Engineering Ltd v Federal Housing Authority* 1997 (9) NWLR (part 520) 224; *Murmansk State Steamship Line vs. Kano Oil Millers Limited* 1974 (5) SC 115.

The Amendment Bill addresses this issue by providing that the limitation period will begin to run from the date of the final award rather than from when the original cause of action which gave rise to the arbitration arose.¹⁵⁰ The position of the Amendment Bill is similar to the provisions of section 35(2) of the Arbitration Law of Lagos State, which provides that the limitation period for the enforcement of arbitral awards shall begin to run from the date the award is issued thereby addressing the problem with the position laid down by cases like *City Engineering Ltd v Federal Housing Authority*.¹⁵¹

(ii) Award Review Tribunal

The Amendment Bill seeks to introduce an appellate mechanism to the arbitration process through an award review tribunal. However, this measure is proposed as an opt-in provision and will only be available to parties who have agreed to it. The award review tribunal is essentially a second-tier tribunal that may review the award on same grounds upon which a court may set aside an arbitral award.¹⁵²

The Bill provides that the parties may agree on the procedure to be adopted by the award review tribunal. In the absence of such an agreement, the tribunal will conduct the proceedings in a manner it deems appropriate and deliver its decision within 60 days from the date of the constitution of the tribunal.

The decision of the award review tribunal may be challenged in court.¹⁵³ Where, however, an award has been affirmed by the award review tribunal wholly or in part, a party may only apply to the court for the setting aside of the award on the grounds of public policy or arbitrability.¹⁵⁴

(iii) Award of interim measures

The Arbitration Act already empowers a tribunal to award interim measures.¹⁵⁵ The Amendment Bill confers additional powers on the arbitral tribunal to modify, suspend, or terminate an interim measure or a preliminary order that it has granted upon application of any

¹⁵⁰ Section 34 of the Amendment Bill.

¹⁵¹ Supra.

¹⁵² Section 55(7) of the Amendment Bill.

¹⁵³ Ibid, section 55(8).

¹⁵⁴ Ibid, section 55(14).

¹⁵⁵ See Article 26 of the Arbitration Rules.

party or, in exceptional circumstance and upon notice to the parties, on the arbitral tribunal's own motion in certain circumstances.¹⁵⁶

The circumstances in which the powers to modify, suspend, or terminate an interim measure may be exercised include where important facts were concealed from the arbitral tribunal, the measure or order was obtained by fraud, or facts come to the knowledge of the arbitral tribunal, which if known at the material time, would have led to the tribunal refusing to grant the measure or order.¹⁵⁷

(iv) *Emergency arbitrator provisions*

The Amendment Bill introduces provisions relating to the appointment of an emergency arbitrator who is empowered to grant urgent interim relief.¹⁵⁸ A party in need of such an urgent interim relief may apply for same before the arbitral institution designated by the parties or in the absence of such a designation, to the court. This should be done at the time of filing a request for arbitration, or after filing the request for arbitration but prior to the constitution of the arbitral tribunal.

If the relevant arbitral institution or court considers the application for the appointment of an emergency arbitrator meritorious, it is expected, unless the parties otherwise agree, to appoint an emergency arbitrator within two business days after the date the application is received.¹⁵⁹ Any decision of the emergency arbitrator is to take the form of an order and must be made within 14 days from the date on which the file is received by the emergency arbitrator. The Bill also allows parties to conduct emergency proceedings through a meeting in person, by video conference, telephone, or similar means of communication.¹⁶⁰

(v) *Third party funding*

Funding of litigation, known as champerty, and maintenance are prohibited under common law in Nigeria.¹⁶¹ In essence, it is unlawful for a party to obtain funding from a third party who has no legitimate interest in the litigation and an agreement to provide such finance is unenforceable. The Rules of Professional Conduct for Legal Practitioner 2007 also prohibit

¹⁵⁶ Section 19 of the Amendment Bill.

¹⁵⁷ Ibid section 24.

¹⁵⁸ Ibid section 16(1).

¹⁵⁹ Ibid section 16(5).

¹⁶⁰ Ibid section 18(2).

¹⁶¹ *Oloko v Ube* 2001 (13) NWLR (Part 729) 161(CA); *Kesington Egbor v Ogbor* 2015 LPELR 24902(CA).

legal practitioners from financing or acquiring any form of interest in the matters they handle.¹⁶²

It is a matter of debate whether the prohibition applies to arbitration as well.¹⁶³ English common law, which has a strong persuasive influence in Nigeria, has extended the prohibition to arbitration¹⁶⁴ and it is likely that a Nigerian court will be inclined to adopt the same view. The Amendment Bill puts possible doubts to rest and seeks to permit the practice.

The Amendment Bill eliminates the common law restrictions on champerty and maintenance in Nigerian-seated arbitrations.¹⁶⁵ Therefore, when the Bill is eventually passed into law, the torts of maintenance and champerty will no longer apply to third party funding of arbitration in Nigeria. However, in its current form, the Amendment Bill does not make adequate provisions for third party funding. Issues such as withdrawal of funding, confidentiality, privilege, disclosure, and conflicts of interest are not addressed in the Amendment Bill. The implementation of the Bill may therefore prove problematic in its current state.

In conclusion, the Arbitration Act is a robust piece of legislation that provides an adequate legal framework for the investment arbitration to be conducted under the UNCITRAL framework. The reforms to be introduced by the Amendment to the Arbitration Act will further enhance the ad hoc arbitration regime and ensure that same is updated with innovations which are already in place in other jurisdictions.

V. OTHER LEGISLATION

There are several other pieces of legislation relevant to investor-state arbitration in Nigeria, particularly the Petroleum Act 51 of 1969,¹⁶⁶ the Public Enterprises (Privatisation and Commercialisation) Act 28 of 1999, and the NLG Act (Fiscal Incentives, Guarantees and

¹⁶² See Rule 50(3) of the Rules of Professional Conduct 2007.

¹⁶³ Sixtus Iwuoha 'Third party funding in Nigeria seated arbitrations: Time to join the progressives' 2020 11(1) *The Gravitas Review of Business & Property Law* 11 at 12; Opemipo Omoyeni 'Third party funding in Nigerian seated arbitration: setting the law straight' accessed at http://arbitrationblog.kluwerarbitration.com/2019/03/12/third-party-funding-in-nigerian-seated-arbitrations-setting-the-law-straight/?doing_wp_cron=1598724626.8309440612792968750000 on 29 August 2020.

¹⁶⁴ *Bevan Ashford v Geoff Yeandle* (Contractors) (in liquidation) 1999 Ch 239; See also Willem H Van Boom 'Third Party Funding in International Investment Arbitration' (2011) *SSRN* 37 accessed at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027114 accessed on 30 August 2020.

¹⁶⁵ Section 50(1)(g), 83 of the Amendment Bill and Article 41(1)(g) of the Arbitration Rules to the Amendment Bill.

¹⁶⁶ See also Regulation 41 to the Petroleum Act.

Assurances) Act 39 of 1990(the NLG Act). Section 11 of the Petroleum Act provides that disputes in the petroleum sector shall be resolved by arbitration while section 22 of the second schedule to the NLG Act contains the Nigerian government's consent to ICSID arbitration in respect of disputes in the liquified natural gas sub-sector.

VI. CONCLUSION

It can be seen from the above that Nigeria's statutory framework for investment arbitration affords access to arbitration under the ICSID system and other arbitration Rules. The NIPC Act which contains Nigeria's consent to the ICSID mechanism does not provide express consent but rather qualified or conditional consent. This consent is conditional upon a disagreement as to the mode of dispute settlement. Where there is an agreement or treaty which provides for another mode of dispute resolution, the conditional consent at section 26(3) of the NIPC Act may be unavailable to an investor.

The ICSID Act is a crucial component in Nigeria's ISDS legal framework because it provides that ICSID awards shall be enforced directly at the Supreme Court. This gives the ICSID mechanism an important advantage in the Nigerian context because direct enforcement at the Supreme Court under the ICSID Act eliminates the possibility of prolonged enforcement proceedings and appeals in respect of enforcement and setting aside proceedings.

The Arbitration Act is Nigeria's primary framework for ad hoc arbitration. The Arbitration Act incorporates the UNCITRAL Rules, which are enacted in Nigeria as the Arbitration Rules, and the New York Convention.¹⁶⁷ The Amendment Bill seeks to introduce a number of innovations to make the ad hoc mechanism and possibly non-ICSID institutional arbitration especially with respect to matters such as court-ordered measures and post-arbitral award litigation more effective.

Other legislation, like the Petroleum Act, which provide for the resolution of disputes in the oil and gas industry by arbitration contains an important statutory framework for investor state arbitration. In accordance with this provision of the Petroleum Act, the production sharing contracts in the oil and gas industry typically contain arbitration clauses for contractual disputes arising from the PSCs. The LNG Act which seeks to attract investment into the liquified natural gas sectors provides for ICSID arbitration as the mode of resolving disputes.

¹⁶⁷ Schedules 1 and 2 to the Arbitration and Conciliation Act.

In addition to the statutes discussed above, Nigeria's treaty framework forms an important component of the country's ISDS framework. Conventions such as the ICSID Convention, the New York Convention amongst others will therefore be discussed in detail.

CHAPTER THREE

THE TREATY FRAMEWORK FOR INVESTOR-STATE ARBITRATION IN NIGERIA

I. INTRODUCTION

This chapter examines the treaty framework for investor-state arbitration in Nigeria. In addition to the statutes discussed in Chapter 2 above, Nigeria is a party to a number of important conventions and treaties which provide a robust legal framework for investor state arbitration. Only treaties which have been enacted into law in Nigeria and which contain investor-state dispute resolution clauses¹⁶⁸ will be examined for the reason that only such treaties can be considered to be part of the legal framework for investor-state arbitration in Nigeria.

Having shown that there are gaps in the statutory framework for ISDS in Nigeria, especially the lack of express consent to ICSID arbitration in the NIPC Act in respect of disputes with foreign investors, this chapter explores the treaty framework for ISDS and the adequacy thereof. This chapter therefore analyses the following conventions and treaties: (i) the ICSID Convention, (ii) the New York Convention, (iii) the Revised ECOWAS treaty (iv) the ECOWAS Supplementary Agreement (v) the OIC Agreement, and finally Nigeria's Bilateral Investment Treaties.

II. MULTILATERAL INVESTMENT TREATIES AND CONVENTIONS

a. The ICSID Convention

The ICSID Convention which came into effect on 14 October 1966 is one of Nigeria's most important treaties for the conduct of investor-state arbitration. The ICSID Convention applies to investment disputes which the parties ie a member host state and a national(s) of another member state have agreed to submit to the centre. An ICSID tribunal will only assume jurisdiction over an investment dispute rather than a commercial claim.¹⁶⁹

Nigeria signified its commitment to the protection of foreign investments and the ISDS mechanism by its early ratification of the Convention on 13 July 1965 and domesticating same on 23 August 1965. The ICSID Convention has been wholly adopted by Nigeria. No territories

¹⁶⁸ Important treaties like the World Trade Organization and the African Continental Free Trade Agreement (AfCFTA) are not discussed because their dispute resolution clauses only provide for settlement of disputes between states. It is also noteworthy that the ECOWAS Energy Treaty is yet to be enacted into law in Nigeria.

¹⁶⁹ See for example *Postova v banka a.s. and INSTROKAPITAL SE v Greece* ICSID Case No. ARB/13/8 award dispatched on 9 April 2015, para 333-50, where it was held that the claimant's interests in government bonds did not qualify as an 'investment' neither within the meaning of the treaty nor Article 25(1) of the ICSID Convention.

within Nigeria have been excluded and no notifications have been given by Nigeria on any class of disputes to be excluded pursuant to sections 70 and Article 25(4) of the Convention respectively.¹⁷⁰ The consent of the Nigerian government as contained in a number of treaties may be treated as a standing offer to arbitrate which an aggrieved investor may accept by filing a claim.¹⁷¹

In addition to the designation of the state-owned oil company, the Nigerian National Petroleum Corporation as a constituent agency,¹⁷² the Nigerian government enacted the ICSID Act discussed in chapter 2 above. ICSID awards are to be enforced by member states as final judgments of their courts. One of the primary advantages of the ICSID mechanism lies in the obligation of member states to enforce such judgments as final judgments of their courts.

Another key advantage of the ICSID mechanism is that it is a self-contained mechanism which ensures that the ICSID arbitral proceedings are not subject to any national seat; thereby removing the possibility of setting aside proceedings at under national arbitration laws at such seats. The effect of this is that ICSID awards are not subject to the varying provisions of the national arbitration laws. This removes the possibility of an ICSID award being denied enforceability on wider grounds such as arbitrability and public policy. Moreover, by Article 52 of the ICSID Convention, an ICSID award can only be annulled by an ad hoc Annulment Committee constituted by ICSID, on limited grounds similar to those contained in the New York Convention.

For the above reasons, the ICSID Convention is arguably a more effective mode of investment dispute resolution than UNCITRAL arbitration in the Nigerian context. This is because the process potentially affords the speedy enforcement of awards and eliminates the possibility of prolonged post arbitral award litigation, especially in the Nigerian context, unlike enforcement proceedings under the New York Convention and the Arbitration Act.¹⁷³

¹⁷⁰See <https://icsid.worldbank.org/about/member-states/database-of-member-states/member-state-details?state=ST102> last accessed on 3 October 2020.

¹⁷¹ Paulsson op cit note 99 at 236.

¹⁷² NNPC was designated as a constituent agency on 11 May 1978 pursuant to Article 25(1) and (3) of the ICSID Convention. Because the NNPC is an important player in the nation's important oil and gas industry and the counter-party (on behalf of the government) to many contracts in the oil and gas industry on behalf of the Nigerian government, the designation of the NNPC as a constituent agency is a pragmatic way of giving effect to the Convention on the part of the Nigerian government.

¹⁷³ Andrew Okekeifere 'Enforcement and challenge of foreign arbitral awards in Nigeria (1997) 14(3) *J. Int'l Arb.* 223 at 226.

However, Nigeria's express consent to the ICSID framework is contained in less than 15 BITs, practically none of the MITs in force, and conditionally in the NIPC Act. Only the NLG Act contains express consent to the ICSID Centre. Also, in the absence of a BIT which contains Nigeria's express consent to the ICSID Centre, it is uncertain that an investor will be able to take advantage of the conditional consent in the NIPC Act in all instances.

Overall, the ICSID Convention affords an effective mechanism for ISDS especially regarding the enforcement of a valid award. However, the limited number of the treaties which contain Nigeria's consent to the jurisdiction of the ICSID Centre and the qualified consent in the NIPC Act significantly curtails the availability of the mechanism to a wider range of nationalities who may have significant investments in Nigeria.

b. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention)

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('the New York Convention') which was acceded to by Nigeria on 17 March 1970 and came to force in Nigeria on 15 June 1970 provides for the recognition and enforcement of foreign arbitral awards. Section 54(1) of the Arbitration Act incorporates the New York Convention into Nigerian law¹⁷⁴ and provides for the enforcement of final arbitral awards arising out of international commercial arbitration. The New York Convention is vital for the enforcement of awards rendered under ICSID additional facility and other non-ICSID investor-state arbitration proceedings.

Section 54 of the Arbitration Act reserves the applicability of the Convention to states which are members of the Convention and which have reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention.¹⁷⁵ The Arbitration Act also restricts the applicability of the Convention to contractual disputes.¹⁷⁶ Because the provision of section 54 exists without prejudice to the provision of section 51, it would appear that section 51 exists independently of section 54 and that the foreign arbitral awards can be enforced in Nigeria in instances where the New York Convention will not apply by the reservations contained at section 54 by section 51.

¹⁷⁴ The New York Convention is attached as the Second Schedule to the Arbitration Act.

¹⁷⁵ Section 54(1)(a) of the Arbitration Act.

¹⁷⁶ Section 54(1)(b) of the Arbitration Act.

The widespread adoption of the New York Convention¹⁷⁷ affords a successful claimant a range of options for the jurisdiction where a final award may be enforced provided the losing party has assets in such a jurisdiction. However, in Nigeria, unlike the measure of finality afforded by the ICSID Act by the enforceability of ICSID awards at the Supreme Court, enforcement proceedings under the New York Convention have to be filed at the High Court and are therefore subject to the possibility of delays and prolonged appellate proceedings.¹⁷⁸

The adoption of the Convention also gives arbitration an important advantage over litigation in Nigeria especially in the area of enforcing the final outcome of the process¹⁷⁹ for two reasons. First, there is still a degree of uncertainty concerning the legal regime for the enforcement of foreign judgments in Nigeria. This is because the legal framework consists of a mixture of archaic ordinances and common law requirements.¹⁸⁰ Secondly, a foreign judgment in Nigeria may have to be enforced by means of a new action hence there is a possibility of challenges on matters of substance to such an action coupled with possible difficulties in ascertaining the principles of foreign law according to which the dispute was determined in the foreign forum.¹⁸¹ In general, the New York Convention serves as a vital anchor for the non-ICSID arbitration process in Nigeria.¹⁸²

c. The Revised ECOWAS Treaty (1993)

The Revised Economic Community of West African States (ECOWAS) Treaty ('the Revised ECOWAS Treaty') was signed on 24 July 1993 to reaffirm the ECOWAS Treaty of 28 May 1975.¹⁸³ The aim of the Revised ECOWAS Treaty includes the promotion of co-operation and integration, with a view to the establishing an economic union in West Africa to raise the living standards of its peoples, and to maintain and enhance economic stability, promote relations among member states and contribute to the progress and development of the African Continent.¹⁸⁴

¹⁷⁷ 165 countries as of August 2020 including most if not all the major economies.

¹⁷⁸ Fagboyegun op cit note 99 at 52-3.

¹⁷⁹ Olawoyin op cit note 26 at 131-132; See also Gbenga Bamodu 'The enforcement of foreign money judgments in Nigeria: A case of unnecessary judicial pragmatism?' (2012) 12(1) *Oxford University Commonwealth Law Journal* 1.

¹⁸⁰ Olawoyin ibid at 132,134-38.

¹⁸¹ Ibid at 132.

¹⁸² Ufot op cit 28 at 824, 836.

¹⁸³ See Article 2 of the ECOWAS Revised Treaty. See <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3778/ecowas-treaty> accessed on 20 January 2020.

¹⁸⁴ Ibid at Article 3(1) of the Revised ECOWAS Treaty.

The treaty applies to investments among member states of the ECOWAS region. It seeks to facilitate cross-border investment by the promotion of joint venture initiatives by private sector enterprises and other investors and envisages the adoption of a regional agreement on cross border investment.¹⁸⁵

The treaty contains important investment protection guarantees relating to most favoured nation treatment and non-arbitrary or discriminatory measures.¹⁸⁶ Although the guarantees at provisions of Articles 43 to 44 relate to trade, nothing in the treaty excludes their application to investment activities, hence those provisions may be regarded as important investment guarantees.

Article 16 of the treaty establishes an arbitration tribunal. However, the article does not contain any provision about the kind of disputes that may be submitted to arbitration or the scope of application of the article. There is also no indication whether the reference to arbitration at the aforementioned article is in respect of state-state or investor-state disputes.

Although Article 16(2) provides that ‘the status, composition, powers, procedure and other issues concerning the Arbitration Tribunal shall be as set out in a Protocol relating thereto’, no protocol has been issued regarding the procedure and other modalities for the conduct of arbitration pursuant to the said article have not been established. In the absence of the protocol described above, it is doubtful if the ECOWAS Court can act as an arbitral tribunal. This is because the power and jurisdiction of the ECOWAS Court as an arbitral tribunal are uncertain and cannot be invoked.

The vague dispute resolution provisions of the Revised ECOWAS Treaty alone cannot serve as a basis for investor-state arbitration as the treaty contains no provisions on the resolution of investment disputes. Furthermore, as explained above, the protocol for the conduct of arbitration is yet to be issued. The ECOWAS Supplementary Act on Investments enacted pursuant to the ECOWAS Revised Treaty contains more detailed provisions on investment protection and dispute resolution and is discussed in the next section.

¹⁸⁵ Ibid at Article 3(2)(e) and (f) of the Revised ECOWAS Treaty.

¹⁸⁶ Articles 43-44 of the Revised ECOWAS Treaty.

d. ECOWAS Supplementary Act on Investments (2008)

The ECOWAS Supplementary Act on Investments ('the Supplementary Act') was enacted as a form of delegated legislation by ECOWAS pursuant to the revised ECOWAS Treaty to create a legal framework for the promotion of investment that supports 'sustainable development' in the West African sub-region.¹⁸⁷

The Supplementary Act applies to all investments by an investor, whether the investment is made before or after the entry into force of the Act.¹⁸⁸ Also, the Act contains important investment protection guarantees such as national treatment,¹⁸⁹ most favoured nation treatment,¹⁹⁰ prohibition of unlawful expropriation without compensation,¹⁹¹ and free transferability of assets and profits relating to investment.¹⁹²

In addition to investment guarantees, the Supplementary Act contains two key provisions which address some of the criticisms of the ISDS framework. The first relates to the imposition of an obligation on the investor to conduct pre-environmental impact assessment tests prior to the admission of investment¹⁹³ while the second relates to the transparency in the conduct of procedural and substantive dispute settlement hearings.¹⁹⁴

However, the dispute resolution provisions of the Supplementary Act are unclear. Article 33 of the Supplementary Act deals with dispute resolution and provides for the resolution of state-state and investor-state disputes through arbitration but the arbitration referenced is not binding.¹⁹⁵ Under Article 35(2), a dispute which has been resolved by arbitration may be submitted to another 'competent jurisdiction' hence the arbitration referred to at Article 33(6) is not a conclusive mode of dispute resolution.

Moreover, the Supplementary Act does not refer to any of the recognised mechanisms or rules of arbitration such as ICSID or the UNCITRAL Rules. Rather, the Supplementary Act contemplates arbitration through the ECOWAS Court of Justice (the ECOWAS Court. Article

¹⁸⁷ See Article 3 of the Supplementary Act.

¹⁸⁸ Ibid Article 4.

¹⁸⁹ Ibid Article 5.

¹⁹⁰ Ibid Article 6.

¹⁹¹ Ibid Article 8.

¹⁹² Ibid Article 10.

¹⁹³ Ibid Article 12(1).

¹⁹⁴ Ibid Article 34.

¹⁹⁵ Ibid Article 35(2).

9(6) of the Protocol on the Community Court of Justice ('the Protocol') requires the consent of the parties for disputes to be submitted to the ECOWAS Court.¹⁹⁶ There is also a 'cooling off' period of six months within which the parties are required to explore the possibility of amicable settlement.

It appears that the word 'arbitration' is used rather loosely at Article 33(1) of the Supplementary Act. This is in the light of the reference to 'court' at Article 33(6) which provides as follows:

- Any dispute between a host Member State and an Investor, as envisaged under this Article that is not amicably settled through mutual discussions may be submitted to arbitration as follows:
- (a) a national court.
 - (b) any national machinery for the settlement of investment disputes.
 - (c) the relevant national court of the Member States.

Article 33 of the Supplementary Act makes no reference to the arbitral tribunal to be established under Article 16 of the Revised Ecowas Treaty. Moreover, although Article 16 of the ECOWAS Revised Treaty establishes an arbitration tribunal for the community, the protocol which is required by the Supplementary Act to make provisions for the status, composition, powers, and other issues relating to the arbitral tribunal is yet to be enacted.

Article 9(5) of the Revised Protocol of the ECOWAS Court of Justice(ECJ) provides that pending the establishment of the Arbitration Tribunal provided under Article 16 of the ECOWAS Treaty, the ECJ shall have the power to act as arbitrator for the purpose of Article 16 of the treaty. In the interim, the ECOWAS Treaty empowers the ECOWAS court to adjudicate investment disputes pending the establishment of the arbitral tribunal contemplated by Article 16 of the Treaty.

It is questionable whether the ECJ can perform this function as an arbitral body because there is no specific provision in the Protocol on the Community Court of Justice that provides for the court to have jurisdiction over investor–state disputes and the protocol relating to the arbitral tribunal as explained in the preceding paragraph is yet to be enacted.¹⁹⁷ The effect of this is that power and jurisdiction of the ECJ as a potential arbitral tribunal is yet to be defined.¹⁹⁸

¹⁹⁶ Matthew Happold and Relja Radovic 'The ECOWAS Court of Justice as an investment tribunal' (2017) *SSRN* available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3003616 accessed on 3 September 2020.

¹⁹⁷ Matthew Happold 'Investor-state dispute settlement using the ECOWAS Court of Justice: An analysis and some proposals' (2019) 34(2) *ICSID Review* 496 at 510.

¹⁹⁸ *Ibid.*

Notably, Article 35 deals with the enforceability and finality of the outcome of dispute settlement proceedings. Article 35(1) provides that ‘the Final Awards/Decisions on investment disputes made by mediations, arbitrations and judicial bodies shall be enforceable.’ While Article 35(2) imposes an obligation on member states parties to the Supplementary Act to abide by the decisions of mediation, arbitration, and judicial bodies on investment disputes, there is no procedure for the enforcement of arbitral awards and settlement agreements made pursuant to mediation.

Arbitral awards may therefore be enforced under the New York Convention and mediated settlement agreements may be enforced under the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Mediation Convention) which entered into force on 12 September 2020 where the Convention has been ratified by the state where the Agreement is to be enforced.¹⁹⁹

While the Supplementary Act contains impressive provisions relating to the admission and protection of investment, the dispute resolution provisions of the Supplementary Act are inadequate and confusing.²⁰⁰ However, there may be a leeway for investors to file claims for breach of investment protection guarantees or violation of property rights against their host state at the ECJ by invoking the human rights jurisdiction of the ECJ.²⁰¹ The ECJ may also assume jurisdiction over a dispute which the parties have agreed to submit to it hence the ECJ may assume jurisdiction over an investment dispute if the parties consent to the jurisdiction of the court.²⁰²

e. Agreement on Promotion, Protection and Guarantee on Investments Among Members of the Islamic Conference (1981)

The Agreement on the Promotion, Protection and Guarantee of Investments Among Member States of the Organization of Islamic Conference (the OIC Agreement) was framed following

¹⁹⁹ Interestingly, Nigeria is the only West African country that has signed the Singapore Convention as at the time of writing. Nigeria is yet to ratify same.

²⁰⁰ Happold op cit note 197 at 510-11.

²⁰¹ This is pursuant to Article 9(4) of the Protocol A/P.1/7/91 on the ECOWAS Community Court of Justice (which entered into force on 5 November 1996) and amended by the Supplementary Protocol A/SP.1/01/05. See for example *Dexter Oil Ltd v Liberia* ECW/CCJ/JUD/03/19 of 6 February 2019 where the court allowed the claimant to bring a claim for the freezing of its bank account by the Liberian authorities. Although the claim ultimately failed on the merits, the court acknowledged that corporations enjoy a limited number of rights under international law such as the right to fair hearing, freedom of expression and property. Accordingly, an artificial person is entitled to bring such a claim

²⁰² Article 9(6) of the Protocol.

the Twelfth Islamic Conference of Foreign Ministers held in Baghdad, Iraq held from 1 to 5 June 1981 and entered into force in February 1988. This agreement was drawn up by member states of the Organization of Islamic Conference to implement the Agreement for Economic, Technical and Commercial Cooperation among member states of the Organization of the Islamic Conference, especially the provisions of the Article 1 of the said Agreement and to create a favourable climate for investment in member states.

The OIC Agreement applies to investments among member states of the Organization of the Islamic Conference which consists of about 53 states across Africa, Asia, and the Balkans with substantial Muslim populations.²⁰³ The Agreement defines an ‘investment’ as follows:

‘...employment of capital in one of the permissible fields in the territories of a contracting party with a view to achieving a profitable return , or the transfer of capital to a contracting party for the same purpose, in accordance with this Agreement.’

An ‘investor’ is defined as follows:

‘...the government of any contracting party or natural corporate person, who is a natural of a contracting party and who owns the capital and invests it in the territory of another contracting party’.²⁰⁴

Articles 10 to 14 of the agreement contains important investment guarantees typically found in bilateral and multilateral investment treaties notably national treatment, the guarantee against expropriation without compensation, free transferability of funds relating to investment, and compensation for any violation of rights or guarantees.

Articles 16 and 17 of the Agreement provides for dispute resolution and afford an investor a choice between litigation,²⁰⁵ arbitration,²⁰⁶ and conciliation.²⁰⁷ Article 16 of the Agreement provides for resolution of disputes by litigation and states that the host state guarantees the investor the right to access to court for redress in respect of any measures that an investor may be dissatisfied with or for shortcomings’ with the provisions of the laws or

²⁰³ Members of the Organization of Islamic State are Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Brunei Darussalam, Burkina Faso, Cameroon, Chad, Comoros, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea Bissau, Indonesia, Iran, Iraq, Jordan, Kuwait, Kyrgyzstan, Lebanon, Libya, Maldives, Malaysia, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Syria, Tadjikistan, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, Yemen and Tanzania. Article 59 of the Articles of Agreement of the Islamic Conference for the Insurance of Investment and Export Credit also provides for the resolution of disputes by arbitration.

²⁰⁴Chapter 3 of the OIC Agreement.

Article 1(5) and (6) of the OIC Agreement.

²⁰⁵ Article 16(1) of the OIC Agreement.

²⁰⁶ Ibid at Article 17(1).

²⁰⁷ Ibid at Article 17(2).

regulations in force in the host territory. irrespective of whether the complaint is related, or otherwise, to the implementation of the provisions of the Agreement’.

In essence, an investor may seek redress for breach of a treaty standard before a national court. Article 16 contains a fork in the road clause which compels an investor to choose between arbitration and litigation. The wording of Article 16 suggests that an investor may litigate disputes relating to the breach of investment guarantees if such an investor so wishes.

The Agreement envisages the eventual creation of a mechanism for the resolution of investment disputes although no timeframe for such is specified. However, until such a system is put in place, disputes that may arise out of the operation of the agreement shall be resolved through conciliation or arbitration in accordance with the rules and procedure set out in the said article.²⁰⁸

Article 17(2) which deals with arbitration, provides for procedure for the commencement of the arbitration and the appointment of the arbitrators. More importantly, the decisions of an arbitral tribunal in such arbitral proceedings shall be final and unchallengeable. Similar to the ICSID Convention, Article 17(2)(d) imposes an obligation on member states to enforce such an award as a binding and final regardless of whether the enforcing state was a party to the dispute or not and whether the investor is one of its nationals or residents.

The OIC Agreement imposes an obligation on an OIC state to enforce an OIC award within its territory, whether or not such a contracting state was a party to the dispute, and irrespective of whether the investor against whom the decision was passed is one of its nationals or residents or not, as if it were a final and enforceable decision of its national courts. OIC awards have the force of judicial decisions.²⁰⁹

This feature of the OIC Agreement is strikingly similar to the ICSID Enforcement regime in that it provides that its awards are to be enforced like final judgments of courts. Further, unlike the ICSID mechanism which affords the possibility of annulment on a number of grounds,²¹⁰ Article 17(2)(d) of the OIC Agreement provides that the decision of the arbitral tribunal shall be final and cannot be contested.

²⁰⁸ See Article 17(1). Article 17(2) contains procedural steps to be taken in conducting arbitration particularly the commencement of arbitration and the constitution of the arbitral tribunal and the hearing of the dispute.

²⁰⁹ Article 17(2)(d) of the OIC Agreement.

²¹⁰ See Article 52 of the ICSID Convention.

It is however desirable to include an annulment system on grounds similar to that of the ICSID Convention in the OIC mechanism. This is because even if the OIC system ensures the appointment of the best arbitrators, there is still a possibility of error. For instance, an arbitrator may exceed his powers or scope of reference or inadvertently commit a procedural error that may amount to a breach of fair hearing. It is therefore preferable to include a measure to guard against injustice in instances where an arbitrator may have acted wrongly.

Finally, although the exact number of arbitral proceedings that have been commenced on the basis of the OIC Agreement is unknown, it is interesting to note that in recent times, there has reportedly been an increase in the use of the OIC Agreement as an investment protection instrument.²¹¹ OIC arbitration may therefore afford a viable dispute resolution option to nationals of OIC states that do not have BITs with Nigeria in view of the substantive protections afforded therein.

f. Other multilateral investment treaties

Other important multilateral investment treaties include the Partnership Agreement between members of the African, Caribbean and Pacific Group of States and the European Union 2000 (the Cotonou Agreement) and the Convention Establishing the Multilateral Investment Guarantee Agency 1985 (MIGA).²¹²

The Cotonou Agreement was signed as a partnership agreement between the European Union and the African, Caribbean and Pacific Group of States (ACP) to facilitate economic, cultural and social development of the states to improve peace, security, and create a stable and democratic political environment on 23 June 2000.

The agreement also contains investment protection measures and provides for the resolution of disputes by arbitration.²¹³ However, it is unclear what procedure is to be adopted for the conduct of arbitration as the agreement only provides that the arbitration shall be ‘in accordance with the procedural rules which will be adopted by decision of the Council of

²¹¹ Hogan Lovells ‘The organization of Islamic Cooperation Agreement on Promotion, Protection and Guarantee of Investments among member states: Thirty years since its entry into force’ available at <https://www.hoganlovells.com/en/publications/the-organisation-of-islamic-cooperation-agreement-on-promotion-protection-and-guarantee-of-investments-among-member-states> accessed on 5 September 2020

²¹² The MIGA contemplates the resolution of disputes between member states and the Agency. See Article 57 of MIGA and Article 4 of Annex II of MIGA.

²¹³ Article 30 of Annex IV of the Cotonou Agreement.

Ministers at the first meeting following the signing of the Agreement and following the recommendation of the ACP EC Development Finance Committee'.²¹⁴

It can be seen from the above that unlike regional treaties like the North American Free Trade Agreement (NAFTA),²¹⁵ the MITs do not generally provide for ICSID arbitration or even UNCITRAL arbitration hence they cannot form the basis of the Nigerian government to ICSID arbitration pursuant to section 26(2)(b) and (c) of the NIPC Act, or UNCITRAL Rules arbitration. A few of them such as the OIC Agreement and the Cotonou Agreement contain peculiar arbitration provisions.

III. NIGERIA'S BILATERAL INVESTMENT TREATIES

Nigeria has signed a total of 31 Bilateral Investment Treaties (BITs) starting with the France-Nigeria BIT on 27 February 1990.²¹⁶ Of this number, 15 have been ratified. Although the last BIT, the Morocco-Nigeria BIT was signed in 2016, the National Assembly has not ratified any BIT in the last ten years.

A close examination of these BITs reveals a lack of policy coherence in vital aspects of investment protection such as admission of investment, definition of investment, national and most favoured nation treatments, fair and equitable treatment, exhaustion of domestic remedies, and the scope of consent to international adjudication etc.²¹⁷ Most notably, Nigeria has no model BIT²¹⁸ and the BITs currently in force in Nigeria contain significant textual variations in several respects. In this section, however, the author focuses on the dispute resolution provisions in those BITs.²¹⁹ In view of the lack of express consent to the ICSID

²¹⁴ Ibid.

²¹⁵ See Article 1120 of Chapter 11 of NAFTA.

²¹⁶ See <https://investmentpolicy.unctad.org/international-investment-agreements/countries/153/nigeria> last accessed on 29 September 2020. The dispute resolution provisions of Nigeria's BITs are highlighted in Appendix II of this thesis, except for the Taiwan-Nigeria BIT which was unavailable at the time of the conclusion of this thesis.

²¹⁷ See Appendix II of this dissertation; See also Orji Uka *An Appraisal of the Legal and Regulatory Regime for the Promotion and Protection of Foreign Investments in Nigeria* (unpublished LLM dissertation, King's College London 2019) 16.

²¹⁸ There are indications that this is likely to change soon as Nigeria is likely to reform its BIT practice soon. See Kingsley Alu 'Nigeria begins reforms of International Investment Agreements' *Leadership* 9 August 2020 available at <https://leadership.ng/2020/08/09/nigeria-begins-reforms-of-international-investment-agreements/> last accessed on 7 September 2020.

²¹⁹ <https://investmentpolicy.unctad.org/international-investment-agreements/countries/153/nigeria> accessed on 17/01/2020. Nigeria has also signed but is yet to ratify BITs with Turkey, Bulgaria, Egypt, Algeria, Jamaica, Uganda, Ethiopia, the Russian Federation, Kuwait, Austria, Singapore, the United Arab Emirates and Canada. The China-Nigeria BIT of 1997 has been terminated.

arbitration in the NIPC Act, it is worth considering whether Nigeria's BIT regime provides an adequate framework for ISDS.

The provisions of the dispute resolution clauses of the various BITs are not uniform perhaps because as stated above, Nigeria has no model BIT. However, the dispute resolution provisions are similar. While some of the BITs immediately provide for ICSID arbitration only,²²⁰ a number afford the option of either ICSID and UNCITRAL rules,²²¹ with some containing provisions which grants the option to either litigate or submit disputes to arbitration.²²² A striking similarity of most is the requirement to explore amicable settlement or 'consultations' during cooling off periods.²²³

Nigeria has only 15 BITs in force, with only 13 of them providing for the ICSID mechanism. Consequently, not all potential investors can initiate investor state arbitration against Nigeria at ICSID on the basis of the express consent given in the BITs. Nigeria hosts significant investment from countries other than those with which it has BITs, notably the United States²²⁴ and India.²²⁵ Therefore, if BITs witness a further decline in popularity and some of the existing BITs are terminated, the number of investors who may take advantage of the express consent will be further reduced.

Moreover, unlike local investors who may commence ad hoc arbitration against the Nigerian government on the basis of section 26(2)(a) of the NIPC Act which contains Nigeria's consent to ad hoc arbitration in respect of investment disputes with local investors, a foreign investor whose home state does not have a treaty that provides for UNCITRAL arbitration or other form of arbitration may be unable to commence arbitration against Nigeria.

In the absence of a treaty, an investor may only submit a dispute to arbitration with the consent of the Nigerian government to such arbitration, most likely on the basis of an

²²⁰ See the BITs with the UK, the Netherlands and Germany.

²²¹ See the BITs with Finland, Spain, Serbia, Sweden, Switzerland, Italy, and Romania. In the case of South Africa, ICSID Additional Facility Rules and ad hoc arbitration (although not under UNCITRAL Arbitration Rules).

²²² See the BITs with Finland, Spain, Serbia, Sweden, China, Switzerland, Italy, and Romania.

²²³ A cooling-off period is the time during which parties are required to engage in consultations or negotiations towards an amicable resolution of the dispute prior to the filing of a claim. See Blackaby et al op cit note 7 at para 8.45. The Netherlands and the UK do not have cooling off periods.

²²⁴ See statistics on US investment in Nigeria available on the website of the Office of the United States Trade Representative at <https://ustr.gov/countries-regions/africa/nigeria> last accessed on 4 October 2020; Maryam Abdu 'Foreign Direct Investment and Economic Growth in Nigeria' (2013) 6(1) *Conference of the International Journal of Arts and Sciences* 63 at 67-68

²²⁵ See Nigerian Investment Promotion Commission 'Indian investments in Nigeria exceed 15 billion dollars, says High Commissioner' available at <https://nipc.gov.ng/2020/01/28/indian-investments-in-nigeria-exceed-15-billion-dollars-says-high-commissioner/> last accessed on 30 September 2020.

investment agreement.²²⁶ In view of the limited number of BITs and the lack of consent to arbitration in most of the investment-related instruments, an amendment to the NIPC Act is necessary for express consent to be given by the Nigerian government.

IV. CONCLUSION

Nigeria is a signatory to several important conventions and treaties which provide a viable framework for the resolution of investment disputes in addition to statutes like the NIPC Act, ICSID Act, and the Arbitration Act. However, some of the treaties such as ECOWAS Supplementary Act on Investments contain inadequate or ambiguous dispute resolution provisions.

The ICSID Convention and the Agreement for the Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference are remarkable in that they provide for an enforcement regime aimed at avoiding prolonged enforcement proceedings.²²⁷ Furthermore, the ICSID and OIC framework offer the advantage of enforceability in a manner similar to that of a final judgment of a national court.

An OIC award cannot be contested while an ICSID award may only be contested on limited grounds, including that the tribunal has been improperly constituted, it failed to provide reasons for its decision or has acted in manifest excess of its powers, corruption, or a departure from a fundamental rule or procedure.²²⁸ An ICSID award that has not been annulled must be enforced as a final judgment of the court where the enforcement is sought in an ICSID Convention state.²²⁹

Although the New York Convention affords an effective enforcement framework for arbitration conducted under the ICSID Additional Facility Rules, the UNCITRAL Rules, and institutional rules, there are some drawbacks to the enforcement of awards under the New York Convention in Nigeria. A dissatisfied party may resist the enforcement of such an award under the New York Convention on grounds that are unavailable under the ICSID annulment system, i.e. arbitrability and public policy. Furthermore, enforcement and set-aside proceedings have

²²⁶ Typically, Public Private Partnership (PPP) Agreements, Built Operate and Transfer (BOT) Contracts, Concession Agreements etc.

²²⁷ See sections II(a) and (e) above for the discussion on ICSID Convention and OIC Agreement, respectively.

²²⁸ Article 52(1) of the ICSID Convention.

²²⁹ Article 54 of the ICSID Convention.

been known to last for several years in the Nigerian courts.²³⁰ The next chapter discusses the flaws in Nigeria's ISDS framework in greater detail.

²³⁰ Fagboyegun op cit note 99 at 52-54.

CHAPTER FOUR

INADEQUACIES IN THE CURRENT LEGAL FRAMEWORK FOR INVESTOR-STATE ARBITRATION IN NIGERIA

I. INTRODUCTION

There are several factors within Nigeria's investor-state arbitration framework which inhibit the efficiency of this mode of dispute resolution, especially at the enforcement stage. Having shown in Chapter 1 that a neutral and efficient dispute resolution framework is an important component of a healthy investment climate, the author will discuss the flaws in the legal framework for investment arbitration in Nigeria in this chapter.

This chapter therefore explores the following issues: (i) the inadequacies of the NIPC Act as an investment protection statute, (ii) problems associated with the enforcement of non-ICSID awards in Nigeria, (iii) the unenforceability of interim relief in aid of ICSID arbitration, (iv), the limitation period for the enforcement of arbitral awards, and (v) the requirement of the Attorney General's consent for the attachment of judgment debts in garnishee proceedings.

II. INADEQUACIES OF THE NIPC ACT AS AN INVESTOR-STATE ARBITRATION STATUTE

The NIPC Act is not a comprehensive investment statute and contains a number of flaws. However only those flaws relating to dispute resolution are examined here because of their significance with respect to the jurisdiction of an arbitral tribunal in a potential action. These are primarily the consent of the Nigerian government to ICSID arbitration in the NIPC Act and the definition of 'investment'.

a. Lack of express consent to ICSID arbitration in the NIPC Act

Sections 26(2)(b) and (c) of the NIPC Act restate Nigeria's commitment to the dispute resolution mechanism in the country's treaty regime and provide that such disputes shall be resolved 'within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties' or within the framework of any national or international machinery agreed to by the parties.

The effect of the absence of express consent to the ICSID Centre in the NIPC Act is that an aggrieved foreign investor may either look to a treaty if his home state has one with

Nigeria for the latter's consent to ICSID or take advantage of the conditional consent to the ICSID Centre contained in section 26(3) of the NIPC Act. As indicated in section III of Chapter 3 above, Nigeria has only 15 BITs in force, 13 of which have provisions for the resolution of disputes by ICSID arbitration. None of the MITs provides for ICSID arbitration. Nigeria's treaty regime as the framework for ICSID arbitration as contemplated by section 26(2)(b) of the NIPC Act may therefore be unhelpful for investors who prefer the ICSID mechanism because of its advantage in enforcement, where the home state of such an investor has no treaty with Nigeria.

Section 26(3) of the NIPC Act provides that where there is a dispute between an investor and the government on the mode of dispute resolution to be adopted, the ICSID Rules shall apply. Nigeria's consent to ICSID arbitration at section 26(3) of the NIPC Act, this consent is at best qualified or conditional consent which is conditional upon a disagreement between the disputing parties as to the mode of dispute resolution.

Where there is a treaty between the home state of the investor and Nigeria which provides for a dispute resolution method other than ICSID arbitration, it is arguable that because there is an agreement between the parties on how to resolve disputes and such an investor will be unable to take advantage of the ICSID mechanism in terms of section 26(3) of the NIPC Act. In such a scenario, it can be said that there is already an agreement on dispute resolution and the condition at section 26(3) which stipulates the existence of a disagreement as to the mode of dispute resolution before the conditional consent at the said provision can be activated, would not have been fulfilled.

Also, there has been a decline in the popularity of investment treaties in recent times. BITs had previously gained great momentum from around 1987 with over 1900 BITs concluded around this period.²³¹ Globally, the number of BITs signed each year began to decrease around 2001²³² and although about 330 investment treaties were concluded between 2010 and 2014,²³³ there are indications that the treaty regime may be losing popularity in some important jurisdictions.²³⁴ None of Nigeria's regional trade and investment treaties, eg the ECOWAS treaty and the Cotonou Agreement, provide for ICSID arbitration, hence an investor

²³¹ Dugan et al op cit note 8 at 51.

²³² Ibid at 702; UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* UN Doc. UNCTAD/ITE/IIT/2006/5 (2007).

²³³ See UNCTAD, *World Investment Reports (UN, 2011-2015)* available online at <http://unctad.org>.

²³⁴ Lim et al op cit 1 at 491.

especially from the West African states will not be able to take advantage of the ICSID mechanism on the basis of the regional treaties.

It is therefore clear that Nigeria's treaty regime is inadequate as the basis for investor-state arbitration owing to the limited number of BITs and the fact that multilateral investment treaties at the regional level either contain unclear arbitration provisions²³⁵ or do not provide for arbitration as the mode of dispute resolution. As Nigeria seeks to attract foreign direct investment in diversifying its economy,²³⁶ investors from more countries than those with which Nigeria has BITs should be afforded the assurance that a neutral dispute resolution mechanism such as ICSID affords, hence the NIPC Act ought to be amended to include Nigeria's express consent to ICSID arbitration.

b. Definition of 'investment' in the NIPC Act

As stated in para (II)d of Chapter 2 above, the NIPC Act defines an investment as 'investment made to acquire an interest in an enterprise operating within and outside the economy of Nigeria'. This vague definition may be problematic because commercial claims could be elevated to the standard of investment claims as a result. In the absence of a treaty which clearly defines the concept of investment in the 'objective' sense,²³⁷ a tribunal may be constrained to treat what ordinarily would be a commercial claim as an investment dispute on the basis of the definition in the NIPC Act.²³⁸

III. INTERIM RELIEF IN AID OF ICSID ARBITRATION

Generally, a party may require interim measures to prevent irreparable harm from being done to the subject matter of the dispute or to secure the claim.²³⁹ In more extreme cases, such an interim measure may be required to obtain evidence or to preserve evidence in the custody of a state party.²⁴⁰

Unlike commercial arbitration, which has a seat and whose municipal courts may grant interim reliefs and other measures in aid of the arbitral process, the ICSID process is 'a-national' and has no seat. Furthermore, Article 26 of the ICSID Convention provides that consent to the ICSID arbitration excludes all other remedies unless the parties agree otherwise.

²³⁵ See discussion on multilateral treaties at Chapter 3 above.

²³⁶ See section V(b) of Chapter 1 above.

²³⁷ Lim et al op cit note 1 at 218-21.

²³⁸ See *Romak v Uzbekistan* PCA Case No. AA280 and the discussion at page 24-6 above.

²³⁹ Blackaby et al op cit note 7 para 7.14.

²⁴⁰ Lim et al op cit note 1 at 183.

In terms of Article 47 of the Convention and Rule 39(1)-(4) of the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules), the ICSID tribunals may only recommend provisional measures to preserve the rights of the parties. A strict literal interpretation of Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules suggests that an ICSID tribunal is not empowered to issue injunctive reliefs to preserve the rights of the parties but may only recommend measures which it considers necessary to prevent a party from suffering irreparable harm or dealing adversely with the subject matter of the arbitration.

Arguably, the underlying philosophy of Article 26 of the ICSID Convention is to prevent the grant of anti-arbitration injunctions by municipal courts.²⁴¹ Indeed, the grant of an anti-arbitration injunction by a national court would be a breach of the state's undertaking to honour its commitment to the ICSID Convention by Article 26 of the Vienna Convention.²⁴² However, there is no reason in principle why a municipal court cannot support the ICSID process by the grant of interim reliefs or the enforcement of provisional recommendations that have been granted by an ICSID tribunal just as ICSID awards may be enforced by judicial authorities.

ICSID tribunals have been known to issue interim relief or, in the language of the ICSID Convention, provisional especially against competing court actions.²⁴³ However, the grant of interim injunctions by national courts in support of ICSID arbitration has been the subject of controversy.²⁴⁴ In *ETI Euro Telecom International NV v Bolivia and Another*,²⁴⁵ while observing that the English courts should not be easily predisposed to the granting interim reliefs in respect of ICSID arbitration, the English Court of Appeal also took the view that the use of the word 'recommend' at Article 47 does not prevent an ICSID tribunal from ordering interim relief.²⁴⁶

Also, although ICSID tribunals may grant interim relief, it has been suggested that they are not in the practice of issuing injunctions against state parties.²⁴⁷ It is however submitted

²⁴¹ Dugan et al op cit note 8 at 110-16; Schreuer et al, op cit note 119 at 351-52.

²⁴² See Richard Garnett 'National Court Intervention in Arbitration as an Investment Treaty Claim' (2011) 60(2) *International & Comparative Law Quarterly* (2011) 485 at 488.

²⁴³ *MINE v Guinea* ICSID Arb No 84/4(1985); *Maffezini v Kingdom of Spain* ICSID Case No.ARB/97/7(Procedural Order No.2 of 28 October 1999).

²⁴⁴ Lim et al op cit note 1 at 183-84.

²⁴⁵ (2008) EWCA Civ 880.

²⁴⁶ See also *Maffezini v Kingdom of Spain* (supra).

²⁴⁷ Paul Friedland 'Commentary: ICSID tribunals and injunctions by state courts' (2014) 18(3) *Arbitration International* 323 at 325.

that, the enforcement of such interim relief by national courts has no negative impact on the status of the ICSID mechanism as a self-contained system. In essence, there is no substantive reason why a national court cannot enforce such a relief.

There is currently no statutory framework for the enforcement of ICSID provisional recommendations in Nigeria. The effect of this is that the Nigerian government – depending on the regime in power and its attitude to the rule of law and observance of international obligations – may choose not to comply with such measures although such non-compliance would amount to a breach of Article 26 of the Vienna Convention. The existence of a statutory framework which allows a claimant who has obtained provisional recommendation in an ICSID proceeding to convert such a relief into an order of court would assist in ensuring that such an order is complied with.

IV. ENFORCEMENT OF NON-ICSID AWARDS IN NIGERIAN COURTS

a. Grounds for refusal of recognition and enforcement of awards under the New York Convention and UNCITRAL rules

The New York Convention allows a party to resist enforcement on the grounds of incapacity of the parties or validity of the arbitrability, public policy, and incapacity of the parties to the agreement,²⁴⁸ grounds which are unavailable under the ICSID annulment mechanism.²⁴⁹ If the enforcement of an award is sought in a jurisdiction where the subject matter of the award is not arbitrable, such an award may be denied enforcement under the New York Convention.

The Nigerian courts have adopted the test of accord and satisfaction as the guide in resolving the question of arbitrability.²⁵⁰ By this test, a dispute is arbitrable if it can be compromised by way of accord and satisfaction, hence matters bordering on crime,²⁵¹ status²⁵² and public revenue²⁵³ are not arbitrable. Therefore the question of arbitrability poses no significant challenge in Nigeria.

²⁴⁸ Article V (2) (a) and (b) of the New York Convention. By Article 52 of the ICSID Convention, a party may apply for the annulment of an ICSID award on the grounds of corruption and failure of the tribunal to state reasons for the award.

²⁴⁹ Article 52(1) of the ICSID Convention.

²⁵⁰ *Kano State Urban Development Board v. Fanz Construction Ltd* 1990 (4) NWLR (Pt. 142) 1 at 32-33 para H-A (SC) ; *United World Ltd. Inc. v. M.T.S. Ltd.* 1998 LPELR 15-17 para A-A (SC); See also Paul Idornigie ‘The principle of arbitrability in Nigeria revisited’ (2004) 27 *Journal of International Arbitration* 282-83

²⁵¹ *Mekwunye v Lotus Capital Ltd & Ors* (2018) LPELR 45546 (CA).

²⁵² *Kano State Urban Development Board v Fanz Construction Co* (supra). This includes matters relating to divorce, insolvency, bankruptcy, and other issues relating to status which statutes require courts to pronounce upon.

²⁵³ *Statoil Nigeria Limited v Federal Inland Revenue Service* (2014) LPELR 23144.

The public policy ground appears thornier.²⁵⁴ Indeed, public policy is an unruly horse²⁵⁵ and a challenge on that ground could lead to unsatisfactory outcomes depending on the judicial system where the award is under consideration. This view is underscored by the recent decision of *State Trading Corporation v Betamax*²⁵⁶ where the Supreme Court of Mauritius set aside an award on the grounds of public policy. Although the Mauritian Supreme Court had previously determined that public policy had to be approached in the international sense²⁵⁷ rather than from a domestic standpoint, the court found that the failure to comply with local public procurement laws prior to the execution of the contract in respect of which the dispute arose constituted sufficient basis to set aside the award on the ground of public policy.²⁵⁸ While the decision may appear justifiable on the ground that violation of a condition in a domestic statute renders a contract illegal, the decision is a departure from the international approach to public policy as a ground for invalidating arbitral awards.

The problem with public policy as a basis in the adjudication of disputes was aptly described in the case of *Sonnar (Nigeria) Ltd & Anor v Partenreedri M.S Nordwind Owners of the Ship M.V Nordwind & Anor*,²⁵⁹ where the Supreme Court observed as follows:

‘...it is dangerous for a court to base its decision mainly on public policy, which indeed would be another means of avoiding the rules, law and procedure which govern a matter. Public policy is usually equated with public good. To ask a Court to decide only as a result of public policy or public good, goes beyond the measure of liberalism in the application of the law or even viewing a matter from the socio-economic context of law. Who is to determine what constitutes public policy? To rely on public policy or public good simpliciter, is to give room to uncertainty in the law. It’s a way to beg the question.’

In view of the vagueness of the notion of public policy, the Arbitration Act ought to be amended to include a definition of public policy that is precise enough to only allow challenge or refusal of enforcement on more ascertainable grounds.²⁶⁰

²⁵⁴ See Paul Buchanan ‘Public policy and international commercial arbitration’ (1988) 26 *American Business Law Journal* 516-17.

²⁵⁵ See the dictum of Borough J in *Richardson v Mellish* (1824) 2 Bing 229 at 252 (Court of Common Pleas).

²⁵⁶ (2019) SCJ 154 (SC); *Betamax* has been granted leave to appeal to the Judicial Committee of the Privy Council being the final court of appeal for Mauritius.

²⁵⁷ *Cruz City I Mauritius Holdings v Unitech Ltd* (2014) SCJ 100(SC).

²⁵⁸ The matter is now on appeal at the Judicial Committee of the Privy Council.

²⁵⁹ ((1987) All N.L.R 548 at 564(SC).

²⁶⁰ This proposal is discussed in greater detail in the next chapter.

b. Delay in enforcement and set aside proceedings in Nigeria

While a party may choose arbitration to avoid litigation and a particular seat of arbitration which it considers to be unfavourable,²⁶¹ such a party may still require the aid of such a national court especially in the enforcement or challenge of awards. Where particular care has not been taken to avoid an undesirable seat of arbitration, such a seat will be the forum for setting aside proceedings and the grant of court ordered interim measures.

In view of the symbiotic relationship between courts and arbitral tribunals, the choice of arbitration may not completely assist a party in dispensing with litigation altogether. It is therefore important to discuss the inhibitions in the arbitration process in Nigeria especially as it relates to court assisted measures and post arbitral award litigation i.e. enforcement and setting aside proceedings.

While the Nigerian courts have demonstrated support for the arbitral process in recent years,²⁶² one of the challenges that has persisted in the area of post arbitral award litigation under the New York Convention enforcement mechanism is the delay associated with the proceedings owing to the congested court dockets. In essence post-arbitral award litigation are subject to the same delays as other court matters. In Nigeria, enforcement and setting aside actions (which are often consolidated when both are pending before the same court) have become ten-year court battles.²⁶³ Speed – which is one of the important advantages of arbitration especially in Nigeria – has therefore become an illusion in post-award proceedings in Nigeria.²⁶⁴

Although an arbitral award may be enforced against the Nigerian government and its agencies and corporations in any New York Convention jurisdiction, provided there are assets that may attached in such a jurisdiction, in certain instances, a judgment creditor may be restricted in choice to enforcing in Nigeria. For example, where the arbitration has been conducted against an agency or government-owned corporation for instance a subsidiary of the NNPC with no assets outside Nigeria, the judgment creditor will only have the option of

²⁶¹ According to the 2015 Queen Mary International Arbitration Survey, enforceability of awards was chosen as the most valuable characteristic of arbitration followed by the desire to avoid certain national legal systems and courts. See Queen Mary School of International Arbitration '2015 Improvements and Innovations in International Arbitration' available at <http://www.arbitration.qmul.ac.uk/research/2015/> last accessed on 1 October 2020.

²⁶² *Statoil v NNPC* 2013 (7) CLRN 72 (CA); *Williams v Williams* 2014 (15) NWLR (part 1430) 213 (CA)

²⁶³ See Fagboyegun op cit note 99 at 52-53; Obiokoye Onyinye Iruoma *Eradicating delay in the administration of justice in African courts: A comparative analysis of South African and Nigerian courts* (unpublished LLM dissertation, University of Pretoria, 2005) 36-40.

²⁶⁴ See Fagboyegun ibid at 52-4.

enforcing the award in Nigeria with the attendant result that he may become embroiled in a decade-long enforcement court battle.

c. Limitation period for the enforcement of arbitral awards

Under Nigerian law, the limitation period for the enforcement of arbitral awards begins to run from the date of accrual of the original cause of action rather than the date on which the final arbitral award was issued.²⁶⁵ In the case of *City Engineering v Federal Housing Authority*,²⁶⁶ the Supreme Court, in interpreting section 6 of the Limitation Law of Lagos State (now section 8(1)(d) of the Limitation Law of Lagos State) held that the six-year limitation period for the enforcement of arbitral awards begins to count from when the original cause of action accrued.

The effect of computing the limitation period from the date that the cause of arose is that in instances where the arbitral proceedings have been prolonged, the successful party will have a shorter period within which to apply for the enforcement of the award or may even lose the ability to enforce the award at all.

V. REQUIREMENT OF ATTORNEY GENERAL'S CONSENT FOR ATTACHMENT BY GARNISHEE PROCEEDINGS OF FUNDS IN CUSTODY OF PUBLIC OFFICERS

Where the unsuccessful party fails to comply with an award, the successful party is constrained to apply to court for the recognition and enforcement of such an award. An arbitral award, although binding, is not self-enforcing and lacks the force of a judgment of court. Where the losing party does not voluntarily comply with the award, the successful party may need to convert the award into a judgment of court by applying to court for recognition and enforcement to take advantage of the enforcement mechanisms available for enforcing court judgments.

Two of the primary means of enforcing money judgments in Nigeria include writ of *fi fa* and garnishee proceedings²⁶⁷ writ of *fi fa*, and garnishee proceedings. Writs of *fi fa* are an effective means of enforcement because the judgment creditor applies to the registrar of court

²⁶⁵ See Ifeanyi Ebokpo 'Limitation period for the enforcement of arbitration awards in Nigeria: The imperative for a change' (2019) 10 (4) *The Gravitas Review of Business & Property Law* 71 at 82.

²⁶⁶ (1997) (9) NWLR (Pt.520) 224 at 245-46.

²⁶⁷ Sections 44-46 and 83 of Sheriffs and Civil Process Act 40 of 1945. See also Fidelis Nwadialo *Civil Procedure in Nigeria* 2 ed (2000) 985; Ernest Ojukwu and Chudi Ojukwu *Introduction to Civil Procedure* 3 ed (2009) 339-44. The use of judgment summons is less popular and essentially entails committing a judgment debtor who refuses to satisfy a judgment debt despite having the means to prison. There are also methods payment by instalments, the filing of a bankruptcy notice under the Bankruptcy Act and winding up proceedings under CAMA.

for the issuance of the writ through a fairly straightforward administrative process.²⁶⁸ Where the arbitral award is against a respondent who either does not own physical assets or owns insufficient physical assets but possesses liquid assets such as money in the bank or receivables in the hands of third parties, enforcement through a writ of *fi fa* becomes impracticable and garnishee proceedings may be a preferable option in realising the judgment debt.

Garnishee proceedings entail the attachment of funds belonging to or due to a judgment debtor from a third party by means of a court order known as a garnishee order.²⁶⁹ By a court order known as a garnishee order, money standing to the credit of the judgment debtor in the hands of a third party known as the garnishee is attached and paid over to the judgment creditor. Where the unsuccessful party to a dispute is not a government entity, the garnishee process is usually seamless and can prove effective. However, where the government or its agencies is the custodian of the funds to be attached, there could be obstacles in realizing the judgment debt through garnishee proceedings notably, the requirement to obtain the consent of the Attorney General in the Sheriffs and Civil Process Act ('the Sheriffs Act) before applying for garnishee orders.

By section 84 of the Sheriffs Act, the consent of the Attorney General is a pre-condition for the attachment by garnishee proceedings of money in the custody or under the control of a public officer in his official capacity. Failure to obtain such consent renders the garnishee proceedings incompetent and liable to be set aside.²⁷⁰

Section 84 of the Sheriffs Act is only relevant where the government or its entities is a counter party, or where the funds to be attached in execution are held by a government agency. It is therefore arguable that section 84 of the Sheriffs Act is unconstitutional for the reason that it is a law which places the validity of enforcement proceedings in the hands of a public official who is the chief legal officer of a counter- party to such proceedings.²⁷¹

Recently, the Supreme Court made an exception to the requirement of consent for funds held in the Central Bank of Nigeria(CBN) by the government in *CBN v Intersella*²⁷² on the

²⁶⁸ Order 4 Rule 17 of the Judgment (Enforcement) Rules Court; Nwadialo *ibid* at 986.

²⁶⁹ See s.83 of the Sheriffs Act; Afe Babalola *Enforcement of Judgments* (2003) 91-3.

²⁷⁰ *National Insurance Commission v Oyefesobi* (2013) LPELR 20660(CA).

²⁷¹ Strangely the courts have taken the view that section 84 is not unconstitutional. See the cases of *See Onjewu v KSMCI* (2003) 10 NWLR (Pt 827) 40 (CA) and *Government of Akwa Ibom State v Powercom (Nig)Ltd* (2004) 6 NWLR (Pt. 868) 202(CA).

²⁷² 2018 (7) NWLR (Part 1618) 294 (SC). It appears that in *CBN v Intersella*, the Supreme Court discountenanced the provisions of s.84(1) of the Sheriffs Act was because the Attorney General of the Federation was the judgment

ground that the CBN is not a public officer within the contemplation of section 84 of the Sheriffs Act. This decision was a departure from previous decisions of the superior court on the status of the CBN.²⁷³ The effect of this is that funds belonging to the government or its entities in CBN accounts may be attached by garnishee proceedings without the Attorney General's consent.

With respect to government funds in accounts other than CBN accounts, section 84 of the Sheriffs Act may pose an obstacle in respect of the enforcement of judgments relating to arbitral awards in Nigeria where government parties are involved and may serve to discourage investors who may view the provision as conferring an undue advantage on the government and government-owned entities by shielding them from their obligation to liquidate judgment debts.²⁷⁴

VII. CONCLUSION

It can be seen from this chapter despite the seemingly comprehensive legal framework for the investor-state arbitration in Nigeria, there are a number of inadequacies which may inhibit the efficiency of the system in Nigeria. The inadequacies of the NIPC Act especially as it relates to the lack of express consent to the ICSID mechanism ought to be addressed to provide for a more effective process.

The case for a better statutory framework for Nigeria's consent to the ICSID mechanism has been made. This is because the consent contained in the treaty is inadequate as the basis for investor state arbitration having regard to the limited number of Nigeria's BITs. This will afford potential investors the benefit of ICSID arbitration in respect of their disputes where the home state of the investor remains a party to the ICSID Convention.

Other issues such as the problems in the enforcement regime for non-ICSID awards have been explored. Practical impediments to the enforcement of judgments by garnishee proceedings, especially the requirement of obtaining the leave of the Attorney General for the validity of the proceedings, could serve to frustrate an investor from realising the fruit of the

debtor and had been sued in his capacity as such, hence he could not have been expected to seek consent from himself.

²⁷³ See *CBN v Shipping Company Sara B.V* (2015) 11 NWLR (Pt.1469) 130 at 135(CA).

²⁷⁴ Afe Babalola 'A call for the review or abolition of archaic, anachronistic and unconstitutional laws- Section 84 of the Sheriffs and Civil Process Act protecting government from payment of judgment debt' (2013) 1(1) *ABUD Law Journal* 1 at 11-4,34-5; See also Udo Udoma & Belo Osagie 'A discretion too far' *IFLR 2018* <https://www.iflr.com/Article/3839053/A-discretion-too-far.html> accessed on 18 April 2020.

award. It is therefore desirable for the section 84 of the Sheriffs Act to be repealed in view of these concerns raised especially regarding the constitutionality of the said provision.

The next chapter proposes solutions to the problems identified. Statutory consent to the ICSID mechanism will be discussed. Measures to improve the efficiency of the ICSID enforcement framework for both final awards and provisional measures is explored. The possibility of making the Arbitration Act regime more suitable for investor-state proceedings especially as it relates to the enforcement of awards is discussed.

CHAPTER FIVE

RECOMMENDATIONS FOR THE REFORM OF THE CURRENT LEGAL FRAMEWORK FOR INVESTOR-STATE ARBITRATION IN NIGERIA

I. INTRODUCTION

In the previous chapter, the author considered the challenges with the current legal framework for the investor-state arbitration as an efficient mode of resolving investment disputes in Nigeria. This Chapter proposes the practical solutions that may be adopted towards solving these problems with a view creating a legal regime that affords investors a speedy and efficient dispute resolution mechanism in Nigeria.

The Amendment Bill to the Arbitration Act contains a number of innovations which will address some of the problems of the arbitral process in Nigeria. This chapter deals with the reforms in the Amendment Bill and additional suggestions towards addressing issues peculiar to the ISDS framework in Nigeria and other legal barriers towards an effective dispute resolution process. These recommendations are to be viewed as local solutions to the peculiar inhibitions in Nigeria, in addition to the reforms being devised at the international level by bodies such as the UNCITRAL Working Group III.

The following proposals will be made: (i) an amendment of the NIPC Act to provide for express consent to the ICSID Centre and also to make investment guarantees subject to the lawful and non-discriminatory exercise of regulatory powers of government, (ii) amendment of the ICSID Act to provide for the enforcement of provisional measures granted by ICSID tribunals and the possibility of extending the ICSID Act to ICSID additional facility awards; (iii) constitutional Amendments to provide for special procedures to be adopted by the high court of the states in adjudicating enforcement and setting proceedings, (iv) enforcement of arbitral awards in the high courts as a fast-track matter; (v) amendment of the Arbitration Act for computation of the limitation period to run from the date of the award; (vi) emergency arbitrator proceedings; (vii) small claims investment arbitration and expedited arbitration; (viii) third party participation; (ix) consolidation of arbitral proceedings; (x) providing a definition for public policy; and (xi) amendment of the Sheriffs Act to remove the requirement of consent of the Attorney General for attaching funds held by public officials.

II. PROPOSED AMENDMENTS TO THE NIPC ACT

a. Express consent to the jurisdiction of the ICSID Centre

The first proposal relates to potential amendments to the NIPC Act. As shown earlier, the consent of Nigeria to the jurisdiction of the ICSID Centre is conditional consent. Arbitration, whether commercial or investor-state, is based on the consent of the parties. As can be seen from the objection raised in the *Interocean* case, the lack of express consent as required by Article 25 of the Convention may constitute a ground for challenging the Centre's jurisdiction in certain circumstances especially there is an existing treaty or other agreement which provides for a mode of dispute resolution other than ICSID.

A comparison may be drawn between section 26(3) of the NIPC Act and the investment statute of one of Nigeria's neighbours, Mauritania, where the Investment Code provides express consent to the ICSID Convention as a stand-alone option thereby removing any ambiguity or the possibility of jurisdictional objections on the basis of consent.²⁷⁵

The provision of section 26(3) of the NIPC Act may also be compared with the provisions of section 22 of the Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act 39 of 1990 which provides for express consent. Section 22 provides as follows:

In the event of any dispute in respect of a substantial matter arising from the provisions of the Decree, the aggrieved shareholder(s) in the company shall issue a letter of notification to Government formally notifying Government and the other shareholders of the dispute. The Government's representatives and one of the Company's shareholders as the case may be, shall make serious efforts to resolve amicably such dispute. In the event of failure to reach amicable settlement within 90n days of the date of the letter of notification mentioned above, *such dispute may be submitted to arbitration before the International Centre for the Settlement of Investment Disputes.* (Emphasis supplied).

The rendering of an award in respect of a party that has not consented to the jurisdiction of the centre amounts to the tribunal exceeding its powers which may lead to the annulment of such an award.²⁷⁶ Given this, it is proposed that sections 26(2) and (3) of the NIPC Act should be amended to expressly provide for the consent of Nigeria to the ICSID Centre. This will

²⁷⁵ See Article 30 of the Mauritanian Investment Code Law No. 52 of 2012. Article 7.2(c) and (d) of the Mauritania's Ordinance No. 89.013/CMSN of 1989 Concerning the Investment Code provides that disputes between a foreign investor and the government of Mauritania may be resolved according to the arbitration or conciliation procedure of the ICSID Convention and that the article constitutes the consent of Mauritania to ICSID

²⁷⁶ See Article 52(1)(b) of the ICSID Convention; The principle of consent in investor state arbitration is essentially the same as what obtains in international commercial arbitration. Lack of consent to the process is a jurisdictional issue and will amount to an arbitral tribunal exercising powers that it has not been granted. See Blackaby op cit note 7 para 5.91.

afford greater comfort to investors who may wish to take advantage of the ICSID mechanism, especially those whose home states are also parties to the ICSID Convention for two reasons.

First, investors from countries that are members of ICSID will be able to use the ICSID mechanism regardless of whether their home state has a BIT or has an MIT which contains consent to ICSID arbitration. Secondly, Article 25(1) of the ICSID Convention provides that, once consent is given, such consent cannot be unilaterally revoked, hence an investor is assured of the express consent of the Nigerian government and is unlikely to be met with a jurisdictional objection like in the *Interocean* case if express consent to the ICSID Centre is provided by legislation.

b. Admission of investment subject to regulatory powers of the state

As set out in Chapter 1, a principal criticism of the ISDS framework is that the mechanism often entails a curtailment of a state's sovereign powers by private tribunals.²⁷⁷ The breach of a treaty standard usually entails the exercise of a state's sovereign powers. Sometimes these powers are exercised for good reasons, yet the host state may be required to compensate an aggrieved investor who suffers loss as a result.²⁷⁸ When investment claims are successful and damages awarded, the perception is that states are being penalised by arbitral tribunals for implementing policies to address their peculiar challenges.²⁷⁹

In Chapter 1 of this dissertation, it was argued that the state of crisis in the Nigerian judiciary has occasioned a growing lack of confidence in the court system,²⁸⁰ hence the current proposals made by the EU in creating a multilateral investment court may be unsuitable for Nigeria, at least in the short-term. Growing dissatisfaction with the court system shows that arbitration is still the preferred mode of commercial and investment dispute settlement in Nigeria.

In view of the criticism of the ISDS framework as a private dispute resolution framework which sometimes curtails the regulatory or sovereign powers of a state, a balance must be found between the continued use of the ISDS framework as the preferred mode of

²⁷⁷ Section III of Chapter 1 above.

²⁷⁸ See for example the case of *MetalClad Corporation v The United States of Mexico* ICSID Case No. ARB(AF)/97/1, Award 30 August 2000.

²⁷⁹ See for example Jennifer Reed, 'South African revolutionizing foreign investment protection system' (2014) 6 *Y.B. Arb. & Mediation* 295 at 298-99 which explains the situation of South Africa and the immediate cause of discontent with BITs with Europe.

²⁸⁰ See section IV of Chapter 1 above, Bamgbose op cit note 59 at 24-37.

dispute settlement in the Nigerian context on the one hand and the need to uphold the regulatory powers of Nigeria as a sovereign state on the other hand.²⁸¹

In proposing a possible amendment to the NIPC Act, the approach of a number of recent treaties on the issue²⁸² may serve as a guide. For instance, the NIPC Act might be amended to include a provision which expressly provides that the investment guarantees contained in the NIPC Act are subject to the regulatory powers of the federal and state governments provided such powers are exercised in a non-discriminatory manner, in good faith, and in the overriding interest of the public, rather than the exercise of state powers against foreign investors in a discriminatory manner²⁸³ or sometimes for political reasons as was done in the 1970s.²⁸⁴

Such an amendment will preserve the regulatory powers of the government while maintaining the protection and guarantees afforded to investors. In the proper exercise of such powers, a state will not be required to compensate an investor for an act which would otherwise amount to expropriation or another breach of a treaty standard or the obligations of the host state to protect a foreign investor where such an act has been done for the purpose, *inter alia*, of executing tax laws, protection and maintenance of public health, environmental safety or national security.

However, an amendment of this nature must be balanced by including more investment guarantees than those in the current NIPC Act.²⁸⁵ Discriminatory and arbitrary conduct on the part of the government must be expressly prohibited. It must therefore be clear that the ‘police powers’ of the state to be exercised will apply to every natural and juristic person within the territory of the country and that such powers must only be exercised in good faith and to protect the overriding interest of the public.²⁸⁶

²⁸¹ See for example Article 12 of the US Model BIT 2012.

²⁸² See Articles 12 and 13 of the US Model BIT 2012; article 3(2) of the Netherlands Model BIT 2019.

²⁸³ See sections 4-5 of the Nigerian Enterprise Promotion Decree 4 of 1972; Chibuike Uche ‘British government, British businesses, and the indigenization exercise in post-independence Nigeria’ (2012) 86(4) *The Business History Review* 745 at 752-755.

²⁸⁴ Ann Genova ‘Nigeria’s nationalization of British Petroleum’ (2010) 20(1) *The International Journal of African Historical Studies* 115.

²⁸⁵ The NIPC Act currently contains only the guarantees relating to free transferability of funds and non-expropriation of investment without compensation. See sections 24 and 25 of the NIPC Act.

²⁸⁶ Note, however, that where such measure involves the seizure of property, compensation must be paid in accordance with section 44(1) of the Constitution of the Federal Republic of Nigeria 1999(as amended). Where real property, compensation must be paid in accordance with sections 28 and 29 of the Land Use Act 6 of 1978.

d. Definition of ‘foreign investor’ in the NIPC Act

As explained above, because foreign investors cannot carry out business in Nigeria without incorporating a company in Nigeria and registering same with the NIPC, it may be helpful to define who a foreign investor is for section 26 (2) and (3) of the NIPC Act. This is because a foreign investor who only has a negligible interest in a Nigerian company may seek to file an investment claim against Nigeria on the basis that the company is one with foreign participation which is registered with NIPC Act and therefore entitled to take advantage of the investment guarantees in the NIPC Act including the dispute resolution provisions.²⁸⁷

As explained in Chapter 2, ICSID tribunals have addressed this issue by inquiring into the ownership or controlling interest of such local companies. However, it is preferable to amend the NIPC Act to define a ‘foreign investor’ as a company incorporated with Nigeria and duly registered with the NIPC Act but with the majority of its shares or controlling shareholding interests vested in a foreign national(s). This is line with ICSID jurisprudence on the subject²⁸⁸ and will help prevent a situation where a Nigerian owned company with foreign participation which consists of only a minority or negligible foreign shareholding, may contend to be a foreign investor for the purpose of the dispute resolution provisions of section 26 (2) and (3) of the NIPC Act.

e. Definition of ‘investment’ in the NIPC Act

The vague definition of ‘investment’ in the current NIPC Act ought to be amended to incorporate the attributes of investment as defined in a number of ICSID cases, especially the *Salini* case.²⁸⁹ More specifically, the definition of ‘investment’ in the yet to be ratified Morocco-Nigeria BIT 2016 should be adopted. This is because this definition in the BIT with Morocco contains the attributes of investment and clearly excludes commercial transactions.²⁹⁰

²⁸⁷ Although as explained at Chapter 2, ICSID jurisprudence indicates that a tribunal will make an inquiry as to the controlling interest of a company, it is desirable to remove ambiguities by defining the term. It is noteworthy that section 26(2)(a) of the NIPC Act contains the consent of the Nigerian government to ad hoc arbitration in respect of disputes with local companies hence a company with majority Nigerian shareholding but with some foreign participation, is not without remedy if an investment dispute arises.

²⁸⁸ See *Liberian Eastern Timber Corp LETCO v Liberia* ICSID Case No. ARB/83/2 award on 31 March 1986.

²⁸⁹ See section II(d) of Chapter II above.

²⁹⁰ See Article 1 of the Morocco-Nigeria BIT 2016.

III. PROPOSED AMENDMENTS TO THE ICSID (ENFORCEMENT OF AWARDS) ACT

a. *Enforcement of interim/provisional measures*

As already explained, party may require interim measures pending the conclusion of an ICSID arbitral proceeding for a number of reasons²⁹¹ including to compel the production of evidence,²⁹² restraining parallel domestic proceedings,²⁹³ or further aggravating the situation complained of.²⁹⁴ Although an ICSID tribunal possesses the powers to grant provisional measures in aid of the arbitral process, it lacks the powers to enforce such orders.

By Article 26 of the ICSID Convention, submission to ICSID excludes recourse to all other remedies, hence once parties' consent to ICSID arbitration, no remedy may be sought before a national court or judicial authority.²⁹⁵ Article 26 has two effects. First, once parties submit to ICSID arbitration, they lose their right to seek relief in another forum. Secondly, no judicial authority may interfere with an ICSID arbitration process once commenced.²⁹⁶ The provisions of Article 26 of the ICSID Convention therefore accentuate the feature of the ICSID mechanism as a self-contained system with no seat of arbitration unlike UNCITRAL Arbitration. For this reason, national courts may be reluctant to grant injunctive relief in aid of an ICSID arbitration.²⁹⁷

As shown at Chapter 3, Article 47 of the ICSID Convention empowers the ICSID tribunals to recommend 'provisional measures' which essentially serve the same purpose as interim measures usually granted by national courts in aid of commercial arbitration. Unlike interim relief granted by an arbitral tribunal in an UNCITRAL arbitration which may be enforced as an interim award by a court at the seat of the arbitration²⁹⁸ or which, if obtained from a court in the forum where it is to be enforced, may be enforced with relative ease by the court of such a forum,²⁹⁹ recommendations made further to Article 47 cannot be enforced by an ICSID tribunal.³⁰⁰

²⁹¹ Dugan op cit note 8 at 140-45.

²⁹² *AGIP S.p.A v People's Republic of Congo* ICSID Case No. ARB/77/1.

²⁹³ *Holiday Inns SA and Others v Morocco* ICSID Case No. ARB/72/1.

²⁹⁴ Dugan et al op cit note 8 at 141.

²⁹⁵ Article 26 of the ICSID Convention.

²⁹⁶ *ibid.*

²⁹⁷ See for instance *ETI Euro Telecom International NV v Bolivia and Another* (2008) EWCA Civ 880 (HC).

²⁹⁸ Article 26 of the UNCITRAL Rules. Blackaby et al op cit note 7 para 7.14-7.18.

²⁹⁹ Blackaby et al, *ibid* 7.19. However, such interim awards are not enforceable under the New York Convention as they are not final awards. See Dugan et al op cit note 8 at 139.

³⁰⁰ Dugan et al *ibid* at 138.

ICSID tribunals have however acknowledged that these recommendations are in the nature of injunctive relief. In *Mafezzini v Spain*, the tribunal observed that the use of the word ‘recommend’ at Rule 39 of the ICSID Arbitration Rules and ‘order’ as used elsewhere in the ICSID Convention to express the binding nature or otherwise of the measure is more apparent than real. The tribunal effectively equated the provisional measures with an award. A similar conclusion was reached in *Tokolos Tokeles v Ukraine*³⁰¹ where the tribunal held that the provisional measures recommended by an ICSID tribunal are ‘legally compulsory’ and that parties are under a legal obligation to comply with them.³⁰² The assistance of the court in the enforcement of such provisional measures is not to be viewed as seeking relief outside the self-contained ICSID mechanism but rather as giving effect to or complying with the ICSID mechanism.

The ICSID mechanism could be strengthened by amending the ICSID Act to confer the powers to enforce provisional measures granted by an ICSID tribunal on the Supreme Court. Measures that require the force of an order of court include those relating to compelling the production of evidence, restraining parallel domestic proceedings,³⁰³ preventing irreparable injury,³⁰⁴ to prevent further wrongful actions or an aggravation of the existing circumstances³⁰⁵ until the resolution of the dispute especially where the state in question may be unable to compensate the counter party through such pecuniary relief as may be eventually granted by the tribunal.

It is therefore desirable to have a system in place that enables the enforceability of such measures in Nigeria. The inclusion of a legal framework in the ICSID Act to ensure that provisional measures granted by an ICSID tribunal may be enforced by the Supreme Court will afford more efficacy to the ICSID arbitration process to enforce such relief as may be granted by an ICSID tribunal.

Furthermore, such an amendment to include the enforcement of provisional measures by the Supreme Court could be viewed as Nigeria’s consent to the right of the claimant to seek provisional measures from a judicial authority further to rule 39(6) of the ICSID rules which

³⁰¹ ICSID Case No. ARB/02/18, Order No.1, Claimant’s Request for Provisional Measures.

³⁰² See also *Occidental Exploration and Production Co v Ecuador* LCIA Case No. UN 3467) Final Award 1 July 2004.

³⁰³ See for example *Holiday Inns v Morocco*; *Maritime International Nominees Establishment (MINE) v. Republic of Guinea* ICSID Case No. ARB/84/4.

³⁰⁴ Steven Finizio, Ethan Shenkman and Julian Mortenson ‘Recent developments in investor-state arbitration: effective use of provisional measures’ 2007 *European Arbitration Review* 15 at 16.

³⁰⁵ Dugan et al note 8 at 141.

permits the parties, provided that they have so stipulated in the agreement recording their consent, to request from a judicial or other authority, provisional measures prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

b. Enforcement of ICSID Additional Facility awards under the ICSID Act

In spite of the wide ratification of the ICSID Convention, there are a number of important absentees, including a few whose nationals have substantial investments in Nigeria.³⁰⁶ Nationals of such states may utilise the ICSID Additional Facility Rules in resolving investment disputes. However, unlike ICSID arbitration, an ICSID Additional Facility arbitration has a seat of arbitration,³⁰⁷ hence awards rendered under the system may be set aside at such a seat. Moreover, ICSID additional facility awards are enforced under the New York Convention and may be subject to prolonged enforcement proceedings through the hierarchy of the superior court system. This is because by Article 3 of the ICSID Additional Facility Rules, the ICSID Additional Facility mechanism is not governed by the provisions of the ICSID Convention.³⁰⁸

Nigeria's obligation to ensure that ICSID awards are enforced like the final judgments of its national courts does not extend to ICSID Additional Facility awards. As a matter of exercising its sovereign legislative powers and providing an additional incentive in the area of investment protection, the National Assembly could extend the enforcement mechanism afforded by the ICSID Act to ICSID Additional Facility awards. This would enable investors from some of Nigeria's important trading partners which are not parties to the ICISD Convention to take advantage of the finality afforded by the ICSID Act.

In making such an amendment to the ICSID Act, it is important to bear in mind that because such awards may be set aside at the seat of arbitration, a reasonable opportunity must be afforded an unsuccessful party who may have grounds upon which to apply for the setting aside of the award. An amendment extending the ICSID Act to the enforcement of ICSID additional facility awards must therefore be made subject to the lapse of the three month time frame within which a setting aside application must be filed in Nigeria,³⁰⁹ or in the case of foreign-seated arbitration, any such time as may be prescribed in the statute of the seat of arbitration for the setting aside of arbitral awards.

³⁰⁶ For instance, India and South Africa.

³⁰⁷ Article 20 of the ICSID Arbitration (Additional Facility) Rules.

³⁰⁸ Ibid Article 3.

³⁰⁹ Section 29 of the Arbitration and Conciliation Act.

Where there are grounds upon which an award may be challenged, the above measure will afford an aggrieved party the opportunity of doing so. Having regard to the limited grounds upon which an award may be refused enforcement under the New York Convention, where an unsuccessful party lacks cogent grounds to challenge an award or after such setting aside proceedings are concluded, such an award may then be enforced directly at the Supreme Court without the rigours of prolonged post arbitral award litigation through the superior court hierarchy of Nigeria.

The proposal for making enforcement and setting aside proceedings fast track matters may take care of the prolonged proceedings that a setting aside proceedings may occasion prior to when the successful party make take advantage of the proposed amendment to the ICSID Act to enforce such at the Supreme Court.

IV. CONSTITUTIONAL AMENDMENTS TOWARDS PROVIDING A MORE EFFICIENT REGIME FOR THE RECOGNITION AND ENFORCEMENT OF NON-ICSID ARBITRAL AWARDS

The enforcement of foreign arbitral award in Nigeria is governed by the Arbitration Act³¹⁰ and the New York Convention.³¹¹ A decision of the High Court recognising and enforcing an arbitral award, refusing the recognition and enforcement of award, or setting aside of an arbitral award is subject to appeals to the Court of Appeal and further to the Supreme Court.³¹²

The result of this is that the element of speed in respect of arbitration has become whittled down in recent times owing to significant delays in post arbitral award litigation which usually follows. This specie of litigation, in the form proceedings for the setting aside or enforcement of arbitral awards, has now become the second stage in what is essentially a two-stage dispute resolution process where if there is an arbitration agreement; first, the parties participate in arbitration and secondly, after the final award is handed down, the parties then engage in litigation by way of enforcement or setting aside proceedings at the High Court sometimes all the way to the Supreme Court.³¹³

The problem of delay can be remedied by amending the constitution to: (1) make special provisions for the composition of the High Courts of the various states and the Federal

³¹⁰ Sections 31, 51, 52 and 54 of the Arbitration Act.

³¹¹ Ibid Section 54.

³¹² Section 241(1)(a) and 233(1) of the Constitution of the Federal Republic of Nigeria 1999 as amended.

³¹³ See Fagboyegun op cit note 100 at 52-3.

High Court for arbitration related proceedings and, (2) to restrict the right of appeal by making the Court of Appeal the final appellate for arbitration-related matters. Such amendments might limit further appeals to the supreme court to grounds of fundamental human rights similar to the provisions of the constitution, which restricts the grounds of appeals from decisions of the national industrial court to issues relating to fundamental human rights.³¹⁴ The restriction of appeals in industrial matters decided by the national industrial court was put in place to ensure an element of finality in employment litigation and to avoid a situation where employees (who are usually in a weaker position especially impecunious ones who cannot afford prolonged litigation) are subjected to prolonged appellate litigation.

An amendment of this nature to similarly restrict the right of appeal in respect of arbitration-related proceedings must take into account the quality of the High Court bench in the various states to reduce the chances of incorrect decisions. It is therefore suggested that the composition of the High Court when considering whether an arbitral award ought to be enforced or set aside, be increased to three justices. By increasing the composition of the High Court to three justices when considering the enforceability or otherwise of an arbitral award, and making the Court of Appeal the final appellate court, the chances of incorrect decisions are significantly reduced, thereby striking a balance between dispensing substantial justice and the desire for speed.

It is also suggested that the proposed amendment should be extended to all arbitration related proceedings including the grant of interim measures in aid of arbitration, orders relating to discovery, interrogatories, the subpoena of witnesses etc. This is because it is undesirable for such interlocutory matters to become the object of prolonged appeals intended merely to delay the process, as Nigerian litigation lawyers are reputed to act.

The measures suggested above would address the problem of prolonged proceedings in respect of enforcement and setting aside proceedings and also the possibility of prolonged interlocutory actions regarding interim measures while also ensuring that injustice is unlikely

³¹⁴ See section 243(2) of the Constitution which provides that appeals from the National Industrial Court shall only lie to the Court of Appeal as of right in respect of questions of fundamental rights. Section 243(3) provides that where any law prescribes that that an appeal shall lie from decisions of the National Industrial Court to the Court of Appeal, such an appeal shall be with the leave of the Court of Appeal. It is however important to note that in the case of *Skye Bank v Iwu* (2017) NWLR 16 NWLR (Pt. 240) 1, the Supreme Court held that notwithstanding these provisions, no constitutional provisions expressly divests the appellate jurisdiction of Court of Appeal over all decisions of National Industrial Court on civil matters.

to be occasioned to a party who is dissatisfied with an arbitral award or who has a reasonable or legitimate basis to contest interim measures.

However, constitutional amendment in Nigeria is a cumbersome process and may not happen in the short-term unless the National Assembly considers that there are urgent problems of national importance to be addressed, in which case the relevant participants may cease the opportunity to insert such reforms.

V. ENFORCEMENT OF ARBITRAL AWARDS AS A FAST-TRACK MATTER

In the absence of constitutional amendment, which as stated above, is a time-consuming and sometimes difficult political process,³¹⁵ an alternative solution which would prove effective in reducing the delays in enforcement proceedings in the short-term may be devised. This may be achieved by the issuance of practice directions for the enforcement of arbitral awards or the amendment of the High Court (Civil Procedure) Rules to provide for the adjudication of enforcement applications as fast-track matters.

Order 59(1) of the High Court of Lagos State (Civil Procedure) Rules 2019 provides that the object of the fast-track procedure is to ensure that matters initiated under the procedure are concluded within a timeframe of nine months, from the date of commencement to judgment. By Order 59(2), only the following matters qualify for the fast-track procedure: (a) claims commenced by writ of summons or counter claims for liquidated money demands in the sum of N100,000,000 and above and (b) claims involving mortgage transactions, charges or other securities.

It is proposed that applications for the enforcement or for the setting aside of arbitral awards should be included in the matters to be considered as fast-track matters in the civil procedure rules or by way of practice directions. This will ensure that such matters are speedily dispensed with. Such a fast-track procedure could also be included in the rules of the appellate courts, i.e. the Court of Appeal and the Supreme Court. In the past, the Court of Appeal demonstrated commitment to the ADR process by creating the Court of Appeal Mediation Programme (CAMP) in the Court of Appeal Rules 2011.³¹⁶ It is proposed that a fast-track

³¹⁵ Section 9(2) of the Constitution provides that an Act of the National Assembly for the alteration of the constitution shall not be passed in either House of Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all members of the Houses of Assembly of not less than two-thirds of all the states.

³¹⁶ This has been retained since then. See Order 16 of the Court of Appeal Rules 2016.

procedure also be introduced in the Supreme Court and Court of Appeal Rules for appeals relating to arbitration matters to ensure that arbitration related appeals are speedily adjudicated. A time frame of nine months (similar to what is contained in the fast-track procedure in the High Court of Lagos State (Civil Procedure) Rules) should also be introduced in an amendment to the Court of Appeal Rules.

It is therefore submitted that the amendment of the Rules of Court or the issuance of practice directions as suggested above could be effective solutions in addressing the delays in respect of enforcement or setting aside proceedings in Nigerian courts.

VI. LIMITATION PERIOD FOR ENFORCEMENT OF ARBITRAL AWARDS

As addressed in Chapter 4 above, the limitation period for awards rendered in ad hoc arbitration proceedings is reckoned from the date when the cause of action arose rather than when the arbitral award is delivered.³¹⁷ The result of this is that when arbitral proceedings have lasted for a long time,³¹⁸ the successful party may find that such an award is already barred or prescribed by statute. As discussed at section IV(b)(i) of Chapter 2 above, the Amendment Bill seeks to cure this anomaly by providing that the limitation period will begin to run from the date the award was issued rather than when the original cause of action arose.

VII. EMERGENCY ARBITRATOR PROCEEDINGS

As stated at section IV(b)(iv) of Chapter 2 above, the Amended Bill to the Arbitration Act also provides for the appointment of an emergency arbitrator where urgent interim relief is required. By the Proposed Amendment Bill, such relief may be sought from an institution agreed between the parties and failing such an agreement, from the court. This will enable a party to obtain urgent relief that may be required before the constitution of the arbitral tribunal.

VIII. SMALL CLAIMS INVESTMENT ARBITRATION AND EXPEDITED ARBITRATION PROCEEDINGS

While the principle of party autonomy which affords the parties significant control over the arbitral process is an important element of the arbitral process,³¹⁹ it is also desirable that some

³¹⁷ *City Engineering Ltd v Federal Housing Authority* (supra).

³¹⁸ See for example the case of *The Ocean Victory: Gard Marine and Energy Limited v China National Chartering Company Ltd and Another* [2017] UKSC 35(SC) where the arbitration lasted for eleven years.

³¹⁹ Blackaby et al op cit note 7 para 1.104.

measure of expedition is attained in the arbitral process, especially where time is of the essence to one or more parties. Although time limits are usually included in the procedural timetable of ad hoc proceedings, parties may take the liberty to default in complying with such timelines.

One of the disadvantages of the ad hoc arbitration process is that the efficiency of the process depends on the cooperation of the parties,³²⁰ hence, parties sometimes employ the delay tactics typically associated with litigation. In providing for expedited proceedings, the possibility of shutting out a party or preventing such a party for not complying with procedural timelines may give rise to fair hearing considerations. Such considerations may be addressed by providing a fair opportunity for extension of time applications. The fact that an arbitration has been conducted in default of participation by a party, owing to an inordinate delay by such a party in presenting his case, should not be a sufficient basis to nullify a proceeding. This is because the requirement of fair hearing only entails affording a party reasonable opportunity to present his case and does not necessarily imply that a party will be indulged infinitely.³²¹

Including a special provision for small claims and expedited proceedings will afford aggrieved investors with small claims the benefit of having their disputes resolved speedily. This will help prevent incurring large costs and loss of time in respect of small claims as is sometimes the case where parties do not abide by the timelines agreed upon in the usual ad hoc proceedings.

A small investment claim - which is proposed to be defined as claims not exceeding US\$ 1 million - could be resolved on an expedited basis. With the exception of cases which are by their nature complex and may consequently require a fair amount of time, the Arbitration Rules should be amended to include to provide for expedited proceedings. In essence a claim below US\$ 1m may be expedited unless the arbitrator or tribunal reaches the determination that more time will be required for the resolution of the dispute due to its complexity. Such proposed expedited proceedings could be designed to ensure that matters conducted under the procedure are concluded within a timeframe of six months.³²²

³²⁰ This is unlike institutional arbitration where timelines are set by the rules of the institutions and are expected to be complied with by the parties; See also Blackaby et al op cit note 7 para 1.145.

³²¹ *Diga v Tony* (2013) LPELR 20768 (CA).

³²² See for example Article 4(1) of the ICC Expedited Procedure Rules and Article 42 of the Swiss Rules of International Arbitration 2012.

This is to ensure time and cost efficiency for ‘small claims’.³²³ For instance, article 30(2)(a) of the ICC Arbitration Rules provides that the Expedited Procedure Rules shall apply to disputes where the claim does not exceed US\$2 million. Similarly, Article 42(2) of the Swiss Rules of International Arbitration 2012 provides that the expedited procedure contained therein will apply to disputes where the amount claimed does not exceed CHF1 million unless the court decides otherwise.

Given that the expedited procedure usually entails an abridgement of the evidential hearing,³²⁴ it is important to avoid pitfalls which may lead to the setting aside of the award of the award on the grounds of fair hearing or inability of a party to present his case as highlighted above.³²⁵ It is also important to state that the procedure may be inappropriate for complex matters or those where expert evidence or extensive oral evidence is required.³²⁶

IX. THIRD PARTY PARTICIPATION

There has been a drive towards greater transparency in the investor-state arbitration.³²⁷ Unlike international commercial arbitration which usually involves business disputes between individuals or private entities and as a result is typically kept confidential,³²⁸ the public nature of investment arbitration has triggered a departure from the principle of confidentiality and a move towards transparency because such disputes usually arise out of the obligation of governments and the effect that such awards ultimately have on the general public.³²⁹ The requirement of accountability by government has given rise to a demand for transparency in ISDS.

³²³ Peter Michaelson ‘When speed and cost matter: Emergency and expedited arbitration’ (2014) 218(4) *New Jersey Law Journal* 50.

³²⁴ See Irene Wesler and Christian Klausseger ‘Fast track arbitration: Just fast or something different’ *Austrian Arbitration Yearbook* 2009, 274 available at https://www.cerhahempel.com/fileadmin/docs/publications/Welser/Beitrag_Welser_2009.pdf accessed on 01 August 2020.

³²⁵ *ibid* 269. See also Klaus Peter Berger ‘The need for speed in international arbitration’ *Kluwer Law International* (2008) 25(5) 599-600.

³²⁶ See Wesler and Klausseger *op cit* note 324 at 274.

³²⁷ See the United Nations Convention on Transparency in Treaty Based Investor State Arbitration 2014; See also for example Article 29 of the US Model BIT 2012; Gary Born and Stephanie Forrest ‘Amicus Curiae Participation in Investment Arbitration’ (2019) 34(3) *ICSID Review* 626 at 628,63; See also Christina Knahr and August Reinisch ‘Transparency v Confidentiality in International Investment Arbitration – *The Biwater Gauff Compromise*’ 2007 6 *The Law and Practice of International Courts and Tribunals* 97 at 110-115.

³²⁸ Article 28(3) of the UNCITRAL Rules provides that the proceedings shall be confidential unless the parties agree otherwise.

³²⁹ Tomoko Ishikawa ‘Third party participation in investment treaty arbitration’ 2010 59(2) *ICLQ* 373 at 375-76; Dugan et al *op cit* note 8 at 706; Adeola Awojobi *Confidentiality in Investor State Arbitration* (unpublished LLM Dissertation University of Cape Town, 2015) 63.

The practice of affording non-disputing parties the opportunity of filing written submissions gained traction in NAFTA chapter eleven arbitrations.³³⁰ With the coming into force of the UNCITRAL Rules on Transparency Based Investor-State Arbitration on 18 October 2017 in respect of treaties concluded after 1 April 2014 except where parties agree otherwise, transparency rather than confidentiality may soon become one of the distinctions between investor-state arbitration and commercial arbitration.

The Nigerian government has not concluded any treaty since 2006, hence the UNCITRAL Transparency Rules are not applicable to Nigeria's existing BITs. It is therefore suggested that the Nigerian Arbitration Rules be revised to include the provisions of the UNCITRAL Transparency Rules to ensure that arbitral proceedings conducted under the arbitration rules are transparent. While the rules will not apply to ICSID arbitration involving Nigeria, the rules will apply where the arbitration is ad hoc and has its seat in Nigeria.

The inclusion of such rules by way of an amendment to the Arbitration Rules will ensure that the Transparency Rules apply to disputes that may be initiated either on the basis of Nigeria's existing treaties since a good number of them contain the option of UNCITRAL arbitration or investment agreements which provide for UNCITRAL Arbitration.

The inclusion of a transparency regime in Nigeria's Arbitration Rules will allow for greater scrutiny and allow third party participation through the submission of amicus briefs in respect of arbitral proceedings involving the government and may be helpful in avoiding undesirable results as a result of corrupt practices or inadequate representation in Nigeria seated proceedings.³³¹ Furthermore, in addition to other reforms, transparency may give greater legitimacy to the ISDS system.³³²

X. CONSOLIDATION OF PROCEEDINGS

³³⁰ Awojobi, *ibid* 59.

³³¹ The importance of transparency in investor-state arbitration especially for Nigeria came to the fore in enforcement proceedings in respect of the London seated *Process and Industrial Development Ltd v Nigeria* arbitration recently. In this arbitration where the recording breaking sum of US\$ 6.6 billion was awarded as damages against Nigeria, allegations that the underlying contract was procured by bribing top government officials have come to light. It has also been suggested that if the proceedings had been made public, the outcome might have been different, perhaps because public scrutiny might have put greater pressure on Nigeria's defence team and led to the presentation of evidence relating to these allegations of corruption at the arbitration. See Kate Beioley and Neil Munshi 'The \$6bn judgment pitting Nigeria against a London court' *Financial Times* 12 July 2020 available at <https://www.ft.com/content/91ddb53-a754-4190-944e-d472921bb81e> accessed on 12 July 2020.

³³² Gary Born & Stephanie Forrest 'Amicus curiae participation in investment arbitration' (2019) 34(3) *ICSID Review* 626, 627.

One of the procedural practices of litigation which may be incorporated into the ad hoc arbitration process is the consolidation of similar arbitral proceedings involving the same parties and the same subject matter.³³³ A matter may be consolidated where (1) a common question of law or fact arises in both or all the causes or matters, (2) rights to reliefs are claimed in respect of a arises out of the same transaction, or (3) for some other reason, it is desirable to make an order of consolidation.³³⁴

Just as the primary objective of consolidation in litigation is to save time and cost,³³⁵ introducing the measure into ad hoc investor-state arbitration will afford the parties greater speed and also helps prevent the possibility of conflicting decisions in respect of matters with similar facts if such matters were to be decided by different tribunals.

Given that the nature of arbitration is based on the consent of the parties, such a measure must be agreed to by the parties.³³⁶ Indeed, section 35(2) of the Arbitration Act ch.23 of 1996 of England provides that unless the parties agree to confer such powers on the tribunal, the tribunal has no power to order consolidation or concurrent hearing.

A provision should be included for the consolidation of proceedings or concurrent hearings where the parties consent and in instances where the parties to both or all proceedings are the same, common questions of law or fact are likely to arise for determination or in any other instance where there are cogent reasons for such consolidation. Furthermore, the rules of some arbitral institutions such as the ICC Court of Arbitration³³⁷ and the Swiss Chambers' Arbitration Institution already provide for consolidation of proceedings and for joinder of parties.³³⁸

XI. DEFINITION OF PUBLIC POLICY AS A GROUND FOR THE SETTING ASIDE OF AN AWARD

The Amendment Bill replaces the current grounds upon which an award may be set aside with the clearer ones.³³⁹ The ground of public policy remains one of the grounds for setting aside

³³³ See Order 41 Rule 7 of the High Court of Lagos State (Civil Procedure) Rules 2019.

³³⁴ *Naboth Okwuagbala & Ors v Margaret Ikwueme & Ors* (2010) 12 SC (Pt. IV) 1(SC).

³³⁵ *Diab Nasr v Complete Home Enterprises (Nigeria) Limited* (1977) 5 SC 1 at 11(SC).

³³⁶ See Article 33 of the US Model BIT 2012.

³³⁷ Article 10 of the ICC Rules of Arbitration 2017.

³³⁸ Article 4(1) and (2) of the Swiss Rules of International Arbitration, respectively.

³³⁹ This contrasts with the provisions of the current section.

under the Amendment Bill and upon which recognition and enforcement may be refused under the New York Convention.

The Amendment Bill should be revised to include a clear definition of public policy, preferably one which restricts it to matters bordering on illegality, violation of human rights, contravention of penal statutes and mandatory provisions of civil laws. This will help to eliminate the vagueness of the term and prevent the ground from becoming a subject of abuse in the hands of unscrupulous or tardy judicial officers.

XII. REPEAL OF SECTION 84 OF THE SHERIFFS AND CIVIL PROCESS ACT

Finally, as explained at Chapter 3, by section 84 of the Sheriffs and Civil Process Act, funds in the custody of a public officer can only be attached in execution of judgment with the consent of the Attorney General. The provisions of section 84 of the Sheriffs and Civil Process Act may be a stumbling block in instances where the respondent is a government-owned entity which has contracted as a separate juristic entity and its own name, and such a government entity has no physical assets which may attached in execution.

Attorneys General in Nigeria, especially at the federal level, in recent times, have primarily been politicians who occupy office to do the bidding of their employers rather than independent public servants.³⁴⁰ In view of this, an Attorney General might be inclined to frustrate efforts to levy execution against a government-owned entity. If the Attorney General withholds consent, a judgment creditor may be constrained to file an administrative law action³⁴¹ to compel the Attorney General to grant the consent, thereby leading to further delays in the enforcement process.

It is therefore proposed that the requirement of subjecting a judgment that has been obtained against a government-owned entity to the approval of the Attorney General – who is an agent of the executive arm of government – ought to be addressed by repealing section 84 of the Sheriffs Act.

³⁴⁰ The Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration) Bill, No.19, 2017 ‘seeks to establish the office of the Attorney-General of the Federation and of the State separate from the office of the Minister of, or Commissioner for, Justice to make the office of the Attorneys-General an independent and insulated from partisanship.’ See also Ebuka Onyeji ‘Why Nigeria’s Office of the Attorney-General should be separated from Minister of Justice – Adoke’ *Premium Times* 12 September 2019 available at <https://www.premiumtimesng.com/news/top-news/352026-why-nigerias-office-of-the-attorney-general-should-be-separated-from-minister-of-justice-adoke.html> last accessed on 19 November 2020.

³⁴¹ In such an instance, the appropriate administrative law remedy is an of mandamus. See Ese Malemi *Administrative Law* 4 ed (2012) 353-4.

XIII. CONCLUSION

The Arbitration Act is currently undergoing its first comprehensive review since 1988 to introduce amendments that are long overdue. It is hoped that a culture of regular consultation aimed at identifying the clogs in the wheel of the arbitration framework will be developed, especially in view of the emergence of several arbitral institutions on the Continent and the consequent competition to attract international arbitrations to Nigeria. Nigeria cannot stay ahead of this competition if it does not undertake a periodic review of its laws and practices.

CHAPTER SIX

CONCLUSION AND SUMMARY

Nigeria has progressed from a regime of nationalisation and indigenisation in the 1970s to one of relative economic liberalism as enshrined in legislation such as the NIPC Act in the mid-1990s. The enactment of the NIPC Act and Foreign Exchange Miscellaneous Provisions Act in 1995 signified a remarkable departure from contradictory government actions in the legal framework governing foreign investment, as evidenced by the simultaneous pursuit of a policy of indigenisation and nationalisation, and the ratification of investment protection and arbitration conventions, in the late 1960s and 1970s.

While investment protection statutes and treaties alone may not be sufficient to attract FDI, those measures are essential for the creation of a healthy investment climate. Furthermore, having cited an inefficient judicial system and unreliable dispute settlement mechanisms as some of the challenges that discourage foreign investors, it is clear that the provision of an efficient and neutral dispute resolution mechanism is a vital investment protection measure.

To this end, the importance of the assurance that a neutral and effective dispute resolution mechanism creates for a foreign investor cannot be over-emphasised. Nigeria established a reputation for being an arbitration-friendly jurisdiction relatively early. It was the first African state to ratify the ICSID Convention. In the past decade, several important court decisions³⁴² have entrenched the country's reputation as an arbitration friendly jurisdiction. However, this research reveals that there are practical inhibitions in the arbitration mechanism in Nigeria.

Accordingly, the dissertation explored solutions to the inadequacies in the legal framework for investor-state arbitration in Nigeria by proposing a number of reforms both in respect of ICSID and non-ICSID investor-state arbitration. These recommendations are additional measures to the ongoing reforms aimed at addressing the backlash against the ISDS mechanism on the global stage.

With respect to the ICSID framework, this dissertation outlines several solutions to address many significant issues in improving the efficacy of the ICSID mechanism in Nigeria. First, the conditional consent to the jurisdiction of the ICSID Centre at section 26(3) of the NIPC Act was discussed. The possibility that nationals of a number of countries may be barred from

³⁴² *Statoil v NNPC* 2013 (7) CLRN 72; *Williams v Williams* 2014 (4) CLRN 86

taking advantage of this conditional consent was considered. Accordingly, it is preferable to amend the NIPC Act to provide the express consent of Nigeria to ICSID arbitration. Furthermore, statutory consent is preferable to that contained in treaties, considering the limited number of BITs and the unavailability of consent in virtually all the MITs in force.

Another important factor is the definition of ‘investment’ as contained in the NIPC Act, especially because of its significance to jurisdiction. The broad definition of investment in the current NIPC Act may elevate commercial claims to the status of investment claims. Consequently, a more restrictive definition of investment in line with prevailing ICSID jurisprudence, was proposed to ensure that Nigeria’s submission to the ICSID Centre is only in respect of investment claims and to avoid opening a floodgate to commercial claims in general.

The enforcement of interim relief in aid of ICSID arbitration is controversial because the ICSID mechanism is ‘self-contained’. Once there is a valid submission to the jurisdiction of the ICSID Centre, parties may not seek relief from national courts or any other forum. However, a party may require interim relief in aid of the arbitral process. While ICSID tribunals may grant provisional measures in aid of the arbitration, tribunals lack the power to enforce these measures. A party may need to enforce a provisional measure to preserve evidence, preserve the subject matter of the arbitration, prevent a further aggravation of the situation complained of, amongst other reasons.

This dissertation therefore argues that the amendment of the ICSID Act to provide for the enforcement of provisional measures, further to Rule 39 of the ICSID Rules, is an important measure for the support of the ICSID system in Nigeria.

Falling outside of the ICSID Convention, the ICSID Additional Facility awards cannot be enforced directly at the Supreme Court. Although widely accepted, there are a few important absentees from the ICSID Convention such as India and South Africa. Nigeria hosts significant investment from these countries; hence it is proposed in this work that the ICSID Act be extended to include the enforcement of ICSID additional facility awards. Extending the ICSID Act to include the enforcement of ICSID additional facility awards in this manner is to be done in the exercise of state legislative powers rather than in fulfilment of Nigeria’s obligations under Article 54 of the ICSID Convention.

In the non-ICSID context, this dissertation recommends several reforms in addition to those already contained in the Proposed Amendment to the Arbitration Act. A constitutional

amendment to provide a special regime for post-arbitral award litigation was considered. This entails measures to ensure that enforcement and setting aside proceedings are not subject to prolonged litigation through the superior court hierarchy. The possibility of including post-arbitral award litigation on the list of matters for fast-track proceedings is an alternative to constitutional amendment because the process of constitutional amendment in Nigeria is cumbersome and may be more difficult to implement.

Other recommendations include the possibility of special provisions for the expeditious determination of small investment claims, defined in this dissertation as disputes not exceeding US\$1 million in value. This is aimed at ensuring the cost-effectiveness of such proceedings. Another recommendation is the inclusion of a definition of public policy as a ground for setting aside of arbitral awards under the Arbitration Act or the refusal of recognition and enforcement of arbitral awards under the New York Convention. Lastly, the amendment of section 84 of the Sheriffs and Civil Process Act to remove the requirement for the consent of the Attorney General as a pre-condition for the attachment of funds in the custody of public officials, in enforcing money judgments against the government or government corporations is suggested.

While the above measures may not guarantee a perfect dispute resolution system, they are likely to significantly address the current deficiencies in the legal framework in Nigeria. Having discussed the symbiotic relationship between arbitration and the court system, it is hoped that the reforms required to restore the Nigerian judiciary – once reputed for high standards, and known to export judges to other African countries – to its rightful place will occur speedily. Perhaps, in future, the reform of our judiciary may lead to talks about the establishment of a multilateral investment court.

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CHAPTER N117

NIGERIAN INVESTMENT PROMOTION COMMISSION ACT

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CHAPTER N117

NIGERIAN INVESTMENT PROMOTION COMMISSION ACT

An Act to establish the Nigerian Investment Promotion Commission, to encourage and promote investment in the Nigerian economy, and for matters connected therewith.

[No 16 of 1995.]

[Date of commencement: 16th January, 1995]

PART I

*Establishment of the Nigerian Investment Promotion Commission***1. Establishment of the Nigerian Investment Promotion Commission**

(1) There is hereby established a body to be known as the Nigerian Investment Promotion Commission (in this Act referred to as the "Commission").

(2) The Commission shall be a body corporate, with perpetual succession and a common seal and may sue and be sued in its corporate name.

2. Governing Council of the Commission

(1) There shall be for the Commission, a Governing Council (in this Act referred to as "the Council"), which shall be responsible for the discharge of the functions of the Commission.

(2) The Council shall consist of—

(a) a chairman;

(b) a representative each of the following Federal Ministries, who shall not be below the rank of a Permanent Secretary—

(i) Industry;

(ii) Commerce;

(iii) Internal Affairs;

- (iv) Finance;
- (v) Foreign Affairs;
- (vi) Culture and Tourism;
- (vii) Petroleum Resources;
- (c) a representative of the National Planning Commission, who shall not be below the rank of a Permanent Secretary;
- (d) the Governor, Central Bank of Nigeria;
- (e) six other persons from the private sector organisations to be appointed by the President, on the recommendation of the Minister;
- (f) the secretary of the Commission, who shall also be the secretary to the Council.

[No. 32 of 1998.]

(3) The chairman shall be appointed by the President.

(4) The supplementary provisions set out in the Schedule to this Act shall have effect with respect to the proceedings of the Council and the other matters contained therein.

3. Tenure of office, etc.

(1) A member of the Council, other than the secretary, shall hold office for a term of four years and may be re-appointed for one further term of four years and no more.

(2) A member of the Council may at any time resign his office in writing addressed to the President and may be removed from office by the President.

(3) Members of the Council shall be paid such allowances as may be determined by the Federal Government.

PART II

Functions and powers

4. Functions of the Commission

The Commission shall encourage, promote and co-ordinate investment in the Nigerian economy and accordingly, shall—

- (a) be the agency of the Federal Government to co-ordinate and monitor all investment promotion activities to which this Act applies;
- (b) initiate and support measures which shall enhance the investment climate in Nigeria for both Nigerian and non-Nigerian investors;
- (c) promote investments in and outside Nigeria through effective promotional means;
- (d) collect, collate, analyse and disseminate information about investment opportunities and sources of investment capital, and advise on request, the availability, choice or suitability of partners in joint-venture projects;
- (e) register and keep records of all enterprises to which this Act applies;
- (f) identify specific projects and invite interested investors for participation in those projects;
- (g) initiate, organise and participate in promotional activities, such as, exhibitions, conferences and seminars for the stimulation of investments;
- (h) maintain liaison between investors and Ministries, Government departments and agencies, institutional lenders and other authorities concerned with investments;
- (i) provide and disseminate up-to-date information on incentives available to investors;

- (j) assist incoming and existing investors by providing support services;
- (k) evaluate the impact of the Commission in investments in Nigeria and make appropriate recommendations;
- (l) advise the Federal Government on policy matters, including fiscal measures designed to promote the industrialisation of Nigeria or the general development of the economy;
- (m) perform such other functions as are supplementary or incidental to the attainment of the objectives of this Act.

5. Powers of the Commission

The Commission shall have power to—

- (a) do all things which by this Act or any other enactment are required or permitted to be done by the Commission; and
- (b) do such other things as are necessary or expedient for the performance of its functions under this Act.

PART III

Staff

6. Secretary of the Commission

(1) There shall be for the Commission a secretary, of a rank equivalent to a Permanent Secretary in the civil service of the Federation, who shall be the chief executive of the Commission and be appointed by the President, on the recommendation of the Minister.

(2) The secretary shall hold office for a term of five years in the first instance on such terms and conditions as the President, may, on the recommendation of the Minister, determine and may be re-appointed for one further term of five years and no more.

(3) Subject to such general directions as the Council may give, the secretary shall be responsible for the day-to-day administration of the Council and the implementation of the decisions of the Council.

(4) The secretary shall perform the functions of keeping the record of proceedings and decisions of the Council and such other functions as the Council may, from time to time, direct.

7. Other staff of the Commission, etc.

(1) The Council shall have power to appoint either on transfer or on secondment from any public service in the Federation, such number of employees as may, in the opinion of the Council, be required to assist the Commission in the discharge of any of its functions under this Act; and shall have power to pay to persons so employed, such remuneration (including allowances) as the Council may determine.

(2) The terms and conditions of service (including terms and conditions as to remuneration, allowances, pensions, gratuities and other benefits) of the persons employed by the Commission shall be as determined by the Council, from time to time.

(3) The Council may engage such consultants and advisers as it may require for the proper and efficient discharge of the functions of the Commission.

8. Staff regulations

The Commission may, subject to the provisions of this Act, make staff regulations relating generally to the conditions of service of the employees of the Commission and without prejudice to the generality of the foregoing, such regulations may provide for—

- (a) the appointment, promotion and disciplinary control (including dismissal) of employees of the Commission; and
- (b) appeals by such employees against dismissal or other disciplinary measures.

9. Conditions of service

The Commission shall determine its conditions of service, including pensions and gratuities, as appropriate for its employees.

10. Pensions

(1) It is hereby declared that service in the Commission is a scheduled service and shall be deemed to be pensionable under the Pension Reform Act and, accordingly, employees of the Commission shall in respect of their service in the Commission, be entitled to pensions, gratuities and other retirement benefits as are prescribed thereunder.

[Cap. P4.]

(2) Notwithstanding the provisions of subsection (1) of this section, nothing in this Act shall prevent the appointment of a person to any office on terms which preclude the grant of a pension or gratuity in respect of that office.

11. Departments of the Commission

The Council may, on the recommendations of the secretary, create such departments in the Commission as it may deem fit for the efficient discharge of the functions of the Commission.

PART IV*Financial provisions***12. Fund of the Commission**

(1) The Commission shall establish and maintain a fund which shall be applied towards the discharge of its functions under this Act.

(2) There shall be paid and credited to the fund established pursuant to subsection (1) of this section—

- (a) such sums as may be provided by the Government of the Federation for the Commission;
- (b) any fees charged for services rendered by the Commission; and
- (c) all other sums accruing to the Commission by way of gifts, testamentary depositions, endowments and contributions from philanthropic persons and organisations or otherwise howsoever.

13. Power to accept gifts

(1) The Commission may accept gifts of land, money or other property on such terms and conditions, if any, as may be specified by the person or organisation making the gift.

(2) The Commission shall not accept any gift if the conditions attached by the person or organisation making the gift are inconsistent with the functions of the Commission.

14. Borrowing power, etc.

(1) The Council may, with the consent or in accordance with any specific authority given by the Minister, borrow by way of loan or overdraft from any source approved by the Minister, such specified amount of money as may be required by the Commission for meeting its obligations and discharging its functions under this Act.

(2) The Council may, subject to the provisions of this Act and the conditions of any trust created in respect of any property, invest all or any of its funds with the like consent or general authority of the Minister.

(3) The Council may invest any surplus funds of the Commission in securities prescribed by the Trustee Investments Act or such other securities as may, from time to time, be approved by the Minister.

[Cap. T22.]

(4) Subject to the provisions of the Land Use Act, and any special or general direction which the Minister may give in that behalf, the Council may acquire or lease any land required for its purpose under this Act.

[Cap. L5.]

15. Annual estimates, accounts and audit

(1) The Council shall cause to be prepared, not later than 30 September in each year, an estimate of the expenditure and income of the Commission during the next succeeding year and when prepared, they shall be submitted through the Minister for approval by the President.

(2) The Council shall cause to be kept proper accounts and proper records in relation thereto and when certified by the Council, such accounts shall be audited as provided in subsection (3) of this section.

(3) The accounts of the Commission shall be audited by auditors appointed from the list of auditors and in accordance with the guidelines issued by the Auditor-General for the Federation and the fees of the auditors and the expenses for the audit generally shall be paid from the funds of the Commission.

16. Annual reports

The Council shall, not later than six months after the end of each year, submit through the Minister to the President, a report on the activities of the Commission and its administration during the immediately preceding year and shall include in the report the audited accounts of the Commission and the auditors comments thereon.

PART V

Provisions relating to investment

17. Enterprises eligible for participation

Except as provided in section 18 of this Act and subject to this Act, a non-Nigerian may invest and participate in the operation of any enterprise in Nigeria.

18. Application of this Act

The provisions of this Act shall not apply to "negative list" as defined in section 31 of this Act.

19. Establishment of an enterprise

(1) An enterprise in which foreign participation is permitted under section 17 of this Act, shall not commence business, except it is incorporated or registered under the Companies and Allied Matters Act.

[No. 32 of 1998 and Cap. C20.]

(2) Subject to this Act, nothing in this Act shall be construed as precluding an enterprise to which this Act applies, from obtaining such licence, lease, permit or any other approval as may be required for the establishment or operation of the enterprise.

20. Registration of enterprise with the Commission

(1) An enterprise in which foreign participation is permitted under section 17 of this Act shall, before commencing business, apply to the Commission for registration.

[No. 32 of 1998.]

(2) The Commission shall, within fourteen working days from the date of receipt of completed registration forms, register the enterprise if it is satisfied that all relevant documents for registration have been duly completed and submitted or otherwise advise the applicant, accordingly.

21. Purchase of the shares of a domestic company by a foreign company

A foreign enterprise may buy the shares of any Nigerian enterprise in any convertible foreign currency.

22. Incentives for special investment

For the purpose of promoting identified strategic or major investment, the Commission shall, in consultation with appropriate Government agencies, negotiate specific incentive packages for the promotion of investment as the Commission may specify.

23. Priority areas

(1) The Commission may issue guidelines and procedures, which specify priority areas of investment and prescribe applicable incentives and benefits, which are in conformity with Government policy.

(2) Guidelines and procedures issued under subsection (1) of this section shall be signified under the hand of the chairman of the Council.

24. Investment guarantees, transfer of capital, profits and dividends

Subject to this section, a foreign investor in an enterprise to which this Act applies, shall be guaranteed unconditional transferability of funds through an authorised dealer, in freely convertible currency, of—

- (a) dividends or profits (net of taxes) attributable to the investment;
- (b) payments in respect of loan servicing where a foreign loan has been obtained; and
- (c) the remittance of proceeds (net of all taxes), and other obligations in the event of a sale or liquidation of the enterprise or any interest attributable to the investment.

25. Guarantees against expropriation

(1) Subject to subsections (2) and (3) of this section—

- (a) no enterprise shall be nationalised or expropriated by any Government of the Federation; and
- (b) no person who owns, whether wholly or in part, the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other person.

(2) There shall be no acquisition of an enterprise to which this Act applies by the Federal Government, unless the acquisition is in the national interest or for a public purpose and under a law which makes provision for—

- (a) payment of fair and adequate compensation; and
- (b) a right of access to the courts for the determination of the investor's interest or right and the amount of compensation to which he is entitled.

(3) Any compensation payable under this section shall be paid without undue delay, and authorisation for its repatriation in convertible currency shall where applicable, be issued.

26. Dispute settlement procedures

(1) Where a dispute arises between an investor and any Government of the Federation in respect of an enterprise, all efforts shall be made through mutual discussion to reach an amicable settlement.

(2) Any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions, may be submitted at the option of the aggrieved party to arbitration as follows—

- (a) in the case of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified in the Arbitration and Conciliation Act; or
- (b) in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties; or
- (c) in accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties.

[Cap. A18.]

(3) Where in respect of any dispute, there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Disputes Rules shall apply.

27. Assistance to enterprise

The Commission shall provide an enterprise with such assistance and guidance as the enterprise may require and shall act as liaison between the enterprise and the relevant Government Departments, agencies and such other public authorities.

28. Transitional provisions

The Minister may by order make such transitional provisions as appear to him necessary or expedient to give full effect to the provisions of this Act.

29. Repeal of Cap. 178, L.F.N. 1990, etc.

(1) The Industrial Development Co-ordination Committee Act is hereby repealed.

(2) Any approval granted under the enactment repealed under subsection (1) of this section, shall continue to be in force notwithstanding the repeal of the enactment.

30. Regulations

(1) The Commission may make regulations—

- (a) providing for anything requiring to be prescribed under this Act; and
- (b) generally for carrying out the principles and objectives of this Act.

(2) Any instrument issued under subsection (1) of this section shall be under the signature of the chairman of the Council or any other officer of the Commission as may be designated by him.

31. Interpretation

In this Act, unless the context otherwise requires—

“**authorised dealer**” has the meaning assigned to it under the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act;

[No. 32 of 1998 and Cap. F34.]

“**capital**” means all cash contributions, plant, machinery, equipment, building, spare parts, raw materials and other business assets, other than goodwill;

“**Commission**” means the Nigerian Investment Promotion Commission established under section 1 of this Act;

“**Council**” means the Governing Council established for the Commission under section 2 (1) of this Act;

“**enterprise**” means an industry, project, undertaking or business to which this Act applies or an expansion of that industry, undertaking, project or business or any part of that industry, undertaking, project or business and, where there is foreign participation, means such an enterprise duly registered with the Commission;

“**foreign capital**” means convertible currency, plant, machinery, equipment, spare parts, raw materials and other business assets, other than goodwill, that are brought into Nigeria with no initial disbursement of Nigerian foreign exchange and are intended for the production of goods and services related to an enterprise to which this Act applies;

“**foreign loan**” means a loan obtained from outside Nigeria and denominated in any convertible currency;

“**investment**” means investment made to acquire an interest in an enterprise operating within and outside the economy of Nigeria;

“**Minister**” means the Minister charged with responsibility for matters relating to industry;

“**negative list**” means the list of those sectors of investment prohibited to both foreign and Nigerian investors, that is—

- (a) production of arms, ammunition, etc.;
- (b) production of and dealing in narcotic drugs and psychotropic substances;
- (c) production of military and paramilitary wears and accoutrement, including those of the Police and the Customs, Immigration and Prison Services; and
- (d) such other items as the Federal Executive Council may, from time to time, determine;

“**own**” in relation to an enterprise, includes the holding of any proprietary interest in the enterprise;

“**portfolio investment**” means an investment in shares or other securities traded on the Nigerian Stock Exchange.

32. Short title

This Act may be cited as the Nigerian Investment Promotion Commission Act.

SCHEDULE

[Section 2 (4).]

*Supplementary Provisions Relating to the Council, etc.**Proceedings of the Council*

1. (1) Subject to this Act and section 27 of the Interpretation Act, the Council may make standing orders regulating its proceedings or those of any of its committees.

[Cap. I23.]

(2) The quorum of the Council shall be five members, including the chairman or, in his absence, the person elected to preside, and three other members from the public sector, and the quorum of any committee of the Council shall be determined by the Council.

2. (1) The Council shall meet at least once a month in each calendar year and subject thereto, the Council shall meet whenever it is summoned by the chairman, and if the chairman is required to do so by notice given to him by not less than four other members, he shall summon a meeting of the Council to be held within fourteen days from the date on which the notice is given.

(2) At any meeting of the Council the chairman shall preside, but if he is absent, the members present at the meeting shall elect one of their number to preside at that meeting.

(3) Where the Council desires to obtain the advice of any person on a particular matter, the Council may co-opt him to the Council for such period as it thinks fit; but a person who is in attendance by virtue of this sub-paragraph shall not be entitled to vote at any meeting of the Council and shall not count towards a quorum.

(4) The decision of the Council shall be by simple majority.

Committees

3. (1) The Council may appoint one or more committees to carry out, on behalf of the Council, such of its functions as the Council may determine.

(2) A committee appointed under this paragraph shall consist of such number of persons (not necessarily members of the Council), as may be determined by the Council; and a person other than a member of the Council shall hold office on the committee, in accordance with the terms of his appointment.

(3) A decision of a committee of the Council shall be of no effect until it is confirmed by the Council.

Miscellaneous

4. (1) The fixing of the seal of the Commission shall be authenticated by the signature of the chairman or of any person specifically authorised to act for that purpose by the Council.

(2) Any contract or instrument which, if made or executed by a person not being a body corporate, would not be required to be under seal may be made or executed on behalf of the Commission by the chairman or any person specially authorised to act for that purpose by the Council.

(3) Any document purporting to be a document duly executed under the seal of the Commission shall be received in evidence and shall, unless and until the contrary is proved, be presumed to be so executed.

5. The validity of any proceeding of the Council or of a committee thereof shall not be adversely affected by any vacancy in the membership of the Council or committee, or by any defect in the appointment of a member of the Council or of a committee, or by reason that a person not entitled to do so took part in the proceedings of the Council or committee.

APPENDIX TWO: NIGERIA'S BILATERAL INVESTMENT TREATIES*

<i>Country and year of ratification</i>	<i>Cooling off Period</i>	<i>Litigation</i>	<i>Arbitration under UNCITRAL Rules</i>	<i>Other Ad Hoc Arbitration</i>	<i>ICSID</i>
<i>China (2001)</i>	6 months	✓	X	✓	X
<i>Finland (2005)</i>	3 months	✓	✓	X	✓
<i>France (1990)</i>	6 months	X	X	X	✓
<i>Germany (2000)</i>	6 months	X	X	X	✓
<i>Italy (2000)</i>	6 months	✓	✓	X	✓
<i>Korea, Republic of (1998)</i>	6 months	X	X	X	✓
<i>Netherlands, the (1992)</i>	X	.X	X	X	✓
<i>Romania (1998)</i>	6 months	✓	✓	X	✓
<i>Serbia (2002)</i>	6 months	✓	✓	X	✓
<i>South Africa (2000)*</i>	6 months	X	X	✓	✓ *
<i>Spain (2002)</i>	6 months	✓	✓	X	✓
<i>Sweden (2002)</i>	6 months	✓	✓	X	✓
<i>Switzerland (2000)</i>	6 months	✓	✓	X	✓
<i>United Kingdom (1990)</i>	3 months	X	X	X	✓

** This table contains only BITs that have been passed into law. The text of the Taiwan-Nigeria BIT(1994) was unavailable at the time of writing.

** ICISID Additional Facility

X: Not applicable