MPRI-JHSS| INTERNATIONAL JOURNAL OF HUMANITIES & SOCIAL SCIENCE
VOL. 11 NO.6 JUN-2020 ISSN: 1021-3197

THE UTILITY OF ARBITRATION IN PROMOTING FOREIGN DIRECT INVESTMENT IN AFRICA: NIGERIA PERSPECTIVES

ERIC OMO ENAKIRERU
University School of Postgraduate Studies and Research, Okada, LLB LLM (Benin)

Abstract

The fact that African countries economic is facing hardship is no longer news and many of these developing economy are making efforts to attract foreign investments to Africa in a new bid to steer the economy from the path of recession as presently been experience by developing countries. This paper shall discuss generally, the law and practice of arbitration and other models. However, the main thrust of this work shall be to answer the question, "how can arbitration bring about economic reform and development? Thus, this paper discusses why and how Arbitration can serve as a springboard for promoting and encouraging foreign direct investment in Africa. It will be argued that one way (amongst many) to attract foreign investors is via an investment treaty embodying an arbitration clause between many Africa countries and the foreign investors. The rationale for the said argument shall be fully elucidated in the course of the discussion. It later concludes that as long as the present challenges facing arbitration persist, economic reforms and developments will be inevitable. This paper further recommends other factors that need to be put in place if the economic reform and development is to have a lasting impact.

KEYWORDS:
Arbitration, Dispute resolution, Investment, and Economic development

INTRODUCTION

The need for economic reform and development given the present economic challenges bedevilling the African states cannot be overstated. Recently, President Muhammadu Buhari of Nigeria, the country regarded as the largest economic in Africa called on religious leaders in the country to keep calming the people, promising that government was working hard to solve problems of poverty, unemployment, and insecurity in the country.[1]The fact that Nigeria is facing economic hardship is no longer news[2] and the Federal Government is making efforts to attract foreign investments to Nigeria in a new bid to steer the economy from the path of recession.[3]

It must, however, be noted that the nature of the Nigerian legal system is usually put into consideration by potential investors because it is a key factor in assessing the country's investment climate. An investor is concerned about the security of his investment and the possible effects or impact of disputes. An investor wants to be assured that the available dispute resolution mechanism in the investor country is effective.[4]Some critical questions are usually asked and one of such questions relates to the prevailing legal and institutional framework for dispute resolution.[5]

Since conflicts are inevitable in business relationships and court-based litigation tends to be a deterrent to potential investors especially foreign

---

[1] Juliana Taiwo-Obalonye, (July 29, 2016.) "Economic Hardship: Help Beg Nigerians –Buhari tells Muslim Clerics. *"Sun Newspaper*, Retrieved from http://sunnewsonline.com/economic-hardship-help-beg-nigerians-buhari-tells-muslim-clerics/ on August 13, 2016.

[2] Sylvester Ugwuanyi, (May 29, 2016) "Democracy Day: Buhari Unveils How Government Will End Economic Hardship Faced by Nigerians." *Daily Post Newspaper*, May 29, 2016. Retrieved from http://dailypost.ng/2016/05/29/democracy-day-buhari-unveils-how-government-will-end-economic-hardship-faced-by-nigerians/ on August 13, 2016

[3] Kunle Aderinokun and Olaseni Durojaiye, (2016) "The Renewed Search for Foreign Investment."*Thisday Newspaper*, August 13, 2016. Retrieved from http://www.thisdaylive.com/index.php/2016/08/07/the-renewed-search-for-foreign-investment/ on August 13, 2016

[4] Adedoyin Rhodes-Vivour, "Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform, Retrieved from"www.nigerianlawguru.com/articles/**arbitration**/**ARBITRATION**%20&%20A.D.R.**pdf** *on August 13, 2016.*

[5] James Michel, (2011): "Alternative Dispute Resolution and the Rule of Law in International Development Cooperation," *Journal of Dispute Resolution* 1, 42. Some other questions are: Who are the system's operators? How are they selected, trained, compensated, monitored, and disciplined with respect to standards of ethical and efficient performance? Do the system's operators have popular credibility? Who are the users of the system, and what do they seek from it? Is the system responsive to their needs? What are the role of civil society in the system's implementation and oversight? Is there sufficient transparency? What are the links between informal and formal institutions in the justice system, including with respect to enforcement, appeals, and consistency with fundamental rights? Does the system produce legally significant results?

investors because of some obvious concerns such as the independence of the judiciary, the delays associated with judicial proceedings, unfamiliarity with the local law, anxiety on how to relate to an unfamiliar legal system and culture, etc.[6]There is, therefore, a need for an alternative to court-based litigation. Fortunately, in the past quarter-century, significant changes have occurred in the ways lawyers approach conflict. There have been unprecedented efforts to develop strategies aimed at more efficient, less costly and more satisfying resolution of conflict.[7]

An effective arbitration and alternative dispute resolution (ADR) regime solves some of the perceived fears of a potential investor. Commercial contracts are increasingly complex and often require reliable, flexible dispute resolution mechanisms. Thus, commercial arbitration and other ADR mechanisms give the parties the autonomy they need to create systems tailored to their disputes.[8]

This paper shall discuss generally, the law and practice of arbitration and other ADR models. However, the main thrust of this work shall be to answer the question, "how can arbitration and ADR bring about economic reform/development? Thus, this paper shall be specifically concerned with discussing why and how Arbitration vis-à-vis ADR can serve as a springboard for economic reform and development in Nigeria. It will be argued that one way to attract foreign investors[9] is via an investment treaty embodying an arbitration clause between Nigeria and the foreign investors. The rationale for the said argument shall be fully elucidated in the course of the discussion. This paper further recommends other factors which need to be put in place if the economic reform and development is to have a lasting impact.

Nature and Scope of Arbitration

It should be noted from the onset that a discussion on arbitration for the purpose of this paper will be limited to the interface between arbitration as an alternative dispute resolution method, as a contributory tool in promoting foreign direct investment in Africa.. This approach is adopted in order to accommodate space. Arbitration is a device whereby the settlement of a question is entrusted to one or more persons who derive their powers from a

---

6 Rhodes-Vivour, "Arbitration and Alternative Dispute Resolution."

7 Thomas J. Stipanowich, (2004) "ADR and the 'Vanishing Trial': The Growth and Impact of 'Alternative Dispute Resolution,'" *Journal of Empirical Legal Studies*, 1, 843.

8 Sophie Pouget, "Arbitrating and Mediating Disputes, Retrieved from" https://www.wbginvestmentclimate.org/.../FDI-Regulations_Arbitrating-and-Mediating-Disputes,htm on 12th August, 2016. In addition, foreign investors view arbitration as a way to mitigate risks by providing legal certainty on enforcement rights, due process, and access to justice.

9 And of course local investors too.

private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such agreement.[10]

Like the public trial, arbitration is an adjudicatory process in which a third-party neutral simply decides the dispute.[11] It differs substantially, however, in that the proceeding is informal rather than formal, and is not bound by traditional rules of evidence or procedure. Furthermore, arbitration as an adjudicatory dispute resolution process involves one or more arbitrators who issue a judgment on the merits (which may be binding or non-binding) after an expedited, adversarial hearing, in which each party has the opportunity to present proofs and arguments. It is procedurally less formal than court adjudication; however, procedural rules and the substantive law may be set by the parties. The arbitrator's decision addresses only the disputed legal issues and applies legal standards. Either party may reject the non-binding ruling and proceed to trial; sometimes, cost sanctions may be imposed in the event the appellant does not improve his/her position in court. This process may be mandatory or voluntary.[12]

The mechanics of arbitration are relatively straightforward. Investors initiate arbitration by submitting a Request for Arbitration to their selected forum. Then, the process of selecting a tribunal begins. Typically, panels of three arbitrators resolve investment disputes. The investor selects one arbitrator and the respondent State picks a second arbitrator. The default rules for selecting the final arbitrator, the presiding arbitrator or chair, vary according to the institution chosen.[13]All arbitrators are generally required to be impartial and to contribute to the adjudicatory outcome.[14]

Nevertheless, the presiding arbitrator performs a different role than the party-appointed arbitrator and his or her appointment is a matter of vital importance. The presiding arbitrator can influence the style of an international arbitration and make critical procedural decisions. Some suggest that presiding arbitrators resolve disputes between party-appointed arbitrators and in some cases, become the ultimate decision maker.[15]

---

10 Alessandra Casella, (1996): "On Market Integration and the Development of Institutions: The Case of International Commercial Arbitration," *European Economic Review* 40, 155.

11 Richard C. Reuben, (2005) "Democracy and Dispute Resolution: Systems Design and the New Workplace," *Harvard Negot. Law Review* 11, 279

12 In court-annexed arbitration, one or more arbitrators, usually lawyers, issue a non-binding judgment on the merits after an expedited, adversarial hearing.

13 Susan D. Franck, (2009) "Development and Outcomes of Investment Treaty Arbitration," *Harv. Int'l L. J.* 50, 435

14 Claudia T. Salomon, (2002) "Selecting an International Arbitrator: Five Factors to Consider," *MEALEY'S INT'L ARB. REP*. Nos. 10, 2, 3, 17. Also available online at http://www.arbitralwomen.org/files/publication/0405202743129.pdf. Retrieved on August 12, 2016

15 Franck, *Investment* Treaty Arbitration," 436.

For these reasons, the role of the presiding arbitrator is of particular interest. Once the tribunal is constituted fully, the parties gather evidence and present arguments. The tribunal then renders an award on the merits of the dispute that is enforceable worldwide.

Arbitration and other Alternative Dispute Resolution[16] Systems as Panacea for Economic Reforms and Development

A. Utilizing the 'Investment Treaty' Tool

Foreign investment is a vital aspect of the international political economy. Foreign investment has a critical impact on the world economy and development.[17] Almost every government in the world attempts to entice foreign capital. Governments in both rich and poor nations compete in a 'race to the bottom' to attract needed foreign investment. There is evidence that this competition is particularly prevalent among developing countries.[18]Governments of these less-developed countries, in an effort to attract foreign investment, compete with one another to make their standards the most attractive to the investing companies."[19]

Traditional methods to lure foreign investment involve liberalizing an economic sector, providing tax incentives, improve domestic infrastructure, promote a skilled labor force, and establish agencies to promote foreign investment, improve the regulatory environment, or enter into international agreements.[20] An improved dispute resolution system is also a potential method of encouraging foreign investment[21]and this improved dispute resolution can be incorporated in an investment treaty.

An investment treaty is an agreement between two or more governments that safeguards investments made by qualifying investors in the territory of other

[16] [Hereafter-Alternative Dispute Resolution]

[17] Bishop, R. Doak., (1995) Foreign Investment Disputes: Cases, Materials and Commentary 2–7 (2005); Encyclopedia of Public International Law, Vol. II 435–37, referred to in Susan D. Franck, Development and Outcomes of Investment Treaty Arbitration, 50 Harv. Int'l L. J. 435 (2009). 435-489.

[18] Teresa Edwards, (2002) the Relocation of Production and Effects on the Global Community, 13 COLO J. INT'L ENVTL. L. & POL'Y 183, 190, referred to in Susan D. Franck, Development and Outcomes of Investment Treaty Arbitration, 50 Harv. Int'l L. J. 435 (2009) 435-489.

[19] Lawrence Jahoon Lee, (2006) Barcelona Traction in the 21st Century: Revisiting Its Customary and Policy Underpinnings 35 Years Later, 42 STAN. J. INT'L L. 237, 265

[20] See The World Bank, World Development Report (2005): A Better Investment Climate for Every- one 20 (2004), available at http://siteresources.worldbank.org/INTWDR2005/Resources/complete_report.pdf. Accessed on 12th August, 2016.

[21] Effective ADR Mechanism Can Fetch More FDI than China, EXPRESS INDIA, Nov. 5, 2005, available at http://www.expressindia.com/fullstory.php?newsid=57809 (discussing how a law minister in India believed that an effective alternative dispute resolution system would help them attract more foreign investment than China).

signatories. These treaties grant reciprocal investment rights, both procedural and substantive, to private investors from the signatory countries.[22]

Today, nearly 170 countries have signed onto one or more Bilateral Investment Treaties ("BITs"). These treaties offer foreign investors a series of economic rights, including the right to arbitrate claims, in hopes of attracting Foreign Direct Investment ("FDI") that will bring a country infrastructure projects, financing, know-how, new jobs and, economic stability. While the number of investment treaties has increased, there has also been a marked increase in FDI, which surged from $200 billion in 1990 to over $1 trillion in 2000[23]

Substantively, governments guarantee investors certain treatment, such as the right to be free from expropriation without just compensation, the right to be free from discrimination on the basis of nationality, the right to fair and equitable treatment, or the guarantee that states will honor their contractual commitments.[24]

Investment treaties are not simply revolutionary because of the substantive protections that they provide. The real innovation was the provision of procedural rights that gave investors a mechanism to enforce the substantive rights directly. In other words, investors not only have rights, they also have an agreed forum to redress alleged wrongs. This prevents the rights in investment treaties from being the equivalent of a legal fiction. Procedurally, the existence of an investment treaty means that if investors believe their substantive rights have been violated they can seek redress against the host state through the treaty's dispute resolution mechanism. The objective of these procedural rights is to move beyond war, gunboat diplomacy, and politicized forms of dispute resolution to provide a neutral forum for the resolution of investment conflicts. [25]

Analysts from the United Nations Commission on Trade and Development ("UNCTAD"), the World Bank, and elsewhere have conducted research

[22] Susan D. Franck, (2009).Development and Outcomes of Investment Treaty Arbitration, 50 Harv. Int'l L. J. 435 435-489. See also, United States Trade Representative, CAFTA-DR Final Text, Chapter 10, available at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html. Accessed on 12th August, 2016. These treaties typically take the form of Bilateral Investment Treaties ("BITs"), an emerging trend is the creation of larger, multilateral investment treaties ("MITs").

[23] See UNITED NATIONS, WORLD INVESTMENT REPORT: PROMOTING (2001) PROMOTING LINKAGES, xiii, 9-10 (2001), available at http://www.unctad.org/en/docs/wir01full.en.pdf Retrieved on August 13, 2016 noting the increase in FDI and finding worldwide foreign investment was in the order of $1.3 trillion in 2000.

[24] See Susan D. Franck, (2007). "Integrating Investment Treaty Conflict and Dispute Systems Design," 92 MINN. L. REV. 161, 171

[25] Supra. the "presumption behind the [investor-state arbitration] process is that foreign investors do not generally receive fair treatment in domestic courts in developing countries when complaining of a government action")

suggesting that investment treaties have an impact on foreign investment.[26]These studies suggest that they are one aspect of larger market forces that impact FDI (e.g., the size of the internal market, the gross domestic product ("GDP") of the host country, pre-existing levels of investment, and the degree of market liberalization). There has been some suggestion that dispute resolution provisions are one of the strongest investor protections in investment treaties. The former U.S. Treasury Secretary, John Snow, has also suggested that focusing "attention on a dispute resolution process [is] a way to facilitate foreign direct investment."[27]

This is because in a typical situation, the host state can potentially benefit by unilaterally resiling from its obligation once the investor has completed his initial investment. The investor, in turn, cannot easily reemploy his investment elsewhere without significant losses in the form of sunk costs. Thus, often, the only possibility for the host state to make credible commitments and immunize investor-state cooperation against subsequent opportunistic behavior is through the establishment of independent third-party dispute-settlement mechanisms such as courts or arbitration.[28]

A. The Preference for Arbitration (ADR) in Investment Treaty [29]

Neither the courts of the host state nor the courts of any third state are well-positioned to enforce the state's promises vis-à-vis foreign investors, including those in investment treaties. The problem with most state courts is that they are not or at least they are not perceived to be sufficiently neutral in resolving disputes between foreign

[26] United Nations Commission on Trade and Development, Bilateral Investment Treaties in the Mid 1990s, UNCTAD/ITE/IIT/7, Sales No. E.98.II.D.8, 8-10 (1998).

[27] Khozem Merchant (2005), *Snow Calls for an Arbitration System to Ease India Fears*, FIN. TIMES, Nov. 8, *available at* http://news.ft.com/cms/s/d810ddf8-5078-11da-bbd7-0000779e2340.html (on file with the *Pacific McGeorge Global Business & Development Law Journal*).

[28] See Zachary Elkins, Andrew T. Guzman, and Beth A. Simmons, (2006) "Competing For Capital: The Diffusion of Bilateral Investment Treaties," 1960-2000, 60 Intl. Org. 811, 823-24

[29] In the past, when a government's violation of international law adversely affected an investment, an investor's remedies were limited. Investors' remedies tended to be limited to the following: (1) negotiating with the sovereign; (2) suing the sovereign in the sovereign's own courts where defenses of sovereign immunity may be readily available; (3) asking their home government to negotiate diplomatically on their behalf; or (4) lobbying their home government to espouse a claim on their behalf before the International Court of Justice. While some of these options may have provided useful opportunities to solve disputes, they were often ineffectual and investors were unable to redress their grievances satisfactorily. Moreover, even when litigation was pursued on an investor's behalf by its home country, it was uncertain whether the investor would receive the financial compensation for its damages. *See, e.g.*, William S. Dodge, *Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1, 5-8 (2006) (describing the traditional diplomatic protections available to foreign investors harmed by breaches of international law)

investors and host states.[30] In many developing and transitioning countries, independent courts that decide cases in accordance with pre-established rules of law in a timely fashion are missing altogether. Corruption in the judiciary is a sad but daily business in the courts of many countries.[31] Additionally, lengthy and inefficient court proceedings dragging on over years, if not decades, remain too commonplace.[32]

Under such circumstances, it is difficult to argue convincingly that dispute resolution in many host states' courts constitutes a way for investors to make a recalcitrant host state comply with its investment-treaty commitments. (Exceptions to these observations exist, especially in countries with well-developed judicial systems that provide for effective and independent protection against government conduct.[33]

Similarly, the courts of third states are not better placed to offer effective dispute settlement between investors and host states. The judiciary outside the host state is often equally reluctant to subject sovereign nations to full-fledged judicial scrutiny and control. Various legal obstacles including state immunity and doctrines of judicial restraint such as the act-of-state doctrine constitute significant limits to the subjection of host states to third-country jurisdiction.[34]

Courts outside the host state are, therefore, equally incapable of providing effective enforcement mechanisms that could back up the credibility of promises a host state makes vis-à-vis foreign investors. The investor's options for the enforcement of host-state promises are not any better under the framework established by customary international law. Here, investors are denied standing to initiate proceedings in international courts and tribunals. Instead, only the home state of an investor is able to espouse its claim and exercise diplomatic protection.[35]

---

[30] The fundamental reason that the great majority of modern investment protection treaties have opted for international adjudication is that domestic courts are often perceived to be biased against alien investors.

[31] On corruption in the judiciary, see generally Maria Dakolias and Kimberley L. Thachuk, (2000) Altacking Corruption in the Judiciary: A Critical Process in Judicial Reform, 18 Wis Intl L J 353 Eduardo Buscaglia and Maria Dakolias, (1999). An Analysis of the Causes of Corruption in the Judiciary, 30 L & Poly Intl Bus 95

[32] Supra no. 40

[33] See William S. Dodge, (2006). Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement, 39 Vand J Transnatl L 1, 2-4

[34] M. Sornarajah, (2009) The Pursuit of Nationalized Property 253-301 (Martinus Nijhoff 1986) referred to in Brower, Charles N. and Schill, Stephan W. "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?," Chicago Journal of International Law: Vol. 9: No. 2, Article 5. Available at: Retrieved from http://chicagounbound.uchicago.edu/cjil/vol9/iss2/5 on August, 2017, 471-498.

[35] Supra

Significant drawbacks vitiate the effectiveness of diplomatic protection in making host states comply with promises given to foreign investors. First, the investor has no right vis-a-vis its government to a grant of diplomatic protection, and the latter no duty to accord it. Instead, states remain free to decline diplomatic protection. [36]

Second, the home state exercises exclusive control over the rights of its nationals on the international level and hence is entitled to settle, waive, or modify them by agreement with the host state.[37]

Third, under customary international law the entitlement to receive compensation for the violation of international law protecting foreign nationals is vested not in the alien but in his or her home state. Compensation received therefore need not be paid to the investor but the home state espousing the claim. The home state, in turn, is under no obligation to pass the compensation on to the investor who suffered the damage.

Finally, diplomatic protection and interstate dispute settlement are subject to the requirement that local remedies first be exhausted. While this affords the host state an opportunity to redress a violation of a foreign investor's rights, it also hardly affords efficient dispute settlement between investors and host states if the host state's courts are not impartial and independent enough in addressing that state's opportunistic behavior.

The foregoing factors thus illustrate the insufficiency of diplomatic protection as a procedural means for efficiently enforcing host-state promises vis-à-vis foreign investors and for enabling host states to make fully credible commitments.

Thus, large-scale investment contracts have always contained contractual arbitration clauses and have included choice-of-law clauses, stabilization clauses that insulate an investor- state contract from future changes of the law governing a contract or internationalization clauses that subject a contract to international law as the governing law.

By means of such contractual arrangements, investors and host states are thus able to deal with some of the limitations of dispute settlement

[36] See, for example, Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain), 1970 ICJ 3, 44 (Feb 5, 1970), stating: The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.

[37] Supra

under customary international law. Arbitration clauses remove the settlement of disputes from the realm of domestic adjudication and alleviate connected deficiencies; choice-of-law clauses, stabilization clauses, and internationalization clauses, in turn, protect investor-state contracts against unilateral changes in the governing law by the host state that might affect the contractual equilibrium.[38]

It is worth mentioning that investor-State disputes arising under international investment treaties are not ordinary commercial disputes. Treaty- based investor-State disputes are special, and their special nature must be understood because it affects the ways in which the disputants approach their conflict and the utility and effectiveness of dispute resolution techniques employed to resolve that conflict. First, such disputes are not a matter of simple contract claims governed by contract law. They are disputes governed by public international law in the form of treaties; instruments of international law solemnly entered into by two or more states. Given the international legal nature of these disputes, unilateral attempts to deal with them through domestic laws and regulations are usually unavailing.[39]

And indeed, without the investor having the option of recourse to ADR such as arbitration, investment treaties would be mere political declarations (albeit with some implications on the diplomatic level) instead of a set of rules enforceable against states. The importance of this right in fulfilling the object and purpose of investment treaties to protect and promote foreign investment becomes most apparent in considering the function that independent dispute-settlement mechanisms perform in stabilizing and enabling economic exchange in the investment context.[40]

ADR provides tailored dispute resolution mechanisms that are particularly useful tools for complex commercial transactions, such as foreign direct investments (FDI). Commercial arbitration enables the parties to create systems tailored to their dispute and to guarantee the necessary confidentiality to protect their commercial secrets and their reputation. It also allows them to select arbitrators who are

[38] Supra no. 47

[39] Jeswald W. Salacuse, (2007) "Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution," *Fordham International Law Journal*, Volume 31, Issue 1 Article 6 (138-185).

[40] Supra no. 47

experienced professionals with a particular expertise relevant to the dispute. [41]

Hence, ADR is now widely recognized as the preferred dispute resolution mechanism for many investors and entrepreneurs.

B. Arbitration (ADR) and Economic Development

Even if no systematic evidence has been found regarding the impact of ADR on FDI[42], authors recognize that economies should improve their ADR regimes and allow for flexible and faster dispute settlement in order to attract FDI. Studies find that more than two-thirds of multinational corporations prefer commercial arbitration over traditional litigation, either alone or in combination with other alternative dispute resolution mechanisms, to resolve cross-border disputes.[43] Commercial arbitration is considered to provide a neutral forum for the settlement of disputes related to FDI, which can often be sensitive and, hence, limits the risks associated with FDI.

Dispute settlement has a central function in stabilizing the expectations of foreign investors and enables them to counter opportunistic behavior by the host state, such as unreasonable interferences with the investor's economic rights or even expropriations without compensation. Recourse to a dispute settlement and enforcement mechanism empowers the investor to effectively hold states liable for breaches of their promises in investment treaties to not expropriate foreign investors without compensation, to treat them fairly and equitably, to provide full protection and security, and so on. Conversely, from the host state's perspective, the investor's right to initiate arbitration enables the host state to make credible the commitments it made under its investment treaties.

This, in turn, reduces the political risk of foreign investment, lowers the risk premium connected to it, and therefore makes investment projects more cost-efficient. This increased efficiency benefits not only investors, but also the host state, as the products and services that a foreign investor offers become cheaper.

Moreover, a robust ADR framework, including laws and private institutions that provide ADR services, contributes indirectly to the rule of law. Because ADR is particularly attractive for foreign investors, it is usually an incentive for greater accessibility to the legal system, online

[41] Supra note 8.
[42] [Hereafter Foreign Direct Investment]
[43] Price Waterhouse Coopers and Queen Mary University 2006 referred to in supra note 8.

and in English, thus attracting the international business community. It also contributes to the training of judges and lawyers, as many of them serve as arbitrators and mediators and their obligations often include obtaining a certification and placing emphasis on ethics, impartiality, and independence.[44]

Arbitration is becoming recognized as a "growth industry" and benefits the reputation of an economy in the international arena. For instance, Singapore is now a recognized hub for arbitration, and is often chosen by foreign investors as a place where they can have their disputes settled. Two factors explain this achievement: Singapore has consistently amended its legislation on international arbitration and is now able to offer dynamic and reliable arbitration services.

Hence, policy reforms that remove barriers for investors to settle their disputes are crucial. For instance, practitioners such as the Secretary General of the International Chamber of Commerce's (ICC) Court of Arbitration recognize the need to have a faster way to settle disputes and to enforce arbitral awards to attract FDI. Some stated that "if you are to bring in more FDI you need fast-track arbitration," that is, time-bound arbitration where arbitrators have to observe specific time limits[45].

Others have also indicated the need to guarantee that foreign investors can freely appoint their lawyers. The Chair of the Commission on arbitration for the ICC in Thailand suggested that "granting short-term work permits or business visas for foreign lawyers" could be an option.[46]

There is, thus, a need to assess ADR and to provide comprehensive and substantive information on why and how ADR regimes can be reformed. In an interdependent and interconnected world, where FDI inflows are vital to economic growth, economies need to have an attractive investment climate. This means that economies should be able to answer the growing and more complex needs of the business community. This supposes, in particular, that economies should offer up-to-date, stable and predictable ADR regimes in order to better attract FDI.[47]

Arbitration and Alternative Dispute Resolution (ADR) are not imported mechanisms in Africa. Litigation is the imported mechanism.

[44] Supra note 8.
[45] supra
[46] Bangkok Post 2012, supra
[47] Supra no. 8.

Traditionally, most States in Africa, disputes were traditionally resolved through Arbitration and ADR. Indeed, Customary Law Arbitration[48] and ADR remains part of the Nigerian Legal System.[49]

Challenges of Arbitration in Africa

The challenges of Arbitration in Africa[50] include but not limited to the following:

A. The National Laws and Rules are outdated and not in tune with recent practices. The National and State Assemblies and enabling bodies are thus urged to update the draft ACA and ACL 2006 and pass them into law. Government should create an enabling environment for arbitration the laws, rules, arbitral institutions and the infrastructure (social and economic).
B. Most legal practitioners and law officers are not well trained for arbitration and thus confuse litigation and arbitration when they act as arbitrators. There is therefore, need for proper training for Legal Practitioners. The Court plays supervisory and supportive roles to arbitration and they are expressly stated in the Arbitration laws. It is recommended that where a counsel brings unmeritorious applications outside those expressly provided for in the arbitration laws, the court should refuse it and award costs personally against the Counsel.

Conclusion

[48] For more on Customary Arbitration in Nigeria, see Ibrahim Imam, "The Legal Regime of Customary Arbitration in Nigeria Revisited." Available at http://unilorin.edu.ng/publications/imami/UNIKOGI%20CUSTOMARY%20ARBITRATION%202.pdf; see also, Muhammed Mustapha Akanbi, *(*2015) "Customary Arbitration in Nigeria: A Review of Extant Judicial Parameters and the Need for Paradigm Shift," *Afe Babalola University: J. of Sust. Dev. Law & Policy*, Vol. 6: 1, 200-221; Bello, Adesina Temitayo, *(2014*) Customary and Modern Arbitration in Nigeria: A Recycle of Old Frontiers, Journal *of Research and Development Vol. 2, No.1.*

[49] Adedoyin Rhodes-Vivour (Mrs.), "Arbitration and Alternative Dispute Resolution as Instruments for Economic Reform," available at www.nigerianlawguru.com/articles/**arbitration**/**ARBITRATION**%20&%20A.D.R.**pdf,** accessed on 12th August, 2016.

[50] Paul Obo Idornigie, "Challenges to Arbitration Practice in Nigeria, Nigerian Institute of Advanced Legal Studies, Abuja, Nigeria; Nigeria: The Problems Militating Against The Growth of Arbitration In Nigeria," available at http://www.mondaq.com/Nigeria/x/322946/Arbitration+Dispute+Resolution/The+Problems+Militating+Against+The+Growth+Of+Arbitration+In+Nigeria. Accessed on 12th August, 2016.

Countries are targeting effective alternative dispute resolution systems as a method of fostering foreign investment.[51] Because of its numerous advantages, commercial arbitration is important to the investment climate of an economy. For this reason, it should be more widely recognized and made comprehensively accessible, in order to facilitate access to information for foreign investors. Thus, it is critical to make all the substantial and procedural provisions regulating commercial arbitration incorporated available in one single source of information, either a law incorporated in a code or a specific statute. Most Africa countries are lagging behind with regard to this as the Arbitration Bill which was presented to the House since 2006 in Nigeria is yet to be passed into law. The National Assembly should expedite the passage of the draft Arbitration Bill which has lingered in the Assembly for about a decade. Furthermore, to facilitate access to information, arbitration laws should be available online. As technology continues to develop, ease and speed of access to information is becoming paramount for foreign investors and the investment climate of these economies in general.

Given the extent of cross-border transactions in today's world, as well as the numerous locations for holding assets, recognition of a foreign arbitral award can be a very important stage in the arbitration process. Evidently, the ease of recognition and enforcement of foreign arbitral awards is critical for a foreign investor who is looking not only for economies which can offer business opportunities, but also legal certainty and time efficiency, in case of the need to enforce an arbitral award. It is also critical because, more generally, foreign investors often take into consideration whether the economy they choose to invest in is supportive of Alternative Dispute Resolution (ADR).

The New York Convention is critical to a good legal framework on commercial arbitration, as it requires national courts to recognize foreign arbitral awards, i.e., to grant them the same validity as a judgment. As a result, it also means that domestic courts must enforce foreign arbitral awards in the case where a debtor refuses to abide by its terms.[52] Fortunately, most Africa states are signatory to the New York Convention.

Certainly, the credibility of the host state's commitments does not solely rely on the availability of dispute settlement mechanisms. Arbitration and ADR models alone cannot sustain the economic development. The country's reputation, community pressure, the moral obligation to keep promises and

[51] Express India, Effective ADR Mechanism Can Fetch More FDI than China (Nov. 5, 2005), available at http://www.expressindia.com/fullstory.php?newsid=57809.) on October, 2017

[52] Supra no. 8.

the host state's self-interest are also contributory factors.[53] Other critical variables influencing investment choices can include the potential financial risks and benefits to the investor,[54] the stability of an investment environment[55] and the availability of appropriate human capital.[56]

The paper has strived to discuss the ambit of arbitration and ADR as it affects foreign direct investment in Africa. However, there is limited discussion on arbitration in Nigeria. This is premised on the fact that there is relatively fair number of literatures on arbitration in Nigeria. The prime focus of this paper is on arbitration as an alternative dispute resolution system and the threshold nexus in heralding reforms and developments in a developing world. Arbitration can indeed bring about economic development by being an incentive in attracting Foreign Direct Investment to Africa.

[53] See generally Andrew T. Guzman, (2008) How International Law Works. A Rational Choice Theory 71-117 (Oxford) (detailing how reputation functions as a mechanism to induce states' compliance with their obligations under international law).

[54] See Magnus Blomström & Ari Kokko, (Jan. 2003), Working Paper 168: The Economics of Foreign Direct Investment Incentives available at http://web.hhs.se/eijswp//168.pdf, on 16th August 2017, See also Andrew Charlton, Working Paper No. 203: Incentive Bidding for Mobile Investment: Economic Consequences and Potential Responses (Jan. 2003), available at http://www.oecd.org/dataoecd/39/63/2492289.pdf on 23th March, 2016

[55] See generally The World Bank, World Development Report (2005) A Better Investment Climate for Everyone (2004), available at http://siteresources.worldbank.org/INTWDR2005/Resources/complete_report.pdf.on 14th July, 2018 where investment incentives are unstable they become less effective in attracting investment, observing that "heavy-handed bureaucracy and administrative procedures are major discouragements to investment" and noting that efforts to streamline a regulatory regime may lead to increases in investment.

[56] See Koji Miyamoto, Working Paper 211: Human Capital Formation and Foreign Direct Investment in Developing Countries, (July 2003), available at http://www.oecd.org/dataoecd/45/25/5888700.pdf on 17th September, 2017 (reviewing the literature on human capital formation and skills development and analyzing their impact on FDI).