PROTECTIONISM IN THE ENFORCEMENT OF ARBITRAL AWARDS IN NIGERIA AGAINST STATE-OWNED ENTITIES? A CASE STUDY OF THE NIGERIAN NATIONAL PETROLEUM CORPORATION*

Abstract
This paper assesses the viewpoint that the practice of Nigerian courts in relation to the enforcement of arbitral awards against state-owned entities in Nigeria are skewed in favour of state-owned entities, using the Nigerian National Petroleum Corporation (NNPC) as a case study.

Keywords : Arbitration, Arbitral Awards, Enforcement, Protectionism, Nigeria, NNPC.

1. Introduction

Developing countries constantly compete for foreign direct investment (FDI) in the hope that it will complement the activities and efforts of domestic investors in the quest to promote the success of their economies. Nigeria is not an exception to this trend. FDI inflows into host countries are determined by a variety of factors. The institutional characteristics of a host country, including the nature of the judicial system, for example, can have a positive influence on the flow of FDI into that country.[1] Whether FDI has, in fact, fostered economic development in Nigeria remains an open debate which is outside the scope of this paper. But if the arguments of proponents of that idea are anything to go by, it follows that a stable and transparent approach in the Nigerian judicial system, particularly in relation to the enforcement of arbitral awards, could be vital in the goal to achieve a successful investment regime in Nigeria.

Separately, increased investment or commercial activity often begets an increased potential for disputes. And in the resolution of these disputes, many investors in Nigeria adopt arbitration as their preferred forum. Although the specific reasons for choosing arbitration over litigation as the primary mechanism for settling commercial disputes vary from one investor to another, consistent reasons include mistrust of the court process, expediency that arbitration promises, confidentiality, and general flexibility of the arbitral process. In addition, the attraction of arbitration is further strengthened by the relative ease of enforcing arbitral awards in the country where assets or funds that can satisfy the award are located. Considering the shift towards arbitration, Nigeria, consequently, aspires to become an arbitration-friendly jurisdiction. However, the general, albeit largely unwritten, notion is that Nigeria is not a supportive environment for enforcing arbitral awards which involves Nigerian state-owned entities. This idea is primarily based on the impression that Nigerian courts adopt a protectionist approach towards Nigerian state-owned entities in matters involving the enforcement of arbitral awards against them.[2]

This paper is an attempt at evaluating whether Nigerian courts adopt a protectionist stance towards Nigerian state-owned entities in matters involving the enforcement of arbitral awards against them, using the Nigerian National Petroleum Corporation (NNPC) as a case study. The focus on NNPC is justified on the basis that oil extraction has been the dominant target of FDI in Nigeria for the last thirty years and its impact on the Nigerian economy has been considerable.[3] It bears mentioning that pursuant to the recently enacted Petroleum Industry Act 2021, Nigerian National Petroleum Company Limited (NNPC Limited) was incorporated and the assets, interests and liabilities of NNPC subsequently transferred to NNPC Limited which will take over the operations and functions of NNPC.[4] In any event, the analysis in this paper remains relevant to NNPC Limited given that NNPC Limited will take the place of NNPC in the near future, and there are no reported cases currently involving NNPC Limited since it is a new born.

The assessment will begin by examining the role of state-owned entities, particularly NNPC (*section 2*), before analysing the trends toward arbitration in settling commercial disputes (*section 3*), and the enforcement of arbitral awards in Nigeria (*section 4*). It will then assess the factors which suggest that Nigerian courts take a protectionist

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[1]UNCTAD, 'Recent developments in international investment agreements (2007–June 2008)', <http://unctad.org/en/docs/webdiaeia20081_en.pdf > accessed 11 July 2022.

[2]Atake *et al*, 'Beating the System: Enforcement of Arbitral Awards against State-owned Entities (IFLR,2012), <http://www.iflr.com/Article/3083868/Beating-the-system.html> or <https://www.templars-law.com/413-2/> accessed 11 July 2022. For the purposes of this paper, a protectionist approach or protectionism denotes a judicial or statutory attitude that strives to protect state-owned entities against all arbitral awards or judgments that favour private parties.

[3]M Ekperiware, 'Oil and Nonoil FDI and Economic Growth in Nigeria', (2011), 2(3) JETEMS, 333.

[4]See generally sections 54, 55, 310 of the Petroleum Act 2021.

stance in favour of NNPC, with focus on procedural delays and judicial attitude of Nigerian courts (*section 5*), before offering a normative analysis of findings (*section 6*).

2. State-owned Entities in Nigeria: A Brief Introduction to NNPC

In general terms, state-owned entities are corporations or enterprises owned and controlled by the executive arm of government. After Nigeria's independence in 1960, entrepreneurs were few and majority of businesses were unsophisticated and lacked the necessary resources and skills to develop some sectors, including the petroleum industry.[5] Specifically, the absence of private economic incentives to engage in some ventures due to uncertainty regarding the size of local markets, unreliable sources of supply, and absence of technology, among others, made the existence of state-owned entities in Nigeria.[6] Nigerian state-owned entities were, therefore, birthed as instruments of managing and implementing the social and economic policies in the core sectors of the Nigerian economy.[7] Indeed, their primary missions are connected to the Nigerian government's objectives and legalised by the Nigerian Constitution.[8] Nigeria does not operate a centralised ownership system for its state-owned entities. The enabling legislation for the relevant entity usually stipulates its ownership and governance structure, and the entity derives its existence from that statutory instrument which also defines its powers and functions and gives the entity specific jurisdiction over an area of commercial activity. An example of a Nigerian state-owned entity, which is particularly relevant to this paper, is NNPC.[9] NNPC, and its successor company, NNPC Limited, are the biggest and arguably the most important entities in Nigeria because Nigeria heavily relies on petroleum. Again, whether NNPC has accomplished or exceeded its traditional role of assisting in the development of the Nigerian oil and gas industry is outside the scope of this paper. What is certain, however, is that it is still a legalised tool which the Nigerian government uses in its activities in the oil and gas sector of the economy.

3. Arbitration as a Mechanism for the Settlement of Commercial Disputes

Cross border and global investments are expanding and becoming common around the world. This development has led to commercial relationships. However, disputes are inevitable in these relationships and there are different ways of resolving them rather than through the local courts.[10] Arbitration is one of the alternative dispute resolution mechanisms. In summary, it is a private method of settling disputes by one or more persons, referred to as arbitrators, based on the parties' agreement, for a final and binding decision, referred to as an award. Investors generally rely on arbitration to limit litigation exposure while expanding their business interests. According to the 2015 International Arbitration Survey Report conducted by Queen Mary University of London and White & Case, 90 percent of respondents indicated that arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (56 percent) or together with other forms of alternative dispute resolution (34 percent).[11] Even NNPC provides in its commercial contracts, including production-sharing and joint venture contracts, that disputes will be resolved by arbitration.

Several reasons account for the choice of arbitration, one of which is flexibility. Flexibility is an important reason for adopting arbitration considering commercial parties are able to specify the important features of the arbitral process. For example, the parties can choose their arbitrators, the seat of the arbitration—which has a significant effect in the proceedings—as well as the substantive and procedural rules that will govern the arbitration. Further,

[5]EC Ugorji, 'Privatization/Commercialization of State-Owned Enterprises in Nigeria: Strategies for Improving the Performance of the Economy', (1995) 27(4) Comparative Political Studies, 537.
[6]MI Obadan, 'Privatization of Public Enterprises in Nigeria: Issues and Conditions for success in the second round' (2000) 1st edn, NCEMA, Monograph Series No 1.
[7] Ugorji, *supra* note 5.
[8]1999 Nigerian Constitution (as amended). Section 16(1) provides that Nigeria shall (a) harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy; (b) control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity; (c) without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy;(d) without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.
[9]NNPC was established by the NNPC Act, which has now been repealed by the Petroleum Industry Act 2021. See section 1 above on the status of NNPC. See also Sections 310 and 311 of the Petroleum Industry Act 2021.
[10]Mediation, conciliation, negotiation, expert determination and adjudication are other forms of ADR mechanisms.
[11]2015 Queen Mary University of London/White & Case International Arbitration Survey: Improvements and Innovations in International Arbitration, p2,
https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf, accessed 10 July 2022.

the proceedings are usually confidential,[12] and there can be limited formal procedure, and extensive discovery are rare. This also makes arbitral proceedings relatively quicker than the conventional litigation in some common law regimes, depending on the circumstances of the case.[13] Arbitral awards are more likely to be final than the judgments of national courts of first instance, which will often be subject to appeal. Although arbitral awards may also be challenged, in either the country that supervised the arbitral proceedings or where enforcement is sought, as discussed in section 4 below, the grounds of challenge available against arbitral awards are limited.

Overall, it is difficult to foresee a practical and realistic alternative to arbitration in coming years in the context of commercial disputes. Indeed, the existence of a stable arbitration regime cannot be ruled out as an important variable that could affect the decision of foreign investors to invest in a host country. Specifically, '*market-friendly laws and an independent, competent judiciary to implement them have long been credited for fostering economic and industrial development.*'[14] Specifically, at the 9th Geneva Global Arbitration Forum in 2022, Dr Asouzu observed as follows:

> If you will reform the Judiciary, it can work hand in hand with arbitration to promote development because doing business will be faster, the cost of doing business in Nigeria will be less, people will be happier. When you know that you have a quarrel with a foreign investor, it will be resolved by neutral independent qualified individuals. Investors will have confidence that their money is secure. Investors think about money a lot, and for them to invest in Nigeria-even in the war field, people still invest in Africa because you come and make the money and go.[15]

The rise in the use of arbitration is the reason that countries, including Nigeria, are striving to be perceived as arbitration friendly. In *M.V. Lupex v. N.O.C*,[16] for example, the Supreme Court held that it was an abuse of court process for the respondent to institute a fresh suit in Nigeria against the appellant on the same dispute during the pendency of arbitration proceedings in London. Furthermore, according to Hodges, a London-based arbitration partner:

> [T]he [Nigerian] Courts have also been more open to supporting arbitration and enforcing arbitral awards. These are all positive steps in attracting foreign investment. All measures that visibly increase the efficiency and impartiality of the Nigerian courts will help to reassure investors that the Nigerian courts represent a suitable forum for the resolution of their disputes.[17]

Without a doubt, arbitration is not perfect.[18] However, despite its inherent flaws, it will remain a significant dispute resolution mechanism for a while, particularly as it is constantly evolving in response to the changing needs of its users. At any rate, although arbitration can serve as an alternative to national courts, national courts are still relevant in the administration of the arbitration process, especially in relation to enforcement of the arbitral awards which is discussed immediately below.

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[12]The confidential nature of arbitration means that the proceedings, or even the existence of the dispute, are not widely known and there are comparatively few legal and subject matter experts who are familiar with the ways in which some sensitive issues have been treated.

[13]2015 Queen Mary/White & Case (supra note 11) survey identified the 'enforceability of awards' (65 percent of respondents) and 'avoiding specific legal systems/national courts' (64 percent) as the 'most valuable characteristics of arbitration'. 'Flexibility' and 'selection of arbitrators' (both 38 percent) were chosen less frequently.

[14]F Delacey, 'Enforcing Contracts in Developing Countries', in European Bank of Reconstruction and Development, Law in Transition: Contract Enforcement (2001), 20.

[15]See 'Arbitration will Bring Economic Development in Nigeria' (2002) <http://allafrica.com/stories/200212170555.html> accessed 11 July 2022.

[16]*M.V. Lupex v. N.O.C* [2003] 15 NWLR (pt. 844) 469.

[17]N Mellersh, 'Reforming Dispute Resolution in Nigeria', (2015) <https://www.africanlawbusiness.com/news/5810-reforming-dispute-resolution-in-nigeria> accessed 11 July 2022.

[18]The 2015 International Arbitration Survey (supra note 11) suggested that the cost of international arbitration was a significant concern, with more than 68 percent of participants complaining about such cost. In addition, 46 percent of those surveyed criticised the lack of effective sanctions for breaches of the arbitrators' directions and delaying tactics, and 39 percent complained about the lack of insight which parties were given as to the likely efficiency of the arbitrators appointed in their cases. The survey noted a growing concern amongst arbitration users about due process 'paranoia'; that is, a perceived reluctance by arbitral tribunals to act firmly and decisively in certain situations, for fear of their awards being challenged based on a party not being afforded a proper opportunity to be heard. Other significant concerns from respondents about the arbitral process involved delays in reaching final awards, the risk of local court intervention, and the inability to join third parties.

4. Enforcement of Arbitral Awards in Nigeria

An effective dispute resolution system requires a legal structure that respects the finality of arbitral awards. Usually, most arbitral awards are complied with voluntarily.[19] However, when this is not the case, the party seeking to enforce the award will rely on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[20] or on the relevant domestic statutes that have ratified the Convention, such as the Nigerian Arbitration and Conciliation Act, 1988 (ACA).[21] In other words, the need to enforce an arbitral award becomes necessary only when a party refuses to voluntarily comply with the award. According to Gaudet, the former chairman of the ICC Court of Arbitration, enforcement of arbitral awards is the last and decisive step of arbitration.[22] In fact, success in arbitration is typically measured, at least in part, by the enforcement of arbitral awards and whether arbitration is effective depends, to a large extent, on if the award obtained by the successful party can be enforced against the adverse party. If it was impossible to enforce arbitral awards, the arbitration framework will be meaningless[23] or valueless.[24] According to Holtzmann, 'if businessmen are not reasonably sure of enforcement of foreign arbitral awards, there will be little or no arbitration.'[25] Overall, arbitration cannot play an effective role in an economy unless the arbitral award is enforceable in that jurisdiction.[26] Put differently, economic development may not be foreseeable if a stable framework for the enforcement of arbitral awards is defective.[27]

Nigeria, in March 1970, acceded to the New York Convention and in 1988, enacted the ACA as the primary legislation governing arbitration, including the enforcement of arbitration awards.[28] There are currently different regimes for enforcement of arbitral awards in Nigeria. These regimes include (***i***) enforcement by court action upon the arbitral award at Common Law;[29] (*ii*) enforcement under the Reciprocal Enforcement of Foreign Judgments Ordinance[30] and the Foreign Judgments (Reciprocal Enforcement) Act;[31] (*iii*) enforcement under the AC;[32] (*iv*)

[19]A Redfern et al, Law and Practice of International Commercial Arbitration (4th Edn Sweet & Maxwell London 2004); AJVD Berg, 'Recent Enforcement Problems under the New York and ICSID Conventions' (1989) 5 Arbitration International Journal 2. Other studies have also shown that most arbitral awards are complied with. For example, there is evidence that 90% of ICC arbitration awards were complied with voluntarily at some point – See P Lalive, 'Enforcing Awards', in 60 Years of ICC Arbitration: A Look at the Future 315 (ICC Publishing S.A. 1984). According to the 2008 Queen Mary/ PwC survey, 84 percent of respondents indicated that the opposing party had honoured the award in full in more than 76 percent of cases – see Queen Mary & PricewaterhouseCoopers, International Arbitration: Corporate Attitudes and Practices 2008, <https://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf> accessed 11 July 2022.

[20]It is the most important treaty governing the enforcement of international arbitral awards by making them enforceable across various countries that have ratified the Convention

[21]The ACA was largely adapted from the 1985 UNCITRAL Model Law on International Arbitration. Also, a few state arbitration laws exist in parallel with the ACA. An example is the Arbitration Law of Lagos State, Cap A11, Laws of Lagos State, 2015.

[22]As cited in M Suffian 'International Commercial Arbitration in a Changing World' (1984) International Arbitration 60 Years of ICC Arbitration a Look at the Future 377. See also L Daradkeh, 'Recognition and Enforcement of Foreign Commercial Arbitral Awards Relating to International Commercial Disputes: Comparative Study (English and Jordanian Law)' (2005), Unpublished PhD Thesis submitted to the University of Leeds, 1.

[23]I Carr, International Trade Law (Cavendish Publishing Limited, 1996).

24A Asouzu 'The Adoption of the UNICITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral awards' (1999) Journal of Business Law 185.

25HM Holtzmann 'Commentary' (1984) International Arbitration 60 Years of ICC Arbitration a Look at the Future, 361.

26AJVD Berg, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions' (1987) 2 ICSID Review-Foreign Investment Law Journal, 439.

27 *Ibid.*

[28]Nigeria is also a party to some Regional Conventions concerning the recognition and enforcement of arbitral awards. See, for instance, the Economic Community of West African States (ECOWAS) Energy Protocol. Article 26 thereof provides for the settlement of disputes between a contracting state and an investor by the International Centre for Settlement of Investment Disputes (ICSID) if the investor's country and that of the contracting party are both parties to the ICSID Convention or a sole arbitrator or ad hoc arbitration tribunal established under the United Nations Commission on International Trade Law (UNCITRAL) Rules, or an arbitral proceeding under the Organization for the Harmonization of Trade Laws in Africa (OHADA). There is also the Treaty of ECOWAS (1993 revised Treaty). Article 16 thereof establishes an Arbitration Tribunal whose powers, status, composition, and procedure were to be as set out in a subsequent protocol.

[29] P Idornigie, Commercial Arbitration Law and Practice in Nigeria, (Law Lords: 2015).

[30]Cap 175, Laws of the Federation of Nigeria and Lagos, 1958. *Tulip (Nig.) Ltd. v Noleggioe Transport Maritime S.A.S* [2011] 4 NWLR (pt. 1237) 254.

[31]Cap 152, Laws of the Federation of Nigeria, 1990. Now in Cap. F35, Laws of the Federation of Nigeria (2004). See also *Andrew Mark Macaulay v Raiffeisen Zentral Bank, Austria* [2003] 18 NWLR (pt. 852) 282., *Marine and General Assurance Co Plc v Overseas Union & 7 Others* [2006] 4 NWLR (pt. 971) 622.

[32]Sections 31, 32, 51, 52, 57 of the ACA. *Ebokan v Ekwenibe & Sons Trading Co* [2001] 2 NWLR (pt. 696) 31; *Magbagbeola v Sanni* [2005] 11 N.WL.R. (pt. 936) 253.

enforcement under the New York Convention,[33] and (***v***) enforcement under the International Centre for the Settlement of Investment Disputes Act.[34] Detailed review of these regimes does not fall within the scope of this paper. However, Nigerian courts are generally open to the enforcement of arbitration awards and keen to dismiss challenges that are geared towards frustrating the arbitration process.[35] According to a 2021 survey report on Nigerian-related arbitration cases, out of 41 cases relating to the enforcement of arbitral awards that were analysed, 33 cases concerned domestic awards, while 8 cases concerned international awards.[36]Out of the 33 domestic awards, 26 were enforced while 7 were unenforced.[37] Also, out of the 8 international awards, 7 were enforced while 1 was unenforced.[38] Overall, this is an encouraging statistics. What is crucial at this point, however, is whether Nigerian courts adopt a protectionist approach in the enforcement of arbitral awards against state-owned entities, specifically NNPC, and this is discussed in the heading below.

5. The Existence or Non-Existence of a Protectionist Approach

Although Nigeria continues to strive towards becoming a pro-arbitration jurisdiction, there is still a heightened concern, albeit largely unwritten, that Nigerian courts adopt a protectionist attitude towards state-owned entities, particularly NNPC.[39] A protectionist approach or protectionism, in the context of this paper, denotes a judicial or statutory attitude that strives to protect state-owned entities against arbitral awards that favour private parties. This stance suggests the existence of bias and invention of judicial tactics that undermine arbitral processes, particularly the enforcement of arbitral awards against NNPC. If a stable, unbiased arbitration regime and practice are indeed important for facilitating commercial activities among investors and state-owned entities, then an attitude which discourages the enforcement of arbitral awards against NNPC could have a negative effect to Nigeria's reputation. The following sub-sections will examine these concerns, with the aim of assessing whether Nigerian courts adopt a protectionist approach in favour of NNPC and will proceed under the sub-headings of (***i***) judicial attitude and (***ii***)procedural delays.

Judicial attitude

Critics suggest that Nigerian courts are quick to set aside or refuse to enforce arbitral awards that do not favour state-owned entities, particularly NNPC.[40] In advancing this viewpoint, two cases are often referenced – Esso Exploration and Production Nigeria Limited & Shell Nigeria Exploration and Production Company Limited v Nigeria National Petroleum Corporation (Esso v NNPC'[41] and Shell Nigeria Exploration and Production Limited & Others v Federal Inland Revenue Service and Nigeria National Petroleum Corporation (Shell v FIRS).[42] Both cases, in summary, involve arbitral proceedings that were settled in favour of private commercial entities. However, the arbitral awards were challenged and subsequently set aside by Nigerian courts on the basis that the arbitral tribunals lacked the jurisdiction to determine tax disputes, even though the private parties contend, amongst others, that the disputes are contractual in nature.[43] These cases are currently pending at the Supreme Court for determination. In addition, a 2021 survey report on arbitration-related cases in Nigeria noted that high-value awards against NNPC were annulled in decisions of trial courts and the Court of Appeal.[44] However, these

[33]Arts III, IV and V of the New York Convention.

[34]International Centre for the Settlement of Investment Disputes (ICSID) Act 1967; Nigerian Investment Promotion Commission Act, 1995.

[35]*Mekwunye v Imoukhuede* (2019) 13 NWLR (Pt. 1690) 439.

[36]Broderick Bozimo & Co, *Analysis of Arbitration Related Decisions in Nigeria 2021*, pp 4, 5: https://broderickbozimo.com/wp-content/uploads/2021/10/BBaC-Analysis-of-Arbitration-Related-Decisions-in-Nigeria.pdf accessed 15 July 2022.

[37]Broderick Bozimo & Co, *Analysis of Arbitration Related Decisions in Nigeria 2021*, pp 4, 5: https://broderickbozimo.com/wp-content/uploads/2021/10/BBaC-Analysis-of-Arbitration-Related-Decisions-in-Nigeria.pdf accessed 15 July 2022.

[38]Broderick Bozimo & Co, *Analysis of Arbitration Related Decisions in Nigeria 2021*, pp 4, 5: https://broderickbozimo.com/wp-content/uploads/2021/10/BBaC-Analysis-of-Arbitration-Related-Decisions-in-Nigeria.pdf accessed 15 July 2022.

[39]A Atake *et al*, *supra* note 2.

[40]A Atake *et al*, *supra* note 2.

[41]*Esso Exploration and Production Nigeria Limited & Shell Nigeria Exploration and Production Company Limited v Nigeria National Petroleum Corporation*, CA/A/507/2012.

[42]*Shell Nigeria Exploration and Production Limited & Others v Federal Inland Revenue Service and Nigeria National Petroleum Corporation*, CA/A/208/2012.

[43]For context, Nigerian courts had not ruled firmly that tax disputes are non-arbitrable. The ACA did not provide for arbitrable and non-arbitrable disputes and as such the determination of same was left to the courts. The Supreme Court, in *Kano State Urban Development Board v Fanz Construction Company Limited* [1990] NWLR (pt.142) 1 simply adopted the list of disputes that are non-arbitrable contained in the fourth edition of the Halsbury's Law of England, but the list did not contain tax-related disputes

[44]Templars Arbitration Report on Nigeria 2021, p5: https://www.templars-law.com/wp-content/uploads/2021/10/templars-arbitration-report-on-nigeria-2021.pdf accessed 14 July 2022.

cases are also pending at the Supreme Court for decision. There was not, however, any figure in support of this claim given that these cases have not, according to the survey report, been published in mainstream law reports.[45]

However, it is doubtful whether the simple fact that there are decisions, including *Shell v NNPC* and *Esso v NNPC,* which favour NNPC in the context of enforcement of arbitral awards conclusively, suggest that Nigerian courts adopt a protectionist approach in favour of NNPC. With specific reference to *Shell v NNPC* and *Esso v NNPC,* it is well-known that the primary duty of the judiciary is not to make laws but rather to interpret and apply the laws made by the legislature. However, judges meet new circumstances that were not contemplated by the legislature when the law was first made. In such circumstances, judges create new laws to meet the changed conditions. Indeed, there are several instances in history where judges have created, expanded, or widened the law.[46] Although evaluating the validity of the decisions in *Shell v NNPC* and *Esso v NNPC* is outside the scope of this paper, what is certain at this point, is that the Nigerian Courts acted within their powers in determining that tax disputes are non-arbitrable.

More so, it cannot be expected that all decisions relating to the enforcement of arbitral awards involving NNPC will be in favour of private parties. In fact, based on a 2021 survey report on Nigeria-related arbitration cases, it was noted that out of 25 reviewed cases involving government-related parties, 13 of them favoured the government, that is a 52% success rate of government parties over other parties.[47] In any event, there are specific instances where Nigerian courts have delivered judgments that are against the interest of NNPC. In *Nigerian Agip Exploration Ltd v Nigerian National Petroleum Corporation & Anor*,[48] it was agreed in a production sharing contract that disputes relating to the interpretation or performance of the contract would be referred to arbitration in accordance with the ACA. However, when NNPC sought to set aside the partial arbitral award, the Court of Appeal held against the interest of NNPC. In *Nigerian National Petroleum Corporation v CLIFCO Nigeria Ltd*,[49] an arbitral tribunal issued an award in favour of CLIFCO and NNPC sought to set aside the arbitral award at the Federal High Court. The trial court set aside the award and held that the award could not be enforced. The Court of Appeal, however, set aside the arbitral award only in part, but NNPC further appealed to the Supreme Court. The Supreme Court ultimately dismissed the appeal, against the interest of NNPC. Also, in *Feed & Food Farms (Nigeria) Ltd v Nigerian National Petroleum Corporation*,[50] the trial court gave judgment in favour of Feed & Food Farms, but on appeal to the Court of Appeal, it was held that the jurisdiction of the trial court was ousted by the failure of Feed & Food Farms to give pre-action notice to NNPC. The Court of Appeal also dismissed the award of damages by the trial judge. However, the Supreme Court unanimously set aside the decision of the Court of Appeal, restored the judgment of the trial High Court, and awarded costs in favour of Feed & Food Farms. The foregoing cases and more[51] are few instances where Nigerian courts have ruled against NNPC, or rejected an application brought by NNPC to set aside an arbitral award that was against the interest of NNPC.

Although a detailed empirical study which analyses Nigerian cases would throw more light on this perspective, it appears, based simply on the foregoing, that the few instances where the Nigerian courts have ruled in favour of NNPC in the context of enforcing arbitral awards do not offer credible basis for the viewpoint that Nigerian courts are protectionist.

Procedural delay

Procedural delay is yet another factor which seemingly suggests that Nigerian courts adopt a protectionist approach in favour of NNPC in the enforcement of arbitral awards. The crux of this argument is that Nigerian courts intentionally delay proceedings for the enforcement of arbitral awards that are against the interest of NNPC, or

[45]Templars Arbitration Report on Nigeria 2021, p5: https://www.templars-law.com/wp-content/uploads/2021/10/templars-arbitration-report-on-nigeria-2021.pdf accessed 14 July 2022.

[46]For example, *Hedley Byrne co. Ltd. v. Hellers Partners Ltd***.** [1961] 3 WLR 1225 – (Tort of negligent misrepresentation), *Donoghue v Stevenson* [1932] AC 562 – (Neighbour principle for determining the existence of a duty of care in negligence), *Lakanmi and Anor v. Attorney General of Western Nigeria and others* [1971] 1 UILR 201 (Application of ouster clauses), *Peter Obi v. INEC* (S.C. 123/2007) – (when the term of a governor begins to run). In India, *Vishakha v State of Rajasthan* [1997] 6 SCC 241 took judicial legislation to an unprecedented level by relying on international treaties on sexual harassment that had not been domesticated and finally providing guidelines to regulate such cases until the legislature makes a law on the Subject. Also, in *Shaw v. DPP* [1962] AC 220 (the Ladies Directory Case) created the crime of conspiracy to corrupt public morals in England.

[47]Templars Arbitration Report on Nigeria 2021, p5: https://www.templars-law.com/wp-content/uploads/2021/10/templars-arbitration-report-on-nigeria-2021.pdf accessed 14 July 2022.

[48]Suit No. CA/A/628/2011, decided by the Nigerian Court of Appeal, Abuja Division, on 25 February 2014.

[49]*Nigerian National Petroleum Corporation v CLIFCO Nigeria Ltd* [2011] LPELR-2022.

[50]*Feed & Food Farms (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2009] 12 NWLR (pt. 1155) 387.

[51]*Nigerian National Petroleum Corporation v Famfa Oil Limited & Attorney General of the Federation* [2009] 12 NWLR (pt. 1156) 462., *Nigerian National Petroleum Corporation v Roven Shipping Ltd* [2009] 12 NWLR (pt. 1156) 462.

proceedings for the setting aside of an arbitral award against NNPC, for the purpose of frustrating the successful party. A go-to example is the case of *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation*.[52] Here, IPCO, a contractor specialising in the construction of onshore and offshore oil and gas facilities, agreed to design and construct a petroleum export terminal in Nigeria, known as the Bonny Export Terminal Project, for NNPC. The contract was to be governed by and construed in accordance with Nigerian law and the contract provided for arbitration in Lagos, in accordance with the ACA. During the business relationship, disputes arose between IPCO and NNPC in connection with the contract and the major issue was that the project took about 22 months longer to complete than provided for in the contract. Ultimately, the matter proceeded to arbitration. The arbitrators delivered an award in October 2004. In November 2004, NNPC commenced proceedings before the Federal High Court in Lagos to set aside the award and for a stay of execution. In November 2005, NNPC issued a motion for transfer of the case and in late 2008, NNPC also raised additional allegations that the award had been procured by fraud. The Nigerian proceedings are still pending in the Federal High Court to date, after over 10 years. In fact, between 2008 and 2015, there has been two discontinued criminal prosecutions and currently the third criminal prosecution for fraud and forgery privately pursued by NNPC against IPCO is ongoing in Nigeria.[53] Since then, IPCO has taken steps to enforce the award in the English courts, and several other developments which are outside the framework of this paper have arisen.[54]

Also, in *Esso v NNPC*, the decision of the Federal High Court in which the court set aside the arbitral award made in favour of Esso/Shell was delivered in May 2012 and an appeal was filed by Esso/Shell in July 2012. However, the Court of Appeal delivered its decision in July 2016. In *Shell v NNPC*, the appeal arose from the judgment of the Federal High Court delivered in February 2012 in which the trial court set aside the arbitral award made against NNPC. The appeal was argued upon the Notice of Appeal filed in May 2012, but the Court of Appeal decision was rendered in August 2016. These two cases took an average of four years to be settled by the Court of Appeal.

However, it is now a well-known fact that delay in the administration of justice is a problem that currently taints the Nigerian court process. Nigerian commentators, courts, and procedural guidelines have constantly frowned at the problem of delay. In *Fanz Holdings Limited v Mrs. Patricia Lamotte*,[55] for example, Justice Uwais encouraged Nigerian courts to discourage any form of delay tactics by legal practitioners. Several issues are responsible for the problem of delay in Nigerian judicial proceedings – the notable one being the congestion of cases in Nigerian courts because cases are filed at a rate that is more than what the judges can handle within a reasonable time.[56] Although research has noted that the average time for case disposition in Nigerian courts is between 6 to 10years[57] and it takes a minimum of two years for the Nigerian Supreme Court to hear an appeal from the Court of Appeal,[58] there are far worse instances. For example, *Shell Petroleum Dev. Co. v Uzo & 3 Ors*[59] was instituted in the trial court in 1972 and was decided by the same court in 1985. The case was finally determined by the Court of Appeal in 1995 (i.e., 22 years after the date the case was initially instituted in the court). Another example is the case of *Elf Nigeria Limited v Operesilo & Anor*[60] which was filed in 1967, decided by the trial court in 1987, further decided by the Court of Appeal in 1990, and finally by the Supreme Court in 1994.

With specific reference to arbitration-related cases, a 2021 survey report on arbitration-related cases in Nigeria noted that out of 82 reviewed cases relating to arbitration (some of which did not involve NNPC or a state-owned entity), 19 cases were Supreme Court decisions and the quickest of the cases went through the courts in approximately 2 years[61] and the slowest lingered for 17 years.[62] In all, 12 of the 19 Supreme Court cases were decided in 10 or more years, 5 were decided in between 5 and 9 years, while only 2 were decided in less than 5 years.[63] A different 2021 survey report on arbitration cases in Nigeria analysed 33 cases from the High Court, 33

[52]For a comprehensive break down of the facts of this case, see the UK court decision: https://www.supremecourt.uk/cases/uksc-2015-0247.html accessed 11 July 2022.
[53]E Onyema, (2015), 'Nigeria: IPCO vs NNPC Saga and Liability of Nigerian Legal System' <http://allafrica.com/stories/201512220439.html> accessed 11 July 2022.
[54]*Supra* notes 52 and 53.
[55]*Fanz Holdings Limited v Mrs. Patricia Lamotte* (1977) NNLR 163.
[56]O Obi-okoye, Eradicating Delay in the Administration of Justice in African Courts: A Comparative Analysis of South African and Nigerian Courts' (2005) Unpublished LLM Thesis submitted to University of Western Cape.
[57]O Oko 'The Problems and Challenges of Lawyering in Developing Societies' (2004) 35 Rutgers Law Journal, 15.
[58]N Tobi, 'Justice in the Judicial Process' in C Nweze, Essays in Honour of Honourable Justice Eugene Ubaezona (Fourth Dimension Publishing Co. Ltd: Enugu, 1997).
[59]*Shell Petroleum Dev. Co. v Uzo & 3 Ors* [1994] 9 NWLR (pt. 366) 51.
[60]*Elf Nigeria Limited v Operesilo & Anor* [1994] 6 NWLR (pt. 350) 258.
[61]*Metroline Nig. Ltd & Ors v. Dikko* (2021) 2 NWLR (PT 1761) 422
[62]*NITEL Ltd. v. Okeke* (2017) 9 NWLR (Pt. 1571)
[63]Templars Arbitration Report on Nigeria 2021, p 5: https://www.templars-law.com/wp-content/uploads/2021/10/templars-arbitration-report-on-nigeria-2021.pdf accessed 14 July 2022.

cases from the Court of Appeal, and 12 cases from the Supreme Court to track the amount of time it took to commence and conclude enforcement applications. At the High Court, it took an average of 2 years from the date of filing the originating process to the date of judgment. Of the 33 cases, 14 cases were concluded within a year, 12 cases were concluded within two years, 2 cases were concluded within three years, and 5 cases were concluded above three years. At the Court of Appeal, it took an average of 3 years and 1 month from the date of filing the notice of appeal to the date of judgment. Of the 33 cases, 5 cases were determined within one year, 3 cases were determined within two years, 10 cases were determined within three years, and 15 cases were determined above three years. Also, for 22 cases in which there was no appeal from the Court of Appeal to the Supreme Court, it took a period of 6 years and 7 months from the date of the award to the date of the judgment of the Court of Appeal. At the Supreme Court, it took an average of 3 years and 9 months from the date of filing a notice of appeal to the date of judgment to determine 12 cases. Of the 12 cases, only 1 case was determined within a year, 4 cases were determined within three years, and the remaining 7 cases were determined above three years. For cases concluded at the Supreme Court, it took an average time of 9 years and 1 month from the date of the award to the date of the judgment of the Supreme Court.[64] It is also worth noting that these cases do not all involve NNPC or a state-owned entity.

Based on the foregoing, although it is possible that there are instances where certain judges act in a protectionist manner in relation to the enforcement of arbitral awards against NNPC, careful consideration needs to be given to the fact that it is a general problem in all Nigerian proceedings, not just proceedings that involve the enforcement of arbitral awards against NNPC.

6. Conclusion: Normative Analysis of Findings

Overall, the answer to the question of whether Nigerian courts adopt a protectionist approach in favour of NNPC in the enforcement of arbitral awards against it is not as clear as day. In any event, targeted and detailed empirical research is required to clarify this point by analysing all Nigerian case law involving NNPC. This may, however, prove difficult because several Nigerian judicial decisions do not appear in Nigerian law reports to date. Specifically, decisions of courts of first instance are underreported in Nigeria. And some law reports, especially the very few ones that cover courts of first instance, have also been in and out of print, which means that even the limited coverage might have omitted cases while they were out of print. Be that as it may, relying solely on the analysis set out above shows that the reasons advanced by the proponents of protectionism view are not as strong as they appear. This is because there are arbitration-related cases where Nigerian courts have ruled against the interest of NNPC, and the issue of procedural delays is not unique to just the enforcement of arbitral awards against NNPC. Having established that a good dispute resolution structure in Nigeria could foster the inflow of FDI and increase the confidence of investor in the Nigerian court system, there is a need to quickly tackle the issue of procedural delays by employing more competent and hardworking judges and judicial officers, building more court structures, and embracing technological advancement, among others. This will also provide an opportunity for a detailed empirical analysis based on comprehensive reported decisions of Nigerian courts.

[64]Broderick Bozimo & Co, *Analysis of Arbitration Related Decisions in Nigeria 2021*, pp 4, 5: https://broderickbozimo.com/wp-content/uploads/2021/10/BBaC-Analysis-of-Arbitration-Related-Decisions-in-Nigeria.pdf accessed 15 July 2022.