

GETTING THE
DEAL THROUGH 

Investment Treaty Arbitration 2019

Contributing editors

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Preface

Investment Treaty Arbitration 2019

Sixth edition

Getting the Deal Through is delighted to publish the sixth edition of *Investment Treaty Arbitration*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Belgium, Malaysia, Nigeria and Singapore.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Stephen Jagusch QC and Epaminontas Triantafilou of Quinn Emanuel Urquhart & Sullivan LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
October 2018

Nigeria

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Background

1 What is the prevailing attitude towards foreign investment?

Foreigners are welcome to invest freely in any enterprise in Nigeria (except those listed on the negative list as contained in the Nigerian Investment Promotion Commission Act, Cap N117, Laws of the Federation of Nigeria 2004 (NIPC Act), that is, businesses that produce arms, ammunition, military and paramilitary clothing and equipment, narcotic drugs and psychotropic substances, etc), and may freely repatriate capital, interest, profits or dividends in freely convertible currency. Nigerian laws protect foreign investments from nationalisation, expropriation or compulsory acquisition except in rare cases and upon the payment of adequate compensation. They also provide incentives for investments, and create an effective dispute resolution process for investor-state arbitration.

Generally, foreign investment is encouraged in most sectors of the Nigerian economy. However, the Nigerian government is attempting to increase and promote indigenous participation in major sectors, including the information and communication technology and oil and gas sectors, through the local content policy. The local content policy in Nigerian laws favours Nigerians and Nigerian companies in these sectors and requires multinational companies operating in these sectors to, amongst other things, have a local content promotion plan for job creation and the development of local human capital. The policy also seeks to encourage technology transfer as much as possible.

2 What are the main sectors for foreign investment in the state?

According to the National Bureau of Statistics' May 2018 report, the following represents the capital importation by sector for the first quarter of 2018:

- banking (US\$1.108.81 billion);
- the services industry (US\$328.15 million);
- finance (US\$485.41 million);
- production (US\$144.09 million);
- agriculture (US\$130.90 million);
- telecommunication (US\$87.25 million); and
- oil and gas (US\$85.62 million).

It is important to note that the services industry covers all other private economic activities that do not directly result in the production of material goods but render advisory and other related professional services. This would include the provision of legal and accounting services.

3 Is there a net inflow or outflow of foreign direct investment?

According to the Nigerian National Bureau of Statistics, the total value of capital imported into Nigeria in the first quarter of 2018 stood at US\$6.303.63 billion. This represents a year-on-year increase of 594.03 per cent and a 17.11 per cent growth over the previous quarter (fourth quarter, 2017). Nigeria is said to have attracted a total of US\$246.2 million net inflow foreign direct investment (FDI) in the first quarter of 2018, compared to US\$378.41 million in the fourth quarter of 2017. This represents a 34.83 per cent drop from the previous quarter. FDI in Nigeria is, however, not as high as foreign portfolio investment (FPI) and other investment. Foreign direct investment represents only 3.9 per cent of total capital imported in the first quarter of 2018. Nonetheless,

on a year-on-year basis, FDI in Nigeria has grown by 16.67 per cent. A total of US\$4.565.09 billion in FPI was realised at the same period as compared to US\$3.477.53 billion in the fourth quarter of 2017, with an increase in capital importation to US\$6.303.63 billion.

4 Describe domestic legislation governing investment agreements with the state or state-owned entities.

The NIPC Act governs investment agreements in Nigeria. The Act enables foreigners to invest in any enterprise except enterprises with activities on the negative list. The legislation provides protection against nationalisation of businesses or expropriation by the Nigerian government and provides for free transferability of capital and returns on investment. It also prescribes that disputes between an investor and the state will be resolved by arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) 1965 where attempts at amicable resolution fail.

International legal obligations

5 Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party, also indicating whether they are in force.

Nigeria is a party to bilateral investment treaties (BITs) with the following countries: Algeria (2002), signed (not in force); Austria (2013), signed (not in force); Bulgaria 1998, signed (not in force); Canada 2014, signed (not in force); China 2010, terminated; China (2001), in force 2010; Egypt (2001), signed (not in force); Ethiopia (2004), signed (not in force); Finland (2005), in force 2007; France (1990), in force 1991; Germany (2000), in force 2007; Italy (2000), in force 2005; Jamaica (2002), signed (not in force); Korea (1998), in force 1999; Kuwait (2011), signed (not in force); Morocco (2016), signed (not in force); the Netherlands (1992), in force 1994; Romania (1998), in force 2005; Russia (2009), signed (not in force); Serbia (2002), in force 2003; Singapore (2016), signed (not in force); South Africa (2000), in force 2005; Spain (2002), in force 2006; Sweden (2002), in force 2006; Switzerland (2000), in force 2003; Taiwan (1994), in force 1994; Turkey (1996 and 2011), signed (not in force); Uganda (2003), signed (not in force); the United Arab Emirates (2016), signed (not in force); the United Kingdom (1990), in force 1990; and the United States (2013), signed (not in force).

Nigeria is a party to multilateral treaties with the following countries: Economic Community of West African States (ECOWAS) ECOWAS-US Agreement for the Development of Trade and Investment Relations (TIFA) (2014), signed (not in force); ECOWAS Supplementary Act on Investments (2008), in force 2009; ECOWAS Energy Protocol (2003), signed (not in force); Revised ECOWAS Treaty (1993), in force 1995; OIC Investment Agreement (1981), in force 1988; ECOWAS Protocol on Movement of Persons and Establishment (1979), in force 1980; and ECOWAS Treaty (1975), in force 1975.

6 If applicable, indicate whether the bilateral or multilateral investment treaties to which the state is a party extend to overseas territories.

Nigeria possesses no overseas territories.

7 Has the state amended or entered into additional protocols affecting bilateral or multilateral investment treaties to which it is a party?

Nigeria's BITs typically indicate that amendments are made in writing and come into effect following the consent of both contracting parties, and after 30 days of the completion of the Exchange of Notes. There is no publicly available information concerning amendment protocols for Nigeria's BITs. Nigeria has replaced its BIT with China (1997) with a new BIT signed in 2001.

As a member of ECOWAS, Nigeria has also signed the Supplementary Protocol A/Sp1/12/01, amending articles 1, 3, 6 and 21 of the Revised Treaty of the Economic Community of West African States, which sought to amend the Revised ECOWAS Treaty, which Nigeria signed in 1993.

Nigeria is also a signatory to the ECOWAS Supplementary Act A/Sa.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (2008). The Supplementary Act on Investment requires ECOWAS member states to afford investors from other ECOWAS states the protection of national treatment, most-favoured-nation treatment, the right to transfer assets freely and the guarantee against expropriation or nationalisation.

Under the Supplementary Act on Investment, Nigeria is to ensure that the provisions of other international trade agreements to which it is a party are consistent with the provisions of this Supplementary Act such that the provisions of the Supplementary Act are effectively applied within the international trade agreements. In the event of a dispute, Nigeria is required to resolve any dispute within the framework of the Supplementary Act, as a preliminary step.

8 Has the state unilaterally terminated any bilateral or multilateral investment treaties to which it is a party?

We are not aware that Nigeria has unilaterally terminated any bilateral or multilateral investment treaties. The bilateral investment treaty between Nigeria and China of 12 May 1997 was mutually terminated and replaced by a new bilateral investment treaty of 27 August 2001 that came into force on 18 February 2010.

9 Has the state entered into multiple bilateral or multilateral investment treaties with overlapping membership?

Nigeria is a contracting party to a TIFA with the United States of America (signed on 16 February 2000) (Nigeria-US TIFA, as well as an ECOWAS member state party to the Agreement for the Development of Trade and Investment Relations with the United States of America (signed on 5 August 2014) (ECOWAS-US TIFA (2014)). Nigeria is also a signatory to the Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organisation of Islamic Cooperation (signed on 4 November 1998) (which co-exists and runs parallel with the Nigeria-Uganda BIT and Nigeria-Turkey BIT).

10 Is the state party to the ICSID Convention?

Yes. Nigeria is a contracting party to the ICSID Convention. Nigeria signed the ICSID Convention on 13 July 1965, and it came into force in Nigeria on 14 October 1966. Nigeria also enacted the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act on 29 November 1967 for the enforcement of ICSID awards. This legislation supports the enforcement in Nigeria of an award by ICSID.

11 Is the state a party to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)?

No. Nigeria is not a party to the Mauritius Convention.

12 Does the state have an investment treaty programme?

Nigeria's investment treaty programme is governed by the Nigerian Investment Promotion Commission (NIPC). The NIPC's main objective is to promote the attractiveness of Nigeria as an investment destination and put in place such measures designed to ease conducting business in the country. Nigeria currently has 29 BITs in place with countries including Spain, Japan, the United Kingdom, and, more recently, Morocco (2016). Fifteen BITs currently remain in force.

Regulation of inbound foreign investment

13 Does the state have a foreign investment promotion programme?

The Nigerian Investment Promotion Commission (NIPC) is established by the NIPC Act. The NIPC's mandate is to promote investments in and outside Nigeria through effective promotional means in a bid to improve the investment climate in Nigeria for Nigerian and non-Nigerian investors alike.

The NIPC established the One Stop Investment Centre (OSIC). The OSIC is an investment facilitation mechanism that brings all relevant government agencies into one location, to provide efficient and transparent services to investors.

The OSIC shortens and simplifies administrative procedures for the issuance of business approvals, permits and licences, and company incorporation, thereby removing avoidable delays faced by investors in establishing and running a business in Nigeria. Ultimately, this reduces the overall cost of doing business in Nigeria. The OSIC provides statistical data and information on the Nigerian economy, investment climate, legal and regulatory framework as well as sector and industry-specific information to help existing and prospective investors in making informed business decisions.

14 Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

The domestic laws applicable to foreign investors in Nigeria include:

- the NIPC Act (Cap N117 LFN, 2004);
- the Companies and Allied Matters Act (CAMA) (Cap C20 LFN, 2004) and the Corporate Affairs Regulations 2012;
- the Central Bank of Nigeria Act 2007;
- the National Office for Technology Acquisition and Promotion Act (NOTAP Act) (Cap N62 LFN, 2004);
- the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act (FEMMPA) (Cap F34 LFN, 2004);
- the Investments and Securities Act 2007 (ISA);
- the Immigration Act 2015 and the Immigration Regulation 2017; and
- the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act 1967, which provides for the enforcement of an award by ICSID in Nigeria.

There are also several sector-specific laws that indirectly regulate foreign investors and foreign investment such as the Nigerian Oil and Gas Industry Content Development Act and the Coastal and Inland Shipping (Cabotage) Act.

15 Identify the state agency that regulates and promotes inbound foreign investment.

The state agency that regulates and promotes inbound foreign investment is the NIPC.

16 Identify the state agency that must be served with process in a dispute with a foreign investor.

The state agency that must be served with process in a dispute with a foreign investor is the Office of the Attorney-General of the Federation and Minister of Justice.

Investment treaty practice

17 Does the state have a model BIT?

Nigeria does not have a known model BIT. However, the recent BIT (Morocco-Nigeria BIT) contains some innovative provisions, as follows:

- investors are required to carry out social impact assessments for their proposed investments (article 14(2));
- investors are required to apply the precautionary principle in assessing the impact of their investments on the environment (article 14(3));
- investors are required to ensure that measures and efforts are undertaken to combat corruption (article 17);
- investors are required to uphold human rights, act in accordance with core labour standards as required by the International Labour

Organisation (ILO) Declaration on Fundamental Principles and Rights of Work, and comply with environmental management standards (article 18);

- a new dispute prevention mechanism was introduced, which will be overseen by a joint committee of representatives of each country who, before the initiation of arbitration, will assess the parties through consultations and negotiations by the committee (article 26(1));
- investments are required to meet or exceed nationally and internationally accepted standards of corporate governance in the sector involved, particularly transparency and accounting practices (article 19);
- the BIT requires that arbitral proceedings must be transparent, such that the notice of arbitration, pleadings, memorials, briefs submitted to the tribunal, written submissions, minutes of transcripts of hearings, orders, awards and decisions of the tribunal are readable by and available to the public (article 10(5));
- investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state (article 20); and
- investors are required to comply with all applicable laws and operate through 'high levels of socially responsible practices' (article 24).

18 Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

Yes. The International and Comparative Department of the Federal Ministry of Justice is the central depository of treaty preparatory materials. The treaty preparatory materials are not known to be publicly available in Nigeria.

19 What is the typical scope of coverage of investment treaties?

Nigerian BITs do not specify the qualifications of investors and the types of investments. The BITs allow investors to invest in varied investments including movable and immovable property, shares, debt instruments, intellectual property rights and business concessions, and offer their protection to any foreign national or company operating in the territory of the other country.

Nigerian BITs, however, require that investments must be made in accordance with the host state's laws, and failure to abide by this requirement may result in the loss of the investor's ability to claim under the applicable BIT.

20 What substantive protections are typically available?

Generally speaking, Nigerian BITs:

- provide investors with compensation in the event of nationalisation, expropriation and equivalent measures;
- guarantee certain minimum standards such as entitlement to fair and equitable treatment and full protection and security;
- offer some protection against losses in the event of conflict or war;
- affirm the right to repatriate profits and other returns; and
- guarantee treatment in line with that accorded by the host state to investors under its most-favoured-nation treatment provisions or to the host state's own nationals.

The BITs also make provisions for settlement of disputes by arbitration under the ICSID Convention and under ad-hoc arbitral tribunals established under the United Nations Commission on International Trade Law. They also provide for the right of subrogation, allowing foreign investors to obtain suitable investment insurance and for these investment insurance providers to seek remedy on their behalf from Nigeria.

21 What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

The most commonly used dispute resolution option for investment disputes between foreign investors and Nigeria is arbitration under the ICSID Convention.

22 Does the state have an established practice of requiring confidentiality in investment arbitration?

There is no known or established practice requiring confidentiality in investment arbitration. However, investment arbitration involving Nigeria is usually treated with confidentiality.

However, in the new Morocco-Nigeria BIT, article 10 provides for a transparent dispute resolution process, wherein both states agreed that administrative rulings regarding foreign investment will be accessible to the general public. The parties agreed that wherein the dispute results in arbitration, the notice of arbitration, pleadings, briefs submitted to the tribunal, other written submissions and all requisite documents shall be available to the public.

23 Does the state have an investment insurance agency or programme?

Nigeria does not have an investment insurance agency or programme specially designed for the insurance of foreign investments.

Investment arbitration history

24 How many known investment treaty arbitrations has the state been involved in?

Nigeria has been involved in three cases at ICSID in respect of its investment treaties:

- *Guadalupe Gas Products Corporation v Nigeria* (ICSID Case No. ARB/78/1), case discontinued on 22 July 1980;
- *Shell Nigeria Ultra Deep Limited v Federal Republic of Nigeria* (ICSID Case No. ARB/07/18), case discontinued on 1 August 2011; and
- *Interocean Oil Development Company and Intercocean Oil Exploration Company v Federal Republic of Nigeria* (ICSID Case No. ARB/13/20), case still pending.

25 Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

Yes. The investment arbitrations involving Nigeria concerned the oil, gas and mining sectors.

26 Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

Nigeria has a history of using default mechanisms for the appointment of arbitral tribunals, namely the ICSID Arbitration Rules. Nigeria does not usually appoint specific arbitrators.

27 Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

Yes. Nigeria typically defends itself against investment claims. This is, however, through private external counsel on the instruction of the Attorney-General of the Federation and the Minister of Justice.

Enforcement of awards against the state

28 Is the state party to any international agreements regarding enforcement, such as the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Yes. Nigeria is a signatory to the ICSID Convention as well as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

29 Does the state usually comply voluntarily with investment treaty awards rendered against it?

There is currently no information to suggest that Nigeria does not comply with investment treaty awards rendered against it.

30 If not, does the state appeal to its domestic courts or the courts where the arbitration was seated against unfavourable awards?

There is no known case where an investment treaty award rendered against Nigeria was appealed in a Nigerian court or the court where the arbitration was seated.

31 Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

We are not aware of any domestic legal provision that may hinder the enforcement of an investment treaty award made against Nigeria. On the contrary, the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act, Cap 120, Laws of the Federation of Nigeria, 2004 (a domestic legal provision), allows for the enforcement of investment treaty awards (ICSID awards) in Nigeria. This statute ranks such awards as if they were a judgment given by the Supreme Court of Nigeria. This classification eliminates challenges and appeals associated with enforcement of such awards in Nigerian courts because the Supreme Court of Nigeria is the country's final appellate court.

Furthermore, the enforcement of ICSID awards cannot be challenged in Nigerian courts except on grounds stipulated in article 52 of the ICSID Convention because the Convention does not derogate from the laws governing a member state's immunity. However, there is no information that suggests that the defence of sovereign immunity has been used by Nigeria.

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