Transparency in Investor-State Dispute Settlement

By

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Introduction

Since the International Centre for the Settlement of Investment Disputes (ICSID or the Centre) was established by the Convention on the settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) on 18 March, 1965 and the coming into force of the Convention on 14, October, 1966, 44 out of the 54 African States have signed and ratified the ICSID Convention. This article is explores current burning issues around Bilateral Investment Treaties (BITs) especially the Investor-State Dispute Settlement Process and how the issues impact on African Economies. There are several burning issues in this area but the article focuses on 'Transparency in Investor-State Dispute Settlement (ISDS).'[1]

The article will examine four main instruments, namely,

a) ICSID Arbitration Rules, 2006.[2]
b) UNCITRAL Arbitration Rules, 2013.[3]
c) UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, 2014.[4]
d) UN Convention on Transparency in Treaty-Based Investor-State Arbitration, 2015 ("the Mauritius Convention").[5]

[1] This is a modified version of a paper with the same title presented at the 1st ICC Africa Regional Arbitration Conference, Lagos, Nigeria: 19-21 June, 2016.

[2] See Rule 37(2) of the ICSID Arbitration Rules, 2006. See also Rule 41(3), Schedule C of the ICSID Arbitration (Additional Facility) Rules, 2006 available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf> accessed 20 May, 2016.

[3] Available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf> accessed 20 May, 2016.

[4] Available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html> accessed 20 May, 2016.

[5] Available at <http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html> accessed 20 May, 2016. As at 19 May, 2016, 17 countries have signed the Convention. They are Netherlands, Belgium, Canada, Congo, Finland, France, Gabon, Germany, Italy, Luxembourg, Madagascar, Mauritius, Sweden, Switzerland, Syria, the UK and the US. See also <unis@unvienna.org> accessed 20 May, 2016.

There are other regional instruments/arbitral decisions dealing with transparency in Investor-State Dispute Settlement (ISDS) and third party participation.[6] However, these four instruments have substantially changed the landscape of investor- state dispute settlement.

We will briefly trace the evolution of investment treaties and examine the provisions of some of them – bilateral, regional and multilateral as well as the modern templates – Southern African Development Community (SADC) and UNCTAD Handbook. We will also examine Transparency – UNCTAD Series on Issues on International Investment Agreements (IIAs).[7]

It is pertinent to examine some statistics as they relate to African states:

i) African States have entered into about 769 BITs.
ii) Purpose and contents of the BITs are generally the same – in terms of dispute resolution, they are ISDS.
iii) 44 out of the 54 African States have signed and ratified the ICSID Convention; 4 have signed but not ratified, and 6 have neither signed nor ratified the Convention.
iv) 29 out of the 44 have been involved in ICSID proceedings.[8]
v) The disputes usually arise from an investment contract, investment legislation or a BIT.[9]
vi) Africa accounts for 28% of the ICSID Members and 23% of ICSID proceedings, but African arbitrators and/or conciliators account for less than 1% of the appointments.

[6] See Art 10:21 of the United States-Dominican Republic-Central America Free Trade Agreement (CAFTA), 2004 that provides for Transparency in Arbitral Proceedings available at <http://www.ustr.gov/trade-agreements/free-trade-agreements> accessed 22 May, 2016); the NAFTA Trade Commission, Statement on Non-Disputing Party Participation, 2003 available at <http://www.state.gov/documents/organization/38791.pdf> accessed 23 May, 2016) and the OECD Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures, June 2005 available at <www.oecd.org/investment> accessed 22 May, 2016.

[7] Available at <http://unctad.org/en/PublicationsLibrary/unctaddiaeia2011d6_en.pdf> accessed 20 May, 2016.

[8] Karel Daele 'Investment Arbitration Involving African States' in Lise Bosman (ed) *Arbitration in Africa: A Practitioner's Guide* (Kluwer Law International 2013) 403

[9] See Jeswald W Salacuse *The Three Laws of International Investment* (OUP 2013) 35 and Paul O Idornigie Commercial Arbitration Law and Practice in Nigeria (LawLords Publication 2015) 335. See also section 26 of the Nigerian Investment Promotion Commission Act, Cap N117, Laws of the Federation of Nigeria, 2004; Ghana Investment Promotion Act (GIPA) 1994; South African International Arbitration Act, and Ugandan Arbitration and Conciliation Act of 2000. In *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria* (ICSID Case No. ARB/13/20) [Decision on Jurisdiction: 29 October, 2014] held that statutory provisions like section 26 of the Nigerian Investment Promotion Commission Act (NIPC Act) make standing offers to investors making a claim under the NIPC Act. See also *Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt* (Decision on Jurisdiction), ICSID Case No. ARB/84/3 (14 April, 1988) where an Egyptian Law with a similar provision was held to be a standing offer to investors.

vii) Egypt has the highest number of BITs in Africa (100), followed by Morocco (61), Tunisia (54), Algeria (46), South Africa (46), Mauritius (36), Libya (32), Zimbabwe (30). Nigeria is ranked 14 with 22 BITs.

Thus Africa is a major player in this area. Yet, the Africa region appears to be an object and not a subject of international law.

Evolution of Investment Treaties

Under customary international law, disputes between nationals and host states were resolved through the use of force (the so-called 'gunboat diplomacy'), consultations or diplomatic channels.[10] One major weakness of this method is that it has no default dispute resolution mechanism that would supplement those in the host state.[11] With the 1965 Washington Convention[12] and emergence of BITs[13], a dramatic shift took place. The Treaty of Friendship, Commerce and Navigation (FCN)[14] is often cited as the precursor to modern investment treaties.[15]

Most investment treaties provide for two distinct dispute settlement mechanisms: one for disputes between the contracting states and the other for disputes between a host state and an aggrieved foreign investor. Generally in BITS, the provisions on state-state arbitration is in relation to the application and interpretation of the BIT[16] while in terms of dispute resolution arising from the investment, it is investor-state arbitration under the auspices of the 1965 Washington Convention or the ICC Arbitration Rules[17] and the LCIA

[10] Customary international law, based on principles of sovereign equality and independence, is less favourable to foreign investors than was its colonial and quasi-colonial antecedents. See Gus Van Harten *Investment Treaty Arbitration and Public Law* (OUP 2007) 18.

[11] For a brief history of foreign investment, see R Doak Bishop, James R Crawford and W Michael Reisman (eds) *Foreign Investment Disputes: Cases, Materials and Commentary* (2nd ed, Kluwer Law International, 2014) 2

[12] ICSID Convention (n 1). For the history of ICSID, see Lucy Reed, Jan Paulsson and Nigel Blackaby *Guide to ICSID Arbitration* (2nd ed, Kluwer Law International 2011) 1. See generally Christoph H Schreuer with Others *The ICSID Convention: A Commentary* (2nd ed, Cambridge University Press 2009).

[13] For the historical background to the treatification process, see Salacuse (n 9) 332 especially the International Chamber of Commerce's International Code of Fair Treatment of Foreign Investment (1949), International Convention for the Mutual Protection of Private Property Rights in Foreign Countries (1957), the Abs-Shawcross Convention (1959) and the OECD Draft Convention on the Protection of Foreign Property (1967). See also Monique Sasson *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International Law and Municipal Law* (Kluwer Law International 2010) 29 and Nigel Blackaby & Constantine Partasides *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 441.

[14] See the Treaty of Friendship, Commerce and Navigation Between the United States of America and Israel (1951), 5 U.S.T.550 (1954). See also Bishop, Crawford and Reisman (eds) (n 11) 28.

[15] Bishop, Crawford and Reisman (eds (n 11) 26.

[16] See Art 37 of the US Model BIT 2012. Available at <http://www.state.gov/documents/organization/188371.pdf> accessed 20 May, 2016) and Art X of the UK-Colombia BIT of 17 March, 2010 available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/317686/40694_Cm_8887_print_ready.pdf> accessed 23 May, 2016.

[17] See ICC Arbitration Rules, 2012 available at <https://international-arbitration-attorney.com/icc-rules-of-arbitration-2012/> accessed 20 May, 2016.

Arbitration Rules[18]. The Southern African Development Community (SADC) Model BIT Template, 2012, now provides for actual resolution of the investment disputes under certain conditions in addition to the traditional role of confining state-state arbitration to the interpretation and application of the BIT'.[19] One of such conditions is the exhaustion of local remedies.

Over the years, granting a private party the right to maintain an action against a sovereign state before an international tribunal has generated a lot of controversy. This is a revolutionary innovation that now seems to be largely taken for granted. Yet its uniqueness and power should not be overlooked. The field of international law, for example, contains no similar procedure. Violations of trade law, even though they strike at the economic interests of private parties, are resolved directly and solely by states. The World Trade Organisation (WTO) does not give a remedy to private persons injured by trade law violations. Modern investment treaties grant aggrieved investors the right to prosecute their claims independently, without regard to the concerns and interests of their home governments.[20] The investors appoint private arbitrators to superintend over the affairs of a sovereign state. The proceedings are held privately and ICSID awards are not published unless with the consent of the parties.[21] Arbitral tribunals are known to have rendered substantial awards against host countries, the latest and largest ever is the sum of over $50 billion awarded against the Russian Federation in *Yukos Universal Limited (Isle of Man) v The Russian Federation*.[22] This arbitration was based on the Energy Charter Treaty, 1994[23] and conducted under the UNCITRAL Arbitration Rules, 1976.[24]

The privacy and confidentiality of ICSID arbitration have raised concerns about transparency and third party participation in investor-state arbitration. The issue of transparency and third party participation as *amicus curiae*, especially by non-

[18] LCIA Arbitration Rules, 2014 available at <http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx> accessed 20 May, 2016.

[19] See Arts 28.4 and 44 of the SADC Model BIT Template, 2012 and the IISD Model Agreement, 2006. For example, Art 28.4 of the SADC Template provides that: A State Party may not submit a claim to arbitration seeking damages for an alleged breach of this Agreement on behalf of an Investor or Investment (a) unless the Investor or Investment, as appropriate, has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies, relating to the measure underlying the claim under this Agreement, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the Host State, or (b) unless the claimant State Party demonstrates to the tribunal established under this Article that there are no reasonably available domestic legal remedies capable of providing effective relief for the dispute concerning the underlying measure, or that the legal remedies provide no reasonable possibility of such relief in a reasonable period of time.

[20] Salacuse (n 9) 398.

[21] Art 48(4) of the ICSID Arbitration Rules, 2006.

[22] See *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227, Final Award of 18 July, 2014. See also *The Russian Federation v Yukos Universal Limited*, Case No. C/09/477162/HA ZA 15-2, The Hague District Court, Judgement delivered on 20 April, 2016. The Dutch court overturned the award in the judgment. See the comments by *The New York Times* of July 20, 2014 available at <http://nyti.ms/1nPlnkb> accessed 21 May, 2016) and April 20, 2016 available at <http://nyti.ms/1WEKmYT> accessed 21 May, 201).

[23] Available at <www.encharter.org/> accessed 22 May, 2016.

[24] Available at <www.uncitral.org> accessed 22 May, 2016.

governmental organisations (NGOs), came to the fore in *Mathanex Corporation v USA*[25], an investor-state arbitration under the North American Free Trade Agreement (NAFTA) Chapter 11 (1992).[26] A decision similar to *Methanex Case* was made by another NAFTA Tribunal, in *United Parcel Service of America Inc v Government of Canada*[27]. In both cases, the Governments of Canada and the United States took positions favouring the filing of *amicus curiae* briefs or memorials by NGOs, while the Government of Mexico opposed such filings. It is noteworthy that all NAFTA Governments have now agreed to a policy of transparency with respect to NAFTA proceedings and regularly post NAFTA arbitration filings on the NAFTA website.[28]

There are several other ICSID decisions on Non-Disputing Party Participation.[29] However, I found *Pero Foresti, Laura de Carli and Others v Republic of South Africa*[30] very interesting. The petitioners sought three reliefs, namely, to file a written submission with the Tribunal regarding matters within the scope of the dispute, access to certain key arbitration documentation and permission to attend and present the key submissions at the oral hearings when they take place. In the alternative, the petitioners sought to attend and/or observe the oral hearings.[31] The Tribunal granted the reliefs sought in the petition.[32] However, the reference was discontinued. This is not to suggest that all such petitions are granted.[33]

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[25] In the Matter of an Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Final Award on Jurisdiction and Merits, 7 August, 2005. Available at <http://www.naftaclaims.com/disputes_us_6.htm> accessed 22 May, 2016. The Tribunal relied on Art 15(1) of the UNCITRAL Arbitration Rules, 1976 and Chapter 11, Section B of NAFTA and held the view that there is nothing in the two instruments that either expressly confers upon the Tribunal the power to accept amicus submissions or expressly provides that the Tribunal shall have no such powers. Thus the powers of the Tribunal were inferred from the more general procedural powers and the prayers granted. See generally Bishop, Crawford and Reisman (eds) (n 10) 1129-1134.

[26] This reference was conducted under UNCITRAL Arbitration Rules, 1976.

[27] Award on the Merits, 24 May, 2007, available at <http://italaw.com/sites/default/files/case-documents/ita0885,pdf> accessed 22 May, 2016. See also ICSID Tribunals in Biwater Gauff (Tanzania) Ltd v Tanzania, ICSID Case ARB/95/22, Award (24 July, 2008), available at <http://italaw.com/sites/default/files/case-documents/ita095.pdf> accessed 23 May, 2016.

[28] See Bishop, Crawford and Reisman (eds) (n 10) 1134.

[29] Available at <https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Decisions-on-Non-Disputing-Party-Participation.aspx> accessed 22 May, 2016. See *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentine Republic* (ICSID Case No. ARB/03/17, Decision on Amicus Curiae of 17 March, 2006.

[30] ICSID Case No. ARB(AF)/0101.

[31] The petition was filed pursuant to Arts 27, 35, 39 and 41(3) of Schedule C of the ICSID Additional Facility Rules as amended on April 10, 2006.

[32] Award, ICSID Case No. ARB(AF)/07/01 of 4 August, 2010.

[33] See *Aguas del Tunari, S.A. v. Bolivia* (ICSID Case No. ARB/02/3), *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15), *Border Timbers Ltd., Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25) and *Apotex Holdings Inc. & Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)12/1) – all available at <https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Decisions-on-Non-Disputing-Party-Participation.aspx> accessed 23 May, 2016.

Another concern is the enforcement of ICSID awards. Article 54(1) of the ICSID Convention requires each ICSID member state to recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state. Pursuant to these provisions, the Federal Government of Nigeria passed the International Centre for Settlement of Investments Disputes (Enforcement of Awards) Act designating the Supreme Court for the purpose of enforcing ICSID awards.[34] The consequence of this is that a review of the award is not possible under ICSID.[35] This was alluded to by Kaita Yannaca-Small[36] thus:

> *On the contrary, the ICSID Convention system prevents domestic courts from reviewing any of its decisions, and ICSID awards are therefore immune from challenges brought before national courts which may have a local bias or be subject to the influence of the host government. The ICSID Convention mechanism is self-contained, providing for internal control which includes provisions on the review of the awards*.

Thus the only remedy available to an adverse award is annulment proceedings, which also have restrictive provisions.[37] With all these challenges, Art 15 of the ICSID Arbitration Rules provide that proceedings shall take place in private and remain secret. Similarly Article 28(3) of the UNCITRAL Arbitration Rules provides that hearings shall be held in camera unless the parties agree otherwise. This is a sharp contract to investment treaty awards under NAFTA, ECA, Canadian Commercial Arbitration Code and BITs conducted under UNCITRAL Arbitration Rules or commercial arbitration, which allow review of awards by the municipal courts.

The problems arising from resorting to arbitration, especially under the ICSID Convention, can be summarized as follows:

a) Conflict of interest between the capital exporting and importing states – while the latter would like to control over their natural resources as provided in various instruments including the General Assembly Resolution of 1962 on Permanent Sovereignty over Natural Resources[38] and Charter of Economic Rights and Duties

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[34] Cap I20, Laws of the Federation of Nigeria, 2004. Section 1(1) of the Act provides that "*… a copy of such award if filed in the Supreme Court by the party seeking its recognition for (or) enforcement in Nigeria, shall for all purposes have effect as it if were an award contained in a final judgment of the Supreme Court, and the award shall be enforceable accordingly while subsection (2) of section 1 provides that the Chief Justice of Nigeria may make rules of court or may adapt any rule of court necessary to give effect to this section".*

[35] See Art 34 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 with amendments as adopted in 2006.

[36] Katia Yannaca-Small: 'Annulment of ICSID Awards: Limited Scope But is There Potential?' in Katia Yannaca-Small (ed) *Arbitration under International Investment Agreements: A Guide to the Key Issues* (OUP 2010) 603.

[37] See Arts 50 and 52 of ICSID Arbitration Rules.

[38] Available at <http://www1.umn.edu/humanrts/instree/c2psnr.htm> accessed 24 May, 2016.

of States, 1974[39] and resolution of disputes in national courts; the former prefer international tribunals and the right to protect their investments.[40]

b) The possibility of parallel proceedings and forum shopping arising from contract claims and treaty claims, especially the fact that there is no doctrine of judicial precedent or *lis pendens* in international arbitration.[41]
c) The conflict between municipal law and international law on the one hand and that of public law and private law on the other. The exercise of sovereign rights is within the purview of municipal and international law, but commercial transactions between states with private individuals is regulated by private law. Indeed the relationship between municipal and international law in this context is unsettled. Absolute *renvoi* to municipal law runs afoul of the principle that international law governs the characterization of an internationally wrongful act.[42]

d) The regulatory powers of states in the following areas: environment, development goals, labour and human rights may be restricted by investment treaties.[43]

e) Corporate governance issues – Depending on the size and nature of an investment, investments ought to meet or exceed national and internationally accepted standard of corporate governance for the sector involved, in particular for transparency and accounting practices; and investors and investments should make available to the public any investment contract or agreement with the host state government(s) involved in the investment authorization process, subject to the redaction of confidential information. Similarly, investors and investments should publish all information relating to payments made to host state public authorities, including taxes, royalties, surcharges, fees and other payments, among others.

f) Corporate social responsibility – in countries like Nigeria, there is no statutory provision on corporate social responsibility on a general scale other than provisions in corporate governance codes.[44] The BIT ought to impose duties on the investors in this regard.

g) Private and confidential nature of arbitral proceedings and the issue of parties to the proceedings. Investor-state arbitration is generally between parties to the

[39] Available at <http://www.un-documents.net/a29r3281.htm> accessed 24 May, 2016.
[40] Se *Yukos Universal Limited* (n 21).
[41] James J Fawcett (ed) *Declining Jurisdiction in Private International Law* (OUP 2005) 27 and Stanimir Alexandrov 'Breach of Treaty Claims and Breach of Contract Claims: Is It Still Unknown Territory?' in Yannaca-Small (n 35) 323. See also Art 59 of the ICJ Statute and Art 53 of the ICSID Convention.
[42] See Art 3 of the International Law Commission's Articles on State Responsibility, 2001 available at <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 21 May, 2016.
[43] Pero Foresti & Others (n 30).
[44] See section 172 of the English Companies Act 2006.

agreement without taking into account the interest of non-disputing parties and the public.[45]

All these challenges/concerns have led to movement from mere disclosure of information by parties in the investment treaties to transparency in arbitral proceedings. More fundamentally, how do we balance the interests of the state, interest of the private investors and that of the public?

Transparency

It is against this background that 'transparency' has become a major issue in investor-state arbitration. It is an evolving concept and its ramifications unsettled. An examination of the older BITs (UK Model Text of 2005, US 1994 and Model Dutch BIT [signed with Nigeria]) shows that that there was no provision on transparency. However, in the US Model BIT 2004, there is a provision on transparency. It is noteworthy that the provisions on transparency in the US Model BIT 2012 are more detailed than that of 2004.[46] It would seem, therefore, that since almost every country is now both capital importing as well as capital exporting, more disclosures are mandatory, or at least expected in the public interest.

Transparency can be seen from many perspectives – expressly providing for the rights of states to regulate, minimum standards for human rights, environment and labour, corporate social responsibility, and pursuit of development goals. This also includes the publication of information by host States on any investment contracts or agreements with an investor or investment involved in the investment authorization process, subject to the redaction of confidential business information, and making available to the public all information relating to payments made to host state public authorities, including taxes, royalties, surcharges, fees and all other payments by the investors.

Another perspective is transparency of arbitral proceedings – notice of intent, notice of arbitration, pleadings, memorials, briefs, transcripts of proceedings, orders, awards and decisions of the tribunal to be made available to the public. Similarly, hearings should be open to the public without prejudice to protected information.

In the case of ICSID arbitration, the level of confidentiality and transparency is determined by the agreement of the parties, the applicable treaty and the decisions of the Tribunals.

Examination of the transparency provisions in the Four Instruments

a) ICSID Arbitration Rules, 2006[47]

Rule 37(2) of the ICSID Arbitration Rules provides thus:

[45] See Arts 15 and 28(3) of ICSID Arbitration Rules and UNCITRAL Arbitration Rules, 2010 respectively.
[46] See also the Indian Model BIT 2015
[47] See also NAFTA Free Trade Commission, Statement on Non-Disputing Party Participation (2003)

> *(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:*
> *(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*
> *(b) the non-disputing party submission would address a matter within the scope of the dispute;*
> *(c) the non-disputing party has a significant interest in the proceedings.*
> *The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and both parties are given an opportunity to present their observations on the non-disputing party submission*.

The ICSID Tribunals in *Biwater Gauff (Tanzania) Ltd v Tanzania*[48] and *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentine Republic*[49] have allowed NGOs that met these requirements to participate in investment arbitrations as *amici curiae*.[50] However, in *Aguas del Tunari, S.A. v. Bolivia*[51], the Tribunal refused to allow NGOs to participate as *amici* on the ground that party consent was necessary, and the parties did not consent.

b) UNCITRAL Arbitration Rules, 2013

The UNCITRAL Arbitration Rules, 2013 incorporates the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration. According to UNCITRAL:

> *With the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency") in 2013, a new article 1, paragraph 4 was added to the text of the Arbitration Rules (as revised in 2010) to incorporate the Rules on Transparency for arbitration initiated pursuant to an investment treaty concluded on or after 1 April 2014. The new paragraph provides for utmost clarity in relation to the application of the Rules on Transparency in investor-State arbitration initiated under the*

[48] Biwater Gauff (n 26)
[49] Suez (n 29)
[50] See also *AES Summit Generations Ltd v Hungary*, ICSID Case No. ARB/07/22, Award (23 September, 2010), where the European Commission granted *amicus curiae status* in an ICSID reference - available at <http://italaw.com/sites/default/files/case-documents/ita0378.pdf> accessed 24 May, 2016
[51] Aguas (n 33)

UNCITRAL Arbitration Rules. In all other respects, the 2013 UNCITRAL Arbitration Rules remain unchanged from the 2010 revised version.[52]

c) UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, 2014

The Rules comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-State arbitration. The Rules on Transparency are also available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules, and in *ad hoc* proceedings.[53] More specifically,

i) Art 1 - Scope of Application – the Rules apply to investor-state arbitration initiated before and after 1 April, 2014.
ii) Art 2 – Publication of information at the commencement of arbitral proceedings – notice of arbitration to the repository [Secretary General of the UN or an institution named by UNCITRAL] and repository to make public the information.
iii) Art 3 – Publication of documents – notice of arbitration, the response to the notice, pleadings, written submissions, export reports and witness statements, etc. to be made available to the public.
iv) Art 4 – Submission by a third party – after consultation with the disputing parties, the arbitral tribunal may allow a non-disputing party to file a submission.
v) Art 6 – Hearings – except where there is a need to protect confidential information or the integrity of the arbitral process, hearings shall be in public.

d) UN Convention on Transparency in Treaty-Based Investor-State Arbitration, 2015.

The Convention is an instrument by which Parties to investment treaties concluded before 1 April 2014 may express their consent to apply the UNCITRAL Arbitration Rules on Transparency. According to the United Nations Information Service:

The Mauritius Convention on Transparency aims at providing States and regional economic integration organizations that so wish, an efficient mechanism for making the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (the "Rules on Transparency") applicable to investment treaties concluded before the Rules entered into force on 1 April 2014.

The Rules on Transparency provide a set of procedural rules that ensure transparency and public accessibility to treaty-based investor-State

[52] Available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html> accessed 23 May, 2016.
[53] See United Nations Information Service, Vienna (UNIS) – unis@unienna.org accessed on 20 May, 2016.

*arbitration, the proceedings of which have traditionally been **conducted behind closed doors**. Together with the Rules on Transparency, the Mauritius Convention on Transparency takes into account both the public interest in such arbitrations and the interest of the parties to resolve disputes in a fair and efficient manner. It is expected that the Convention will significantly contribute to enhancing transparency in investor-State dispute resolutions.*[54]

i) Art 2 – Application of the UNCITRAL Rules on Transparency – to any investor-state arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a party or the claimant is a State that has not made a relevant reservation. Furthermore, the parties to the Convention agree that a claimant may not invoke a Most Favoured Nation (MFN) provision to seek to apply or avoid the application of the UNCITRAL Rules on Transparency under the Convention.

ii) Art 3 – Reservations – a party may declare that it shall not apply the Convention to investor-state arbitration under a specific investment treaty identified by title and name of the contracting parties to that investment treaty, among others.

iii) According to UNCITRAL:

> *Together with the Rules on Transparency, the Convention takes into the account both the public interest in such arbitration and the interest of the parties to resolve disputes in a fair and efficient manner. The Convention foresees the Secretary-General of the United Nations as performing the repository function, through the UNCITRAL secretariat.*[55]

<u>Examination of the UNCTAD Handbook, 2012</u>

The Handbook contains several provisions. It is intended to provide practical and user-friendly information to negotiators of International Investments Agreements (IIAs) for the purpose of concluding agreements with national policy objectives. It addresses several areas, provides model clauses and gives a commentary on the said clauses. In the commentary, examples are shown from several jurisdictions. Standard clauses are provided in addition to the one on 'transparency'.

Art 3.8 Transparency

This provision establishes State transparency obligations. This provision has historically been drafted to enable the investor and its home State to become acquainted with the host State's regulatory framework and the process of domestic rulemaking affecting

[54] UNIS - unis@unvienna.org accessed on 20 May, 2016

[55] Available at http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html accessed on 24 May, 2016.

investments. Recent formulations have also included provisions regarding direct exchange of investment-related information between treaty Parties.

The traditional objective of this provision is to create for investors a more predictable institutional framework within the overall investment climate. The common elements include:

a) Making the information publicly available

i. Laws and regulations
ii. Administrative procedures, administrative rulings, judicial decisions, and international agreements
iii. Draft or proposed rules

b) Exchange of information

i. Intent to pro-actively exchange information
ii. Obligation to respond to information requests

c) Inserting words to expand or limit host State obligations

e) Exclusion of State transparency obligations from investor-State arbitration.

Examination of the International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development – Negotiators' Handbook, 2006

The thrust of this instrument is to set a positive negotiating agenda for sustainable development. The publication provides both the text of the model agreement and a commentary on each article. There are several provisions on anti-corruption, corporate governance, corporate social responsibility, investor's civil liability, maintenance of environmental, labour and human rights standards and publication of information. More specifically, Art 46 of the Handbook deals with transparency. African countries are urged to use this IISD Negotiators' Handbook.

Transparency – UNCTAD Series on Issues on International Investment Agreements (IIAs)

According to UNCTAD:

> *The aim of this paper is to update the first edition of UNCTAD's Pink Series paper on transparency.1 It seeks to examine (i) the way in which traditional transparency issues have been addressed in international investment agreements (IIAs) since 2004, (ii) the emergence of investor responsibilities as a consideration within transparency issues, and (iii) the introduction of a*

transparency dimension into investor-State dispute settlement (ISDS). In analysing these issues, this paper outlines possible sustainable development implications of the different transparency-related formulations used in IIAs and points to some of the most progressive provisions that are appearing more frequently in investment instruments.[56]

This study focused particularly on transparency in ISDS and the implications of this conceptual shift manifested in the dispute resolution context. It also considers transparency concerns as a component of a more generalised interest in the impact of procedural matters in ISDS. A key issue is the appearance of transparency and public participation-related provisions in recent IIAs and the sustainable development implications of such approaches.

Examination of the SADC Template

In a bid to enhance transparency, the SADC has developed a Template to assist in negotiating BITs. The Template provides for

- Common Obligation against Corruption[57]
- Compliance with Domestic Law[58]
- Provision of Information[59]
- Environmental and Social Impact Assessment[60]
- Minimum Standards for Human Rights, Environment and Labour[61]
- Corporate Governance Standards[62]
- Investor Liability[63]
- Transparency of Contracts and Payments[64]
- Right of States to Regulate[65]
- Right to Pursue Development Goals[66]
- Transparency of Investment Information[67]

In the context of dispute settlement, Article 28, Part 5 of the Template deals with state-state- dispute settlement while Article 29 deals with investor-state dispute settlement. As has been stated, quite unlike the provisions in other BITs were state-state dispute settlement essentially deals with the application and interpretation of the BIT, Article 28

[56] Transparency in IIAs (n 4) xii
[57] Art 10 of the SADC Template
[58] Art 11 ibid
[59] Art 12 ibid
[60] Art 13 ibid
[61] Art 15 ibid
[62] Art 16 ibid
[63] Art 17 ibid
[64] Art 18 ibid
[65] Art 20 ibid
[66] Art 21 ibid
[67] Art 24 ibid

of the Template contemplates state-state dispute in relation to interpretation and application of the BIT and claim for damages for alleged breach of the BIT on behalf of an investor or investment.

In consonance with the practice in Australia, South Africa, Brazil and Canada, Article 29 of Template contemplates an opting out of investor-state dispute settlement mechanism. Article 29.14 provides for submissions by Non-Disputing State Party, Article 29.16 for Amicus Curiae Submissions and Article 29.17 for Transparency of Proceedings. Thus, under Article 29.17, the Notice of Intent, the Notice of Arbitration, pleadings, memorials, briefs, written submissions shall promptly be made available to the public and the non-disputing State Party.[68]

African countries are enjoined to adopt the SADC Template in their negotiations.

Examination of Transatlantic Trade and Investment Partnership (TTIP)

Officials from the European Union and the United States gathered in Brussels for the 12th round of negotiations over the Transatlantic Trade and Investment Partnership (TTIP) from February 22 to 26. Among the topics discussed in February was the investor–state dispute settlement (ISDS) mechanism. The EU is proposing an Investment Court System (ICS) composed by a standing tribunal and an appeals mechanism. But the United States is not ready to abandon its long-standing ISDS model recently reproduced in the Trans-Pacific Partnership (TPP).[69]

Due to jurisdictional challenges, it may be difficult to establish an investment court to preside over private transactions. In the public law realm, it is possible hence the standing Courts in the ICJ, EU, AU and ECOWAS.

Other than dealing with colonial relationships only, Africa countries either at the sub-regional or regional levels should enter into partnerships like the TTIP or the TPP.

The Impact on African Economies

Having examined generally the issue of transparency in ISDS, what are the options open to Africa. Given the stage of development of the African economies, it is strongly recommended that any dispute resolution mechanism adopted should take into account the following:

- Exhaustion of Local Remedies as provided in the Indian BIT.[70]
- Akin to this is that disputes should be resolved by state courts/tribunals only.
- There should be movement from BIT to RITs or MITs at the sub-regional or regional levels as done in the ASEAN countries.

[68] See also the Indian Model BIT 2015.

[69] Available at <https://www.iisd.org/itn/2016/05/16/ttip-draft-to-be-prepared-by-july-isds-being-built-based-on-both-eu-and-u-s-proposals/> accessed 16 May, 2016.

[70] See Art 14.3 of the Indian Model BIT

- Retention of ISDS with more disclosures in the BITs and transparency in arbitral proceedings[71]
- Adopting the US Model BIT 2012, where appropriate.
- Drafting of standard BITs or RITs or MITs. Nigeria is drafting one which takes into account the issues canvassed in this article.
- African countries are urged to adopt the UCITRAL Arbitration Rules, 2013 and the Mauritius Convention to allow for more transparency in investor-state arbitration.

Conclusion

As long as there is conflict of interest in International Investment Law, the issue of transparency will remain unsettled. From the FCN to the modern BITs, we have produced some wines in new bottles. The capital-exporting and capital-importing countries should see themselves as partners in progress. Indeed, the boundaries between the two is becoming blurred. There is need therefore to constructively engage each other.

Every country should have a right to regulate, promote its developmental goals, observe international instruments and negotiate BITs instead of a template being foisted on a sovereign country.

African countries are urged to sign and ratify the Mauritius Convention on Transparency and ensure that the UNCITRAL Arbitration Rules 2013 are incorporated in their Arbitration Rules.

In passing, we would like to comment on the issue of state and sovereign immunity. In this regard, we should draw a line between a sovereign act, properly so called and a commercial act. We should be guided by the nature and purpose of the transaction *acta jure gestionis* and *acta jure imperii as* provided in the UN Convention on Jurisdictional Immunities and Their Properties, 2004[72]. The question is should it be restrictive or absolute immunity? It depends.

[71] See Art 14.8 ibid

[72] See also *Trendtex Trading Corporation v Central Bank of Nigeria* (1977) 1 QB 529