How Soon is Too Soon to Activate ISDS? The Nigeria-Morocco BIT Solution to Hasty Arbitration

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International arbitration claims are oftentimes bedevilled with the contention that the claimant invoked the option to arbitrate much too early. Sometimes, this contention is no more than a lawyers' artifice utilised to delay advancing arbitral proceedings. Yet, quite commonly, this contention is true in some cases. In my experience, I have identified a number of reasons for this extreme eagerness to activate arbitration clauses in Investor-State Disputes Settlement (ISDS).

Firstly, there is a distrust of the alternative remedies to arbitration. In Nigeria, the Nigerian Investment Promotion Commission Act (NIPCA), which is the principal legislation that embodies the Nigerian executive policy towards the promotion of investment in Nigeria, requires that domestic remedies be explored and exhausted before arbitration is activated. However, many claimants have flatly refused this owing to a belief (rightly or wrongly) that domestic remedies are biased, cumbersome or just altogether ineffectual.

Secondly, it is quite common for foreign investors to retain foreign counsel in the lifetime of their investments, most of who are unqualified to practice law in the countries where the investments are situate. When disputes arise, it is equally common for foreign counsel to be involved in the settlement of the disputes. This they do by direct appeal to authority and by participation in negotiations. However, when negotiations breakdown and the need to commence some form of legal proceedings arises, it is perhaps to be expected that foreign counsel will activate the dispute-resolution option that they are familiar with and are qualified to advocate.

Thirdly, the imprecise nature of what amounts to the exhaustion of local remedies contributes to the confusion. There is the school that argues that internal remedies include the full utilisation of the Court structure in the host State. Of course, the criticism of that school is that ISDS regimes exist to avoid submission to hometown justice and submission to the local Court structure is exactly that-hometown justice. Indeed, the main purpose of Investor-State arbitration is to avoid resorting to local Courts in deserving instances demonstrated in the 3rd Preamble to the ICSID Convention which recognises that "*international methods of settlement may be appropriate in certain cases*". There is also the contention that litigation and arbitration are parallels and the activation of one should foreclose the other. Consequently, there is another school that argues that internal remedies are limited to non-litigious remedies such as negotiations, mediations and the likes. This school is not without its own criticism as questions persist as to who the competent mediator is in such instances (whether it is the state agency involved in the dispute, the foreign affairs department or the department of justice), what manner negotiations should take (are in-person meetings compulsory or will correspondences suffice), what duration of time is too long to be spent in mediation, when exactly these internal remedies can be said to have failed and what precisely, is the measure of success of these internal remedies, knowing fully that the investor mustn't always prevail. Notably, the NIPCA does not stipulate what internal remedies are.

The effect is that there is now an increasing clamour for states to pull out of ISDS agreements – or to review them. In October 2017, 230 professors of economics and law wrote a letter to President Trump, demanding that he renegotiate both the NAFTA and TPP because those agreements contained ISDS regimes. The arguments of the professors are varied but most relevant here is their contention that ISDS regimes allow investors to "*take those claims to a panel of private international arbitrators, circumventing local, state, or federal domestic administrative bodies*". They also argue that by ISDS regimes, investors "*are even able to re-litigate cases they have already lost in domestic courts.*" With such views on the rise, the future of arbitration and ISDS regimes in investment protection is under renewed scrutiny as parties haste to the arbitration door without heeding the calls to exhaust local remedies.

In Nigeria, the experience is not different and while there has not yet been a call for the total withdrawal from ISDS regimes, there is certainly a rethink of the approach. This rethink is necessary, if not mandatory, as the non-fulfilment of statutory/contractual conditions precedent (such as exhausting internal remedies) is a jurisdictional flaw in any arbitration that purports to interpret Nigerian law. The Nigeria-Morocco BIT, executed on 3 December 2016, exemplifies this rethink. By the treaty, the Parties are obligated by Article 26 to pursue dispute prevention, in addition to dispute resolution. This dispute prevention envisages that parties should first submit their dispute to a Joint Committee (JC) which shall comprise of "*representatives as designated by both parties*". The JC is to submit relevant information about the presented case within 90 days (extendable by another 60). The JC is required to hold in-person meetings and render a report while the entire dispute ought to conclude in 6 months. The treaty does not appear to provide for the proceedings of the JC or what format they should take.

It is noteworthy that under Article 26, a dispute prevention obligation is imposed on the parties to the treaty. The parties are the Kingdom of Morocco and the Federal Republic of Nigeria. Upon a plain reading of Article 26(1), it may appear that the investors of these countries are not obligated by the treaty to undertake dispute prevention as envisaged by Article 26 more so as Article 27 specifically provides for the dispute-resolution procedure where the dispute is between a party to the treaty and an investor of the other party and appears to preserve the right to proceed straight to arbitration without exploring any internal remedies However, that appearance is not the true state of the treaty. Article 26(2) clearly allows a Party to "*submit a specific question of interest of an **investor***" to the JC in dispute prevention. Article 26(5) also specifically refers to the investor and restricts his/her direct access to ISDS without first exhausting local remedies towards dispute prevention. Indeed Article 27 begins by stating that its provisions may be invoked only if "*disputes cannot be settled according to the provisions of article 26*" thus erasing any doubt as to the applicability of Article 26 and its dispute prevention obligation to investors.

The operative words used in Article 26 are quite instructive. The obligation to invoke Article 26 is an express condition precedent to ISDS as submission to the JC shall be complied with "*before initiating an eventual arbitration procedure*". The obligation of an investor in a Party to submit to the JC is not quite as clear as Article 26(2) states that a Party may submit issues relating to the interest of an investor. Nonetheless, even when the JC does not entertain or resolve the dispute, by Article 26(5), the investor is only allowed to explore ISDS remedies after it has exhausted "*local remedies or the domestic courts of host State*". The nebulous phrase "local remedies" appears in this provision again.

It presents a problem when it is considered that it is disjunctively used along with approach of the Courts. Thus, one may argue that having regard to the use of the word "or" which has been interpreted in Nigerian jurisprudence to present an option, an investor is not obligated to approach the courts but may in the alternative simply exhaust "local remedies", whatever they are conceived by the explorer to be. This is especially as the treaty expressly preserves the "*diplomatic channels existing between the Parties*". It appears though that once a Party activates the judicial process, it must see it through, including, to my mind, by exhausting the entire appellate process allowed by law (hence the use of the plural word, "courts").

In the final analysis, what is sure is that the Nigeria-Morocco BIT envisages a delayed activation of ISDS remedies. Despite the disjunctive use of the phrase "internal remedies" in relation to resorting to domestic courts, the treaty achieves the following:

1. It places some specificity on what internal remedies are (consultations and negotiations before the JC)
2. It specifies the duration of these internal remedies (6 months)
3. It clarifies the modalities internal remedies should take (correspondences alone will not suffice and in-person meetings should be held, where possible)
4. It expressly settles the question of whether internal remedies include a submission to local courts and appears to be a waiver to any re-litigation objection that either party may raise in an eventual reference

Since the treaty, Nigeria and Morocco have entered into two high-value agreements for the construction of the Nigeria-Morocco pipeline project and the supply of Fertilizer to Nigeria. In the 10-year lifespan of the treaty, more deals are sure to be executed with the attendant possibility of conflict. Of course, when specific disputes arise, lawyers and tribunals will give imaginative and interesting interpretations to the ISDS regime of the Nigeria-Morocco BIT. Suffice to say for now however, that the Nigeria-Morocco BIT provides a healthy template for avoiding hasty arbitration.