The Investment Treaty Arbitration Review

Sixth Edition

Editor
Barton Legum

The LawReviews

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PREFACE

This year's edition of *The Investment Treaty Arbitration Review*, like that of last year, goes to press under particular circumstances. Measures to contain the covid-19 pandemic around the world have confined many authors to quarters. Despite these constraints, the authors of this volume have delivered their chapters. The result is a new edition providing an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments over the past year.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to and the context behind those developments.

This sixth edition adds new topics to the *Review*, increasing its scope and utility to practitioners. It represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume under the difficult conditions that continue to prevail today.

Barton Legum
Dentons
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May 2021

Part VII

Multi-Lateral Treaties

Chapter 39

INVESTOR–STATE ARBITRATION AND THE 'NEXT GENERATION' OF INVESTMENT TREATIES

Olasupo Shasore SAN, Orji A Uka and Teni Akeju[1]

I INTRODUCTION

Investor–state arbitration has grown over the years to become one of the most dynamic and controversial features of international investment law. Across the world, most states have entered into at least one International Investment Agreement (IIA) to promote and protect investments within their territories. From its days of humble beginnings, when the first Bilateral Investment Treaty (BIT) was executed between West Germany and Pakistan in 1959,[2] to the present day, which is characterised by a multi-layered and multifaceted IIA regime featuring more than 3,300 known IIAs[3], investor–state arbitration has come a long way.

In line with one of the core objectives of IIAs, which is the promotion and protection of foreign investments, a mechanism emerged for the direct invocation of arbitration claims by investors against the host state.[4] That mechanism is investor–state dispute settlement (ISDS), the most widely used ISDS mechanism is investor–state arbitration[5]. In recent times, however, the ISDS system has attracted increasing backlash and become the subject of debate in the investment community and the general public, with many advocating that it be scrapped altogether.[6] The widespread sentiment among policymakers and states is that the adoption of investor–state arbitration as an ISDS mechanism has not succeeded in fostering a balance between promoting and facilitating investments or investor protection on the one hand, and ensuring responsible investment, safeguarding the right to regulate, or protecting the public interest of the host state on the other hand. The latest decisions from ISDS tribunals appear to provide statistical support to this sentiment.

A report published by the United Nations Commission on Trade and Development (UNCTAD) reveals that by the end of 2019, about 61 per cent of ISDS tribunal merit-based

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1 Olasupo Shasore SAN is a partner, Orji A Uka is a senior associate and Teni Akeju is an associate at Africa Law Practice NG & Company (ALP NG & Co).

2 Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Germany and Pakistan, 25 November 1959, 457 UNTS 24 (entered into force 28 November 1962) Available at https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280132bef.

3 https://investmentpolicy.unctad.org/international-investment-agreements.

4 McLachlan, C et al, (2017) International Investment Arbitration: Substantive Principles (2nd edn) Oxford: Oxford University Press, p. 44.

5 As of July 2020, there had been over 1,000 known investor–state arbitration cases. UNCTAD, Investment Dispute Settlement Navigator: full data release as of 31 July 2020 (Excel format), available at https://investmentpolicy.unctad.org/investment-dispute-settlement.

6 As discussed below, the European Union (EU) constitutes probably the biggest threat to the ISDS system as we know it today.

decisions were rendered in favour of investors.[7] This has undoubtedly come at great financial and reputational cost to host states, especially developing countries, with the amounts awarded by some tribunals sometimes running into billions of dollars. It is noteworthy that these decisions were issued on the application and interpretation of the class of IIAs now commonly referred to as 'old-generation' IIAs.[8]

Old-generation BITs:

a provided investors with a right to compensation for a wide range of regulatory conduct based on very vague treaty language;

b obligated host states to compensate investors for direct or indirect expropriation;

c entitled investors to free repatriation of their profits and other capital out of host states;

d entitled the investors to bring a claim for damage occasioned by war, insurrection or other armed conflicts;

e obliged the host states to treat the investors in the same way that they did nationals of the host state (national treatment) or investors of other third countries (most favoured nation treatment); and

f almost always included the vague provision mandating host states to provide investors with fair and equitable treatment (FET).[9]

From the host states' standpoint, these old-generation IIAs have ultimately proved inadequate to the extent that they paid scant regard to factors such as environmental or sustainable development principles, the need for the protection of health and safety, labour rights, etc. This perceived imbalance, coupled with the steadily increasing number of ISDS cases, that have seen tribunals broadly interpreting and applying the IIA provisions, sometimes in an unjustifiably inconsistent manner, has led states to introduce new provisions that aim to address the problems noted in previous IIAs.

The chapter analyses the current framework regulating investor–state arbitration. The chapter begins with a consideration of the areas of key stakeholders' concerns with the ISDS regime by highlighting select ISDS decisions around topical areas in need of reform. Next, the chapter undertakes an overview of select BIT programmes. Thereafter, we highlight recent reform measures aimed enhancing confidence in the stability of the investment environment. These reforms range from procedural matters such as exhaustion of local dispute resolution framework as a prerequisite to investor–state arbitration to substantive matters such as the host state's rights to legislate freely around FET requirements, etc., subject of course to public international law standards. The chapter concludes with policy recommendations for policymakers in future IIAs.

7 UNCTAD, IIA Issues Note, January 2021 – Review of ISDS Decisions in 2019: Selected IIA Reform Issues. Available online at https://investmentpolicy.unctad.org/publications/1241/review-of-isds-decisions-in-2019-selected-iia-reform-issues.

8 UNCTAD defines old-generation treaties as those concluded between 1959 and 2011, prior to the launch of UNCTAD's Investment Policy Framework for Sustainable Development in 2012 (World Investment Report 2012). See UNCTAD 2020 'International Investment Agreements Reform Accelerator: a new tool to facilitate investment treaty reform' Available online at https://investmentpolicy.unctad.org/news/hub/1662/20201112-unctad-s-iia-reform-accelerator---a-new-tool-to-facilitate-investment-treaty-reform.

9 Poulsen, LNS (2017) *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries*, Cambridge: Cambridge University Press.

II WORKINGS OF INVESTOR–STATE ARBITRATION

Unlike its predecessor, which required the intervention of the home state of the foreign investor before a claim can be brought against a host state, the modern ISDS mechanism does not require such intervention as most IIAs, especially the BITs, contain provisions that allow the investors direct right to commence investor–state arbitration against a host state. Similarly, there is no requirement for a prior contractual relationship between the investor and the host state before such claim can be brought.[10] This has been suggestively described as 'arbitration without privity'.[11] All that is required is a unilateral standing offer to arbitrate, on the part of the host state, typically contained in an investment treaty or a national investment legislation and the commencement of a claim by an investor constitutes an acceptance of such offer, provided that the claim meets the jurisdiction and admissibility criteria set by the ICSID Convention[12] and the relevant investment treaty. A claim that satisfies the twin criteria is then determined by a tribunal of private practitioners whose decision is binding on the states, with a recourse to challenge the decision on limited grounds.

III INCONSISTENCY AND INCOHERENCE IN ISDS DECISIONS

As the UNCITRAL Working Group III captures in its 2018 Notes, there have been widespread concerns regarding the consistency, coherence, predictability and correctness of decisions made by ISDS arbitral tribunals.[13] The inconsistent findings have manifested themselves in three broad scenarios.

First, tribunals have reached different conclusions about the same standards in the same investment treaty or about the same procedural issues, including where the facts were similar, or with such differences that are not sufficient to justify a different outcome. Second, ISDS tribunals under different investment treaties have reached different conclusions about disputes involving the same measure, related parties, and similar treaty standards or applicable legal rules. Third, arbitral tribunals organised under the same or different investment treaties have dealt with disputes involving unrelated parties, but similar facts and have reached opposite interpretations of the applicable legal rules.[14]

10 In *Interocean Oil Development Company & Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Award 6 October 2020, the tribunal overruled the objection of Nigeria and held that Section 26(3) of the Nigerian Investment Protection Commission (NIPC) Act constitutes a standing offer to arbitrate under the ICSID Rules.

11 Paulsson, J. 'Arbitration without Privity' (1995) *ICSID Review: Foreign Investment Law Journal* Vol 10 No. 2.

12 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

13 United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-sixth session Vienna, 29 October–2 November 2018 Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters. Available at https://uncitral.un.org/en/working_groups/3/investor-state. See also UNCTAD, IIA Issues Note No.2, June 2013 'Reform of investor-state dispute settlement: In search of a roadmap'. Available online at https://investmentpolicy.unctad.org/publications/62/iia-issues-note-reform-of-investor-state-dispute-settlement-in-search-of-a-roadmap.

14 ibid.

A prominent illustration of inconsistency in ISDS decisions is the often-cited *CME Republic BV v. Czech Republic* decision.[15] In these two cases, a US entrepreneur, Ron Lauder brought a claim under the US–Czech Republic BIT 1991 against the Czech Republic alleging that his investment in the Czech television channel, TV Nova had been expropriated. The investment was exercised through a Dutch investment company, CME Czech Republic BVE (CME), over which he had control. CME brought its own claim under the Dutch–Czech Republic BIT 1991. The tribunals comprised different arbitrators in each case. However, because the allegations against the Czech Republic were substantially the same, the evidence presented to the two tribunals were also substantially the same. In the end, the two tribunals delivered their awards within 10 days of each other but arrived at completely opposite outcomes, a dismissal of the claims in one case and an award of damages in the other. A similar example can be found in the SGS cases.[16]

These areas of inconsistency include questions such as the jurisdiction and admissibility of claims including the interpretations of the outer limits of subject-matter jurisdiction under Article 25(1) of the ICSID Convention, whether the contribution to the host state's economic development is part of the criteria to be considered in the definition of an investment,[17] whether portfolio investments are protected[18] and whether the effective control of a claimant over a relevant entity must be merely legal or also factual for the purposes of determining a claimant's right to bring an investment claim.[19]

15 *Lauder v. Czech Republic*, Ad hoc UNCITRAL Arbitration Rules, Final Award, 3 September 2001 and *CME Czech Republic B.V. v. Czech Republic*, Ad hoc UNCITRAL Arbitration Rules, Partial Award, 13 September 2001.

16 *Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, *Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004; and *Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012.

17 See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007 and *Société Générale de Surveillance S.A. v. The Republic of Paraguay* (see footnote 16); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012.

18 *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997; *Abaclat and Others v. The Republic of Argentina*, ICSID Case No. ARB/07/5 (formerly *Giovanna Beccara and others v. The Argentine Republic*), Decision on Jurisdiction and Admissibility, 4 August 2011; *Ambiente Ufficio S.p.A. and others v. The Republic of Argentina*, ICSID Case No. ARB/08/9 (formerly *Giordano Alpi and others v. Argentine Republic*), Decision on Jurisdiction and Admissibility, 8 February 2013; *Giovanni Alemanni and Others v. The Republic of Argentina*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014; and *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015.

19 *Banro American Resources, Inc. & Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/98/7, Award, 1 September 2000; *Caratube International Oil Company LLP and Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017 paras. 611–615; *TSA Spectrum de Argentina, S.A. v. The Republic of Argentina*, ICSID Case No. ARB/05/5, Award, 19 December 2008 at paras. 134–162 and *Consortium Groupement LESI—DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005.

Other major areas of divergence in decisions are in respect of the interpretation of cooling-off periods before the commencement of investor–state arbitrations;[20] the exhaustion of local remedies;[21] the correct interpretation to the FET standard;[22] the application of the customary international law doctrine of necessity and treaty-based defence of essential security;[23] the umbrella clauses;[24] and the most favoured nation (MFN) treatment provisions.[25]

IV ISDS REFORMS

Understandably, this lack of consistency and coherence, together with other concerns such as the complexity of ISDS decisions, the length of time involved, the costly procedures, the partiality of arbitrators, the absence of an appellate process comparable to the World Trade Organization, the unsatisfactory nature of the review committee process, etc., has provided ammunition for critics of the ISDS mechanism and led to serious concerns on the part of states that these inconsistencies negatively affect the credibility, reliability, effectiveness and predictability of the ISDS regime. The perceived limits to the jurisdiction of international tribunals to hear state counterclaims and the perception that the institution of investment

20 *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016; *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014; *Bayindir Instaat Turizm Ticaret Ve Sanayi AS v. Pakistan* (Decision on Jurisdiction) ICSID Case No. ARB/03/29 (2005); *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010 and *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2 Award on the Respondent's Application Under Rule 41(5) of the ICSID Arbitration Rules 1 November 2019.

21 See *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008 subsequently annulled by the ad hoc Committee dated 14 June 2010.

22 *S. D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 at paras. 262–263; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001 at para. 111.

23 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, para. 150; *Sempra Energy International v. The Republic of Argentina*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, paras 186–207 and *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Republic of Argentina*), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 406 et seq.

24 *SGS v. Pakistan* (see footnote 16); *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009; and *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Republic of Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012.

25 *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005; *Gas Natural SDG, S.A. v. The Republic of Argentina*, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, October 2007; *Impregilo S.p.A. v. The Republic of Argentina*, ICSID Case No. ARB/07/17, Award, 21 June 2011; and *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012.

arbitration is limited to a one-sided presentation of claims, rather than a mutual airing and balancing of claims by both parties, have also led to broader criticism of the ISDS system.[26] The concerns have crystallised in the launch of the most comprehensive reform of the ISDS mechanism.

V REFORM OF THE ISDS MECHANISM

i Multilateral reform endeavours

Since 2017, the United Nations Commission on International Trade Law (UNCITRAL) has been at the forefront of multilateral efforts to reform the ISDS system to promote a fair and inclusive system to resolve investment related disputes. At its 50th session in July 2017, UNCITRAL issued a mandate to the Working Group III to (1) identify and consider concerns regarding ISDS, (2) consider whether reform is desirable and, if so, (3) develop any relevant solutions to be recommended to the Commission. The reform discussions were divided into those three phases.

During Phase I of the reforms, countries built consensus on the need for reform, identified reform areas and approaches, reviewed their IIA networks, developed new model treaties and started to negotiate new, more modern IIAs.[27] Thereafter, UNCTAD proposed 10 policy options for Phase II of IIA reform as follows: jointly interpreting treaty provisions; amending treaty provisions; replacing 'outdated' treaties; consolidating the IIA network; managing relationships between coexisting treaties; referencing global standards; engaging multilaterally; abandoning unratified old treaties; terminating existing old treaties; and withdrawing from multilateral treaties.[28] The multilateral reform discussions are currently at Phase III of recommending reform measures UNICTRAL.[29]

ii The European Union

The commitment of the EU to the replacement of the ISDS regime emerged following objections by European non-governmental organisations and other pressure groups during the negotiation of the Transatlantic Trade and Investment Partnership (TTIP) with the United States.

In a 'Concept Paper', issued in May 2015, the European Commission proposed that Europe 'should pursue the creation of one permanent court' that would apply to multiple agreements and between different trading partners and with a view ultimately to multilateralise the court either as a self-standing international body or by embedding it into an existing

26 Kalicki, JE, Counterclaims by States in Investment Arbitration, International Institute for Sustainable Development Investment Treaty News, available at https://www.iisd.org/itn/en/2013/01/14/counterclaims-by-states-in-investment-arbitration-2/.

27 UNCTAD, IIA Issues Note June 2017 'Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties'. Available at https://investmentpolicy.unctad.org/publications/173/iia-issues-note-phase-2-of-iia-reform.

28 ibid.

29 Three documents have recently been issued by the UNCITRAL Secretariat which summarise the proposals and give reform directions: (1) Code of Conduct of Adjudicators; (2) appellate mechanism and enforcement; and (3) selection and appointment of ISDS tribunal members. These documents were discussed at the latest session of the Working Group III, which took place in Vienna on 8–12 February 2021.

multilateral organisation.[30] Later that year, the European Parliament, during the negotiations for the TTIP, instructed the European Commission to pursue the replacement of investor–state arbitration by a new system in which disputes would be decided in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism.[31] By November 2015, a formal proposal for an investment court system had been prepared and presented to the United States.[32]

In 2016–2017, the European Commission began negotiations for a convention to establish a Multilateral Investment Court (MIC) on behalf of the EU and its Member States. The EU proposal has since been modified with the MIC momentarily replaced with a new system, called the Investment Court System (ICS), with judges appointed by the two parties to the Free Trade Agreement and public oversight.[33] The European Commission has already started including this bilateral ICS provision in recently negotiated international investment agreements, including those with Canada, Mexico, Singapore and Vietnam;[34] the agreements also include provisions anticipating the transition from the bilateral ICS to a permanent MIC. The European Court of Justice (ECJ) has also issued an Opinion confirming that the investor–state dispute resolution mechanism (ICS) set up by the Canada–EU Comprehensive Economic and Trade Agreement (CETA) is compatible with EU primary law.[35] On 6 March 2018, the ECJ in *Slowakische Republik v. Achmea BV* stated that the dispute resolution clause contained in Article 8 of the Netherlands–Slovakia BIT 1991 is not compatible with EU law.[36] Following this decision, a majority of EU Member States on 5 May 2020 signed an agreement to terminate all bilateral investment treaties concluded between them.[37]

30 See European Commission Concept Paper, 'Investment in TTIP and beyond – the path for reform: enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court' (5 May 2015), at 11-12. Available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

31 www.europarl.europa.eu/legislative-train/theme-reasonable-and-balanced-trade-agreement-with-the-united-states/file-ttip-investment-court-system-for-ttip.

32 See Proposal for Investment Protection and Resolution of Investment Disputes (12 November 2015) (EU TTIP Proposal), http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf.

33 Cecilia Malmström, Proposing an Investment Court System, European Commission, The Commissioners Blog (16 September 2015), https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en. See also EC press release, 'Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations', Brussels (16 September 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

34 The EU–Canada Comprehensive Economic and Trade Agreement (CETA), the EU–Vietnam free trade agreement (FTA) and the EU–Singapore FTA.

35 http://curia.europa.eu/juris/document/document.jsf?docid=213502&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=929830

36 *Slowakische Republik v. Achmea BV*, Case C-284/16 (Opinion 01/17).

37 'Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union', available at https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf.

iii US–Mexico–Canada Trade Agreement (USMCA)

The Agreement between the United States of America, the United Mexican States and Canada (USMCA) signed at the G20 summit in Buenos Aires, Argentina,[38] which came into force on 1 July 2020, replaced the North American Free Trade Agreement.

From an ISDS perspective, the USMCA makes substantial changes to the ISDS mechanism under NAFTA. Indeed, Chapter 14 of USMCA, which replaces Chapter 11 of NAFTA, represents a radical change to the North American ISDS landscape.[39] The most significant development of the USMCA entry into force for the ISDS mechanism is that Canada has withdrawn entirely from ISDS under the USMCA. Chapter 14 of USMCA provides that Canada's consent to ISDS for legacy investment claims expires three years after NAFTA's termination. New ISDS claims under Chapter 14 are restricted to claims by US and Mexican investors against an 'Annex Party'; that is, the parties to Annex 14-D, being only the United States and Mexico. Annex 14-D further restricts the types of claims that may be submitted to ISDS. For instance, claims for direct expropriation may be submitted to ISDS but claims for indirect expropriation may not. Chapter 14 of USMCA also contains important changes as compared to Chapter 11 of NAFTA and significantly restricts the protections offered to US and Mexican investors going forward.[40]

With the wave of reforms sweeping through the international investment firmament, with developed countries, who incidentally have been the biggest recipients of the regime, firmly at the centre, it becomes pertinent to examine the place of developing countries who have largely been at the receiving end of adverse and often-times humongous ISDS decisions.

VI DEVELOPING COUNTRIES AND ISDS

Before 2020, there had been only three known ISDS cases against Nigeria. The first two of those cases[41] were ultimately settled with the terms not made public. The third case[42] was heard on the merits and was subsequently decided in Nigeria's favour. Nigeria has not been on the receiving end of any known adverse ISDS decision.[43] Other developing countries do not share Nigeria's fortune.

38 *The Washington Post*, 29 January 2020 'Trump signs USMCA, revamping North American trade rules.' Available at https://www.washingtonpost.com/business/2020/01/29/trump-usmca/.

39 Valasek, MJ et al., October 2018, 'Major changes for investor-state dispute settlement in new United States-Mexico-Canada Agreement' Available at https://www.nortonrosefulbright.com/en/knowledge/publications/91d41adf/major-changes-for-investor-state-dispute-settlement-in-new-united-states-mexico-canada-agreement.

40 ibid.

41 *Guadalupe Gas Products Corporation v. Nigeria* (ICSID Case No. ARB/78/1) and *Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria* (ICSID Case No. ARB/07/18).

42 *Interocean Oil Development Company & Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Award 6 October 2020. Since this award was published, there have, however, been two new ICSID claims against Nigeria in *Eni International B.V., Eni Oil Holdings B.V. and Nigerian Agip Exploration Limited v. Federal Republic of Nigeria* (ICSID Case No. ARB/20/41) and *Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited v. Federal Republic of Nigeria* (ICSID Case No. ARB/21/7) registered in 2020 and 2021, respectively.

43 There is, however, the now infamous decision in *P&ID Ltd v. Nigeria*, the enforcement of which Nigeria is making spirited efforts to resist. This is, however, an international commercial arbitration and not an investment treaty claim.

In 2012, South Africa announced that it was terminating BITs with Belgium and Luxembourg and that they further intended to denounce other treaties with other European countries.[44] It was not a decision that South Africa took lightly but only after becoming the subject of huge ISDS claims.

Following the end of the apartheid policy and the election of the new African National Congress (ANC) government, it launched a massive programme to attract needed foreign capital inflow. Unsurprisingly, this included the execution of BITs and other IIAs. As recounted by Poulssen,[45] the first investment treaty claim against South Africa was brought by a Swiss farmer whose farm had been looted and destroyed during disturbances that followed a land-claims process by blacks and other historically disadvantaged South Africans seeking restitution for lands compulsorily acquired during apartheid. The process was part of South Africa's constitutionally based Black Economic Empowerment (BEE) which mandated the redistribution efforts to mend the vast economic equalities that apartheid occasioned. However, South Africa was found to have breached its obligation under the Swiss–South Africa BIT 1997 to provide full protection and security to Swiss investors and Swiss-owned investments within its territory. Notably, the tribunal awarded the sum of US$1 million to the investor.

It was the *Foresti v. South Africa* claim[46] that brought the implications of the BITs South Africa entered into to the forefront. Here, the investors claimed the sum of US$350 million in compensation against South Africa for enacting the Mineral and Petroleum Resources Development Act to regulate the country's mining industry, which the claimants argued breached several undertakings in the Italy–South Africa BIT including the FET standard and the National Treatment provisions. Ultimately, the claimants withdrew their claim in 2010 and South Africa was awarded the sum of €400,000 in fees and costs but not after the South African mining regulators had made extensive concessions to the claimants and after South Africa had spent almost US$8 million on legal fees and costs.

Apart from South Africa, a host of other African countries have been hit by ISDS claims beginning with the first ever ICSID claim against an Africa state in 1972[47] to the latest one brought by a subsidiary of Canada's First Quantum Minerals against Mauritania which was registered on 4 March 2021.[48]

In an October 2019 report,[49] the authors reveal that by the end of August 2019, African states had been hit by a total of 106 known investment treaty arbitration claims, representing 11 per cent of all known investor–state disputes worldwide. The report further highlights that so far, 28 African countries have been sued by investors at international arbitration tribunals, with just three countries alone – Egypt, Libya and Algeria – accounting for 51 per cent of the total number of claims against African states. In terms of numbers, the total claims against African states since 1993 add up to US$55.5 billion, with investors in 36 claims demanding at least US$100 million, and US$1 billion or more on 10 occasions. Both Algeria and Egypt have received claims for US$15 billion each.

44 Investment Treaty News 'South Africa begins withdrawing from EU-member BITs' Available at https://www.iisd.org/itn/en/2012/10/30/news-in-brief-9/.

45 Poulsen (see footnote 9), pp. 162–191.

46 *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (ICSID Case No. ARB(AF)/07/1).

47 *Holiday Inns S.A. and others v. Morocco* (ICSID Case No. ARB/72/1).

48 *Mauritanian Copper Mines S.A. v. Islamic Republic of Mauritania* (ICSID Case No. ARB/21/9).

49 Muller, B & Olivet C, October 2019, 'ISDS in Numbers: Impacts of investment arbitration against African States' Transnational Institute. Available at https://www.tni.org/en/isdsafrica.

A further reading of the report reveals that African states have been ordered (by ISDS tribunals) or agreed (as a result of a settlement) to pay investors US$4.6 billion to date, with the amounts paid in one-third of the cases remaining unknown, but likely to be higher. The highest amount ever paid by an African country as a result of a single investor claim was the US$2 billion paid by Egypt to Unión Fenosa. To put these figures in perspective, compensation paid by African states is equivalent to almost three times the GDP of The Gambia, or twice that of the Central African Republic in 2018.

Other developing countries in Latin America, especially Argentina and Venezuela, have also been at the receiving end of massive ISDS decisions that contributed to a near collapse of their economies. These countries have also reacted differently. Bolivia, Ecuador and Venezuela, for instance, withdrew from the ICSID Convention in 2007, 2010 and 2012, respectively. In 2008, Ecuador terminated its BITs with several countries and in 2010, Ecuador's Constitutional Court declared the arbitration provisions of six of its BITs to be inconsistent with the country's constitution.[50]

If the old-generation BITs had proved a spectacular success in terms of attractive investments to host states, it would have been easy to overlook all these and advocate for the execution of more BITs, but as Poulsen strenuously argued with eye-opening country-specific evidence, most developing countries had entered into these BITs in less than rational ways and had largely assumed, with little empirical basis, the economic benefits of entering into these BITs while grossly underestimating the legal costs of the claims arising from such treaty breaches.[51]

VII MOVE TOWARDS NEXT-GENERATION INVESTMENT TREATIES

The ISDS decisions rendered on the basis of the old-generation IIAs and the widespread concerns with the ISDS mechanism have fostered reforms and a move towards new-generation IIAs. Unlike the old-generation treaties characterised as short, bare, imprecise, and inconsistent, the next-generation investment treaties have, in line with UNCTAD's Road Map for IIA Reform,[52] put in place safeguards to preserve the state's right to regulate, ensure responsible investment and enhance systemic consistency in dispute resolution. Thankfully, African and other developing countries have not been completely left out.

In the same way that African countries contributed significantly to the establishment of the old order, they are beginning to modify some of the traditional models of BITs while also introducing a new generation of BITs that aim to find a better balance between the interests of the state and those of the investors.[53] Indicative examples are considered below.

50 Mestral, Armand de November 2017 'The Impact of Investor-state Arbitration on Developing Countries' Available at https://www.cigionline.org/articles/impact-investor-state-arbitration-developing-countries.

51 Poulsen (see footnote 9). For a more detailed exposition of the experiences of Africa states at international arbitration, see Asouzu, AA (2001) *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*. Cambridge: Cambridge University Press.

52 UNCTAD (2015). Investment Policy Framework for Sustainable Development. New York and Geneva: United Nations.

53 Le Bars, B & Le Bars, L. 'The Evolution of Investment Arbitration in Africa' *Global Arbitration Review* 11, May 2018, available at https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2018/article/the-evolution-of-investment-arbitration-in-africa.

i South Africa

Following the negative publicity generated by the *Foresti v. South Africa* claim, South Africa started a thorough review of its BITs that culminated in the decision to refrain from signing new IIAs with investor–state arbitration clauses, a renegotiation of existing BITs and the termination of some of its BITs, especially with EU countries, as well as the passage of the Promotion and Protection of Investment Act in 2015.

With the decision of South Africa to terminate its BITs with EU countries, it also took steps to implement subsequent treaties that addressed the shortcomings of old-generation investment treaties and engage in a more region- and continent-driven approach. To this end, a South African Development Community Model Bilateral Investment Treaty (SA Model BIT) was created with the specific goal of developing a comprehensive approach from which Southern African Development Community (SADC) member states can choose to use all or some of the model provisions as a basis for developing their own specific model investment treaty or as a guide through any given investment treaty negotiation.[54]

While the SA Model BIT maintains some of the common features of IIAs such as expropriation and FET standard, it also adds some clauses that seek to remedy the deficiencies of the former system such as:

a requiring investors or their investments to comply with environmental and social assessment screening criteria and prior to the establishment of their investment;

b making investors and investments subject to civil actions for liability in the judicial process of their home state for acts, decisions or omissions made in the home state in relation to investment where these acts, decisions or omissions lead to significant damage, injury and loss of life in the host state;

c reserving the right of a state party to grant preferential treatment in accordance with domestic legislation to any qualifying enterprise, to achieve national or sub-national regional development goals; and

d proposing comprehensive reforms to the ISDS mechanism; etc.

ii Nigeria

Two of Nigeria's more recent BITs have been widely acclaimed as innovative in various respects. The first is the Canada–Nigeria BIT (2014). It is clear from a reading of the provisions that the main aim is to strike a better balance between the interests of the state and those of the investors. The preamble of the BIT reveals that at the core of the treaty objectives is the promotion of sustainable development goals. Article 15 (1) of the BIT also contains an explicit condition that states should not compromise health, safety or environmental standards to attract foreign investments.

A more innovative example is the Morocco–Nigeria BIT (2016),[55] which also attempts to strike a balance between investor protection and the interest of the host state. Under this BIT, each contracting party reserves the right to adopt, maintain or enforce any measure to ensure that investment activity in its territory is undertaken in a manner sensitive to

54 SADC Model Bilateral Investment Treaty Template – Available online at www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf.

55 The Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (Morocco–Nigeria BIT) signed on 3 December 2016.

environmental and social concerns.[56] The BIT also specifically imposes environmental obligations on investors and provides for the recognition and enforcement of high levels of labour and human rights protection appropriate to each contracting party's economic and social situation.

Investors also have clear and unambiguous anti-corruption obligations imposed on them. Under Article 17 of the BIT, a breach of the anti-corruption provisions of the treaty is deemed to constitute a breach of the domestic law of the host state concerning the establishment and operation of an investment. Very importantly too, each host state reserves the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.

Lastly, the BIT contains mandatory provisions on exhaustion of local remedies. Article 26 provides that, before resorting to arbitration, any dispute is to be assessed through consultations and negotiations by the Joint Committee, which comprises representatives appointed by both contracting parties. The submission of a dispute concerning a specific question of interest to an investor to the Joint Committee can only be initiated by a contracting party. If the dispute cannot be resolved within six months, the investor may only resort to international arbitration mechanisms after the exhaustion of local remedies or the domestic courts of the host state. In addition to these next-generation BITs, an evolution of investment arbitration is also evident from a study of recently reformed African regional agreements.

iii COMESA

The Common Market for Eastern and Southern Africa (COMESA) in 2007 adopted the reformed Investment Agreement for the COMESA Common Investment Area with a view to attracting investment from within and outside the region. Although the agreement has not yet come into force, its full operation would provide an investor with a suite of options to bring an investment dispute either before the court of the host state, the COMESA Court of Justice or to pursue arbitration under ICSID or UNCITRAL arbitration rules.

iv OHADA region

The Organisation for the Harmonisation of Business Law in Africa is a regional organisation which is comprised of 17 African, and predominantly French-speaking, States. On 15 March 2018, the revised OHADA Uniform Act on Arbitration (the Arbitration Act) and revised Rules on Arbitration of the Joint Court of Justice and Arbitration (the CCJA) (the Rules), as well as the new Uniform Act on Mediation all entered into force. Article 3 of the Arbitration Act and Article 2.1, Article 5.1(b) of the Rules expressly allow foreign investors to commence arbitration against an OHADA Member State on the basis of any instrument related to the protection of investments, which include BITs and national investment legislation. To give effect to this, Article 2 of the Arbitration Act confirms the ability of public entities to consent to arbitration.

56 Articles 13, 14 and 15.

VIII CONCLUSION – THE AFCFTA INVESTMENT PROTOCOL: THE WAY FORWARD

On 30 May 2019, the Agreement establishing the African Continental Free Trade Area (AfCFTA), entered into force.[57] Before the covid-19 pandemic hit, a draft legal text of the AfCFTA Investment Protocol was originally scheduled to be submitted to the January 2021 Session of the Assembly as part of Phase II negotiations of the AfCFTA Agreement.[58] While this deadline was missed for understandable reasons, it is hoped that the recent start of trading under the AfCFTA at the start of 2021 will speed up this process. Although it is not yet clear what will be contained in the draft legal text of the AfCFTA Investment Protocol, commentators expect it to be modelled on the Pan African Investment Code (PAIC), or at the very least to incorporate part of the key features of the PAIC.[59]

As investor–state arbitration continues its growth as one of the most dynamic and controversial features of international investment law, developing countries must learn lessons from the decisions of arbitral tribunals on old-generation treaties; the template and model provided by the new generation treaties. In addition to making clear and concise provisions on the scope of investments, the scope of breaches that can be submitted to international arbitration, pre-arbitration requirements, transparency requirements, limitation periods, and the relationship between domestic proceedings and international arbitration, the Investment Protocol may expand the ISDS procedures by the inclusion of an early dismissal mechanism to terminate unfounded claims and ensure the inclusion of the states' rights to counterclaim.

Further, to enable ISDS tribunals to reduce the incidents of inconsistencies in their interpretation of treaty provisions, they must be encouraged to pay more regard to decisions that have attained *jurisprudence constante*. Finally, countries such as Nigeria must adopt model form BITs that they use as a starting point in their negotiations of BITs and ensure that there is a deliberate policy behind their BIT programmes. It is no longer rational for a country to wait for an adverse investment arbitration decision before undertaking a reform of its IIA policy.

57 African Union, Agreement establishing the African Continental Free Trade Area, available at https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area .

58 Oulepo, A. 7 February 2021, 'AfCFTA, the Future Investment Protocol, and the Phasing-Out of Intra-African BITs' Kluwer Arbitration Blog, available at http://arbitrationblog.kluwerarbitration.com/2021/02/07/afcfta-the-future-investment-protocol-and-the-phasing-out-of-intra-african-bits/

59 ibid.

Appendix 1

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