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Tribunal as a Last Resort in Adjudicating Market Failure – Case Study of Nigeria's IST

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Abstract

Judicial interference in a free market is generally seen as anathema to the economic logic of the Adam Smith's laissez-faire school of thought, which currently underlines market economies across the globe. Based on this, therefore, when and where such interference occurs, it ought to be solely for practicality and business efficacy. Nonetheless, a desire for non-interference in, and the imperative of justice represent a delicate balancing act particularly in an emerging economy struggling to enhance its ease of doing business. Consequently, and against this background, this paper offers a critical assessment of how Nigeria's Investment and Securities Tribunal (IST) has lived up to its raison-d être in this regard, from inception.

Keywords: market failure, capital markets, emerging markets, adjudication, investments, tribunal, trade disputes, investment law, investment and securities tribunal, ease of doing business

Introduction

The US Securities and Exchange Commission (after which the Nigerian Securities and Exchange Commission was modelled), came into being through the Securities and Exchange Act 1934 as a legislative response to the Wall Street Crash of 1929. The US capital markets had seen a phenomenon rise in stocks and equities to a degree not previously witnessed by investors. As it happens, the boom was soon followed by a bust leading to the Great Crash. Much of the boom was predicated on the bullish[2] activities of traders on the Exchange. It was also led in part, by margin deals and inordinate risk appetite of investors bent on taking full advantage of the seemingly easy ride in the market. The lax and minimal regulatory mechanism available at the time also made it possible for a number of investors to manipulate the system by entering into over exuberance deals bothering on fraud. This led to several states in America introducing the infamous "blue sky laws"[3] specifically aimed at stamping out fraud in the capital markets. From inception, therefore, the US Securities and Exchange Commission had its work cut out for it; to create enforceable standards and promote confidence in the market. Preventing, and deterring fraud, quite understandably, created the impetus for the newly established Commission. The focus has remained unchanged to this day.

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[2] The market is said to be "bullish" when a general optimism in the market drives up investment activities in the expectation of an ever rising returns and increase in share values. It is "bearish" when the opposite (pessimism and decline) is the case.

[3] This refers to state-specific investment and securities laws in addition to the Federal laws. They are particularly designed to prevent fraudulent sales and practices. The laws vary from state to state. See United States Securities and Exchange Commission: https://www.sec.gov/fast-answers/answers-blueskyhtm.html

Like that of the US, the origins of Nigeria's Securities and Exchange Commission was also predicated on an ongoing economic boom, but no bust, unlike the US market crash. In fact, the Nigerian economy was in the middle of an unprecedented government's economic expansionary policy. The Arab-Israeli Conflict (aka the "Yom Kippur War") of 1973 had generated an economic bonanza for Nigeria in the quadrupling of revenues from oil. Consequently, being courted by both camps in the conflict, Nigeria acquired the status of a big player in international affairs, galvanizing interest from foreign investors seeking somewhere 'safe' to put their money. The country's hitherto nascent capital markets began to garner strength and influence, making it inevitable for the establishment of a regulatory framework to better manage the burgeoning economy. A Capital Issues Commission Decree was promulgated by the Mohammed/Obasanjo Military Government in March 1973[4]to mediate disputes in the Nigerian capital markets, then under the auspices of the Lagos Stock Exchange. Any appeals from such disputes went to the Federal Commissioner of Finance whose decision was final.

Resolving dispute, clearing up backlog, and minimizing delay became the immediate pre-occupation of the new regulatory regime. This focus has changed very little subsequently since. And, with a concerted effort to entice new entrants into the market, introduction of new technology, diversification of market participants and portfolios, deeper and more sophisticated trading system, and a growing incidents of market infractions, minimizing delay has indeed become somewhat intractable. In this light, the onus of clearing up capital market appeals being placed on the shoulders of the Federal Commissioner of Finance (and his specialist advisers), appeared effective only as a short term measure. Cases inevitably mounted, needing a more robust system of adjudication. This prompted the establishment of the Securities and Exchange Commission in Nigeria, through Decree 71 of 1979 with enhanced power to regulate and develop the capital markets in the country[5].

The Commission began work in January 1980. This meant that the old Capital Issues Commission was abolished. This new regulatory structure was allowed to settle into and come to grips with the push and pull operations of the capital markets for almost ten years before a new Decree came into being as Decree 29 of 1988[6] aimed at a speedier and more effective adjudication process. An internal dispute resolution of the SEC; Administrative Proceedings Committee (APC), was established to act as the first port of call for all capital markets disputes. Appeals from the APC went to the Federal High Court with the option of progressing further up to the Appeal and Supreme Courts, as opposed to the one-stop shop system of the Federal Commissioner of Finance in place hitherto. This was an improvement to the regulatory framework; it adds an extra layer of the jurisdiction of the courts, thereby providing certainty and confidence in the markets. However, as is usual in regulatory compliance matters, every solution produces its own snags. Recourse to the courts while boosting confidence in the regulatory mechanism, creates an avenue for delay in the adjudication and final resolution of cases. "The heavy caseload of the Federal High Court resulted in delays in the determination of these cases thus frustrating investors as well as stakeholders, and militating against Rapid Investment-Inflow (RII)"[7]

There was now the potential for increasing delay rather than minimizing it mainly because the court operates an adversarial system, requiring claimants and defendants (respondents) to proof their case on the balance of probabilities. It goes without saying that this consumes time, energy and money. Cases have been known to remain in the court system for months and years without resolution. Meanwhile, the stock market continued to grow "at an abysmally slow pace lacking capacity for sizable contribution of funds to investors"[8] even as economic activity expanded, and the backlog of unresolved cases increased in numbers. International Monetary Fund (IMF)'s Structural Adjustment Program (SAP) imposed on the economies across the African continent in the 1980s had a particular negative effect on the Nigerian capital market. Liberalization, Deregulation and Currency devaluation formed the bedrock of the SAP. All of that was underpinned by an aggressive form of privatization of publicly owned enterprises, giving rise to numerous mergers and acquisitions and increased competition. The Nigerian capital market could not be insulated from this. The shakeup of the Nigerian macroeconomic structure saw an increase in the number of listed companies on the Stock Exchange.

[4] See; Securities and Exchange Commission, Nigeria; https://sec.gov.ng/about/what-we-do/(15/April/2020)
[5] See; Securities and Exchange Commission, ibid.
[6] See; George C. Nnona. "The Nigerian Investment and Securities Act: Delineating Its Boundaries in Relation to the Registration of Securities" in 'Journal of African Law' Vol 50, No1 (2006), pp 24-46.
[7] Investment and Securities Tribunal Two Days Sensitization Workshop for Capital Market Stakeholders and Investors in Lagos and South West, Nigeria, September, 2018.. IST Publication, Abuja, Nigeria.
[8] Ibid.

It grew by 95% from 100 in 1988 to 195 as at December 1999[9]. Securities grew from 244 in 1987, to 276 in 1996, then, 268 in 1999, government stocks, corporate bonds, debentures market capitalization from 8.3 billion naira (7.6% GDP) in 1987, to 294.1 billion (8.7% GDP) in 1999[10].

It was in the aftermath of the 'turbulence' of economic restructuring instigated by the SAP that the capital market itself became the focus of a need for its own restructuring, hence, the "Dennis Odife Panel on The Review of the Nigerian Capital Market" by the Federal Ministry of Finance[11]. Foremost on the mind of the Panel was (the now familiar) bottlenecks in the resolution of disputes and the logjam in the (adversarial) judicial system often accentuated by the litigants themselves using legal technicalities and other forms of 'abuse of process' to frustrate legitimate claims of their opponent. The Panel thus recommended the repeal of the Securities and Exchange Commission (SEC) Decree 1988, to be replaced with the Investments and Securities Decree 45, 1999 which, following the in-coming of a civilian administration in 1999, became the Investments and Securities Act (1999)[12]. For our purposes, the most notable aspect of the restructuring was the establishment of a specialist Tribunal; the Investment and Securities Tribunal (IST) to handle all disputes arising from the capital market instead of going through proceedings in the High Court as it was previously.

This recommendation directly led to the repeal of the Investments and Securities Act (1999), to be replaced by the Investments and Securities Act (ISA 2007), which established the Tribunal to "exercise the jurisdiction, powers and authority conferred on it by or under this Act"[13]. Being a specialist Tribunal, its presiding officers are drawn from lawyers with the knowledge and experience of the capital markets. There is provision for ten members of the Tribunal with the Chairman who must be a legal practitioner of no less than fifteen years standing, with "cognate experience in capital market matters"[14]. It is clear that capital markets matters being litigated in ordinary civil courts had proven to be unsatisfactory to say the least. Section 284 of ISA 2007 now makes it mandatory for litigants to approach the administrative proceedings section of the Securities and Exchange Commission in the first instance. If dissatisfied, a litigant can then approach the Tribunal which has both original and appellate jurisdiction. Furthermore, if still dissatisfied with the outcome, a litigant can opt back into the civil court via the Court of Appeal[15], and ultimately, the Supreme Court[16].

The option to move a case back to civil jurisdiction after having exhausted all the available means provides a safety net and confidence-boosting for investors, but is it potentially self-defeating? What is to stop a litigant from 'dragging out' a case with the view to creating frustration and legal bottlenecks for an opponent? Does the benefit of access to higher legal channels outweigh the risk? Does that not reintroduce the original mischief (albeit) through the back door? Should IST be the final legal avenue for all capital markets cases? If so, would that not raise a crucial fundamental issue of fair hearing and access to justice for market participants? Would (an imaginary) IST (Court of Appeal Division) offer a good compromise? In the event of that happening, should it become the final legal avenue or, is a further extension to the Supreme Court necessary in all circumstance? All of these questions can usefully be examined by analysing the performance of the IST from inception and offering some poignant assessments. However, assessing the performance of the Tribunal in a vacuum, without a clear understanding of the macroeconomic backdrop against which it must necessarily operate would be futile. Thus, a brief overview of Nigeria's position on "the ease of doing business" index, and other normative issues, market failure etc will be the next task for this paper, followed by a graphic demonstration of the Tribunal's activities over a period of ten years. Thereafter, we shall be in a good position to draw some salient conclusions.

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[9] See; JA Babalola and MA Adegbite "The Performance of the Nigerian Capital Market Since Deregulation in 1986". Central Bank of Nigeria Economic and Financial Review, Vol 39, No1
https://www.cbn.gov.ng/out/Publications/efr/RD/2002/efrvol39-1-1.pdf (Accessed 24/04/20)

[10] JA Babalola and MA Adegbite, ibid.

[11]https://www.scribd.com/document/47337066/Dennis-Odife-Panel-Report-on-the-Review-of-the-NCM-by-MoF-Sept-1996-Abridged (Accessed 24/04/20)

[12] Nigeria was under military rule (throughout the SAP period and beyond) between 1983 and 1999, hence, the need to incorporate the military Decree into an Act of Parliament.

[13]file:///D:/IST/THE-INVESTMENTS-AND-SECURITIES-ACT-2007_NIGERIA%20(1).pdf (Accessed 24/04/20)

[14] See; s. 275 ISA 2007, ibid.

[15] See; s. 295 (1) and (2) ISA 2007, ibid.

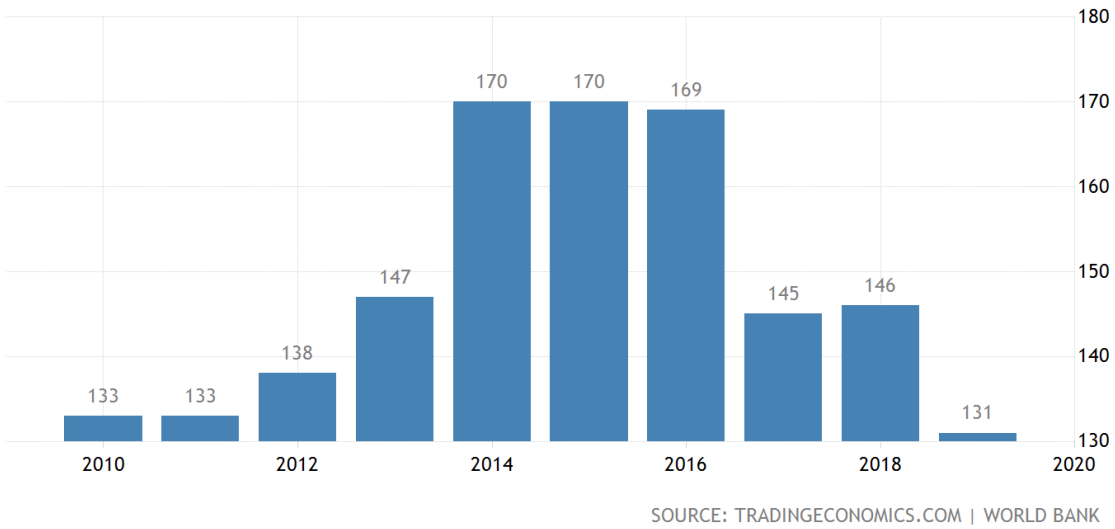
[16] See; s. 297 ISA 2007, ibid.

The Ease of Doing Business Index: Its Logic and Paradox

For Western investors seeking to do business in developing countries in the 1970s and 1980s, there was the "Third World" 'logic' which permeated a lot of the thinking of the entrepreneurs braved enough to take the plunge as it were. In other words, the risk factors were usually priced in, but a lot of those factors were often based on individual value judgements and anecdotal evidence rather than hard-headed market data. As globalization heightened interest in investment in developing countries towards the 1990s and 2000s, however, it became apparent that the old "Third World" assumptions could no longer hold without being backed up by empirical evidence. Financiers and entrepreneurs needed a better measure of the business environment they were entering into, in specific regions/countries, as opposed to a reliance on an oversimplified assumptions which were often too vague, imprecise and downright wrong in many instances.

The Ease of Doing Business Index was a welcome tool for investors in that sense, as it brings clarity and specificity allowing for a better management of risks in volatile regions/countries around the world. That said, the paradox of the index for our purposes here is that time taken and efficiency of resolution of legal disputes between investors is not one of the yardsticks adopted for calculating a country's ranking on the index in spite of its centrality to the thinking of the IST. If it was, Nigeria may well find itself much higher in the rankings than currently. The reason for the exclusion of this important yardstick stems from the fact that the experts who drew them up did not consider judicial involvement in dispute resolution in the investment and securities markets a major issue in their own environment. "Doing business measures getting a building permit, obtaining an electricity connection, transferring property, getting access to credit, protecting minority investors, paying taxes, engaging in international trade, enforcing contracts and resolving insolvency"[17]. In addition, Investment and Securities Tribunal is an additional mechanism rarely if ever found in other jurisdictions in Africa. That notwithstanding, South Africa used to be accepted as the largest economy in Africa until it became apparent that major elements for computation of the data were missing in the case of Nigeria, like the "Nollywood" film distribution for instance. Once this became known, the economic indices were promptly revised, and Nigeria is now ranked as the largest economy in Africa. Similarly for the Ease of Doing Business Index, it is only a matter of time before judicial dispute resolution becomes an integral part of its yardsticks.

Index for Nigeria



Actual	Previous	Highest	Lowest	Dates	Unit	Frequency
131.00	146.00	170.00	120.00	2008 – 2020		Yearly

[17] Bloomberg LP https://www.bloomberg.com/news/articles/2019-10-24/togo-nigeria-big-winners-in-ease-of-doing-business-in-africa. (Accessed 09/05/20)

According to the World Bank, 'the Ease of doing business index ranks countries against each other based on how the regulatory environment is conducive to business operation and stronger protections of property rights. Economies with a high rank (1 to 20) have simpler and more business-friendly regulations'[18]. Of itself, the ranking is a snapshot of views at a particular moment in time; it is not a comprehensive picture of the business environment as given. There are both tangible and intangible qualities that add up to the conclusions about a particular business environment which the index may not capture in its entirety. Nonetheless, it is widely acknowledged to be fair and unbiased. As with ranking of any type, the stigma attached to being found near or at the bottom of the ladder provides the incentive for countries to work harder on improving their rankings. It creates a race to the top for all countries; a most useful logic in the context of Africa. Togo, for instance, was adjudged to have climbed 40 places to 97, making a big splash in international news headlines[19], while Mauritius remains number one in Africa, followed by; Rwanda (38), Kenya (56), South Africa (84), Togo (97), Ivory Coast (110), Ghana (118), Nigeria (131) and Angola (177).

Although Nigeria sits at number nine amongst its nearest competitors in Africa, its 15-place rise on the overall index is clearly welcome news for the country's elite. "We are now ranked 131st from 146th last year, and up 39 places since 2016, when we established the Presidential Enabling Business Environment Council (PEBEC). Our goal is a top 70 position by 2023"[20]. As pointed out earlier, the ranking is a snapshot of views at a moment in time, "while the ease of doing business ranking may be better in the case of Nigeria, the actual process of running a business has been stifled" according to the CNN business analyst[21]. For all its shortcomings, the index has grown in influence requiring a dedicated Presidential Council to monitor and sustain the drive towards a higher ranking as a way of improving the country's competitiveness. IST stands as the ultimate catalyst for achieving that goal.

Between Business Efficacy and Timely Justice

IST is founded on a conception of justice that has business efficacy at its heart. The first point of departure to any discussion of justice within the libertarian framework is, of course, Rawls's assumption of justice being predicated on "fairness". It is a theory of justice associated with the social contract ideas found in Lock, Rousseau, and Kant. For Rawls, the primary subject of justice is the 'basic structure of society, or more precisely, the way in which the major social institutions distributes fundamental rights and duties and determine the division of advantages from social cooperation'[22]. As Rawls himself acknowledges, there is, however, a distinction between justice as a balance between competing interests, and justice as a preconceived model of identifying the underlined considerations of those interests. This means an agreement and adherence to a set of principles of justice that is fair ab initio. It is a utilitarian construct which strives to achieve the greatest net balance of satisfaction across all social institutions. On this basis, therefore, an investments and securities tribunal would not only be an institutional devise for satisfying existing wants and needs but a way of creating and fashioning such for the future[23]. It is balancing the imperatives of timely justice (positive law) with business efficacy (normative economics). The creative (sometimes conflictual) interaction between the two ends gives meaning to the conceptual foundation of IST. That said, IST itself is a child of necessity, it is a means for addressing both market and non-market (i.e. regulatory) failure. 'Just as some types of incentive encourage market failure, so too incentives influencing particular non-market organizations may lead to behaviour and outcomes that diverge from the norm'[24].

Reference to market or regulatory failure where resources are at their most optimal (as in Pareto optimality) or where regulation is at the most equilibrium is really an ideal. Many other unforeseen factors often militate against such idealized settlement: information asymmetry, resistance to or inability to cope with change, uncertainty and inconsistent expectations, vagaries of aggregate demand and other elasticities in the value chain[25]. Market failure in the narrow sense points to the attainment of Pareto optimality's only salient features.

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[18] Doing Business, 2019, World Bank. file:///C:/Users/Mr%20Tokè/Desktop/IST/IST%20ease.pdf

[19] See; "Togo, Nigeria Big Winners in Ease of Doing Business in Africa" https://www.bloomberg.com/news/articles/2019-10-24/togo-nigeria-big-winners-in-ease-of-doing-business-in-africa ibid.

[20] Quote from President Muhammadu Buhari's reaction via tweeter and reported by CNN https://edition.cnn.com/2019/10/24/africa/nigeria-improves-in-world-bank-ranking/index.html (Accessed 09/05/20)

[21] Ibid.

[22] John Rawls. A Theory of Justice (Revised edition). Belknap Press, Harvard University, 1999, page 29.

[23] Ibid, page 252.

[24] Brian E. Dollary, Andrew C. Worthington. "The Evaluation of Public Policy; Normative Economic Theories of Government Failure". 'Journal of Interdisciplinary Economics' 7 (1), pp 27-39.

[25] Francis M Bator. "The Anatomy of Market Failure", in 'The Quarterly Journal of Economics, Vol 72, No 3 (Aug 1958), pp 351-379

Whereas, market failure in a broad sense encompasses a more comprehensive set of normative criteria, meaning when a market fails to reliably or adequately 'generate social outcomes that are desirable from the point of view of an authoritative and overarching normative standard. In that regard, consideration of justice, not technical efficiency should be seen as the primary criteria for assessing whether market are functioning well or failing'[26]. Macleod (2008) concludes in the foregoing assertion that the narrow, technical conception of market failure is of limited normative significance. It is even less so in the context of an underdeveloped market economy. Market failure in the broad sense gives us a better yardstick to measure and interpret the authority of individual preferences that are justiciable.

What then is the purpose of law in the context of the tribunal under discussion? As indicated in the headline, it would be to promote economic efficiency. This is grounded in an early work by Posner (2003) which urged focus on 'ex ante efficient contracting; i.e. which rules will encourage parties to enter into deals that are efficient and wealth maximizing'[27]. Promoting economic efficiency in a broad sense differs sharply from the autonomy theorists who argue that 'contract obligations are deserving of respect based on the rights of the contracting parties regardless of whether they tend to produce other benefits'[28]. Autonomy theory is of limited value in assessing lopsided economies and an imperfect competition environment that a tribunal such as the IST is called upon to adjudicate in. This is all the more so with the pervasive influence of monopoly capital in underinvested, underdeveloped economies with the attendant negative externalities that it brings. The investment from big multinational oil companies is welcome for all sorts of economic reasons; technical know-how, job creation and foreign direct capital. All of these are often countered by the massive environmental pollution that these companies generate, which then affect everyone regardless of any tangible benefit to them. That is a classic example of a negative externality. Positive externalities mainly come by way of government's social welfare provisions.

For instance, a government public expenditure on elimination of small pox, polio and other childhood diseases would translate into less pressure on public hospitals and a healthier workforce for the future, which spreads benefit to everyone regardless of involvement in the initial immunization program. Negative externality imposes costs, while positive externality confers benefit to non-parties. The manner, speed and efficiency of the IST in handling cases before it presents an interesting scenario of an adjudicating body itself generating either positive or negative externalities. Faster handling of cases creates a more efficient market (positive externalities), which confers benefits on market participants including those who have no business whatsoever with the Tribunal. Whereas, an appreciable delay in dispensing justice produces the exact opposite, most notably, in the area of investor confidence – a prime consideration in the performance of capital markets. A less efficient market is necessarily a costlier market for everyone regardless of contact with the Tribunal. This explains how crucial disposition of cases before the IST has become in the overall trajectory of business efficacy, justice and the markets in Nigeria.

COMPUTATION OF CASES[29]

APPEAL CASES FILED BEFORE THE IST FROM INCEPTION

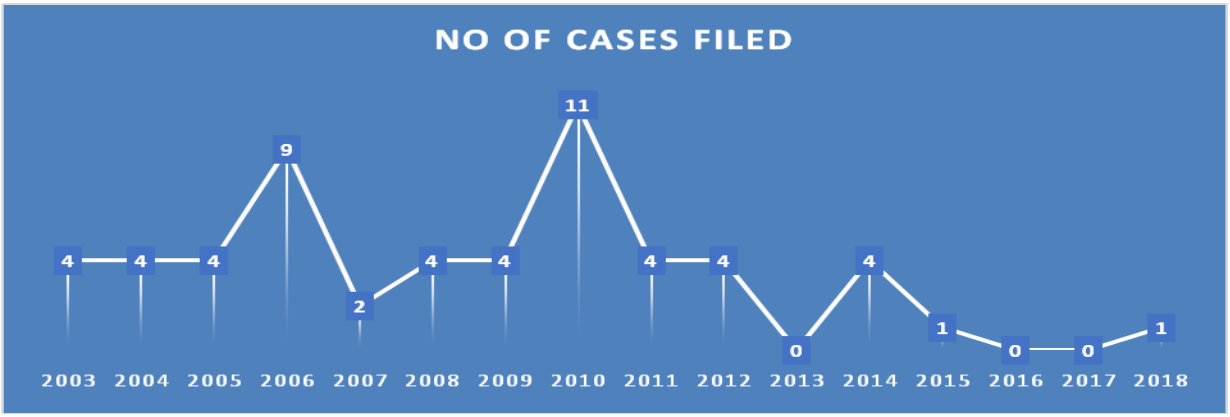

Fig 1

[26] Colin M Macleod. "Market Failure, Justice, and Preferences", in 'Ethics and Economics', 6 (1), 2008

[27] Richard A Posner. Economic Analysis of Law. Wolters Kluwer, 2014.

[28] Wendy Netter Epstein. Contract Theory and the Failures of Public-Private Contracting. Chicago-Kent College of Law Publications, 2013.

[29]The inferences drawn from the graphs are based on specific dates, names of individuals, corporations, and companies provided in confidence by the IST for the purpose of this study.

The above represents the number of cases or suits filed before IST at Abuja between 2003 and 2018. The Tribunal is both an appellate and original jurisdiction. It entertains appeals directly from the Securities and Exchange Commission, as well as direct applications from sources other than the SEC. The graph reflects the trend analysis of disputes between investors in the capital market and Securities and Exchange Commission. There is a noticeable spike in appeal cases in 2006 prior to the 2008 financial meltdown, followed by a lull in 2009, then, a huge rise in 2010. There has been a downward trend since. This suggests that the Tribunal, in its rulings, has managed to set higher standards of compliance to its objectives. It also highlights the tantalizing possibility that the Tribunal may, one day, be the victim of its own success if it continues to entertain less and less appeals, possibly rendering it redundant in the long term? This is highly unlikely as financial and capital markets are susceptible to sudden volatility of the kind witnessed in 2008 and unforeseeable events such as the coronavirus pandemic in 2020. Furthermore, Nigeria is doing all it can to enhance (deepen) participation in its markets. It follows, logically, that the deeper a country's capital markets becomes, the more investor activities it generates, leading naturally to more, not less, disputes to resolve.

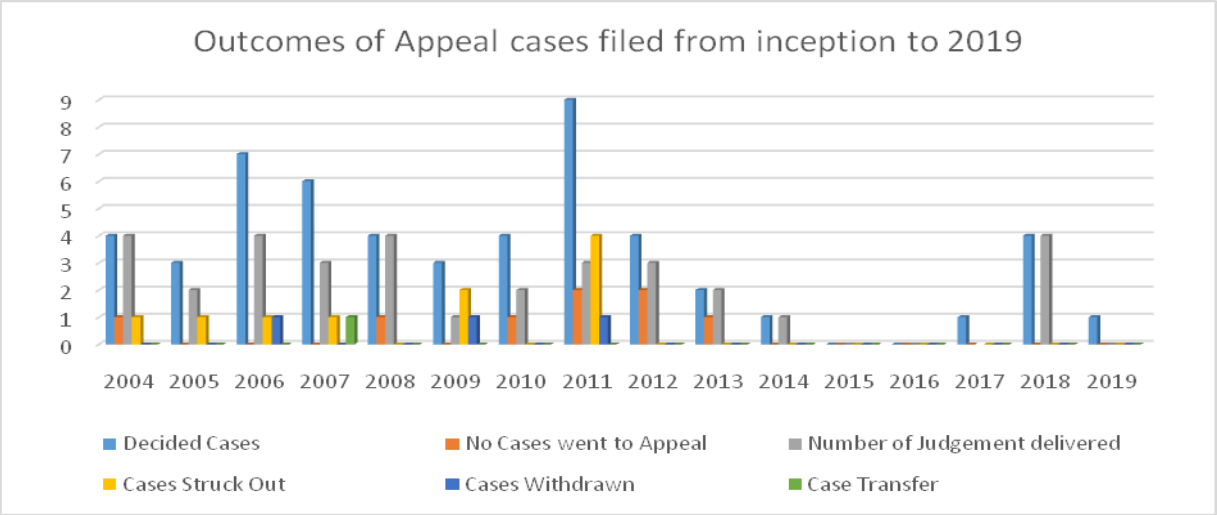

Fig 2

Figure 2represents cases that were entered for judgement and decided upon. Certain cases were struck out either because they were statute-barred, or because of preliminary objection, or for wants of jurisdiction, or due to notice of discontinuance. Other cases were withdrawn or transferred. The graph shows that more cases were decided in 2011.The highest number of judgements were delivered in 2004,2006, 2008 and 2018. Cases can be resolved (decided) pending delivery of judgement. It is significant to note that more cases were struck out in 2011. It is a show of the strength of recovery from the financial meltdown of 2008. It is also in the same year, and the one that followed, in 2012, which saw the highest number of referrals to the court of appeal[30].

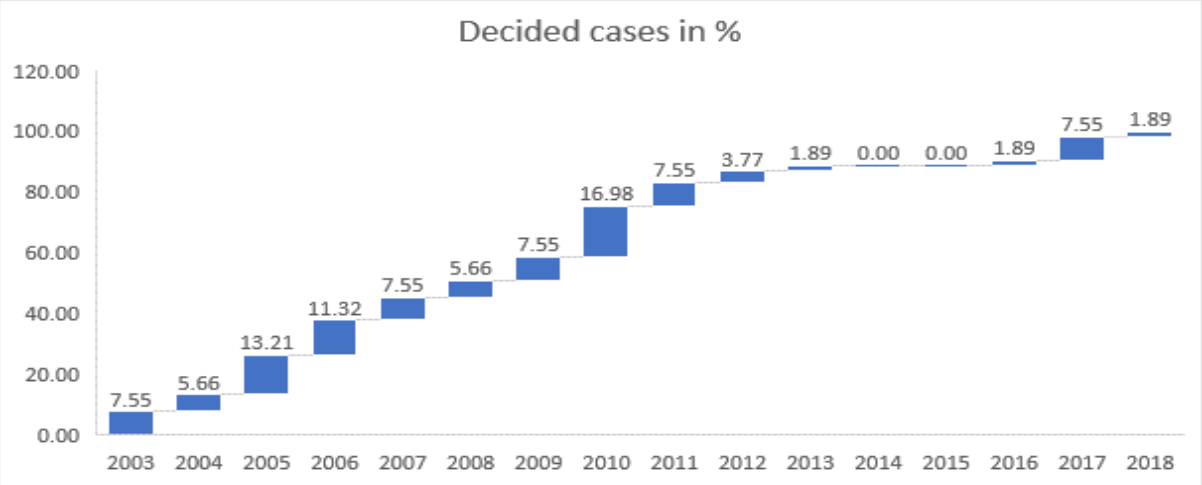

Fig 3

[30] These are interesting pointers to further research in this area.

Fig 3represents the number of cases decided by the Tribunal between 2004 and 2019 in percentage terms. It reveals more cases were decided in 2011 representing 16.98%, followed by 2006 with 13.21%. In 2007 11.32%, 2004, 2008, 2010, 2013 and 2018 7.55%. 2014 and 2017 1.89%, the least cases. No cases were decided in 2015 and 2016. The inconsistency in the number of decided cases is of concern to the Tribunal. The Tribunal has three months to conclude a case from start to finish. It is doubtful whether this laudable aim is matched by the resources at the disposal of the Tribunal[31].

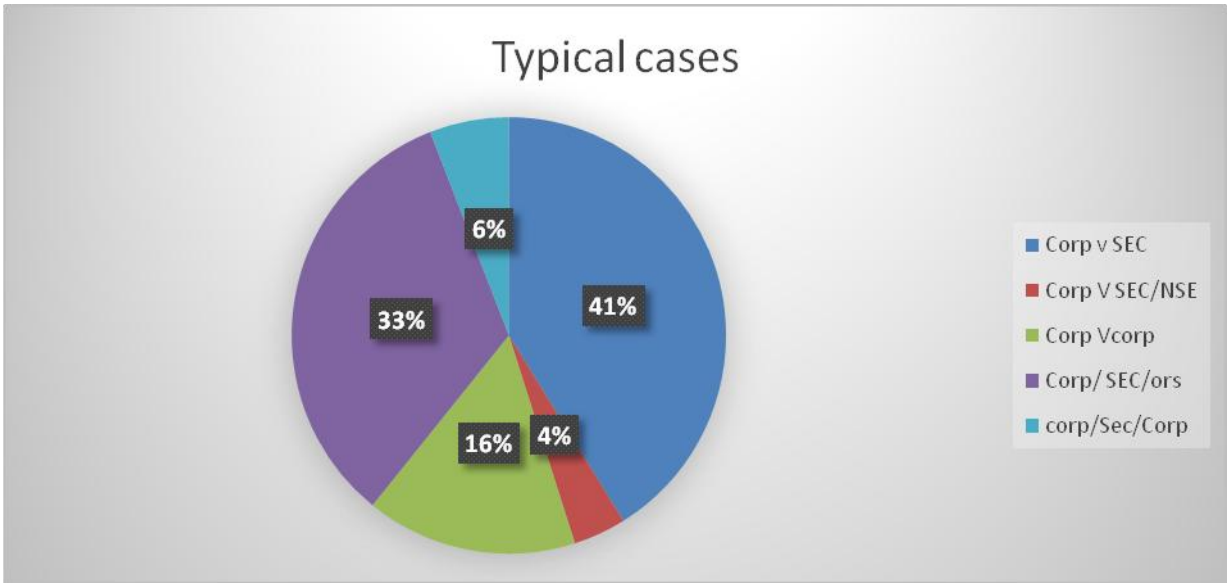

Fig 4

Fig 4representsthe typical cases brought before the IST in chunks between 2003 and 2018. The biggest chunk are cases between corporate individuals and SEC (Corp v SEC) (41%), followed by corporate entities and SEC (Corp v SEC/Ors) 33%, corporate individuals and other corporate individuals (Corp v Corp) 16%, corporate individuals and SEC/other corporate individuals (Corp v SEC/Corp) 6%, corporate individuals and SEC/NSE (Corp v SEC/NSE) 4%. Investors are encouraged to apply to the SEC's Administrative Proceedings Committee in the first instance for any market-related disputes so, it is not surprising that the bulk of the cases coming to the IST for adjudication emanate from this segment.

SPECIFIC CONTEXTS

Originating applications filed before the IST from inception and their positions (Abuja)

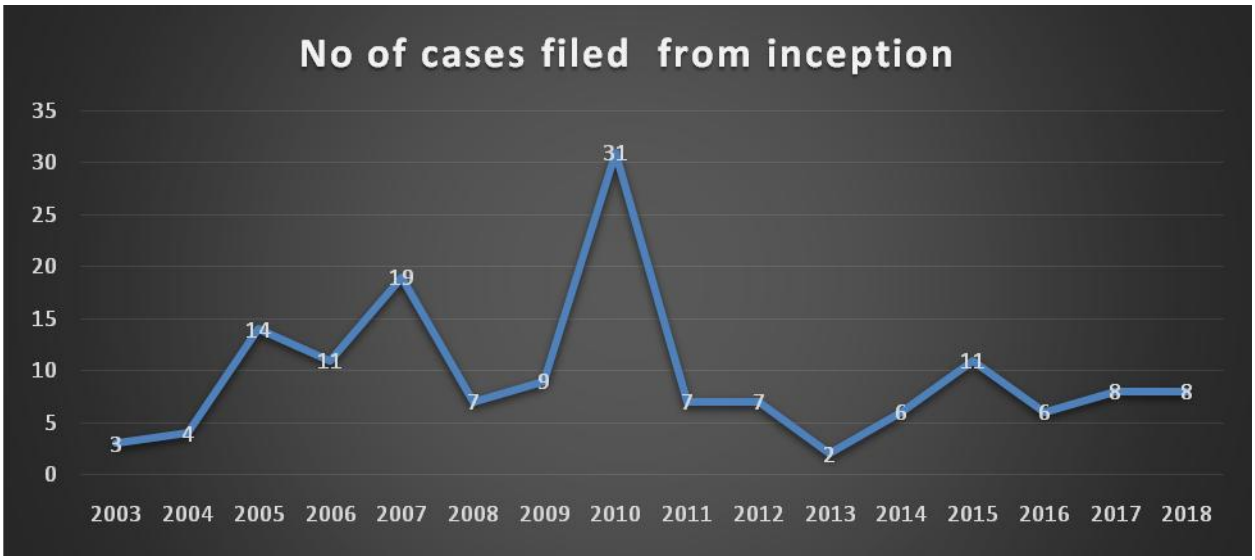

Fig 5

[31] Research findings show inadequate funding of the Tribunal in terms of personnel and equipment. It has only three full time lawyers and one part-time in the Abuja office. Majority of the cases are generated from Port Harcourt, Kano and Lagos.

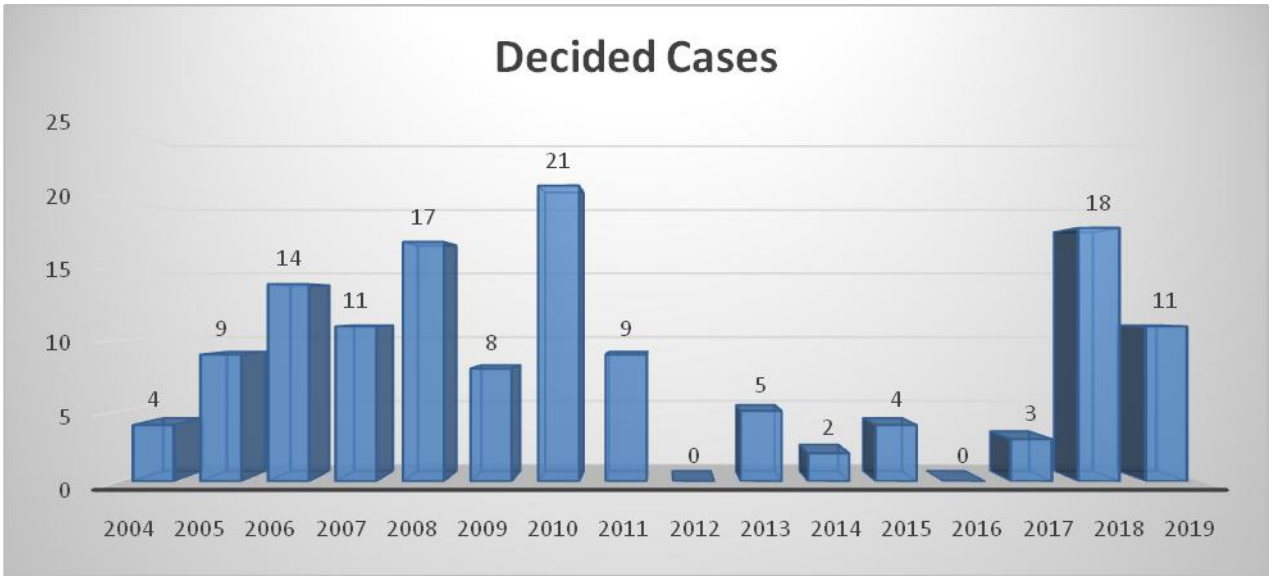

Fig 6

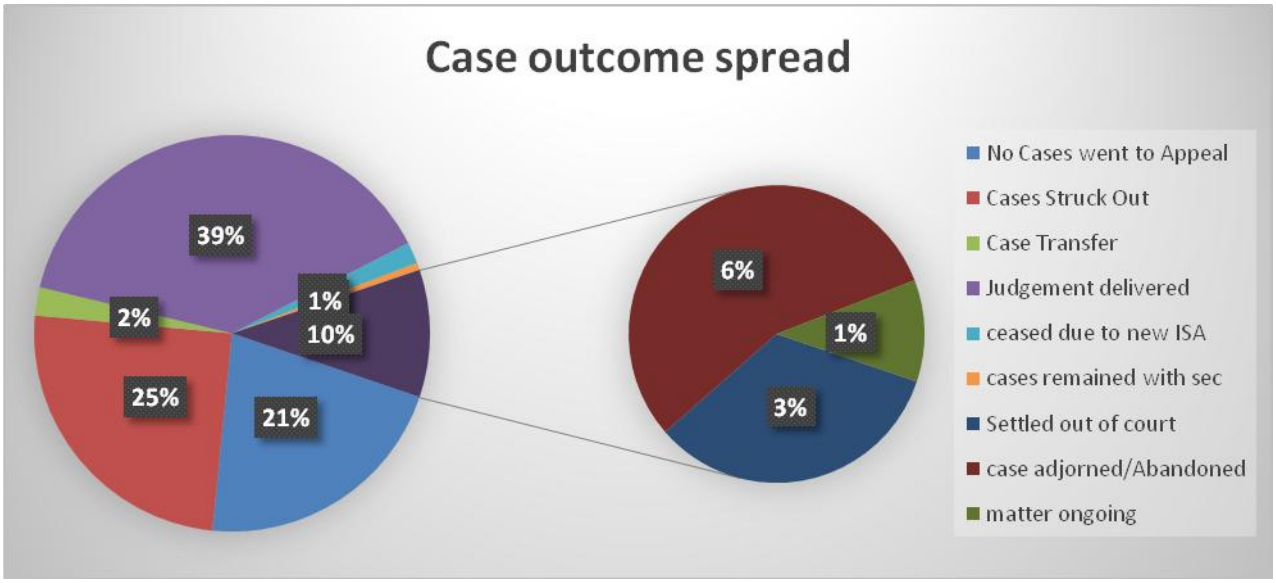

Fig 7

Figure 5, 6, and 7represent graphical demonstrations of the originating cases filed before IST from inception and their position since the filings.

Of the 153 cases filed, 2005had (14), 2006(11),2007 (19) as the global financial meltdown was gathering storm, 2008(8) at the onset of the financial crisis, 2009 (31) as the world was still reeling from the financial meltdown, 2011 and 2012 (7) each as stability was restored in the capital markets, 2015 (11)as Nigeria found itself in the middle of a pivotal Presidential elections, 2017 and 2018 (8) as the economy struggled to recover from a recession. The rest were significantly less.

Meanwhile, 67 cases (39%) had judgements delivered, 43 cases (25%) were struck out, 37cases (21%)moved onto appeal court, 10 cases (10%) were adjourned or abandoned, 6 cases (3%) were settled out of court while others represent cases reverted back to the SEC and others ceased due to the new ISA coming into operation.

Cases filed before IST at KANO Zonal Office

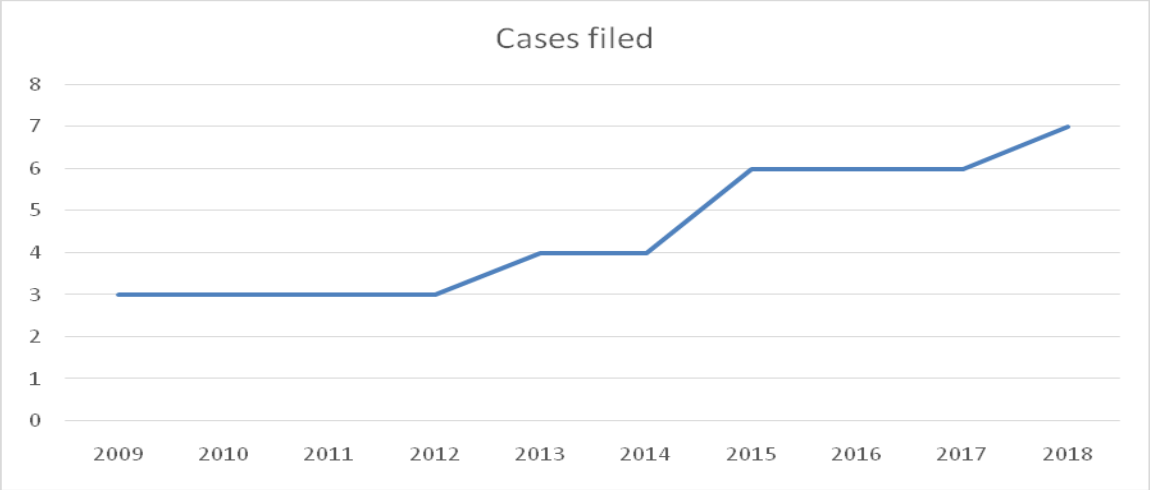

Fig 8

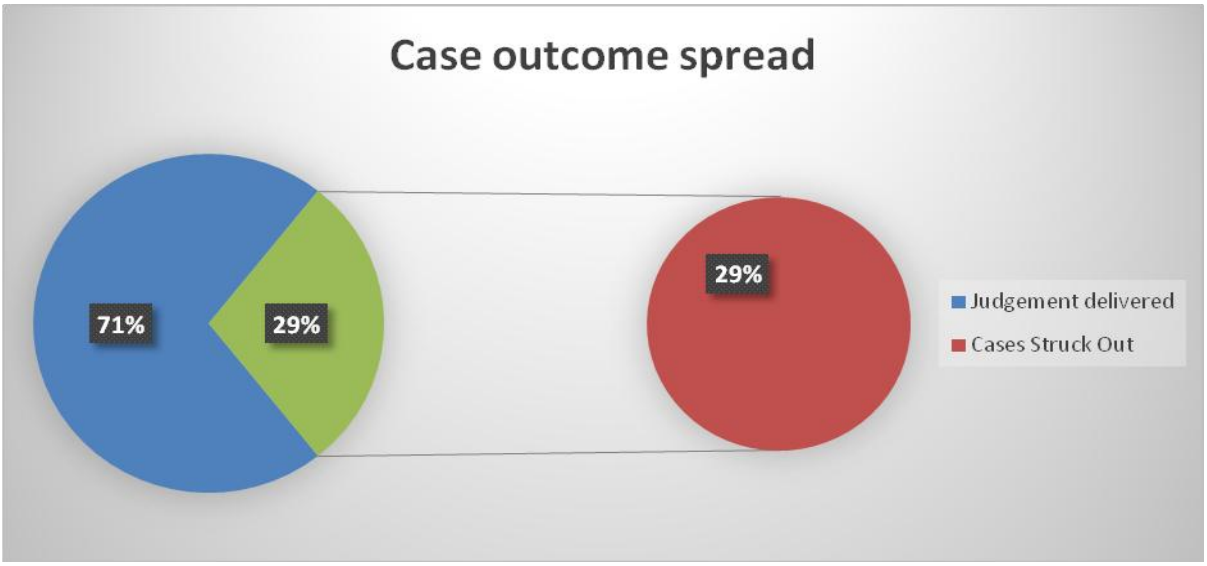

Fig 9

Fig 8 and 9 represent all the cases filed before IST at Kano branch between 2009 and 2018. The total number of cases filed were 7, out of which 3 were filed in 2009, 1 in 2013, 2 in 2015, and 1in 2018. Out of these cases, 6 were found to have "died off" while 1was struck out.

Cases filed with IST at Enugu Zonal office

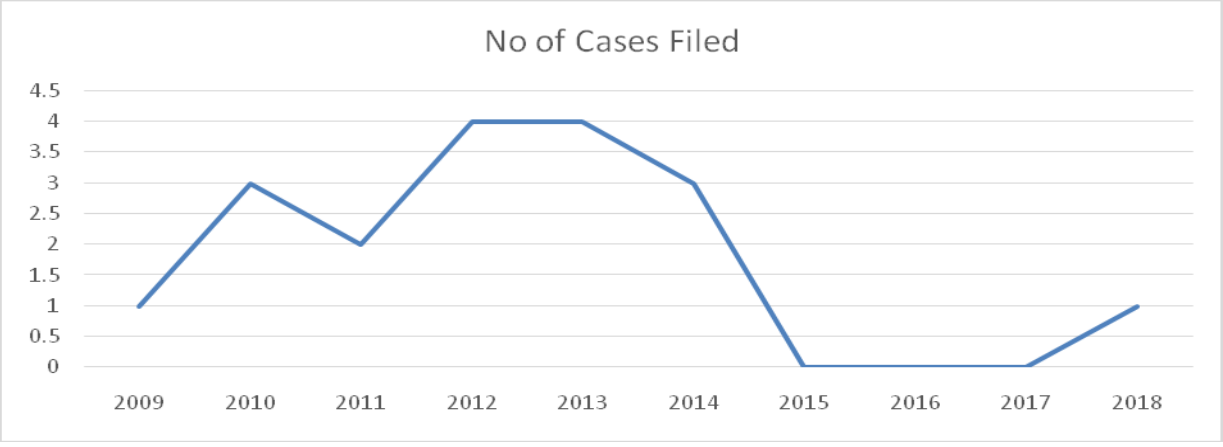

Fig 10

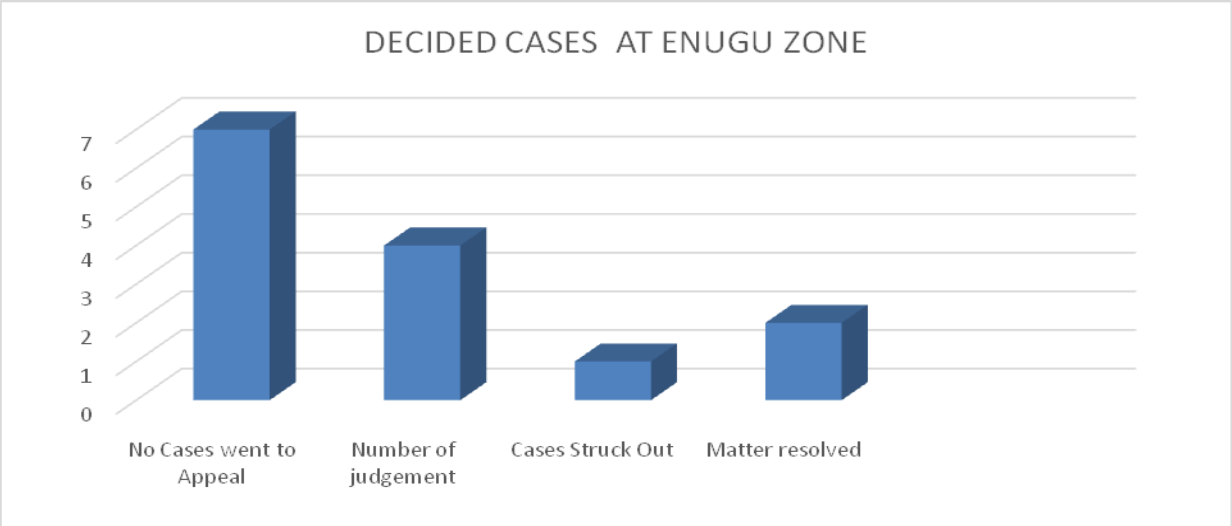

Fig 11

Fig 10 and fig 11 show the number of cases filed before IST at Enugu branch between 2009 and 2018. Fig 10 shows that 18 cases were filed within this period of which 4 cases each were filed in 2012 and 2013, 3 cases each in 2010 and 2014, 2 cases were filed in 2011 while 1 case each was filed on 2009 and 2018. It also shows that no cases were filed between 2015 and 2017. However, out of these cases, 7 cases went to appeal court, 4 of the cases were delivered, 1 case was strike out, 2of the cases were resolved outside court

Cases Filed Before IST in Lagos

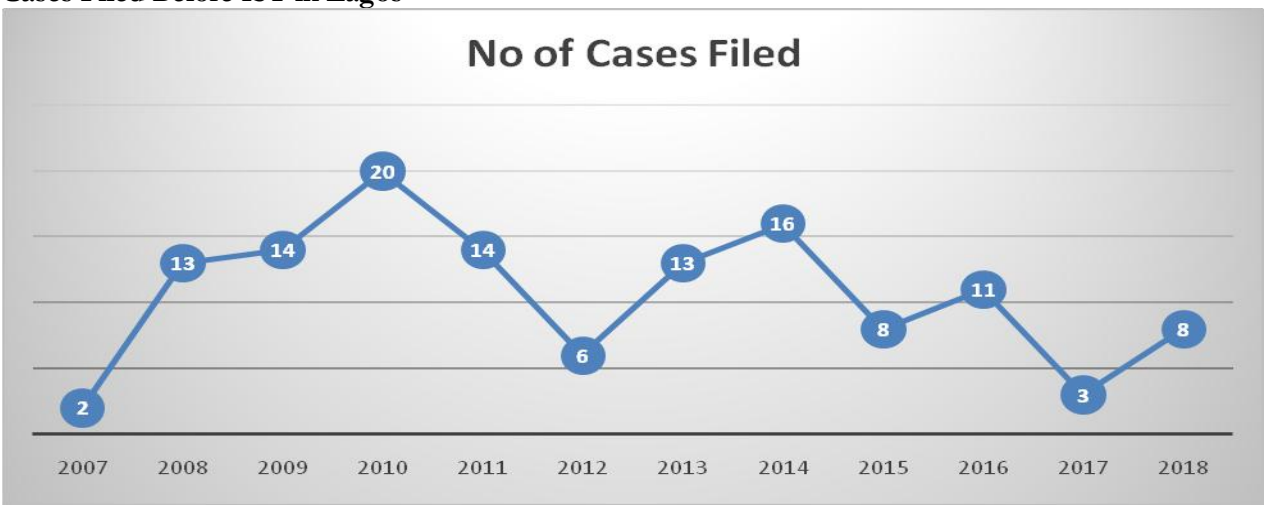

Fig 12

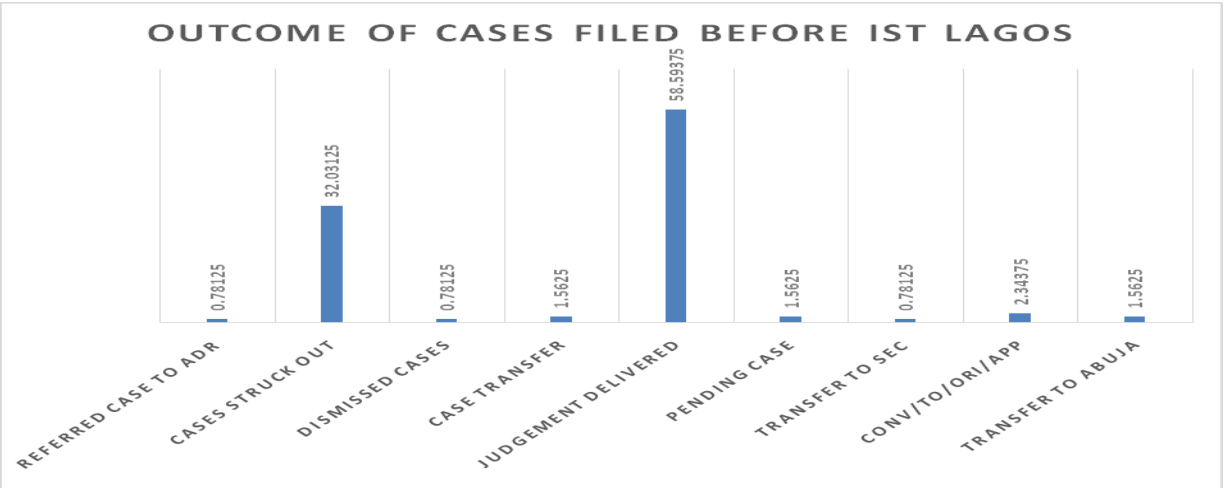

Fig 13

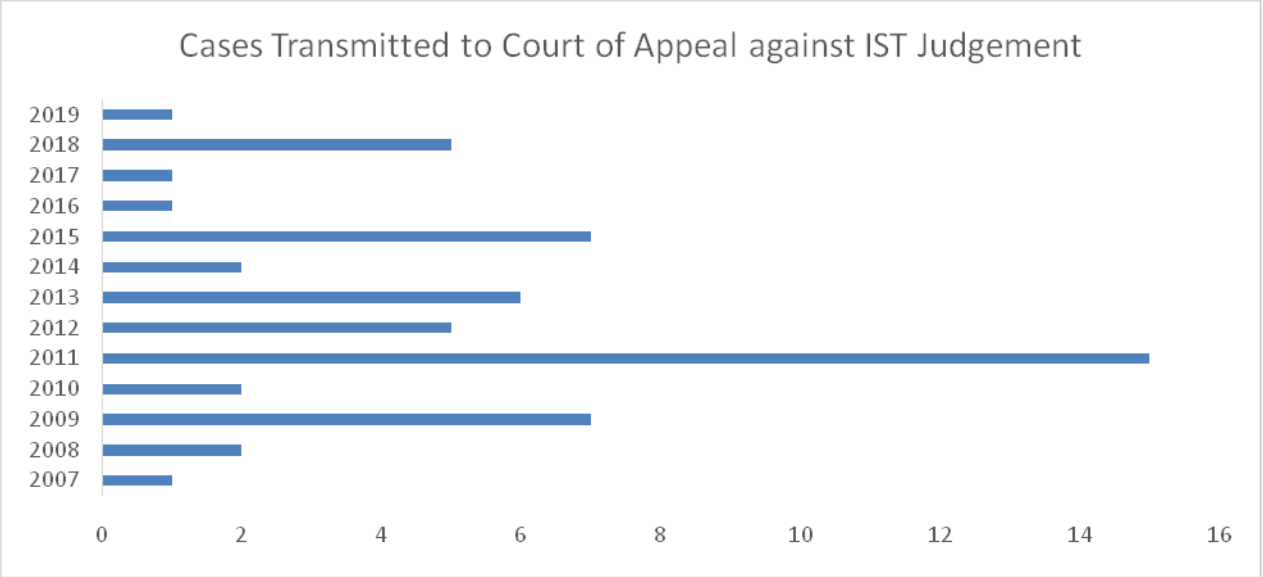

Fig 14

Fig 12 and 13represents the number cases before IST in Lagos between 2008 and 2019 and their outcomes. Out of the 128 cases, (2) were filled in 2007, (13) 2008, (14) 2009, (20) 2010, (14) 2011, (6) 2012, (13) 2013, (16) 2014, (8) 2015, (11) 2016, (3) 2017, and (8) 2018. The year 2010 continues to represent the busiest, followed by 2014, 2011 and 2013 respectively.

The figures further reveal that judgement was delivered in75cases (58.59%), 41 cases (32.03%) were struck out for a mixture of reasons: lack of jurisdiction, cases being withdrawn, discontinuance by application, lack of diligent prosecution, settlement out of court, referral to ADR, dismissals. Cases transferred to SEC (0.78%), transferred and pending cases (1.56%)

Fig 14represents cases transmitted to the court of appeal against the IST ruling between 2007 and 2019. It shows that out of 55, 15 were transmitted in 2011 alone, followed by 7 in 2009 and 2015, 2013 had 6 cases, 2012 and 2018 had 5 cases while the other years transmitted very few (1 or 2) cases[32]

OBSERVATIONS AND RECCOMENDATIONS

More cases were processed in Abuja and Lagos than at any other branches of the IST. This highlights the significance of both as the administrative and commercial capitals of the country respectively. It is also a pointer to where future resources for the Tribunal may be targeted. Enugu and Kano zonal offices had the fewest number of cases. This may be due to a number of factors, some of which include; a lack of awareness and a need for better outreach work by the Tribunal in those areas. It could also point to inadequate resources and a need for investment in human and material capital in the zones.

Overall, IST has made giant strides in resolving securities and investment-related disputes, the Tribunal has a lot to do – still. More than 50% of its decided cases do not proceed to appeal. Availability of ADR at the initial stage of a suit is also an important mechanism for decongesting the workload of the Tribunal. The Tribunal functions as a court of law to the extent that it is on a par with the High Court. It also has the power to order a freeze on accounts, and can refer cases to the police or other relevant agencies for further action. One of the cardinal objectives of the IST from inception was to act as a "one-stop-shop" for investors, and to avoid the usual quagmire involved in an adversarial suit in ordinary civil courts. Even though the Tribunal has been making steady progress along this path, the possibility of taking a case to the Court of Appeal, and ultimately the Supreme Court undercuts the one-stop-shop objective. Being a specialist Tribunal, there is a case for making the IST the final port of call for all investments and securities disputes, but this would obviate the constitutional guarantee of "fair hearing"[33]. The need to enhance business efficacy becomes juxtaposed with the right to fair hearing.

[32] It would be interesting to enquire into the ultimate outcome from the court process, including and up to the Supreme Court. Such cases going all the way are few and far between.

[33] See S. 36 Constitution of the Federal Republic of Nigeria, 1999.

In that situation, a pragmatic solution might be to have the appellate branch of the IST located inside the Court of Appeal, which will act as the final authority on the cases referred to it.

Having said that, there appears to be an inordinate stress on "fairness" on the modus operandi of the work of the IST[34]. On the face of it, this is laudable, but in some instances, fairness can only apply as long as considerations of business efficacy allows. For instance, if there is an investment dispute involving a local community vehemently opposed to an acquisition of land for oil exploration fearing negative externalities from such venture. Meanwhile, the IST is of the view that the wider macroeconomic interest of the market warrants the granting of the right to oil exploration. That would mean that fairness is subsumed to the greater economic good of the market. Or, if the Tribunal is faced with adjudicating on a share ownership in a particularly sensitive sector between a local interest with less capital and a foreign interest with an abundance of capital. Would the state's avowed commitment to attracting foreign direct investment into the Nigerian market outweigh any question of fairness to the local interest? The answer is most probably yes, especially on grounds of policy. So, of itself, fairness for the Tribunal should not be seen as an end but a means to an end.

In terms of resources, there will always be a good argument for more, but at a time of dwindling public expenditure, the market itself, could step forward to fill the void[35]. However, ethical considerations would not allow the market's financial contribution to increase to a level where the IST is beholden to the market for sustenance, lest it becomes a hostage to fortune. After all, the Tribunal is there to referee the work and activities of the market. Tied to the question of resources is the issue of enforcement of the Tribunal's judgements[36]. If the Tribunal is to act as the one-stop-shop that it was conceived to be from inception, it is imperative that it is able to enforce its own judgements. This is more so that the Chairman/CEO of the IST is considered the equivalent of a High Court judge.

The above point underlines a central theme of this paper, which is whether the Tribunal should be conceived as a court of law simpliciter, or rather, as merely a forum (albeit specialized) for settling market, investment and securities disputes. Research findings for this paper show that the judges and lawyers charged with operating the Tribunal see it as a court of law to a large extent. Whereas the authorities, and the Act which founded it stopped short of creating a full blown court in order to avoid turning it into another High Court, with the attendant bottlenecks this may create for market participants. This explains why it has been denied enforcement powers. For the Tribunal to function and cater for the interests of the investing public, it needs to be unshackled from the full architectural design of a court, but for its work to be taken seriously by all, it equally needs to be able to enforce its own judgements. It is an interesting dilemma which has been reflected in the data contained in this paper. Where the Tribunal has been minded to function as a mere forum for settling disputes, it has tended to deliver more judgements than where it has conceived itself as just another court of law[37]. The Chairman of this innovative Tribunal, therefore, has his work cut out for him. Striking a balance between business efficacy and the imperatives of justice is a moving goalpost, and a continuous burden on its principal officers.

[34] IST mission is "to provide efficient resolution of capital market disputes with fairness, flexibility and transparency". While its vision is "to be a world class capital market tribunal that is fair and transparent, dispensing justice without fair or favour".

[35] Nigeria capital markets contributes 0.01% of income from transactions on the floor of the NSE, plus Federal Government allocation of one billion naira (about USD2.5billion) annually. According to the senior personnel of the IST, this is a drop in the ocean judging by the needs of the Tribunal of around five billion naira (almost USD 13 million) annually.

[36] By virtue of the Investments and Securities Act 2007, the Tribunal has no enforcement powers. Enforcement therefore lies with the Federal High Court.

[37] Evidence from interviews and interaction with the personnel of the court as well as several observations of the Tribunal in session.