INVESTMENT TREATY ARBITRATION AND EMERGING MARKETS: ISSUES, PROSPECTS AND CHALLENGES

By

Paul Obo Idornigie, PhD, BL, FCIS, MCIArb(UK)
Research Professor
Nigerian Institute of Advanced Legal Studies
Abuja, Nigeria

BEING THE THIRD INAUGURAL LECTURE
DELIVERED AT THE
NIGERIAN INSTITUTE OF ADVANCED LEGAL STUDIES,
ABUJA, NIGERIA

20 OCTOBER, 2011

FOREWORD

As part of the institute's effort to sustain its mandate to be at the fore of policy formulation, the inaugural lecture series is one of such platforms given to accomplished Research Professors of Law to present an overview of research accomplishments. Prof. Paul Idornigie is celebrated today for the milestones achieved in his academic career and he is thus, given the honour of presenting an Inaugural Lecture to signal his arrival in the domain of international scholarship. This lecture provides great legal enthrallment to a fast and emerging area of law that only a skilled professional can deliver.

The author begins his lecture by tracing the growth and origins of Bilateral Treaty Investment (BIT) and gives an historical overview of investment treaty arbitration, the critical component of which originates in balancing the interests of foreign nationals and host states. He analyses the origin of the "Carlos doctrine" which fought for the independence of newly independent states, to the reforms and creation of the International Center for Settlement of Investment Disputes (ICSID) which ultimately led to investment laws enacted in each jurisdiction.

As the topic centres on emerging markets, he further delves into the challenges of investment treaty arbitration on emerging markets, these challenges as discussed by the author resonates from the complexity of negotiating the contracts, ratification of ICSID, enforcement of substantive rights, and the lack of judicial precedents amongst others.

His careful use of data and statistics have produced explicitly the geographical distribution of all ICSID cases as well as all Bilateral Investment treaties Nigeria has ratified. Professor Paul Idornigie's lecture is an exceptional and well researched. The author is not only vastly experienced in this field of law but has brought his expertise to bear on this highly competitive area of law.

Professor Epiphany Azinge, SAN
Director General
October 2011

General Introduction

My DG, I must publicly thank you for being the Director General of this Institute when I was appointed a Research Professor. I see myself as blessed in various ways. One of such unique ways is for being a Lecturer at the University of Jos, the Nigerian Law School and now the Nigerian Institute of Advanced Legal Studies. I have also taught at ANAN College of Accountancy, Jos and I am currently an Examiner to the Institute of Chartered Secretaries & Administrators.

When I was working as a Personal Secretary to the then Deputy Vice-Chancellor, University of Benin, Professor E U Emovon, he delivered an Inaugural Lecture titled 'Time in Chemistry'. When he became the Vice-Chancellor, University of Jos and I was working with the late Professor Mike Ogbeide, the latter delivered an Inaugural Lecture titled 'They Are As Sick That Surfeit With Too Much As They That Starve With Nothing'. I typed these lectures. Since then I have been enamoured with the concept of Inaugural Lectures. Little did I know that some day, I would have the opportunity of delivering one and typing it for myself.

My DG, distinguished guests, ladies and gentlemen, you can appreciate why today is a special day in my life. This is profoundly underscored by the fact that my first job was that of a Typist Grade III. We opened Auchi High Court, Edo State in March 1970. I actually learnt how to draft and type court processes before I read law. I could argue a motion then. I knew relevant authorities in various areas in criminal law especially rape, stealing, manslaughter and murder. There was no Court of Appeal then. I used to type Record of Proceedings from the High Court to the Supreme Court. I remember that the late Honourable Justice J Omo Eboh, JCA used to dictate judgments to me before they were delivered. That was the level of trust then. I was also privileged to work with his wife, Honourable Justice (Mrs) Modupe Omo Eboh of blessed memory. When you visit my Blackberry Contact Profile, you will find my Status Message thus: 'The good Lord is faithful'. Yes, He has been. I am a testimony of His faithfulness.

In the course of my working life having risen to the status of a Senior Assistant Registrar at the University of Jos before I became an Assistant Lecturer in Law and rose to a Chair in Law, I have had cause to deal with various areas of law. I have been a Legal Consultant, General Counsel, an Arbitrator, Mediator and Negotiator.

I have handled pure commercial arbitration (as a counsel or arbitrator), been involved in public-private partnership (PPP) transactions and lately veered into investment treaty arbitration. Investment treaty arbitration reminds me of the triangular warning sign: "Building site: please enter with care". I found that the issues involved appear skewed in favour of the so-called 'capital exporting countries' to the disadvantage of 'capital importing countries' some of which are referred to as 'emerging markets' and others the Next Eleven. The issues pose enormous challenges to developing countries because the template of a Bilateral Investment Treaty (BIT) drafted in 1959 is like a standard

form contract. I also found that Nigeria is not classified as an 'emerging market' but in the 'Next Eleven'.)[1]

It is against this background that, when the DG informed me that I would deliver an Inaugural Lecture, it sounded strange to a Typist Grade III, as he then was and a Professor of Law, as he now is. I have been different things to different people especially my students at the Nigerian Law School. Some call me 'One Time' and others 'In Charge'. To my clients, I am just a Legal Consultant in the area of Alternative Dispute Resolution (ADR) and Public Private Partnership (PPP) transactions.

What informed my choice of topic for this Inaugural Lecture was a dispute involving the Federal Government of Nigeria (FGN) and an International Oil Company (IOC). It was actually a dispute between an organ of the FGN and the IOC. The FGN entered into a Bilateral Investment Treaty (BIT) with the Government of the national of the IOC. The BIT provided for arbitration under the International Centre for Settlement of Investment Disputes (ICSID) based in Washington and established under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention or the 1965 Washington Convention). The term 'investment treaty arbitration' (or 'investor-state arbitration') refers to compulsory arbitration between a state and an investor, pursuant to an investment treaty entered into between two contracting states that provides for arbitration by nationals (investors) of the contracting states. The term also distinguishes 'treaty' arbitration from the contract- or legislation-based variants of investment arbitration.

In the course of my research into the dispute, I came across a triangular warning sign – 'building site: please enter with care'. I asked myself whether in negotiating treaties and entering into contracts with nationals of other countries, the capital importing countries avert their minds to the provisions of these treaties and contracts, The International Law Commission's Articles on State Responsibility (2001) and the impact of the 1969 Vienna Convention on the Law of Treaties?

This Inaugural Lecture, therefore, affords me the opportunity to share my perspectives on this subject matter. Various issues will be interrogated including:

a) What is commercial arbitration and its distinguishing features?
b) How did investment treaty arbitration evolve?
c) What are the fundamental issues relating to the scope and application of the treaties?
d) What are emerging markets?
e) To what extent do these investment treaties protect the host countries?
f) In such relationships, disputes (contract- and treaty-based) are bound to arise. What are the distinctions between treaty and contract claims?

[1] http://en.wikipedia.org/wiki/Next_Eleven . Made up of Bangladesh, Egypt, Indonesia, Iran, Mexico, Nigeria, Pakistan, Philippines, South Korea, Turkey, and Vietnam

g) If disputes arising from such treaties are to be arbitrated under ICSID, how is the jurisdiction to be invoked?
h) Who is a 'national' of the Contracting States to the Convention and what are 'protected investments'?
i) What are the prospects of investment treaties and challenges faced by emerging markets and developing economies?

The rest of this Inaugural Lecture will be devoted to the consideration and examination of these issues.

Part I

Introduction to Commercial Arbitration

Conventionally, litigation was almost the sole means of resolving disputes, whether commercial or otherwise. Historically, however, conciliation, mediation and arbitration had major roles to play in resolving disputes in Nigeria and indeed globally.

In traditional African societies, any conflict or dispute was seen as social disequilibrium and any dispute resolution process adopted was an attempt to restore equilibrium. In such societies, we had various processes for resolving disputes. Sometimes it is difficult to ascribe a particular word like "mediation", "conciliation", "reconciliation", "early neutral evaluation" or arbitration" to the process as they can be variants or an amalgam of all these processes. For instance when a traditional ruler is sitting over a matter, he may be mediating, reconciling or arbitrating. In rural and some modern communities, these processes for resolving disputes still play a prominent role. Depending on the perspective adopted – whether Afrocentric or Eurocentric, what has emerged today as modern commercial arbitration[2] evolved from customary jurisprudence in Africa and the practices of the law merchant in the United Kingdom.

The problems of delay, technicality, corruption, formality and absence of privacy associated with litigation are well known. This has generated interest in arbitration and the other alternative dispute resolution (ADR) processes. Generally, arbitration, on its part, has significant features. They include:

- Agreement to arbitrate – is the foundation stone of modern commercial arbitration[3]. This distinguishes arbitration from litigation. Such agreement must be valid. The need for the agreement to be valid is recognized by national laws[4] and international treaties[5].

[2] See generally Blackaby A and Partasides C *Redfern and Hunter on International Arbitration*, 5th Edn, Oxford: Oxford University Press, 2009), Sutton, D *et al Russell on Arbitration*, (23rd Edn, London: Sweet & Maxwell, 2007) , Tackaberry J and Marriott A *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (London: Sweet & Maxwell, 2003), Asouzu A A *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (Cambridge: Cambridge University Press, 2001) , Ezejiofor G *The Law of Arbitration in Nigeria* (Ikeja: Longman Nigeria Plc, 1997) , Orojo J O and Ajomo M A *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbeyi & Associates (Nigeria) Ltd, 1999), Binder P *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, (3rd Edn, London: Sweet & Maxwell, 2010) and Onyema, E *International Commercial Arbitration and the Arbitrator's Contract* (Abingdon: Routledge, 2010)

[3] This should be contrasted with section 6 of the 1999 Constitution of the Federal Republic of Nigeria, as amended, that vests judicial powers in the courts established for the Federation and the States.

[4] See the Nigerian Arbitration and Conciliation Act, 2004 (ss 48(b)(ii) and 52(1)(a)(ii)) and the English Arbitration Act, 1996 (s72(a))

[5] See the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (Art II(3)). See also the UNCITRAL Model Law on International Commercial Arbitration, 1985 as amended in 2006 (UNCITRAL Model Law) (Art 34(2)(i)).

- The agreement to arbitrate may be an arbitration clause or a submission agreement. If arbitration clause, the clause is separate and independent of the main agreement - principle of separability.
- The subject matter must be capable of resolution by arbitration – the principle of arbitrability.
- Form of agreement - in writing, signed by the parties. This distinguishes statutory arbitration from customary arbitration.
- The choice of arbitrators – the parties generally choose their arbitrators. This distinguishes arbitration from litigation.
- The decision of the arbitral tribunal is final, binding and conclusive and generally non-appealable but can be set aside – this distinguishes arbitration from mediation/conciliation that are not court-annexed.
- Though proceedings are private but gives rise to legal consequences – an award enforced like the judgment of a court.
- The parties are empowered to take decisions on a number of issues including the number of arbitrators, qualifications and how appointed; how proceedings are to be conducted and nature of award - principle of party autonomy.
- The proceedings are private and confidential – this also distinguishes arbitration from litigation.
- *Competenz competenz* – the competence of the tribunal to inquire into its own jurisdiction instead of applying to a court.
- Judicial non-intervention – the courts cannot intervene except as provided in the arbitral enactment.
- Stay of Proceedings – where a contract contains a clause on arbitration and a dispute arises in connection with the contract, a party is not allowed to proceed to litigate the dispute. If any party does, the other party is entitled to apply for stay of proceedings of the litigation until after arbitration has been concluded.

Part II

Evolution of Investment Treaty Arbitration

….in contemporary international law, the protection of
the rights of companies and the rights of their shareholders, and the
settlement of the associated disputes, are essentially governed by
bilateral or multilateral agreements[6]

Since the advent of colonialism, trade between the colonies and the West has been skewed in favour of the West. The West determined what could be produced, exported

[6] *Case Concerning Ahmadou Sadio Diallo (Guinea v Congo*) Preliminary Objections, ICJ General List No. 103, 24 May, 2007, para 88

and the value of such products. So raw materials were bought at very low prices and shipped off and finished products were brought back at exorbitant prices. They introduced the concept of rights and win-lose syndrome. At the international arena, we were merely objects of international law and not subjects. Indeed when the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was signed, Nigeria was not a party until March 1970. The Long Title to the Arbitration and Conciliation Act, promulgated in March 1988 is to make applicable the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The developing countries have been at the mercy of the developed economies. This is compounded by the fact that capital has accumulated in the money centres of the world. Such centres are looking for opportunities in the developing economies. The critical question has been how to balance and protect the investment of foreign nationals vis-a-vis the interest of the host state. However, a development in the latter part of the 20th century has fundamentally altered this. This was done by way of diplomatic protection from the home state[7]. In which case, the home state must agree to submit the arbitration of the dispute to a claim commission. This required the prior intervention of the home state.

There are various versions of the origin of bilateral investment treaties[8]. However, until the seminal work of the Argentine jurist and diplomat, Carlos Calvo in 1868[9], an individual or a corporation who wished to assert a claim against a foreign state for breach of customary international law could not do so directly. Instead, the individual or corporation concerned had to rely upon his/its government taking up the claim on its behalf. This worked against the colonies because in the case of the major trading countries, influential individuals or corporations convinced their governments to send a small contingent or warships to moor off the coast of the offending state until reparation was forthcoming – the so-called "gunboat diplomacy".[10]

Carlos Calvo fought for the rights of newly independent states to be free of such intervention by foreign powers and promoted the so-called "Calvo doctrine" whereby foreign investors should be in no better position than local investors with their rights and obligations to be determined through the exclusive jurisdiction of the courts of that state or submit to the arbitration of the dispute by a Claims Commission. His thesis was adopted by the First International Conference of American States in 1889. At the Conference an *ad hoc* Commission on International Law adopted his position to wit, foreigners are entitled to enjoy all the civil rights enjoyed by natives and shall be accorded all the benefits of the said rights in all that is essential as well as in the form of

[7] See Harten G V *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2008) pp 9 and 18. See also B Kingsbury "Sovereignty and Inequality' (1998) 9 EJIL 599, 601 (noting that state sovereignty is the 'means by which people can express and be deemed to have expressed, consent to the application of international legal norms and to international institutional competences')

[8] Harten, Op cit at 3 and 12

[9] "*Derecho internacional terorico y practico de Europa y America*", Paris 1868

[10] See Hood M *Gunboat Diplomacy 1895-1905* (London: George Allen & Unwin, 1975) 187-8. Thus when the Venevuelan Government announced that it would not repay its debts to European creditors, a naval armada was dispatched by Germany, Great Britain and Italy to blockade Caracas and bombarded coastal facilities.

procedure, and the legal remedies incidental thereto, absolutely in like manner as said natives.[11]

The Calvo Doctrine was incorporated into the forerunner of the modern investment treaty, the "treaty of friendship, commerce and navigation" (FCN Treaty)[12]. Gunboat diplomacy was brought to an end at the Second International Peace Conference at The Hague in 1907 when the Convention on the Peaceful Resolution of International Disputes was signed. The Convention provided the framework for the conclusion of bilateral investment treaties. Thus, in the event of a dispute between two states arising out of the particular interests of a national of the other state, an independent arbitral tribunal would be formed where the state could espouse the claim of its national (the so-called right of diplomatic protection).[13]

Although the diplomatic protection was a welcome development, Professor Brierley[14] was concerned with the possibility of its being politicized thus leaving investors particularly small and medium-sized enterprises with little recourse save what their government might give them after weighing the diplomatic consequences. This led to more reforms and the creation of the International Centre for the Settlement of Investment Disputes (ICSID) mechanism through the conclusion of the ICSID Convention of 1965.[15]

A byproduct of this Convention is the enactment of investment laws in various jurisdictions[16] and the entering into various bilateral investment treaties (BITs)[17]. The BITs became the natural successors to the FCN Treaties. All these developments provide a right of direct recourse to investors and not subject to the political considerations inherent in the diplomatic protection era. Harten[18] has argued that if foreign investors are permitted to claim compensation under international law, why not a migrant worker who is denied access to the rights and entitlements of domestic employees, or a refugee who is denied asylum and deported to torture, or an indigenous people whose land is polluted and livelihood destroyed by a multinational firm? As at May 2011, 157 countries have signed the ICSID Convention while 144 countries have ratified it. Bolivia and Ecuador have withdrawn their membership while among the countries that have signed, some are yet to ratify the Convention[19]. Nigeria signed the Convention on 13 July, 1965 and ratified it on August 23, 1965.

---

[11] See Blackaby N and Partasides C *Op Cit* at 466.
[12] See Art 21 of the FCN Treaty between Italy and Colombia of 1894
[13] See the *Panevezys-Saldustsikis Railway Case* decided by the Permanent Court of International Justice – Series A/B 76, p.16 and Brierley J L, *The Law of Nations* (6th Edn., Oxford University Press, 1963), p 277
[14] Brierley, Lo Cit
[15] ICSID was established by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).
[16] See the Nigerian Investment Promotion Commission Act of 2004 (s26), Ghana Investment Promotion Act (GIPA) 1994, South African International Arbitration Act, and Ugandan Arbitration and Conciliation Act of 2000.
[17] See the 1959 Abs-Shawcross Draft Convention on Investments Abroad and the 1967 OECD Draft Convention on the Protection of Foreign Property
[18] Harten, Loc Cit
[19] http://en.wikipedia.org/wiki/International_Centre_for_Settlement_of_Investment-Disputes . The countries yet to ratify are Belize, Canada, Dominican Republic, Ethiopia, Guinea-Bissau, Kyrgyzstan, Namibia, Russia, Sao Tome

It is noteworthy that the first case brought by an investor under the investment protections of a BIT was registered in 1987 but was not decided until 1990.[20] Similarly, the world's first BIT was signed in 1959 between Pakistan and Germany.[21] The growth in this form of dispute resolution in the two decades since then has been exponential.[22] From a humble beginning of 8 registered cases with ICSID in 1998, in 2003 it registered 30 new cases. However, as can be seen from the **Geographical Distribution of All ICSID Cases by State Party Involved,** shown below, as at 31 December, 2010, 331 cases were registered under the Convention and Additional Facility Rules out of which 30% are from South America[23], 22% from Eastern Europe[24], 17% from Sub-Saharan Africa[25], 9% from the Middle East & North Africa[26], 8% from Central America & Carribean[27], 8% from South & East Asia & Pacific[28], 5% from North America[29] and 1% from Western Europe[30]. The oil and gas sector has 25% of these cases. The growth is further reinforced by the fact that as at 30 June, 2010[31], there were over 2,700 BITs[32] being concluded since the first such treaty in 1959.[33]

---

and Principe and Thailand. Other non-members are: Andorra, Angola, Antigua and Barbuda, Bhutan, Brazil, Cook Islands, Cuba, Djibouti, Dominica, Equatorial Guinea, Eritrea, India, Iran, Iraq, Kiribati, Laos, Liechtenstein, Libya, Maldives, Marshall Islands, Mexico, Monaco, Montenegro, Myanmar, Nauru, Niue, North Korea, Palau, Poland, San Marino, South Africa, Suriname, Tajikistan, Tuvalu, Vanuatu, Vatican City, Vietnam, and the rest of states with limited recognition.

[20] See *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990 (1991) 6 ICSID Review – Foreign Investment Law Journal 526

[21] See http://www.bilaterals.org/article-print.php3?id_article=717

[22] McLaclan C, Shore L and Weiniger M. *International Investment Arbitration: Substantive Principles* (Oxford University Press: 2008) p 5

[23] Made up of Uruguay, Peru, Ecuador, Venezuela and Bolivia

[24] Made up of Uzbekistan, Serbia, Romania, Macedonia, Georgia and Turkmenistan

[25] Made up of The Gambia, Rwanda, DRC and Tanzania

[26] Made up of Jordan, Egypt and Algeria

[27] Made up Grenada, El Salvador and Costa Rica

[28] Made up of Cambodia and Bangladesh

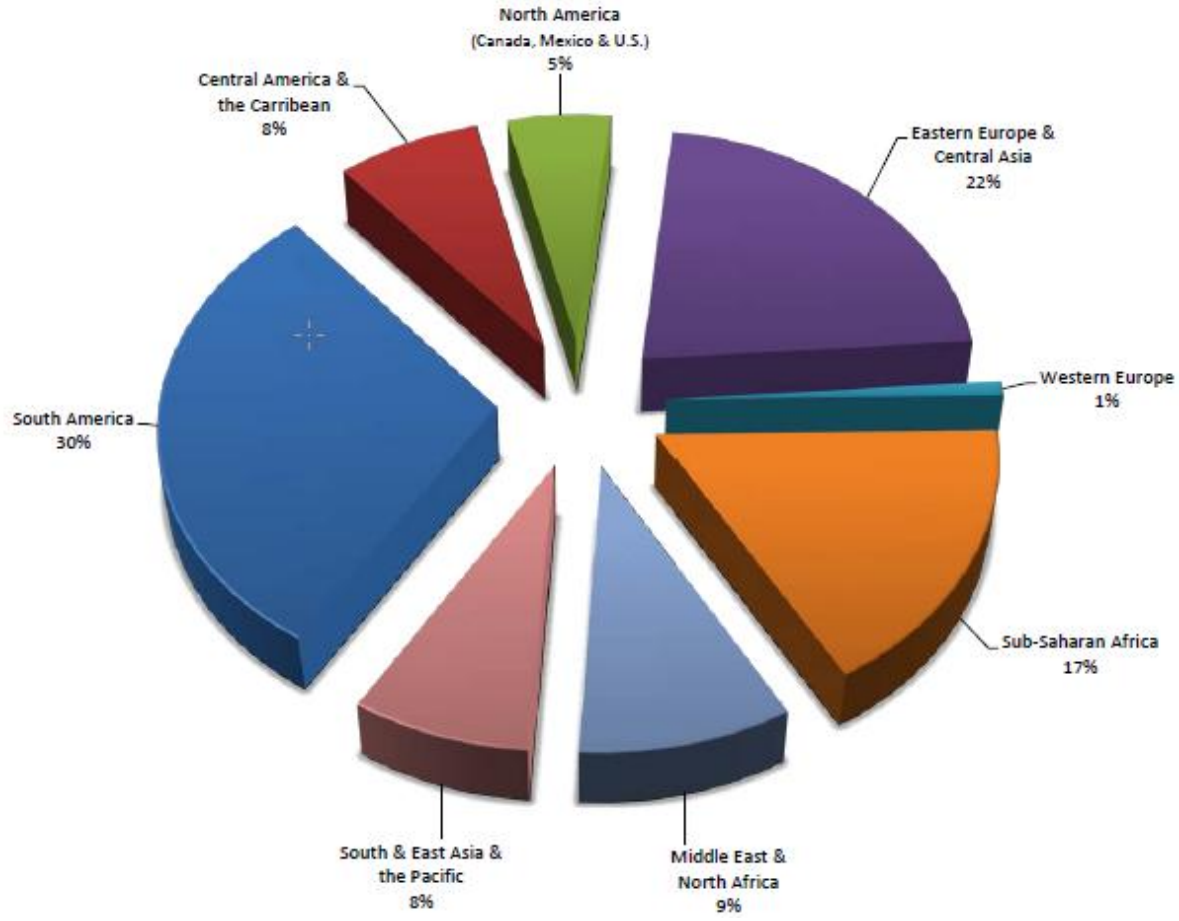
[29] Made up of Mexico

[30] http://icsid.worldbank.org/ICSID/FrontServlet . See also ICSID, "The ICSID Caseload – Statistics" (Issue 2011-1) p 11, http:// icsid.worldbank.org/ICSID/Index.jsp and Reed L *et al Guide to ICSID Arbitration* (2nd Edn, The Netherlands, Kluwer Law International, 2011) p7 . 73% of the registered cases are investment treaty cases.

[31] See ICSID 2010 Annual Report p 5 and http://icsid.worldbank.org/ICSID/FrontServlet

[32] Out of this number, countries like Comoros, Guinea Bissau, Ireland, San Marino, Sao Tome and Principe, Somalia, St Vincent and the Grenadines, Suriname, Tonga and Vanuatu entered into one BIT each while Germany has the highest number of BITs – 147. See http://icsid.worldbank.org/ICSID/FrontServlet

[33] See UNCTAD, World Investment Report (2006) XVII, 26. See also http://en.wikipedia.org/wiki/Bilateral_Investment-Treaty



Geographical Distribution of All ICSID Cases by State Party Involved

Source: ICSID Caseload Statistics 2011

Despite the provisions of Article 102 of the Charter of the UN obligating member states who are parties to BITS to deposit them with the UN Secretariat, ascertaining the exact number of BITS signed is a herculean task. From the ICSID website, Nigeria has 11 BITs.[34] (Table I). Out of the 11, five have been ratified and in force. However, from the UNCTAD website[35], Nigeria has 22 BITs as shown in Table II. Out of the 22 BITs, only four have been ratified and, therefore, in force. As a country at the threshold of industrialization and creating the legal and institutional framework for the attraction of

[34] http://icsid.worldbank.org/ICSID/FrontServlet . Nigeria has entered into BITS with Algeria, Egypt, France, Germany, Netherlands, Serbia, Spain, Sweden, Switzerland, Turkey and the UK.

[35] See United Nations Conference on Trade and Development Document No UNCTAD/DIAE/PCG/2008/1 – http://www.unctad.org/en/docs/diaepcb20081_en.pdf . The countries in this list are Algeria, Bulgaria, China, Egypt, France, Finland, Germany, Jamaica, Republic of Korea, Democratic People's Republic of Korea, Italy, Netherlands, Romania, Serbia and Montenegro, Spain, South Africa, Sweden, Switzerland, Taiwan Province of China, Turkey, Uganda and United Kingdom.

foreign direct investment, it is hoped that efforts will be made to ensure that all the 22 BITs are in force. Similarly, more BITs should be entered into provided that the challenges espoused in this Inaugural Lecture, among others, are taken into account. Nigeria, as a major player in the African continent should spearhead the development of regional investment treaties and produce a template for use by other African States. It is hoped that Nigerian nationals will be encouraged to invest in Nigeria under the same protection offered by the treaties.

In Nigeria, BIT negotiations are conducted by the Inter-Ministerial Committee on Investment Promotion and Protection Agreements made up of representatives of the Ministries of Finance, Justice, Industry/Investment, Foreign Affairs, National Planning Commission, Central Bank of Nigeria and National Investment Promotion Commission. Unfortunately, out of the 22 BITs signed only five have been ratified and, therefore, in force[36].

It is debatable whether, other than the oil and gas sector, Nigeria has really attracted FDI. From the Investment Policy Review prepared by UNCTAD in 2009[37], the contribution to GDP from the non-oil sector is still low as compared to the 1960s when agriculture and manufacturing contributed significantly to GDP. At independence, in addition to being a leading exporter of groundnut, Nigeria accounted for 16 and 43 per cent of world cocoa and oil palm production respectively. Nigeria was largely self-sufficient in terms of domestic food production (85 per cent) and Nigerian agriculture contributed to over 60 per cent of GDP and 90 per cent of exports. Some attribute this decline in FDI to the Indigenization Policy of the 70s but this ought to have been reversed by the relaxation in 1995 through the NIPC Act.

The UNCTAD Review also shows that Nigeria's underperformance in FDI attraction outside the oil sector can nonetheless be illustrated by reference to prominent TNCs that are *not* present in Nigeria but have invested in its peers. In 2003, only 18 of the top 100 world's largest non-oil TNCs (as measured by assets held abroad) had affiliates in Nigeria, compared to 42 in South Africa, 25 in Egypt and 17 in Kenya. In total 41 of the top 100 were present in at least one of these countries but not in Nigeria. These 41 TNCs represent a wide range of sectors, with pharmaceuticals and motor vehicles prominent. However Nigeria has become a destination for South Africa in terms of telecommunications, construction and aviation. Topping the list of the largest foreign investors in Nigeria are the United States, present through Chevron Texaco and ExxonMobil; the Netherlands with Shell; France with Total; and Italy with ENI – all in the oil sector.

[36] Nigeria has been involved in two ICSID Cases – Guadalupe Gas Products Corporation v Nigeria (Case No ARB/78/1) and Shell Nigeria Ultra Deep Limited v Nigeria (Case No ARB/07/18). The former was settled while the latter was withdrawn after conclusion of arbitral proceedings.

[37] See United Nations Conference on Trade and Development Document No UNCTAD/DIAE/PCG/2008/1 available at http://www.unctad.org/en/docs/diaepcb20081_en.pdf):

Other than BITs, there are regional investment treaties (RITs) and multi-lateral investment treaties (MITs).[38] Attempts have been made for a multilateral treaty that would codify liberal standards of investor protection under international law. This would have meant the use of international adjudication for purposes of review and enforcement of such treaties but all such attempts failed.[39]

Bilateral Investment Treaties of Nigeria from ICSID Website

Algeria	Jan 14, 2002	
Egypt, Arab Republic of	Jun 20, 2000	
France	Feb 27, 1990	Aug 19, 1991
Germany	Mar 28, 2000	
Netherlands	Nov 02, 1992	Feb 01, 1994
Serbia	Jun 01, 2002	Jan 24, 2003
Spain	Jul 09, 2002	
Sweden	Apr 18, 2002	
Switzerland	Nov 30, 2000	Apr 01, 2003
Turkey	Oct 08, 1996	
United Kingdom of Great Britain and Northern Ireland	Dec 11, 1990	Dec 11, 1990

Table I

[38] 1987 Association of South East Asian Nations (ASEAN) Agreement for the Promotion and Protection of Investments, Chapter 11 of the 1994 North American Free Trade Agreement (NAFTA), Pt 3 and Art 26 of the 1994 Energy Charter Treaty, and the 1994 Colonia and Buenos Aires Investment Protocols of Mercosur

[39] See the draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries, 1957 – usually referred to as 'a return to the Gay Nineties'.

Partner	Signed on:	Entry into force:
Algeria	14 January 2002	Partner yet to ratify
Bulgaria	21 December 1990	Partner yet to ratify
China	27 August 2001	Partner yet to ratify
Egypt	20 June 2000	Partner yet to ratify
France	**27 February 1990**	***19 August 1991***
Finland	22 June 2005	Nigeria yet to ratify
Germany	28 March 2000	Partner yet to ratify
Jamaica	5 August 2002	Partner yet to ratify
Korea, Rep. of	**27 March 1998**	***01 February 1999***
Korea, Dem. Peoples' Republic of	11 November 1996	Partner yet to ratify
Italy	27 September 2000	Partner yet to ratify
Netherlands	**02 November 1992**	***01 February 1994***
Romania	18 December 1998	Partner yet to ratify
Serbia and Montenegro	01 June 2002	Partner yet to ratify
Spain	09 July 2002	Partner yet to ratify
South Africa	29 April 2000	Partner yet to ratify
Sweden	18 April 2002	Partner yet to ratify
Switzerland	30 November 2000	Partner yet to ratify
Taiwan Province of China	07 April 1994	?
Turkey	08 October 1996	Partner yet to ratify
Uganda	15 January 2003	Partner yet to ratify
United Kingdom	**11 December 1990**	***11 December 1990***

Sources: Government sources and UNCTAD BITs database.

Table II

Part III

Analysis of Common Features of Investment Treaties

An investment treaty can be bilateral or multi-lateral. A Bilateral Investment Treaty (BIT) is an agreement establishing the terms and conditions for private investment by nationals and companies of one state in the state of the other. This is a relationship where capital-importing countries[40] enter into a treaty with capital-exporting countries. Over the years, such treaties have given rise to conflicts between the parties. The capital exporting countries require protection and security over their investments and resolution of disputes in a neutral tribunal while the capital importing countries demand

[40] As a broad category, 'capital importing' refers to about 11 states whose inward stock of foreign direct investment (FDI) exceeded their outward stock in 2004 by a ratio of at least 2 to 1 while 'capital exporting' refers to about 20 states whose outward FDI stock exceeded their inward stock in 2004 [UNCTAD, *World Investment Report 2005* (New York: United Nations, 2005) annex table B.2]

the ability to regain or retain control over key parts of their economies[41] and resolution of disputes in domestic courts/tribunals. Such demand may lead to expropriation. Under customary international law, expropriation is legitimate if for public interest, without discrimination, on basis of nationality and accompanied by payment of appropriate compensation. Under most BITs[42], investments of nationals shall not be nationalized, expropriated or subjected to measure having effect or equivalent to nationalization or expropriation except for public purpose and against payment of prompt, adequate and effective compensation.

On the other hand, a Multi-lateral Investment Treaty (MIT) can cover a region, sector or international[43]. All attempts to have an MIT like the ICSID Convention failed[44]. As will be discussed hereunder the key features of these treaties are the same.

Bilateral Investment Treaty (BIT)

BITs have their origin in FCN. They are generally modeled after the drafts prepared in 1959 by a private group led by Abs and Shawcross and in 1967 by the Organization for Economic Co-operation and Development (OECD)[45]. While FCN treaties commonly contained investment protection provisions and a wider variety of matters, their chief weakness as compared to BITs was the absence of an investor/State dispute resolution provisions. A typical BIT has the following structure[46]:

- Preamble
- Definitions
- Admission
- Substantive Rights – fair and equitable treatment, national treatment, most favoured national (MFN) treatment, full protection and security, protection from expropriation and other umbrella clauses
- Compensation for losses
- Free Transfer of payments
- Settlement of Disputes

[41] See United Nations General Assembly Resolution No 1803 on Permanent Sovereignty Over Natural Resources and the Charter of Economic Rights and Duties of States

[42] See Art 5(1) of UK Model BIT, 2006, Art III of the US 1994 Model BIT, Art 6 of the US 2004 Model BIT, Art 6 of the Netherlands Model BIT and Art 6 of the Sri Lanka Model BIT

[43] For example, NAFTA is restricted to its three countries of Canada, Mexico and United States of America; the ASEAN Agreement for the Promotion and Protection of Investment is restricted to the ten ASEAN countries of Brunei, Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Laos and Vietnam; the Energy Charter Treaty (ECT) is restricted to the energy sector and ICSID is international.

[44] One example of a proposed multilateral treaty is the International Convention for the Mutual Protection of Private Property Rights in Foreign Countries: Harten, Op Cit at 12

[45] McLachlan et al Op Cit at 26. Harten Op Cit at 20 has given a different account of the evolution of the modern BIT including the 1929 Draft Convention on the Treatment of Foreigners and 1948 Havana Charter. The 1948 Havana Charter was rejected by business groups and eventually abandoned after the US Administration declined to submit it to Congress for ratification. See also W Diebold, 'The End of the ITO' in *Essays in International Finance*, No 16 (Princeton: Princeton University Press, 1952)

[46] See also Reed et al, Op Cit at 58

- Duration[47]

In the course of this Inaugural Lecture, we will examine the components of the structure of a BIT.

Multilateral Investment Treaty (MIT)

The structure of an MIT is essentially the same with that of a BIT except that there are provisions peculiar to some of them. For example, they all have clauses on Definition, Substantive rights and Settlement of disputes. However, in the case of NAFTA, it has a Free Trade Commission which is used essentially for the interpretation of the clauses of the Treaty; investors and the enterprise can bring claims; claims cannot be brought more than three years from the date of breach; arbitration can be under ICSID, UNCITRAL Arbitration Rules; and the rules permit consolidation of claims.

In the case of ASEAN, investments must be specifically approved in writing and registered by the host country in order to be protected while the company must have its place of effective management in the territory of a contracting party. Under ECT, a dispute can be referred to any one of a number of dispute resolution fora. They are courts or administrative tribunals of the host state; any applicable previously agreed dispute settlement procedure, ICSID, UNCITRAL or the Arbitration Institute of the Stockholm Chamber of Commerce.

In addition to the BITs and MITs, many capital importing countries have enacted foreign investment laws. The goals of such laws are to promote and control investment. They often contain protections which are similar to those in BITs.

Whether under BITs, MITs or investment laws, there are usually clauses on dispute settlement. The preferred mode is that of arbitration. Arbitration under investment treaties is also referred to as 'Arbitration Without Privity'[48]. What are the characteristics of such an arbitration especially under the ICSID framework? This will become apparent shortly.

Part IV

The Concept of Emerging Markets

The term 'emerging markets' is used to describe a nation's social or business activity in the process of rapid growth and industrialization. Currently, there are approximately 40 emerging markets in the world, with the economies of China and India considered to be

[47] A typical duration is ten years, with the term automatically extended unless and until one party terminates the treaty with notice: Reed, et al, Op Cit at 105

[48] See Paulson J 'Arbitration Without Privity' (1995) 10 ICSID Rev-FILJ 232, 256

two of the largest.[49] According to *The Economist*[50], many people find the term outdated, but a new term has yet to gain much traction. However, the term was originally brought into fashion in the 1980s by then World Bank Economist, Antoine van Agtmael[51]: it is sometimes loosely used as a replacement for emerging economies, but it really signifies a business phenomenon that is not fully described by or constrained to geography or economic strength; such countries are considered to be in a transitional phase between developing and developed status. Examples of emerging markets include China, India, Pakistan, Mexico, Brazil, Peru, Chile, Colombia, Argentina, much of Southeast Asia, countries in Eastern Europe, the Middle East, parts of Africa and Latin America. It must be stressed that the categorization is fluid and it is, therefore, difficult to make an exact list of emerging markets. However, the Morgan Stanley Capital International and *The Economist* tend to provide a useful guide. The ASEAN–China Free Trade Area, launched on January 1, 2010, is the largest regional emerging market in the world.

In the 2008 Emerging Economy Report, the Center for Knowledge Societies defines Emerging Economies as those "regions of the world that are experiencing rapid informationalization under conditions of limited or partial industrialization." It appears that emerging markets lie at the intersection of non-traditional user behavior, the rise of new user groups and community adoption of products and services, and innovations in product technologies and platforms.

The term "rapidly developing economies" is being used to denote emerging markets such as The United Arab Emirates, Chile and Malaysia that are undergoing rapid growth.

In recent years, new terms have emerged to describe the largest developing countries such as BRIC that stands for Brazil, Russia, India, and China,[52] along with *BRICET* (BRIC + Eastern Europe and Turkey), *BRICS* (BRIC + South Africa), *BRICM* (BRIC + Mexico) , *BRICK* (BRIC + South Korea), Next Eleven (Bangladesh, Egypt, Indonesia, Iran, Mexico, Nigeria, Pakistan, Philippines, South Korea, Turkey, and Vietnam) and CIVETS (Colombia, Indonesia, Vietnam, Egypt, Turkey and South Africa)[53]. These countries do not share any common agenda, but some experts believe that they are enjoying an increasing role in the world economy and on political platforms.

It is difficult to make an exact list of emerging (or developed) markets; the best guides tend to be investment information sources like ISI Emerging Markets and *The*

[49] See Jain S C, *Emerging Economies and the Transformation of International Business* (Edward Elgar Publishing, 2006) p 384
[50] September 18, 2008
[51] See http://en.wikipedia.org/wiki/Emerging _markets

[52] Farah Paolo, *Five Years of China's WTO Membership. EU and US Perspectives on China's Compliance with Transparency Commitments and the Transitional Review Mechanism, Legal Issues of Economic Integration*, (Kluwer Law International, Volume 33, Number 3, 2006) pp. 263-304

[53] http://en.wikipedia.org/wiki/Next_Eleven

Economist or market index makers (such as Morgan Stanley Capital International). These sources are well-informed, but the nature of investment information sources leads to two potential problems. One is an element of historicity; markets may be maintained in an index for continuity, even if the countries have since developed past the emerging market phase. Possible examples of this are South Korea[54] and Taiwan. A second is the simplification inherent in making an index; small countries, or countries with limited market liquidity are often not considered, with their larger neighbours considered an appropriate stand-in.

The *Big Emerging Market* (BEM) economies are (alphabetically ordered): Brazil, China, Egypt, India, Indonesia, Mexico, Philippines, Poland, Russia, South Africa, South Korea and Turkey.[55]

Newly industrialized countries are emerging markets whose economies have not yet reached first world status but have, in a macroeconomic sense, outpaced their developing counterparts.

The FTSE Group distinguishes between Advanced[56] and Secondary[57] Emerging Markets on the basis of their national income and the development of their market infrastructure. The Advanced Emerging Markets are classified as such because they are Upper Middle Income GNI countries with advanced market infrastructures or High Income GNI countries with lesser developed market infrastructures.

As of May 2010, MSCI Barra classified 21 countries[58] as emerging markets while Dow Jones classified 35 countries[59] as emerging markets. Yet, as at 31 December, 2010, *Standard & Poor* classified 19 countries[60] as emerging markets.

Thus, in Africa, it is only Egypt and South Africa that belong to all classifications while Nigeria is in the Next Eleven (or N-11)[61]. The N-11 is identified by Goldman Sachs Investment Bank as having a high potential of becoming, along with the BRICs, the world's largest economies in the 21st century[62].

From the analysis of the 331 cases registered with ICSID, it is clear that more than 60% of the cases are from developing countries made up of the emerging economies

[54] Classified by FTSE as a developed market.
[55] Yale University Library: Emerging Markets – The Big Ten Countries
[56] They include Brazil, Hungary, Mexico, Poland, South Africa and Taiwan
[57] They include Argentina, Chile, China, Columbia, Egypt, India, Indonesia, Malaysia, Morocco, Pakistan, Peru, Philippines, Russia, Thailand and Turkey
[58] They include Brazil, Chile, China, Colombia, Czech Republic, Egypt, Hungary, India, Indonesia, South Africa
[59] They include Argentina, Bahrain, Brazil, Bulgaria, Chile, China, Colombia, Czech Republic, Egypt, Estonia, Hungary, South Africa
[60] They include Brazil, Chile, China, Czech Republic, India, Indonesia, Malaysia, Mexico, Egypt, South Africa
[61] See http://en.wikipedia.org/wiki/Emerging _markets and http://en.wikipedia.org/wiki/Next_Eleven
[62] See 'The N-11: More than an Acronym' – Goldman Sachs study of N-11 nations, Global Economics Paper No 153, March 28, 2007

however described and the N-11 countries. Similarly, most developing countries are signatories to the ICSID Convention.[63]

Part V

The Distinction Between Treaty Claims and Contract Claims[64]

The choice of rights by an investor will determine the course of the investment dispute. Does the investor need to choose between treaty rights and contract rights or can the investor pursue both types of rights simultaneously in the same forum, or simultaneously in separate fora? The dispute resolution mechanism in the treaties is usually international arbitration while the underlying contract can provide for litigation and domestic arbitration. The strategic importance of this decision cannot be exaggerated. This decision requires a clear understanding of the distinction and differences between treaty and contract claims. These include

a) **Source of the right** – the source of treaty right is on the plane of international law which is separate and distinct from a claim of breach of national law or terms of a contract which is the effect of an investor's contractual submission to the jurisdiction of the host State courts or arbitral tribunals. Thus, a treaty claim is a right established and defined in an investment treaty while the basis of a contract claim is some right created and defined in a contract. Generally, a treaty right can not arise from a contract.

b) The content of the right – the content of treaty rights is normally quite distinct from that of contract rights[65]. Treaty rights are generic in nature and defined by international law – rights to national treatment, most favoured nation treatment, non-discriminatory treatment, fair and equitable treatment and compensation in the event of expropriation. Contract rights are normally specific to the investment and defined by the domestic law of the Host State. However, it is possible for the content of the two to overlap. For example, an investor that enjoys a right to compensation for expropriation under a BIT might negotiate and receive an identical right in a concession contract with the Host State or such a right is

[63] ICSID 2010 Annual Report, p11

[64] See Sasson M S*ubstantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Municipal Law* (The Netherlands, Wolters Kluwer, 2010) p 151, Cremades B M and Cairns D A 'Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes' in Cremades B M and Lew J D M (eds) *Parallel State and Arbitral Procedures in International Arbitration,* ICC Publishing, Paris, 2005 at 13 and McLachlan et al Op cit at 99, El-Kosheri A S 'Contractual Claims and Treaty Claims within the ICSID Arbitration System' in Cremades B M and Lew J D M (eds), Op cit at 43

[65] See McLachlan Op cit at 199 and Blackaby and Partasides, Op Cit at 488

provided for in a domestic legislation like the 1999 Constitution of Nigeria[66] and the NIPC Act[67].

c) **The parties to the claim -** In the case of a treaty claim, an investor of the Home State and the Host State are usually the parties. The State Party is the State itself and not a federal or regional unit or any state entity or agency. This is so even if the investor has had no direct contract with the State. However, where the treaty claim is based on an exercise of governmental authority at a lower level, then the investor must demonstrate that the State is responsible for this conduct in international law. The International Law Commission has published its Articles on State Responsibility[68]. The Articles provide that a State is responsible for the conduct of internal organs and such conduct is attributable to the State. According to Article 2 of the Articles, there is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to the State under international law and constitutes a breach of an international obligation of the State.

   In contrast, the parties to a contract are the parties to the contract. If the investor enters into a concession contract with the Host State, then the parties to a treaty claim will be identical to the parties to a contract claim.

d) **The applicable law[69] –** This is another potential difference. The applicable law under a BIT normally includes the provisions of the BIT itself, the domestic law of the Host State and the general principles of international law[70]. More fundamentally, BITs are regulated by international law.[71] In contrast, concession contracts are normally subject to the domestic law of the Home State. However, a state may not invoke the provision of its internal law as justification for its failure to perform a treaty obligation[72]. Similarly the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.[73]

---

[66] See section 44(1) of the 1999 Constitution of Nigeria, as amended which provides, inter alia, that no moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by law that, among other things, requires the prompt payment of compensation.
[67] See section 25 of the NIPC Act 2004 which provides for guarantees against expropriation.
[68] See Crawford J *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2005)
[69] See generally Sasson Op Cit at xxi and Harten, Op Cit at 45
[70] See Article 42 of the ICSID Convention and Reed et al, Op Cit at 71
[71] See Article 31 of the Vienna Convention on the Law of Treaties
[72] See Article 27 Id
[73] See Article 3 of the ILC's Articles on State Responsibility

e) **The liability of the host State –** A successful treaty claim results in State responsibility in international law while a successful contract claim results in State responsibility under the rules of its domestic law if the State is a party to the contract.

One of the challenges to an investor is how to avoid duplication of proceedings or parallel proceedings. Many investment treaties anticipate this by providing that an investor can prosecute his claims in domestic courts/tribunals or international forum or alternatively must waive claims in any other forum as a precondition to international arbitration. However, these two techniques of election and waiver have created further confusion by failing to clearly distinguish between treaty and contract claims.

The first type of provision is known as a 'fork-in-the-road clause'[74]. Such a clause is well illustrated by the final sentence of Article 8(2) of the France-Argentina BIT thus:

> "1. Any dispute relating to investments, within the meaning of this agreement, between one of the Contracting Parties and an investor of the other Contracting Party, shall, as far as possible, be resolved through amicable consultations between both parties to the dispute.
>
> 2. If such dispute could not be solved within six months from the time it was started by one of the parties concerned, it shall be submitted, at the request of the investor:
>
> - either to the national jurisdictions of the Contracting Party involved in the dispute;
> - Or to international arbitration.....
>
> Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final"

Another type of provision is a waiver[75]. An example appears in Article 1121 of North American Free Trade Agreement (NAFTA) thus:

> "1. A disputing investor may submit a claim under Art.1116 to arbitration only if:
>
> .....
>
> (b) the investor .... waive[s its] right to initiate or continue before any administrative tribunal or court under the law of any party, or other dispute settlement procedures, any proceedings with respect to the measure ...

[74] See McLachlan, Op cit at 103

[75] See McLachlan, Op cit at 107 and Baptista L O 'Parallel Arbitrations – Waivers and Estoppel' in Cremades and Lew, Op cit at 127

that is alleged to be a breach ... except for proceedings for injunctive, declaratory or other extraordinary relief."

This is the dilemma faced by foreign investors trying to ventilate their grievances or alleged breaches of either a contract or a treaty. This is so because 'investment treaty arbitration (or 'investor-state arbitration') refers to compulsory arbitration, pursuant to an investment treaty, between a state and an investor at the option of the latter. The term also distinguishes 'treaty' arbitration from the contract- or legislation-based variants of investment arbitration.[76]

Part VI

Jurisdictional Issues

It is a truism that the structure of investment treaties (BITs, RITs and MITs) are the same for both developed and emerging markets. Indeed, the treaties are essentially agreements between developed and developing economies or as commonly stated between capital-importing and exporting nations. If an investor opts to pursue treaty claims, what are the jurisdictional issues usually faced?. They are:

a) The existence of a Treaty
b) Protected Investors
c) Protected Investments
d) Arbitration under ICSID
e) Applicable Law
f) Substantive Rights – contingent and non-contingent

a) <u>The existence of a Treaty</u>

It is easy to identify MITs as they are sufficiently notorious. However, despite the provisions of Article 102 of the Charter of the United Nations obligating member states who are parties to BITs to deposit them with the UN Secretariat, copies of BITs are not easy to identify. The most accessible lists of BITs are the compilations appearing on the UNCTAD website[77] and ICSID website[78]. Unfortunately, neither listing is complete as can be seen from the fact that each refers to BITs absent from the other. One other source of information on BITs is the Ministry of Foreign Affairs, Local Embassy Staff or the Treaty sections of the Ministries of Justice.

[76] See Harten Op Cit at 3
[77] http://www.unctadxi.org/templates/DocSearch___779.aspx
[78] http://www.worldbank.org/icsid .

In determining whether a treaty exists, care should be taken in ascertaining the effective date, duration, whether it is retrospective or prospective[79] and the legal status of investments after the termination or expiration of the particular BIT.

b) Protected Investors and Investments[80]

Once it is ascertained that a treaty exists, the definition section of the treaty should be carefully examined to determine who are eligible "investors"[81] or "nationals" or "investments". A cursory review of the existing treaties shows that the definition of "investor" and "investments"[82] is essentially the same. An investor can be a natural or legal person. In the case of natural persons, an issue may arise in the situations of dual nationality. Citizenship laws of the Contracting States are used to determine who is a national of that state[83]. On the other hand, the place of incorporation is indicative of the nationality of a legal person though this appears unsettled.[84] Indeed in *Shell Nigeria Ultra Deep Limited v Federal Republic of Nigeria*,[85] one of the issues was whether the Claimant was not a Nigerian company and therefore not a national of the other Contracting Party. Other than place of incorporation[86], place of control or management (seat) is also relevant.[87] The rules of the contracting states or general principle of international law may be used to resolve this.[88]

Where it is a legal person, it could be a legal person constituted under the law of a Contracting Party or not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons having the nationality of a Contracting Party or by legal persons constituted under the law of the Contracting Party[89]. What is the meaning of 'control'? Does it mean 'majority control' or 'minority

[79] See the Argentina-US BIT (Art XIV(1)) which provides that it shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.
[80] This is one area where international and municipal law play a major role. See Sasson Op Cit at 27, 51 and 65 and Reed et al, Op Cit at 65
[81] See also McLachlan et al, Op Cit at 131
[82] See also Art 25 of the ICSID Convention
[83] Art 1(c) of the China Model BIT defines investor 'in respect of the People's Republic of China' as 'natural persons who have nationality of the People's Republic of China in accordance with its laws'. See China Model BIT reprinted in UNCTAD, *International Investment Instruments: A Compendium* Vol III (1996) 151, 152. Arts 1(c)(i) and 1(3)(a) of The UK and Germany Model BITs also defines 'nationals' specifically by reference to the law in force in their respective countries
[84] See *Tokios Tokelies v Ukraine* (Jurisdiction) (2005) 20 ICSID Rev-FILJ 205, *The Loewen Group Inc and Raymond v United States of America* (Award) 7 ICSID Rep 421 and *Aguas del Tunari SA (AdT) v Republic of Bolivia* (Jurisdiction) (2005) 20 ICSID Rev-FILJ 450
[85] Case No. ARB/07/18)
[86] In *Amco v Indonesia*, (Case No. ARB/81/1), Decision on Jurisdiction, 25 September, 1983, the Tribunal found that PT Amco had the nationality of Indonesia due to its place of incorporation and the place of its registered seat as well as its actual seat. See also *Klockner v Cameroon*, Award, 21 October 1983, 2 ICSID Reports 15, 18, *LETCO v Liberia*, Decision on Jurisdiction, 24 October 1984, 2 ICSID Reports 351, *Cable TV v St Kitts and Nevis*, (Case No. ARB/95/2), Award, 13 January, 1997 and *Vivendi v Argentina*, (Case No. ARB/97/3) Award, 21 November, 2000.
[87] See Schreuer, Op Cit at 279
[88] See *Marvin Roy Feldman Karpa v United Mexican States* (ICSID) Case No. ARB(AF)/99/1
[89] See Art 1(b) of the Nigeria-Netherlands BIT signed on 2 November, 1992 and came into force on 1 February, 1994

control'? This appears unsettled.[90] However, foreign control at the time of consent is an objective requirement which must be examined by the tribunal in order to establish jurisdiction.[91]

Investments are usually broadly defined and sometimes open-ended and may be direct or indirect investments[92]. A shareholding in the host country may be sufficient to constitute investment for the purpose of the protection. A host country can curtail the definition of investments. Article 1(a) of the Nigeria-Netherlands BIT defines 'investments' in terms of every kind of asset and more particularly, though not exclusively (i) movable and immovable properly as well as any other rights *in rem* in respect of every kind of asset; (ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures; (iii) claims to money, to other assets or to any performance having an economic value; (iv) rights in the field of intellectual property, technical processes, goodwill and know-how; and (v) rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.

The ICSID Convention does not define 'investment'.[93] Instead, Article 25 of the Convention limits the Centre's jurisdiction to legal disputes arising 'directly out of an investment'[94] In *Shell Nigeria Ultra Deep Limited v Federal Republic of Nigeria*[95], a major issue was whether there was a legal dispute arising directly out of an investment. Unfortunately, the proceedings were withdrawn by the Claimant after they had been concluded.

c) Arbitration under ICSID

Article 9 of the Nigeria-Netherlands BIT[96] provides thus:

> *Each Contracting State hereby consents to submit any legal dispute arising between that Contracting State and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March, 1965. A legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nations of the other Contracting Party shall, in*

[90] See *AdT v Republic of Bolivia*, ICSID Case No. ARB/02/3, (Jurisdiction)(2005). See also *Vacuum Salt v Ghana*, Case No. ARB/92/1, Decision on Provisional Measures, 14 June, 1992, Reported: 4 ICSID Reports 323, 47; Award, 16 February, 1994, Reported: 4 ICSID Reports 329.
[91] Schreuer Op Cit at 316
[92] See McLachlan et al, Op Cit at 163
[93] See McLachlan et al Op Cit at 164. See also Reed, et al Op Cit at 25
[94] Schreuer Op Cit at 106
[95] Supra
[96] Ibid

accordance with Article 25(2)(b) of the Convention, for the purposes of the Convention be treated as a national of the other Contracting Party.

Similar provisions are found in all MITs[97] and BITs[98]. In the Sri Lanka Model BIT, Article 8 provides for arbitration under ICSID, or the competent tribunal of the Contracting Party in whose territory the investment was made, or the Regional Centre for International Commercial Arbitration in Cairo, or the Regional Centre for Arbitration in Kuala Lumpur, or the International Arbitration Institute of Stockholm Chamber of Commerce or ad hoc arbitration under arbitration rules of UNCITRAL. This type of dispute settlement clause is usually described as a 'cafeteria style' approach where the investor has a choice between a range of different dispute settlement fora. The principle is *electa una via, non datur recursus ad alteram* (When one way has been chosen, no recourse is given to another). This clause represents a marked departure from the position under diplomatic protection procedures whereby an investor is forced to exhaust all available alternative remedies before having his State assert the claim on his behalf.

Where arbitration is under ICSID, the jurisdictional requirements provided in Article 25 of the ICSID Convention[99] must be fulfilled. The scope of the jurisdiction for any investment treaty tribunal is necessarily circumscribed by the dispute settlement clause of the applicable investment treaty. It is the treaty provision that contains the state's consent[100] to submit a defined category of disputes (jurisdictioin *ratione materiae*) with qualifying claimants (jurisdiction *ratione personae*) to arbitration[101]. In the case of the investor, it is the serving of the Request for Arbitration that gives the consent. Under Article 25, the investor will have to demonstrate that[102]

i) there is a legal dispute;
ii) arising directly out of an investment;
iii) between a Contracting State; and
iv) the national of another Contracting State; and
v) which the parties to the dispute consent in writing to submit to ICSID.

[97] See Article 1120 of the North American Free Trade Agreement (NAFTA) and Articles IX and X of the ASEAN Agreement for the Promotion and Protection of Investments

[98] See Article 8 of the UK 2005 Model BIT, Article X of the US 1994 Model BIT, and Article 10 of the Germany Model BIT

[99] See Schreuer C H *et al The ICSID Convention: A Commentary*, 2nd Edn (Cambridge: University Press, 2009) 71. See also Alexandrov S A The "Baby-boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis, 4 *The Law and Practice of International Courts and Tribunals* 19 (2005) and Happ R and Rubins N *Digest of ICSID Awards and Decisions: 2003-2007* (Oxford, University Press: 2009) 330

[100] States can give their consent in three ways: by contract, domestic legislation and treaty. See A R Parra 'The Role of ICSID in the Settlement of Investment Disputes' (1999) 16(1) ICSID News 5. In Nigeria, the NIPC Act (s26) gives such consent by legislation where contracts and the various BITs also give such consent. See also Schreuer Op Cit at 190

[101] Jurisdiction *ratione temporis* refers to the application in time of the respective investment treaty. Normally a state can only be liable for the breach of an investment treaty if that treaty was in force at the time the state took action allegedly in violation of the treaty.

[102] Reed et al Op Cit at 13 and Schreuer, Loc Cit

It is noteworthy that the Convention provides no definition of 'legal dispute' or 'investment'. All these can be ascertained from their definition in the BIT. The existence of a dispute may be in doubt in several ways. An open question may not have matured into a dispute between the parties. Or a difference of opinion may not be sufficiently concrete to amount to a dispute that is susceptible of arbitration. There may have been a dispute that has since become moot. The International Court of Justice (ICJ) has defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or interests between parties". ICSID Tribunals have adopted similar descriptions of "disputes" often relying on the ICJ's definition[103].

The disagreement between the parties must also have some practical relevance to their relationship and must not be purely theoretical. It is not the task of ICSID to clarify legal questions *in abstracto.* The dispute must relate to clearly identified issues between the parties and must not be merely academic.[104]

Another issue is the time of the dispute. The ICSID Convention does not indicate at what time a dispute must have arisen. A guide in this area is the BIT. Some BITs apply retrospectively and others prospectively.[105]

In *Tokios Tokeles v Ukraine*, supra, the Respondent argued that the dispute did not arise directly out of an investment because the alleged wrongful acts by Ukrainian governmental authorities were not directed against the Claimant's physical assets. The Tribunal rejected this argument and held thus:

> *For a dispute to arise directly out of an investment, the allegedly wrongful conduct of the government need not be directed against the physical property of the investor. The requirement of directness is met if the dispute arises from the investment itself or the operations of its investment, as in the present case.*

Generally the interpretation of Article 25 of the ICSID Convention is contentious because that is the basis of its jurisdiction. There are arguments as to who is a national of a contracting state[106] and how consent in writing is given. However, consent through

[103] See *Maffezini v Spain*, Decision on Jurisdiction, 5 ICSID Rep 387, 25 January, 2000.; *Tokios Tokeles v Ukraine*, Decision on Jurisdiction, 29 April, 2004, (2005) 20 ICSID Rev-FILJ 2005; *Siemens v Argentina*, Decision on Jurisdiction, 3 August, 2004, ICSID Case No ARB/02/8; *Luchetti v Peru*, ICSID Case No ARB/03/4, Award, 7 February, 2005; *Impregilo v Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April, 2005; *AES v Argentina*, ICSID Case No ARB/02/17, Decision on Jurisdiction, 26 April, 2005; *El Paso v Argentina*, ICSID Case No ARB/03/15, Decision on Jurisdiction, 27 April, 2006; *Suez at al v Argentina*, ICSID Case No ARB/03/17, Decision on Jurisdiction, 16 May, 2006; *MCI v Ecuador*, ICSID Case No ARB/03/6 Award, 31 July, 2007.

[104] See *Enron v Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January, 2004, *Continental Casualty v Argentina*, ICSID Case No ARB/03/9, Decision on Jurisdiction, 22 February, 2006, and *Pan American v Argentina*, ICSID Case No ARB/03/13, Decision on Preliminary Objections, 27 July 2006

[105] See Argentina-Spain BIT of 1991 that provides that the BIT shall not apply to disputes or claims originating before its entry into force.

[106] See Schreuer, Op Cit at 160

the BIT has become accepted practice[107]. Such a BIT must be in force at the relevant time. In *Tradex v Albania*[108], the Tribunal found that the Request for Arbitration had been submitted before the entry into force of the BIT between Albania and Greece. Therefore, it was not possible to establish jurisdiction on the basis of that treaty. While the host state may express its consent to ICSID's jurisdiction through the BIT, the investor must perform some reciprocal act to perfect consent. The investor may do this by submitting a request for arbitration to ICSID.[109]

Most BITs provide for 'cooling off periods' or 'consultation periods' for amicable negotiations.[110] It is unsettled whether such provisions are merely procedural or jurisdictional and whether failure to comply vitiates consent.[111]

In practice, there are other issues like whether the pre-conditions can be avoided or relying on the "most favoured nation" clause of the applicable treaty in order to access more favourable pre-conditions in other treaties concluded by the host state of the investment[112]; and whether a state's consent to arbitration in a BIT is overridden by a contractual arbitration clause in a related investment contract[113].

This raises the issue of the distinction between contractual right and a treaty right. What separates treaty rights from contractual rights is the source of the right. The foundation of a treaty claim is a right established in an investment treaty and this exist son the plane of international law, while the basis of a contractual claim is a right established in a contract which is found in the domestic law.[114] Ultimately, each jurisdiction is responsible for the application of the law under which it exercises its mandate. Different legal consequences may well flow from the application of the different applicable law. For example, if it is a breach of a treaty, the remedies will be the substantive rights provided in the BIT while, if it is a breach of contract, the domestic

---

[107] See Schreuer, Op Cit at 192

[108] Decision on Jurisdiction, 24 December, 1996, 5 ICSID Reports 58. See also *CSOB v Slovakia*, Decision on Jurisdiction, 24 May, 1999, paras 37-43

[109] See also *Tradex v Albania*, *supra* where the tribunal said: '…. it can now be considered as established and not requiring further reasoning that such consent can also be effected unilaterally by a Contracting State in its national laws, the consent become effective at the latest if and when the foreign investor files its claim with ICSID making use of the respective national law'. In *Zhinvali v Georgia*, (Case No. ARB/00/1) Award, 24 January, 2003 the tribunal found that the host State's offer of consent, contained in its Investment Law, was later accepted in writing by the claimant when it filed its Request for Arbitration. The same position applies where the consent is in a BIT. See AMT v Zaire, (Case No. ARB/93/1), Award, 21 February, 1997. See also Reed, et al Op Cit at 37

[110] See Schreuer, Op Cit at 237

[111] In *Roland S Lauder v The Czech Republic*, Final Award, September 3, 2001, it was held that a six-month waiting period is not a jurisdictional provision and it was waived: www.cetv-net.com/arbitration.asp and *Bayindir v Pakistan* (Jurisdiction) ICSID Case No. ARB/03/29. Compare *Enron Corporation v Argentine Republic* delivered on 14 January, 2004 where it was held that such a six-month requirement was jurisdictional: www.asil.org, *Goetz v Burundi* (Award: First Part) 6 ICSID Rep 3, and Reed et al Op Cit at 49

[112] See *Maffezini v Spain*, ICSID Case No. ARB/97/7, January 25, 2000 (2001) 16 ICSID Review – Foreign Investment Law Journal 212 where Maffezini, a Spaniard relied on another BIT entered into with Chile.

[113] *Lanco v Arginetina*, ICSID Case No. ARB/97/6, December 8, 1998, 40 I.L.M. 457, paras 39-40 where it was held that the BIT took precedence over the contractual claim as long as the arbitration claims allege a cause of action under the BIT.

[114] McLachlan et al, Op Cit at 99

laws will provide its own remedies. In this regard, the provisions of Article 27 of the Vienna Convention on Law of Treaties should be borne in mind – a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty[115]. However, *Noble Energy and MachalaPower Cia Ltd v Republic of Equador and Consejo Nactional de Elictricidad*[116] is an example of a pragmatic 'mix and match' approach in which the arbitral tribunal exercised the power to determine investment treaty question and the contract claim in the same proceedings when the claims are related.

In examining the provisions of Article 25 of the ICSID Convention, it is pertinent to also examine the effect of Article 26 of the Convention on the issue of 'consent to submission to the jurisdiction of ICSID'. Article 26 of the Convention provides thus:

> *Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention*.

It is settled that the consent required of a state is met by the State's consent given in the treaty while that of the investor is met by submission of the claim to arbitration. This being so, the exclusion of other remedies under Article 26 will not apply vis-à-vis the investor until such time as he files his request for arbitration. Mclachlan, et al[117] has comprehensively examined this article and came to the following conclusion:

i) The choice of ICSID arbitration is only to be treated as exclusive once it has been commenced. Any prior proceedings in national courts or pursuit of other alternative remedies will be considered in order to determine whether the state has failed in its substantive obligations under the treaty.
ii) The right to pursue ICSID arbitration for breach of treaty is not waived under Article 26 by the investor's prior invocation of domestic or contractual remedies.
iii) The exclusivity of ICSID arbitration in the case of treaty claims will, however, only relate to the investment dispute which forms the subject of such a claim.

It is submitted that the examination of Article 26 boils down to the issue of the distinction between treaty and contractual claims. Furthermore, the tribunal jurisprudence on this subject shows that it is difficult and controversial. Be this as it may, the examination of sources of the applicable laws will assist in resolving the issues arising from the treaty/contract divide.

[115] See also Article 3 of the ILC's Articles on State Responsibility
[116] ICSID Case No. ARB/05/12
[117] Op Cit at 98

The ICSID Convention will also supply the choice of law rule pursuant to which the law governing the substantive rights in the arbitration will be selected. Article 42 of the ICSID Convention provides:

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable.
(2) The Tribunal may not bring in a finding of *non-liquet* on the ground of silence or obscurity of the law.
(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

Section 6 (Articles 53-55)[118] of the ICSID Convention deals with recognition and enforcement of arbitral award under the Convention. Article 53 provides that the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the Convention while Article 54 provides that each Contracting State shall 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[119]. Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

One significant feature of arbitration under ICSID Convention is section 52 dealing with annulment of an award.[120] A person who is dissatisfied with the award of an ICSID arbitral tribunal may apply for its annulment. The grounds for annulment are: excess of jurisdiction, corruption, serious departure from a fundamental rule of procedure, failure to state the reasons for the award and lack of proper composition of the tribunal. A different panel is usually constituted for this purpose.

d) Law Applicable to the Substance of the Dispute

Generally, BITs make specific provisions on the law to be applied by the arbitral tribunals appointed to resolve disputes under the treaties[121]. While the UK-Argentina BIT provides that the arbitral tribunal shall decide the dispute in accordance with the provisions of the treaty, the laws of the Contracting Party involved in the dispute, including its rules on conflicts of law, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law, the US

[118] See Reed et al Op Cit at 179
[119] See the Nigerian International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act of 2004 which provides that such award shall have effect as if it were an award contained in a final judgment of the Supreme Court and the award shall be enforceable accordingly.
[120] See also Art 50-53 of the Arbitration Rules
[121] See Art 8 of the UK-Argentina BIT, Art 30 of the US 2004 Model BIT and Art 42 of the ICSID Convention.

2004 Model BIT, on the other hand, provides that the arbitral tribunal shall decide the issues in dispute in accordance with the treaty and applicable rules of international law.

A BIT is first and foremost a treaty. In *Asian Agricultural Products (AAPL) v Republic of Sri Lanka*[122]*, it* was held that BITs, as treaties, must be interpreted according to the Law of Nations, and not according to any municipal code. The substantive law applied in a treaty arbitration is the treaty itself and the applicable law for the interpretation of the treaty is international law.[123] In interpreting treaties, tribunals consistently apply the 1969 Vienna Convention on the Law of Treaties. Generally, in investment treaty arbitration, the relationship between international law and municipal law can be characterized as falling into three categories: international law standing alone as the entire dispute is regulated by international law; a *renvoi* to municipal law when it is necessary to apply concepts like 'investment', 'investor's nationality and 'property'; and lastly in applying the standard of protection offered especially under the 'umbrella clauses' where a breach of contract is alleged.[124]

Thus the *lex arbitri* of an ICSID arbitration is the ICSID Convention itself. The rules of law pursuant to which the arbitration is conducted are supplied by the Convention as interpreted under principles of public international law. The laws of the physical place of arbitration have no bearing whatsoever on the arbitration procedure. ICSID arbitration only intersects with domestic law for the purposes of (a) seeking a stay of domestic court proceedings brought in breach of an agreement to arbitrate under ICSID and (b) enforcement.[125] In addition, domestic law is used to determine the nature of the investor's property rights. International law must, of course, prevent a State from using its own laws wrongfully to deny the investment's status as an investment[126]. This has also been restated in Article 3 of The International Law Commission (ILC)'s Articles on State Responsibility thus:

> "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law".

[122] (Award) 4 ICSID Rep 245, 264

[123] The general rule of interpretation contained in the Vienna Convention on the Law of Treaties (VCLT) is found at Arts 31 and 32 of the Convention. See *Aguas del Tunari SA v Republic of Bolivia* (Jurisdiction) (2005) ICSID Rev-FILJ 450 where it was held that the interpretation of Art 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose, and by circling through this three step inquiry iteratively closes in upon the proper interpretation.

[124] See Sasson, Op Cit at xxx

[125] See McLachlan, et al, Op Cit at 55

[126] See Article 27 of the Vienna Convention on the Law of Treaties

e) Substantive Rights[127]

If all the jurisdictional issues discussed above are overcome, what is left to be determined is whether the host state has breached its substantive obligations and if it has, what are the remedies available to the investors[128]. The implications and nature of these remedies are contentious. More fundamentally, there is no doctrine of judicial precedent in arbitration and thus each arbitration is self-contained. This is compounded by the fact that, on the same facts and law, different tribunals can reach different decisions. As a general principle, arbitral awards bind only the parties[129]. The Statute of the ICJ is even more definitive than the ICSID Convention in rejecting the doctrine of judicial precedent.[130]

It should be stressed that there is substantial degree of uniformity in the substantive rights provided in all treaties. However, their scope and application have remained controversial[131]. They are

i) **Fair and equitable treatment[132]** (of the investors) and the international minimum standard. This is determined on a case-by-case basis as it is difficult to reduce the words "fair and equitable" to a precise statement of a legal obligation.[133] Failure to ensure transparency in the functioning of public authorities, bad faith, inconsistency, discrimination, changes in the law, denial of justice and the lack of a predictable framework for investment contrary to legitimate expectations of the investor and commitments made by the host state, are breaches of fair and equitable treatment standards. The standard here is non-contingent and, therefore, an investor must take the laws as he finds them. Indeed of all the catalogue of rights vouchsafed to investors, none has proved more elusive or occasioned as much recent controversy as this right.

ii) **Full protection and security[134]** – it is also difficult to give a precise meaning to this. However, a change in law that undermines the investment may amount to a breach of this obligation. The standard here is also non-contingent.

iii) **No arbitrary or discriminatory measures impairing the investment** –these obligations are not defined in the treaties.

[127] See Reed et al, Op Cit at 74
[128] See McLachlan, et al, Op Cit at 199
[129] See Article 53(1) of the ICSID Convention
[130] Article 59 of the Statute of the ICJ provides that the decision of the Court has no binding force except between the parties and in respect of that particular case.
[131] See McLachlan, et al, Op Cit at 200
[132] See Harten, Op Cit at 86. See also McLachlan, et al Op Cit at 226
[133] See *CME Czech Republic BV (The Netherlands) v The Czech Republic*, Partial Award, September 13, 2001: www.cetv-net.com/arbitration.asp and *Tecnicas Medioambientales TECHMED SA v Estados Unidos Mexicanos*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003
[134] See McLachlan, et al, Op Cit at 247

iv) **No expropriation without prompt, adequate and effective compensation[135] –** may be direct or indirect or creeping. Also includes measures 'tantamount to' or 'equivalent to' expropriation. Expropriation is permissible if done for a public purpose, on a non-discriminatory basis, in accordance with due process of law and on payment of compensation. Thus acts contrary to undertakings and assurances granted to investors may constitute expropriation. However, what is the standard of compensation[136] – full market value or fair market value or liquidated value, replacement value, book value, discounted cash flow (DCF), etc? If there is a track record of profitability, tribunals most readily adopt the DCF.

v) **National and "Most Favoured Nation" Treatment [137]–** treating investors no less favourably than that of nationals and companies of the host state (national treatment) or any other state (most favoured nation).[138] They are relative standards and the scope cannot be defined in the abstract.[139] These are contingent standards.

vi) **Free transfer of funds related to investments –** this obligation entitles foreign investors to compensation if suddenly affected by currency control regulations or other host state acts which effectively confine the investor's money in the host state.

vii) **Observance of specific investment undertakings – the umbrella clause[140] –** does this clause elevate any violation of contractual obligations in direct agreements between the host state and investors to the status of a treaty breach?[141] The consensus is that it does not, to hold otherwise would have had far-reaching legal consequences for the host states.

viii) **Compensation[142]** for expropriation is usually different from remedies for other international law breaches. BITs do not provide for the damages to which the investor is entitled as compensation for the treaty breaches. However, in appropriate cases, damages would be awarded in line with the 1928 principle set out by the Permanent Court of International Justice in the *Chorzow Factory Case[143]*. It should be noted that, in cases of successful claims for expropriation and other treaty breaches, compensation will not be cumulative.[144] Similarly, a respondent State has a duty to mitigate its losses; compound interest can be awarded to the investor and while each party bears its own legal costs, the tribunal costs are shared equally.

---

[135] See Maclachlan, et al, Op Cit at 265. See also Harten, Op Cit at 90
[136] See Maclachlan, et al, Op Cit at 315
[137] See Harten, Op Cit at 83
[138] See McLachlan, et al Op Cit at 251 and 254
[139] See Maffezini v Spain, Supra where the Argentine-Spain BIT was compared with Chile-Spain BIT
[140] See Sasson, Op Cit at 173
[141] See *SGS v Pakistan*, ICSID Case No. ARB/01/13, August 6, 2003 and *SGS v Philippines*, Decision on Jurisdiction, January 29, 2004: www.worldbank.org/icsid/cases/awards.htm
[142] See McLachlan, et al Op Cit at 315
[143] *Case Concerning the Factory at Chorzow (Claim for Indemnity) (Germany v Poland)*, Judgment on the Merits, September 13, 1928, Collection of Judgments, Permanent Court of International Justice, Series A, No. 17 (1928) 47 where it was held that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.
[144] Redfern & Hunter, Op Cit at 580-295.

ix) **The Concept of Attribution[145] –** Under Article 2 of the ILC's Articles on State Responsibility, there is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to the State under international law and constitutes a breach of an international obligation of the State. In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection with the government. In practice, the general rule is that the only conduct attributable to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, that is, as agents of the State.[146]

x) **Reparation, Restitution and Satisfaction[147] -** Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of Chapter II of the ILC's Articles of State Responsibility.[148] Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[149]

Part VII

The Prospects for Emerging Markets

As a general principle, arbitration holds great promise as the most effective way of resolving international commercial disputes, *a fortiori*, investment disputes. Despite the cafeteria-style provisions in most treaties where disputes can be resolved through the courts or other administrative tribunals, arbitral tribunals, have shown that they are quite elastic to handle investment disputes. The benefits derivable include:

---

[145] This is one area where the application of international law inevitably entails consideration of municipal law. See Sasson Op Cit at 1 and Art 4 of the ILC Articles of State Responsibility where reference is made to municipal law (internal law) in Art 4(2). See also Art 5

[146] Brownlie I *Systems of the Law of Nations: State Responsibility* (Part I) (Oxford, Clarendon Press, 1983) 132-166

[147] See Articles 34, 35 and 37 of the ILC's Articles of State Responsibility. See also Happ R and Rubins N *Digest of ICSID Awards and Decisions: 2003-2007* (Oxford, Oxford University Press, 2009) p 366

[148] In *Charzow Factory Case* supra, the PCIJ provided the most-often-cited formula in this field: "The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".

[149] See also *Enron Corporation and Ponderosa LP v Argentine Republic*: ICSID Case No ARB/01/3, Award of 22 May, 2007; *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award of 25 April, 2005, *Azurix Corporation v The Argentine Republic*, ICSID Case No. ARB/01/02 Award of 14 July, 2006; *ADC Affiliate Ltd and ADC and ADMC Management Ltd v The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 October 2006 and *Siemens AG v The Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February, 2007. See generally Happ R and Rubbins N *Digest of ICSID Awards and Decisions: 2003 – 2007* (Oxford, University Press, 2009

- Attraction of Foreign Direct Investment
- Appreciation of Arbitration as the preferred mode of resolving investment disputes
- Adoption of UNCITRAL Model Laws
- Entering into BITs that are properly structured with more favourable terms
- Adoption of other MITS either at sectoral, regional or international basis
- Protection offered by such treaties
- Emergence of a common law of investment protection
- Involvement of scholars and practitioners in emerging economies
- Inclusion of Clauses on environmental protection
- Inclusion of stabilization clauses in the BITs
- Inclusion of *force majeure* clauses in the BITs
- Inclusion of consolidation clauses in the BITs as found in NAFTA (Article 1126)
- Interpretation, Revision and Annulment of Awards under section 52 of ICSID Convention.

Part VIII

Challenges faced by Emerging Markets

Analysing the challenges posed by investment treaty arbitration in emerging markets should bear a triangular warning sign: **"Building site: please enter with care"**. This is so because this area of law is evolving; the doctrine of judicial precedent is inapplicable to arbitral proceedings and states have a right to exercise their sovereignty in negotiating treaties. Indeed, under treaty and international law, states can violate the provisions of BITS under certain special circumstances, including emergency, necessity and *force majeure*.

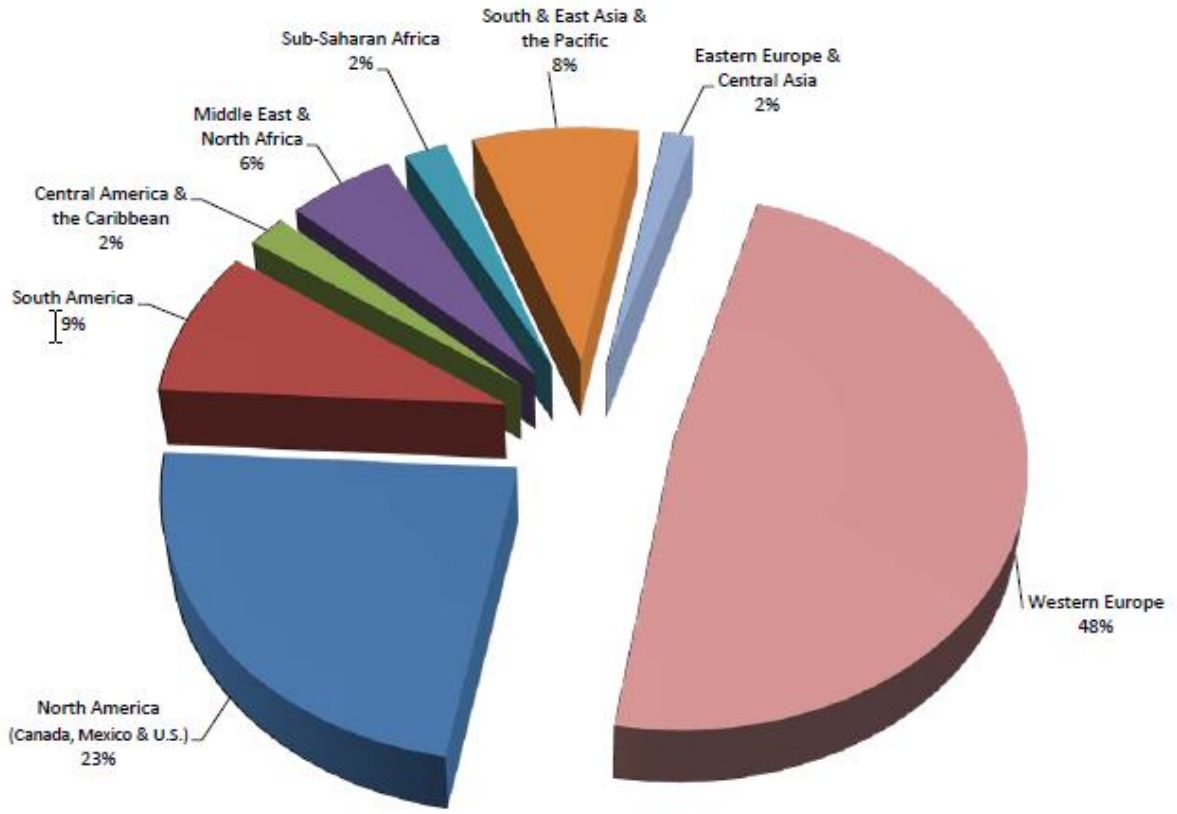
The following are some of the challenges faced by emerging markets in entering into BITs.

- **Negotiating, drafting and executing Investment Treaties** – proper legal advice is imperative. Secondly, the negotiating team should be composed of those with cognate experience and expertise in the particular sector, foreign investments and transnational transactions.
- **Creating the Enabling Environment – ratification of ICSID** – before any treaty is ratified, it should be properly debated and domesticated.
- **Maintaining a balance between rights of investors and host state** – the emerging markets are usually disadvantaged. Although there is a presumption of equality of bargaining powers, this is not always the case. International law also recognizes the doctrine of the equality of states. However, in practice, states are

unequal. No state would like to compromise on the issue of its sovereignty and capacity to protect its territorial integrity.

- **Enforcement of Substantive Rights –** most of these rights can not be comprehensively defined nor their scope delimited. It is hoped that with the development of a common law of treaty arbitration, a common thread would be found.
- **"Fork in the Road" provisions and effect of "cooling off periods" –** the operation of such clauses ("fork in the road") has posed particular difficulties. These may arise as a result of the interrelation with the treaty/contract divide. Has the choice by the investor of a forum to litigate another part of the same factual dispute really precluded it from treaty arbitration, or on analysis, the other claim was founded on contract (eg a concession contract) rather than treaty? Consequently, the forum for the resolution of disputes should be thoroughly examined bearing in mind the issue of *res judicata* and *lis pendens.* It is submitted that cooling off periods should be procedural and not jurisdictional.
- **Constitution of Arbitral Tribunals** – investment treaty arbitration is almost an exclusive preserve of developed economies as shown below. Capacity should be developed in emerging markets so that their citizens are made members of the tribunals. Just as Europe, during the colonial days established and administered courts, that is almost the same way that Western Europe and North America still dominate the number of arbitrators handling ICSID references.[150] The other challenge is to what extent should states empower privately contracted arbitrators to determine the legality of sovereign acts and to award public funds to businesses that sustain loss as a result of exercise of sovereign powers?

[150] 71% of the Arbitrators/Conciliators appointed by ICSID are from Western Europe and North America: ICSID Caseload Statistics, 2011-1, Op cit at p 16



Arbitrators, Conciliators and Ad Hoc Committee Members Appointed in ICSID Cases – Distribution of Appointment by Geographic Region. Source: ICSID Caseload Statistics 2011

- **Enactment of Investment Laws** – while the treaty provides for protection of the substantive rights in the BITs, emerging markets should enact laws that protect both local and foreign investments.
- **Parallel Proceedings[151] –** the very nature of investment arbitration gives rise to the possibility of parallel proceedings[152] or the determination in another forum which may be said to affect the issue to be determined by the investment tribunal. Similarly, it is possible that more than one investment tribunal is constituted by a different investment treaty and may be asked to rule upon the same underlying factual dispute[153]. In such a case, should one tribunal stay its proceedings in deference to the alternative tribunal or insist on the priority of its own process[154]? In the case of multiple claims between the same parties on the

[151] See Cremades M and Lew J D M (eds) *Parallel State and Arbitral Procedures in International Arbitration* (Paris: ICC Publications, 2005) and McLachlan Op Cit at 79
[152] Baptista L O 'Parallel Arbitrations – Waivers and Estoppel in Cremades and Lew (eds) *Parallel State and Arbitral Procedures in International Arbitration, Op Cit* at 127-151
[153] As was the case with the Lauder Cases, supra based on Czech-Netherlands BIT and Czech-US BIT but with the same facts and different results.
[154] See Fawcett J J (ed) *Declining Jurisdiction in Private International Law* (Oxford: University Press, 1995) 27

same subject matter, to what extent are the principles of *res judicata*[155], *lis pendens*[156] *and electa una via*[157] to be applied? Is there any international instrument on *lis pendens when, f*rom the same cause of action parallel proceedings are pending involving the same parties[158]*?* There is an obvious risk that, if the proceedings continue, this may result in two irreconcilable judgments. Will one forum decline jurisdiction or suspend proceedings on the basis of *forum non conveniens* or the 'mechanical first-seised approach'? Alternatively, should both sets of proceedings continue and rules of *res judicata* could be used to prevent two judgments/awards. If there are two judgments/awards, rules on recognition and enforcement could be used to decide which one is to have priority. Unfortunately, ICSID does not have such rules but Contracting States are obliged to enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state[159].

- **Knowledge of existing BITs –** how many nationals are aware of the existence of the various BITs signed by their governments? Nigeria has entered into at least 22 BITs. Is there any proper documentation as to the exact number in compliance with Article 102 of the Charter of the UN obligating member states who are parties to BITS to deposit them with the UN Secretariat?
- **Arbitrating under ICSID or UNCITRAL Arbitration Rules –** ICSID protects foreign investment. Under a BIT, the standards of substantive rights under ICSID arbitration are higher than arbitration under municipal laws under the UNCITRAL Arbitration Rules. Arbitration under the BIT adopts international law as its applicable law by virtue of the provisions of the Vienna Convention on the Law of Treaties while contractual rights are determined by domestic laws.
- **Complaints from emerging markets – l**oss of sovereignty, unequal bargaining power and poor governance. (ICSID tribunals awarded $133 million against Egypt for expropriating the land of two Italian citizens making it the largest award rendered to individual claimants and $353 against Czech Republic). Can ICSID be lenient when governments take measures that they view as necessary to shield their citizens from an economic meltdown, with many prominent lawyers arguing that contract maintenance is a priority?
- **Politicization of Awards –** Argentina has been unable to honour ICSID awards. US-based investors who are owed money are applying pressure on their own government to step up its demands that Argentina complies with the ICSID awards – awards being politicized. The good news is that Chinese Investors (Ping An, a Chinese investment house, suffered a 90% loss on its investment in Fortis during the crisis) are submitting claims against the Belgian government because of its role in pushing the sale of Fortis Bank, a Dutch-Belgian financial firm, to BNP Paribas, a French financial firm, during the financial crisis.

[155] See Sheppard A 'Res Judicata and Estoppel' in Cremades abd Lew (eds) *Parallel State and Arbitral Procedures in International Arbitration, Op Cit* at 219-267

[156] See Vicuna F O 'Lis pendens arbitralis' in Cremades and Lew (eds) *Parallel State and Arbitral Procedures in International Arbitration, Op Cit* at 207-218

[157] See McLachlan et al, Op Cit at 95

[158] See Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968.

[159] See Art 54 of the Brussels Convention

- **Forum Shopping[160] –** In *CME Czech Republic BV v Czech Republic*[161], CME Czech Republic, a Dutch company owned by Ralph Lauder, an American cosmetics billionaire but a Dutch investor, was awarded US$353 million against Czech Republic under the Czech Republic-Netherlands BIT on 13 September, 2001. However in *Lauder v Czech Republic*[162], Lauder, the same American but as the owner of an American company, initiated arbitral proceedings against Czech Republic under the Czech-US BIT, based on the same facts as *CME Czech BV v Czech Republic*, *supra* and the claim was dismissed on 3 September, 2001. This is an invitation to forum-shopping by investors.
- **Annulment Proceedings[163] –** one area of conflict between the capital exporting countries and capital importing countries in relation to ICSID is annulment proceedings provided in Arts 50 and 52-53 of the ICSID Arbitration Rules[164]. Under the provisions of Art 50(1)(c)(iii) an award can be annulled if the Tribunal was not properly constituted, the Tribunal manifestly exceeded its powers, there was corruption on the part of a member of the Tribunal, there was serious departure from a fundamental rule of procedure and the award failed to state the reasons on which it is based. Quite unlike the provisions in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards where domestic courts can set aside an aside, there is no such provision in ICSID. While the capital exporting countries would like their courts to be involved in the process of enforcement or setting aside an award, the capital importing countries prefer the ICSID, where the only remedy available to an aggrieved party is application for annulment. While the capital importing countries see annulment proceedings as one of the strengths of ICSID, the capital exporting countries see them as infringing on their sovereignty. Over the years, there have been conflicting decisions on the interpretation of Arts 50 and 52-53 of the Arbitration Rules bearing in mind that ICSID excludes any appeal or other remedy except those provided in ICSID[165]

---

[160] See Harten, Op Cit at 113

[161] (Merits) (13 September 2001) 14(3) *World Trade and Arb Materials* 109. As an aside, in 2006 Ralph Lauder reportedly paid $135 million for Gustav Klimt's Portraits of Adele Bloch-Bauer I, the highest price ever paid for a painting: C Vogel, 'Lauder Pays $135 million, a Record, for a Klimt Portrait' The New York Times (19 June 2006)

[162] (Final Award) (3 September 2001), (2002) 4 *World Trade and Arb Materials* 35

[163] See Reed et al, Op Cit at 162

[164] See also Arts 50-52 of the Convention.

[165] See *Klockner v Cameroon* , ICSID Case No. ARB/81/2, Award, 21 October, 1983 *and Amco Asia v Indonesia* 1CSID Case No. ARB/81/1, Award, 20 November, 1984 (referred to as the first generation of annulment proceedings regarded as turning the annulment proceedings to appellant systems); *MINE v Guinea* , ICSID Case ARB/84/4, Decision on Annulment (22 December, 1989) (second generation – ruled for failure to state reasons); *Wena Hotels v Egypt*, ICSID Case ARB/93/1, Decision on the Application for Annulment, 5 February, 2002, *Vivendi v Argentina* , ICSID Case No. ARB/97/3, Decision on Annulment, 3 July, 2002 *and CMS v Argentina* , ICSID Case No. ARB/01/18, Decision on Annulment, 25 September, 2007 (third generation – raised fresh issues including the role of ICSID Secretariat) and *Sempra v Argentina*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June, 2010 *and Enron v Argentina*, ICSID Case No. ARB/01/3, Decision on Annulment, 30 July, 2010 (fourth generation – defence of necessity under customary international law and BIT failed): Promod Nair, 'ICSID Annulment Awards: The Fourth Generation' Global Arbitration Review, Volume 5, Issue 5 (October 2010): www.GlobalArbitratioinReview.com. See also C Schreuer 'Three Generations of ICSID Annulment Proceedings' in *IAI International Arbitration Series, No. 1, Annulment of ICSID Awards,* eds. E Gaillard and Y Banifatemi (New York, Juris Publishing, Inc. 2004

- **Denunciation of ICSID[166] –** In April 2007, Bolivia, Venezuela, Nicaragua and Cuba proclaimed their intention to withdraw from the International Monetary Fund and the World Bank. The intention was borne out of the hostility towards international arbitration and the perception in many Latin American countries that international investment arbitration is biased towards investors[167]. Accordingly in May 2007, Bolivia submitted a notice of denunciation of ICSID. Ecuador has followed[168]. The Ecuadorian President stated that it was withdrawing from ICSID "for the liberation of our countries because (it) signifies colonialism, slavery with respect to transnationals with respect to Washington, with respect to the World Bank". At that time ICSID was handling $12 billion worth of requests for arbitration over several disputes against Ecuador (Argentina had over 30 claims and by 2009 had 46 treaty cases[169] outstanding against it!!). However a State's withdrawal does not affect its obligations under the Convention when it has given consent[170] to the jurisdiction of the centre before its notice of denunciation was received.[171] The effect of the denunciation depends on the duration of the respective BITs.
- **Amending ICSID[172] –** It is being suggested that, since ICSID came into being in 1965, it is overdue for review/amendment to include provisions allowing tribunals to consider the inequality, events of *force majeure*[173], erosion of sovereignty, environmental, public health and labour concerns of the host states.
- **Judicial Precedent –** There is no hierarchy of arbitral tribunals and proceedings are generally private and confidential. No award is absolutely binding on the other. Indeed from the ICJ's judgment to ICSID awards, they are binding on the parties to the proceedings only. It is more complicated when one compares international commercial arbitration or investment treaty arbitration regulated by international law and domestic arbitration regulated by municipal law. Do we need an Appellate Body like that of the World Trade Organisation (WTO) to ensure consistency of decisions?

---

[166] Under the rules of customary international law as codified in Art 54 of the Vienna Convention on the Law of Treaties, 1969, a state can withdraw from a treaty if the treaty so provides or at any time by consent of all the parties after consultation with the other Contracting States.. Art 71 of ICSID provides that any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice. However, Art 72 of ICSID provides that such denunciation shall not affect the rights or obligations under this Convention of that State or any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depository. See also Schreuer, Op Cit at 257

[167] See Gaillard E 'The Denunciation of the ICSID Convention' in *International Arbitration Law*, Vol 237, No. 122,

[168] http:www.ejiltalk.org/Ecuador-denounces-icsid-much-abo-about-nothing/

[169] *http:isslerhall.org/drupal/content/argentina/icsid-cases*

[170] See Art 25(1) of ICSID that establishes the conditions for the jurisdiction of ICSID.

[171] See also Art 70(1) of the Vienna Convention on the Law of Treaties, 1969

[172] See Supnik K M 'Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law' *Duke Law Journal*, Vol 59:343

[173] The economic crisis that befell Argentina in 2001-2002 and the more than 30 claims for compensation estimated at $17 billion against her under various BITs supports this view. Similarly, will the global economic meltdown qualify as f*orce majeure?*

- **Regional Investment Treaties (RITs) –** increasingly, there is a regionalization of international investment law[174]. Member States of the Economic Community of West African States (ECOWAS) have entered into various BITs with various provisions. The challenge is whether the West African sub-region, ECOWAS for instance should not pioneer the development of Regional Investment Treaties by drafting a model for use in the sub-region.[175]
- **Need to continue to provide for Investor/State Arbitration** - The Government of Australia has announced that it will no longer pursue investor-state arbitration provisions in future international economic agreements with developing countries. The policy shift builds upon Australia's longer-standing concerns about including such provisions in agreements with higher-income developed economies – pointing instead to the reliability of its own legal system for resolving disputes involving foreign investors). Should all emerging markets adopt this position?

Conclusion

The subject of investment treaty arbitration is *sui generis* and an emerging jurisprudence. Even in developed economies, its ramifications are unsettled. It is comforting, however, that a common law of investment protection is emerging despite the absence of judicial precedent.

Emerging markets should, as a matter of policy, ensure that in negotiating the terms of the treaty, proper legal advice is sought. Emerging markets should subject the draft treaties to vigorous and robust debates to ensure that the best terms are negotiated. The crisis that Argentina had in December 2001 is attributable to the privatization of its utilities – water, gas, electricity against the background of various BITs with America, UK, Spain, France and Germany. To what extent is the ongoing privatization of the power sector in Nigeria protected against such catastrophe?

Most emerging markets have ratified the ICSID Convention but this is known to only a few. The import of the Convention should be publicized.

While it is recognized that the distinction between contractual rights and treaty rights is problematic, a careful analysis of the source of the right or the fundamental basis of the claim is helpful in determining the appropriate forum. Treaty claims exist on the plane of international law while contract claims flow from the parties express agreement and are to be determined in accordance with the law applicable to the contract. The applicable law is usually the municipal law. Attempts should be made to avoid parallel

[174] See UNCTAD, *Investment Provisions in Economic Integration Agreements*, UNCTAD/ITE/IIT/2005/10 (Geneva: UNCTAD, 2006 at 31. See also NAFTA, Chapter II and ASEAN Comprehensive Investment Agreement signed in 2009.

[175] See Zhong, Zewei 'The ASEAN Comprehensive Investment Agreement: Realizing a Regional Community' in *Asian Journal of Comparative Law* (2011), Vol. 6: Iss.1, Article 4

proceedings. In the event that it occurs, the principles of *res judicata* and *lis pendens* should be respected.

For pure investment disputes arising from treaties/laws, arbitrate preferably under municipal law, don't litigate but remember the triangular warning sign: "Building site: please enter with care".

Acknowledgements

I will simply end this Inaugural Lecture by saying 'To God Be the Glory'. It is unimaginable that I would stand before a distinguished audience of this nature to give an Inaugural Lecture. But my scriptures remind me that with God, all things are possible. He and He alone takes the glory and honour done to me by the Director General of this dynamic institution to deliver this Inaugural Lecture. My major regret however, is that my parents, Mr and Mrs Ikozi Idornigie are not alive to witness a day like this in my life. I remember them fondly for all the things that they did and said to me before they passed on.

When I wrote my PhD dissertation, I said of my wife,

> *"my wife, Rosalyn has been a mother, wife and friend. She deserves a special acknowledgement for encouraging, inspiring and standing by me and for me especially when the going was tough. She also managed the home front effectively".*

These words are more relevant today than ever before except that I would like to add that she has been a strong pillar in my life. To our children, Emo, Obo, Emeso, Tony and Imoudu, and our grandchildren, Obekhai and Ochuwa, you have remained a great source of strength in my life. I derive great joy from being your father, grandfather and friend. I dedicate this work to my wife, children and grandchildren.

My Mentors, Uncles, brothers, sisters, extended relatives and in-laws deserve and I hereby give them my sincere appreciation. However, three persons have played a major role in my life. I crave your indulgence to mention specially Chief J O Iluebbey, a retired Permanent Secretary in the Edo State Civil Service and former Acting Secretary to Edo State Government, Chief (Professor) E U Emovon, (CON), FAS the Obayagbona of Benin Kingdom, former Vice-Chancellor, University of Jos and former Minister of the Federal Republic of Nigeria and His Excellency (Dr) Abdullahi Adamu, (CON), Seriki Yaki Keffi, the Aare Obateru of the Source of Ile Ife, Terenu of Owu Kingdom, Zanna of Borno and Adaweji of Afo Nation, a Distinguished Senator of the Federal Republic of Nigeria and former Honourable Minister of State, Federal Ministry of Works and Housing.

In my academic pursuit, I must in a special way thank all my teachers, lecturers, tutors and supervisors. In particular, I recognize my Supervisors, Professor Joash Amupitan, Dr Olugbenda Shoyele and Professor K I Igweike.

I appreciate all my colleagues at the University of Jos, Nigerian Law School, Federal Ministry of Works and the NIALS Family. Perhaps I should not have been a law lecturer today but for the 'Indomitable Five' (Bola, Evelyn, Gab, Yakubu and I) at the University of Jos and the Nigerian Law School. I hereby express my gratitude.

My DG, Sir, you are not just The Okailolo of Asaba land, I want to thank you specially for your robust intellect, encouragement, support and inexhaustible fountain of knowledge. All these are reflected in your accomplishments. It reminds me of one of Lord Denning's works. My DG, what next in your accomplishments?

To my friends, too numerous to mention, I remain indelibly grateful. They are more of relatives than friends. They have been quite supportive indeed.

Finally, I remember the Nigerian Bar Association, International Bar Association, Chartered Institute of Arbitrators, Institute of Chartered Secretaries & Administrators and Commonwealth Lawyers Association. I feel privileged to be a member of these distinguished bodies. I remember my Village Head, my Fathers in the Lord, other professional and academic colleagues, students, friends, clients and well-wishers.

Thank you for your attention and God Bless.