

## **ARBITRATION: A PANACEA FOR INVESTMENT DISPUTES**

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### **Abstract**

*This article seeks to show arbitration as a dispute resolution mechanism in resolving or acting as a remedy for investment disputes both locally and internationally. Treatises are entered into between states in the bid of allowing nationals of a particular state to invest in another thereby bringing income both the foreign investor and the host state. However, owing to general human nature and sophistication in commerce, disputes are bound to arise. This article reveals that Bilateral Investment Treaty (BIT) are entered into which provides for arbitration clauses for settling any investment dispute that may arise between parties to the treaty. The article further shows that for the purpose of having a unified framework for settling investment disputes, the International Centre for Settlement of Investment Dispute (ICSID) was established through the Convention on the Settlement of Investment Dispute between States and Nationals of Other States. In Nigeria, certain statute makes provision for the settlement of investment dispute through arbitration. This article shows that some of this statute stipulates compulsory arbitration thereby negating consent and party autonomy. It is argued that this statutes be reformed as it goes against the jurisprudence of arbitration.*

**Keywords:** Arbitration, Investment, Bilateral Investment Treaty, International Centre for Settlement of Investment Disputes (ICSID)

### **Introduction**

Arbitration is gradually becoming an indispensable tool in resolving disputes around the world. Commercial transactions involving oil and gas, energy, banking and finance, construction, development projects etc. brings about dispute among parties to such a contract. In the bid of looking for a more swift and effective means of resolving whatever form of dispute that may arise, contracting parties incorporate an arbitration clause in their contract which will serve as a means of resolving their disputes rather than going into litigation.

Increasingly, developing countries are exploring avenues to boost their economy. Investments have being largely found to be used. International companies invest in various sectors of the host

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country with the objective of realizing income and developing the host country's economy. However, dispute is inevitable as the more the investment, the more likelihood for dispute to occur. These international companies wouldn't want to subject the determination of the dispute to the municipal adjudication of the host countries. This is predicated on the fact that the law governing the host countries may not be favourable to them or a fair and just judgment may not be given. In the bid of avoiding any form of impartiality and delay in the course of a trade and commerce, arbitration is resorted to where party autonomy is guaranteed; they are at liberty to choose the law that will govern them rather than the imposition of the municipal law of the host country.

Moreover, countries tend to enact investment laws mandating that any dispute should be resolved through arbitration. In addition there are conventions in which countries are signatories to which creates a Centre for the resolution of investment disputes throughout the world. The thematic concern of this paper is to examine arbitration as an Alternative Dispute Resolution (ADR) mechanism in resolving domestic and international investment disputes. Also laws concerning investment specifically in Nigeria coupled with international agreement and conventions to which Nigeria is a signatory to are also discussed.

### **Arbitration and Investment**

It can be succinctly put that there is no universal definition for arbitration. Different authors, professors, writers etc. have one way or the other proffered their independent understanding of arbitration. According to Mustill and Boyd:

*'A complete definition adequate to suit all circumstances cannot succinctly be formulated. It would be enough if a list could be made of those characteristics which a method of deciding questions must (or must not) possess if it is to be an arbitration. Unfortunately, even after centuries of judicial involvement in the judicial process it is still not possible to set out such a list with any degree of confidence. Despite this observation, a few authors have tried to define arbitration.'*<sup>1</sup>

Be that as it may, arbitration can simply be defined as when a dispute or difference between two parties or more is referred to an independent person for resolution. It is a device whereby the settlement of a question which is of interest for two or more parties, is entrusted to one or more other persons – the arbitrator or arbitrators – who derive their powers from the a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement.<sup>2</sup> The Arbitration and Conciliation Act<sup>3</sup>, which is the governing statute for arbitration practice in Nigeria defines arbitration in its section 57 as:

*'Commercial arbitration whether or not administered by a permanent arbitral institution'*

The definition stated by the principal statute on arbitration in Nigeria is in no way detailed enough to have a crystal understanding of arbitration. Halsbury's Laws of England see arbitration as:

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<sup>1</sup> Sir Micheal J. Mustil and Stewart C. Boyd Q.C. (1989): The Law and Practice of Commercial Arbitration in England 2<sup>nd</sup> Ed., England: Butterworths Pg. 39

<sup>2</sup> Rene David (1985): Arbitration in international Trade, Netherland: Kluwer Law and Taxation Publishers p. 5

<sup>3</sup> CAP A10 Laws of Nigeria 2004

*'the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law.'*<sup>4</sup>

Prof. (Dr.) J. Olakunle Orojo CON and Prof. M. Ayodele Ajomo defined it as follows:

*'Arbitration is a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties.'*<sup>5</sup>

Prior to the utilization of arbitration, the adversarial trial process was the only means of resolving a dispute but owing to technicalities, costs, delay and absence of privacy characterized by it, arbitration has being welcomed with open arms. Parties doing business in the same country or different countries may agree in their contract that any dispute will be resolved through arbitration (domestic and international arbitration) or they may agree that the arbitral proceedings will be conducted according to the rules of an arbitral agency (institutional arbitration). Where there is no initially written arbitration agreement and parties in dispute are desirous of submitting their contentious issues to arbitration, there are both at liberty to enter into a '*submission agreement*' which will provide for them to resolve their differences in arbitration. There must be consensus ad idem between the disputants to arbitrate.

The greatest celebrated feature of arbitration is party autonomy. The principle of choice is extensively utilized. Parties are free to choose the applicable law, venue of arbitration, seat of arbitration, those who will be arbitrating, the language to be used etc. thus making the proceedings flexible rather than the rigidity espoused by litigation.

In the past and in recent times, arbitration has being an indispensable tool in resolving investment disputes. Countries in the bid of developing their economy enter into bilateral investment treaties (BIT) which serves as an agreement allowing private investment by nationals and companies of one country in another country. These BITs stipulates amongst other things the terms and conditions for the investment as well guaranteeing security, certainty and fair treatment for investors. In addition, it makes provision for alternative dispute resolution in events of investment disputes which are to be resolved by an international institution known as the International Centre for the Settlement of Investment Dispute (ICSID).

The term investment means differently to various disciplines. In economics, the term investment is used in a limited sense to refer to 'real' investment such as machines and buildings. Hence investment from the economics perspective means investment in real economic resources needed in the production of goods and services.<sup>6</sup> In business administration investments includes any kinds of assets both tangible and non-tangible, having commercial value such as real and financial assets, intellectual property and good will.<sup>7</sup> In personal finance a clear distinction is

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<sup>4</sup> Halsbury's Laws of England (1999) 4<sup>th</sup> Ed. Butterworths para. 601,332.

<sup>5</sup> Olakunle Orojo CON and Ayodele Ajomo (1999): Law and Practice of Arbitration and Conciliation in Nigeria, Lagos: Mbeyi & Associates (Nig.) Ltd pg. 3

<sup>6</sup> <http://www.economist.com/research/economic/alphabetic.cfm?letter=I#investment> accessed July 27, 2014

<sup>7</sup> Investment <http://en.wikipedia.org/wiki/investment> accessed July 27, 2014

made between savings and investment. While savings involves keeping money in form of cash, investment involves an asset where there is an element of capital risk.<sup>8</sup>

The Swiss Model BIT<sup>9</sup> defines investment as every kind of assets in particular:

- a. *Movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges and usufructs;*
- b. *Shares, parts or any other kinds of participation in companies;*
- c. *Claims to money or to any performance having an economic value;*
- d. *Copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;*
- e. *Concessions under public, including concessions for search for, extract or exploit natural resources as well as all other rights by law, by contract or by decision of the authority in accordance with the law.*

However, the US Model BIT 2012<sup>10</sup> sees investment as:

*“investment means every asset that an investor owns or control, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk. Forms that an investment may take include:*

- a. *An enterprise;*
- b. *Shares, stock, and other forms of equity participation in an enterprise;*
- c. *Bonds, debentures, other debt instruments, and loans;*
- d. *Futures, options, and other derivatives;*
- e. *Turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;*
- f. *Intellectual property rights;*
- g. *Licenses, authorizations, permits, and similar rights conferred pursuant to domestic law<sup>11</sup> and;*

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<sup>8</sup> Ibid

<sup>9</sup> Anne Hoffmann (ed) (2010): Protection of Foreign Investment through Modern Treaty Arbitration: Diversity and Harmonisation, ASA Special No 34  
[http://www.lalive.ch/data/publications/vhe\\_Of\\_capital\\_import%3B\\_The\\_definition\\_of\\_%27investment%27\\_in\\_international\\_investment\\_law.pdf](http://www.lalive.ch/data/publications/vhe_Of_capital_import%3B_The_definition_of_%27investment%27_in_international_investment_law.pdf) accessed June 15 2014

<sup>10</sup> 2012 US Model Bilateral Investment Treaty <http://www.state.gov/documents/organization/188371.pdf> accessed July 30, 2014

<sup>11</sup> Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under the domestic law. For greater certainty, the foregoing is without

- h. *Other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgage, liens, and pledges.”*

The Energy Charter Treaty<sup>13</sup> in its Article 1(6) defines investment as follows:

*“Investment’ means every kind of asset, owned or controlled directly or indirectly by an investor and includes:*

- a. *Tangible and intangible, and moveable and immoveable, property, and any property rights such as leases, mortgages, liens, and pledges;*
- b. *A company or business enterprise, or shares, stocks, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;*
- c. *Claims to money and claims to performance pursuant to a contract having an economic value and associated with an investment;*
- d. *Intellectual property;*
- e. *Returns;*
- f. *Any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.”*

Bilateral investment treaties have a predominant role in investment disputes. Prior to the emergence of BITs, foreign companies wanting to claim against countries in which they have investment could not do so directly but through their own government. The government of the foreign companies will exact diplomatic pressure and would intervene through their armed forces in the bid of addressing the investment dispute.<sup>14</sup> However, Carlos Calvo (1824-1906) criticized this system and advocated that people living in a foreign nation should settle their claims and complaints by submitting to the jurisdiction of the local courts and not by using diplomatic pressure or armed intervention.<sup>15</sup> This was known as the ‘*Calvo doctrine*’ which was adopted by the First International Conference of American States in 1889. It was also incorporated into the treaty of friendship, commerce and navigation (FCN Treaty).<sup>16</sup> When the convention on the Peaceful Resolution of International Disputes was signed, it provided a framework for the conclusion of BITs. Hence in the event of a dispute between two states arising out of a particular interest of a national of the other state, an independent arbitral tribunal would be formed where

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prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

<sup>12</sup> The term ‘investment’ does not include an order or judgment entered in a judicial or administrative action

<sup>13</sup> Energy Charter Secretariat: Energy Treaty and Related Documents

[http://www.encharter.org/fileadmin/user\\_upload/document/EN.pdf](http://www.encharter.org/fileadmin/user_upload/document/EN.pdf) accessed July 25, 2014

<sup>14</sup> See Paul Obo Idornigie, Investment Treaty Arbitration and Emerging Markets: Issue, Prospects and Challenges; Third Inaugural Lecture Series, Nigerian Institute of Advanced Legal Studies [http://nials-nigeria.org/pub/INVESTMENT\\_TREATY\\_ARBITRATION,\\_AND\\_EMERGING\\_MARKETS\\_-\\_ISSUES,\\_PROSPECTS\\_AND\\_CHALLENGES\\_BY\\_PROF.\\_PAUL\\_OBO\\_IDORNIGIE.pdf](http://nials-nigeria.org/pub/INVESTMENT_TREATY_ARBITRATION,_AND_EMERGING_MARKETS_-_ISSUES,_PROSPECTS_AND_CHALLENGES_BY_PROF._PAUL_OBO_IDORNIGIE.pdf) accessed August 1 2014

<sup>15</sup> Ibid

<sup>16</sup> FCN Treaty between Italy and Colombia 1894 Art 21

the state could espouse the claim of its national.<sup>17</sup> Be that as it may, in the bid of having a unified framework for the protection and resolution of investment, a convention known as Convention on the Settlement of Investment Dispute between States and Nationals of other states was signed on 18<sup>th</sup> March 1965<sup>18</sup> and entered into on 14<sup>th</sup> October 1966 establishing the International Centre for Settlement of Investment Disputes (ICSID)<sup>19</sup>

### **International Centre for Settlement of Investment Dispute (ICSID)**

This is an international arbitration Centre that facilitates the settlement of investment disputes. The ICSID Convention establishes the Centre endowed with separate international legal personality.<sup>20</sup> It imperative to assert that the Centre does not engage in arbitration itself, but facilitates for the arbitration of investment disputes. In addition, arbitration in ICSID is not mandatory or obligatory for states and investors from other states merely because both disputants and parties to the convention. The preamble succinctly puts that:

*‘declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.’*

Hence, the convention recognizes the sanctity of consent and party autonomy in arbitration. Once parties have agreed that their dispute should be resolved through arbitration at ICSID, it becomes binding. Any form of withdrawal will be futile as Article 25 paragraph 1<sup>21</sup> provides that:

*‘The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or constituent subdivision or agency of a contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.’<sup>22</sup>*

The ICSID Convention lays down strict rules which must be fulfilled before Centre may entertain any dispute circumventing around investment. The most important is on jurisdiction. Article 25 paragraph 1<sup>23</sup> in its first line says that “*the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment...*” The Convention does not give a clear interpretation of what an investment may mean, thus making it difficult for one to actually know the types of investment known to ICSID. Apart from that, the aforementioned provision stipulates categorically that only ‘legal dispute’ arising ‘directly out of an investment’ will make

<sup>17</sup> Brierley J.L. (2003), *The Law of Nations* 6<sup>th</sup> Ed. Oxford University Press p 277

<sup>18</sup> [http://en.wikipedia.org/wiki/International\\_Centre\\_for\\_Settlement\\_of\\_Investment\\_Disputes](http://en.wikipedia.org/wiki/International_Centre_for_Settlement_of_Investment_Disputes) accessed July 30, 2014

<sup>19</sup> Ibid

<sup>20</sup> Arts. 1 and 18

<sup>21</sup> Convention on the Settlement of Investment Dispute between States and Nationals of Other States – International Centre for Settlement of Investment Disputes, Washington 1965

<http://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/landscape.pdf> accessed July, 29 2014

<sup>22</sup> Emphasis mine

<sup>23</sup> Ibid

the Centre have jurisdiction. Hence, disputes arising directly from ordinary commercial transactions will fall outside the jurisdiction of the Centre. However, a thin line separates what an investment is from an ordinary commercial transaction. The Secretary-General is empowered under Article 36 (3)<sup>24</sup> to refuse the registration of a dispute for arbitration when it appears such a dispute is manifestly outside the jurisdiction of the Centre.

This jurisdiction requirement relates both the nature of the dispute and parties of the dispute. The arbitral panel must satisfy itself that the dispute before them for determination arose directly from an investment which must be of a legal nature and that both parties are contracting parties of the ICSID Convention. If the parties are not contracting parties to the ICSID convention, the Centre won't have jurisdiction.

Furthermore, the institution of arbitral proceedings under ICSID is through the filing of a request addressed to the Secretary-General. Article 36 (1) provides that

*“Any contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party”*

Such request being served to the other disputant will contain information like issues in disputes, identity of the parties and their consent to arbitrate<sup>25</sup>. Upon successive grant of arbitration request and service to the other party, the arbitral tribunal will be constituted which shall consist of a sole arbitrator or any uneven number of arbitrators appointed by the parties.<sup>26</sup> In situations where the disputants are not satisfied with the number and appointment of arbitrators, the disputants are at liberty to appoint one arbitrator each and the third, who shall be the president of the Tribunal shall appointed by the agreement of the parties.<sup>27</sup> The appointed arbitrators can be replaced or disqualified in light of Article 56-58. Article 14 (1) states the personality an arbitrator should have. It provides that:

*“Persons designated to serve on the panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.”*

Hence, a party can propose the disqualification of an arbitrator for lack of qualities required in the abovementioned article and where it is well founded on the particular arbitrator for want of qualities; he/she will be replaced or disqualified.

At the end of every arbitral proceedings, an award is made. Unlike litigation where judgment is given, an award is the case in arbitration. Under Article 48<sup>28</sup>, the award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.<sup>29</sup> The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is

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<sup>24</sup> Ibid

<sup>25</sup> Ibid Art 36 (2)

<sup>26</sup> Ibid Art 37 (2)(a)

<sup>27</sup> Ibid Art 37 (2)(b)

<sup>28</sup> Ibid

<sup>29</sup> Art 48(2)

based<sup>30</sup>. ICSID shall on no account publish the award without the consent of the parties<sup>31</sup>. Confidentiality is guaranteed here as the decision from the arbitration is not made public unlike litigation where the judgments are reported. The award shall be binding on the parties and will be recognized by contracting states signatory to the ICSID Convention. Article 54 explains this better by stating that:

*'Each contracting state shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts treat the award as if it were a final judgment of the courts of a constituent state.'*

Irrespective of the fact that Article 53<sup>32</sup> makes the award final and binding on the parties which shall not be subject to any appeal or to any other remedy except those provided for in the ICSID Convention, a disputant to whom the award favors must go to court in the state where his/her investment lies and enforce the award against the other party. This is an area where judicial assistance is largely evident. The court will treat the award as if it were a final judgment.

The ICSID convention provides for the rules and procedure and arbitration proceedings which cover the period of time from the dispatch of notice of registration of a request for arbitration until the final award is rendered. The basic rationale behind this is for achieving a more flexible and efficient arbitration proceedings.

As mentioned earlier on jurisdiction of the Centre, only legal disputes arising directly out of an investment will be entertained at the Centre and also parties in dispute must be parties to the ICSID Convention. However, these limitations brought about a lot of problems as there were certain situations whereby parties in dispute may not meet the objective jurisdictional requirements of ICSID. In the bid of addressing this problem and increasing patronage, the Additional Facility Rules<sup>33</sup> was adopted in 1978 which opened access to the Centre a number of additional cases. These forms of additional cases are stipulated under Article 2<sup>34</sup>:

- Conciliation or arbitration of investment disputes where only one side is either a party to the ICSID Convention or a national of a party to the ICSID Convention.
- Conciliation or arbitration of legal disputes which do not directly arise out of an investment provided that at least one side is either a party to the ICSID Convention or a national of a party to the ICSID Convention.
- Fact-finding proceedings between a State and national of another State.

This reduced the stringent jurisdictional requirement of Art. 25, hence making more investment dispute to be referred to ICSID. In *Metalclad v Mexico*<sup>35</sup> which was an investment case rendered under the Additional Facility held that Mexico, through actions of a local municipality, had

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<sup>30</sup> Ibid Art 48(3)

<sup>31</sup> Ibid Art 48(5)

<sup>32</sup> Ibid

<sup>33</sup> Additional Facility Rules [http://www.limaarbitration.net/pdf/arbitraje-inversiones/AFR\\_English-final.pdf](http://www.limaarbitration.net/pdf/arbitraje-inversiones/AFR_English-final.pdf) accessed July 31, 2014

<sup>34</sup> Ibid

<sup>35</sup> ARB (AF)/97/1, 16 ICSID Review 1 (2001); 40 ILM 36 (2001)

effectively expropriated a United States investor which had previously obtained all required permits to operate a hazardous waste facility.

ICSID arbitration offers a high level of effectiveness for investors including direct access to international dispute settlement and increased enforceability of award. A favourable investment climate is sustained as ICSID enhances foreign investment in host States. ICSID arbitration is in the interest of both the investor and the host States. In the case of *Amco v Indonesia*<sup>36</sup> it was held that the Convention is aimed to protect, to the same extent and with the same vigour, the investor and the host State, not forgetting that to protect investment is to protect the general interest of development and of developing countries. It seeks as a Centre to develop arbitration as well as other dispute resolution mechanism for achieving world peace and development.

### **Arbitrating Investment Disputes in Nigeria**

Nigeria which has often being described as a treasure-trove serves as a hub for both domestic and foreign investment. The table below shows the countries in which it has signed and entered into force BITs.

<b>Reporter</b>	<b>Partner</b>	<b>Date of Signature</b>	<b>Date of entry into force</b>
Nigeria	Algeria	14 January 02	-
	Bulgaria	21 December 98	-
	China	27 August 01	-
	Egypt	20 June 00	-
	Ethiopia	19 January 04	-
	Finland	22 June 05	20 March 07
	France	27 February 90	19 August 91
	Germany	28 March 00	20 September 07
	Italy	27 September 90	22 August 05
	Jamaica	5 August 02	-
	Korea	27 March 98	1 February 99
	Netherlands	2 November 92	1 February 94
	Romania	18 December 98	3 June 05
	Russia Federation	24 June 09	-
	Serbia	1 Jun 02	7 February 03
	Spain	9 July 02	19 January 06
	Sweden	18 April 02	1 December 06
	Switzerland	30 November 01	1 April 03
	Taiwan Province of China	7 April 94	7 April 94
	Turkey	2 February 11	-
Uganda	15 January 03	-	
United Kingdom	11 December 90	11 December 90	

Source: United Nations Conference on Trade and Development (UNCTAD): Full list of BITs concluded, 1 June 2013 [http://unctad.org/Sections/dite\\_pcbb/docs/bits\\_nigeria.pdf](http://unctad.org/Sections/dite_pcbb/docs/bits_nigeria.pdf)

The BITs between Nigeria and the countries stated above enables nationals of those countries to establish businesses and invest in Nigeria. It also gives protection to foreign investors as well as the resolution of foreign investment disputes through arbitration. All Nigerian BITs provide a right of recourse to international arbitration. The BITs with France, Germany, Korea, the

<sup>36</sup> *Amco v Indonesia*, Decision on Jurisdiction, 25 September 1983 para 23

Netherlands and the United Kingdom provide for exclusive ICSID arbitration.<sup>37</sup> All other BITs allow investors to pursue an arbitration claim through ICSID or ad hoc arbitration in accordance with the UNCITRAL rules or any other rules mutually agreed by the parties.<sup>38</sup> Cases filed against Nigeria at ICSID was in the case of *Guadalupe Gas Products Corp. v Nigeria*<sup>39</sup>, where the subject matter was on the production and marketing of liquefied natural gas; the tribunal composed of Ivan Wallenberg (President), Elihu Lauterpacht and Pieter Sanders. The outcome of the arbitral proceedings was a settlement agreement which was recorded in the form of an award pursuant to Arbitration Rules 43 (2). However in the case of *Shell Nigeria Ultra Deep Limited v Federal Republic of Nigeria*<sup>40</sup> which was registered on 26 July 2007 in respect of a hydrocarbon concession was discontinued on August 1 2011.

It is imperative to note that arbitrating investment disputes in Nigeria are contained in certain statutes. The principal statute addressing investment arbitration in Nigeria is the Nigerian Investment Promotion Commission Act<sup>41</sup>. It provides in its section 26 (2) that:

*‘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.’*

This statute tries to maintain a favourable investment climate in Nigeria by adopting a more liberal mechanism in resolving differences that may occur in the course of a domestic or foreign investment. There are also other statutes advocating for the use of arbitration. The principal statutes of the oil and gas sector, the Petroleum Act 1969<sup>42</sup> in its regulation 41 stipulates thus:

*‘If any question or dispute arises in connection with any licence or lease to which this schedule applies between the Minister and the Licensee or Lessee (including a question or dispute as to the payment of any fee, rent or royalty), **the question or dispute shall be settled by Arbitration***<sup>43</sup> *unless*

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<sup>37</sup> Arbitrating Foreign Investment Dispute in Nigeria: Prospects and Challenges

<http://www.internationallawoffice.com/newsletters/detail.aspx?q=63ec87d9-a8ed-4616-b339-62e5684f94eb>  
accessed 31 July 2014

<sup>38</sup> Ibid

<sup>39</sup> (ICSID) Case ARB/78/1

<sup>40</sup> (ICSID) Case ARB/07/18

<sup>41</sup> CAP N117 LFN 2004

<sup>42</sup> CAP P10 Laws of Nigeria 2004

<sup>43</sup> Emphasis mine

*it relates to a matter expressly excluded from arbitration or expected to be at the discretion of the Minister'*

Furthermore, the Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act<sup>44</sup>, in its section 22 provides that:

*'In the event of any dispute in respect of a substantial matter arising from the provision of this Act, the aggrieved Shareholder(s) in the Company shall issue a letter of notification to Government formally notifying Government and other shareholders of the dispute. The Government's representatives and one or more 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 90 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'*

It quite incontrovertible that the abovementioned statutes try to utilize arbitration as an alternative dispute resolution process contrary to the traditional means of resolving disputes which is through litigation. However, it may not be out of place to note that the Petroleum statute tilts contrary to the jurisprudence of arbitration. Arbitration is hinged on agreement and consent. Any deviation from these features will amount to no arbitration. The Nigerian oil and gas sector have numerous investors owing to the fact that it is the backbone of the Nigerian economy. Having established that fact, mandating that any dispute which may arise must be resolved through arbitration raises the eyebrows. It begs the question on what will happen if the parties in dispute do not want to arbitrate, as they would prefer litigation or there wasn't an earlier agreed arbitration agreement. If section 1 of the Arbitration and Conciliation Act (ACA)<sup>45</sup> provides that every arbitration agreement shall be in writing contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement or in an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and denied by another, then the compulsory arbitration under the Petroleum Act is void. By not making arbitration compulsory, parties can submit their dispute to arbitration through entering into a '*submission agreement*' provided there is no initial document showing that the parties choose to recourse to arbitration in the event of a dispute.

All other statutes as states above do not provide for mandatory arbitration as parties free to arbitrate or not. However, parties in dispute must arbitrate provided there is a written document evidencing an arbitration clause. *Onward Enterprises Ltd. V M.V Matrix*<sup>46</sup> where the Court of Appeal clearly stated that: "Once an arbitration clause is retained in a contract which is valid and the dispute is within the contemplation of the clause, the court should give regard to the contract by enforcing the arbitration clause. It is therefore the general policy of the court to hold parties to the bargain which they had entered." Where there is no such document but disputants wish to use arbitration, they may enter a submission agreement allowing arbitration to resolve their dispute.

<sup>44</sup> CAP N87 Laws of Nigeria 2004

<sup>45</sup> CAP A18 Law of Nigeria 2004

<sup>46</sup> [2010] 2 NWLR (Part 1179) 530, 558

## **Conclusion**

Prior to the use of arbitration, the traditional method of resolving dispute was through litigation. However in recent times, the world is gradually moving away from the cumbersome and technical proceedings of litigation to arbitration. With the geometric increase of dispute on a daily basis, arbitration can only be seen as the panacea owing its inherent advantages such as speed, privacy, flexibility and simplicity of procedure, preservation of good business and personal relations etc.

Companies and States must invest in the bid of gaining wealth and development in every ramification. Engaging in investment does not make it free from disputes and conflicts. Whether the investment is local or international, disputes are bound to occur. Arbitration serves as a panacea to both domestic and international investment dispute. With the passage of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, establishing the International Centre for Settlement of Investment Dispute (ICSID), is a milestone in facilitating the resolution of investment disputes through arbitration and other dispute resolution process. The Centre provides institutional support of various kinds. Consent to the ICSID arbitration excludes the harassment potential of diplomatic protection exercised by the home State of investors against hosts States.

Nigeria, a country where all its sectors are opened to both domestic and foreign investment, should strive towards making it a destination where foreign investment dispute are resolved swiftly through arbitration. With the creation of more arbitration institutions in the country and review of laws addressing arbitration practice will go a long way in making Nigeria to be viewed as the place where arbitration thrives most.

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