The Role of Bilateral Investment Treaties (BITs) and Dispute Resolution in the Context of BITs.[1]

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BEING AN INTERVENTION AT THE WEBINAR ORGANISED BY THE LAGOS COURT OF ARBITRATION THURSDAY, 9 JULY, 2020

Outline of Intervention/Presentation

- ✓ **Introduction – origin of BITs, politicisation, de-politicisation and re-politicisation of investment disputes**
- ✓ **Conflict of interest Between Capital-Importing/Exporting Countries – 1962 and 1974 UNGA**
- ✓ **The Basic Features of a BIT (First & Second Generation of BITs)**
  - **Substantive Rights – Protection offered Investors**
  - **Procedural Provisions - Dispute Resolution Clauses in BITs – cafeteria, fork-in-the road, sole forum; invoking Art 25 of ICSID**
- ✓ **The Convention on the Settlement of Disputes Between States and Nationals of Other States (ICSID), 1965**

[1] Note: This Paper is not an academic paper. It was meant to be converted to power point presentation and therefore, there are no footnotes. It is hoped that it will be updated with appropriate footnotes.

- ✓ **Criticisms of Investor State Dispute Settlement (ISDS)**
- ✓ **Reform of ISDS**
- ✓ **Concluding Remarks**

Introduction

I would like to thank the Lagos Court of Arbitration for the opportunity to make this presentation. The subject matter of this Webinar and in particular this topic is very close to my heart for many reasons. Nigeria has signed twenty-nine (29) Bilateral Investment Treaties (BITs) and only fifteen (15) are in force. The duration of such treaties is usually ten (10) or fifteen (15) years. Some of the treaties not ratified have expired and yet they have not been re-negotiated or terminated. In December 2016, Nigeria signed the globally acclaimed reform-oriented Nigeria-Morocco BIT that has a duration of ten (10) years. Morocco ratified it in 2017 and we are yet to ratify it. This leads me to this topic. What is the role of BITs in national development? What should be the appropriate dispute resolution mechanism?

There are various versions on the origin of Bilateral Investment Treaties (BIT). However, until the seminal work of the Argentine jurist and diplomat, Carlos Calvo in 1868, 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".

Although the diplomatic protection was a welcome development, there was 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 is the era often referred to as the 'politicization of investment disputes.

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. The Calvo Doctrine was incorporated into the forerunner of the modern investment treaty, the "treaty of friendship, commerce and navigation" (FCN Treaty).

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 BITs. There were other works like the 1959 Abs-Shawcross Draft Convention on Investments Abroad and the 1967 OECD Draft Convention on the Protection of Foreign Property.

This led to more reforms and the creation of the International Centre for the Settlement of Investment Disputes (ICSID) mechanism pursuant to the provisions of the ICSID Convention of 1965.

In this presentation, the role of BITs and the dispute resolution clauses in them will be examined.

Conflict Between Capital Exporting and Capital Importing Countries

In the sixties, there was a major division between capital exporting and importing countries. There was also conflict. While the capital exporting countries wanted to protect their investment in foreign countries and ensuring that disputes were referred to international tribunals, the capital importing wanted to control their resources and settle disputes in their domestic courts. Recall the UNGA Resolution of 1962 on Permanent Sovereignty over Natural Resources and the UNGA Resolution of 1974 on the Charter of Economic Rights and Duties of States. Today, this distinction is blurred. The consequence is that the BITs used in the 90s are not the same as those used in the 20s. See the Nigeria-Netherlands BIT 1992 and Netherlands Model BIT 2018. See also the older BITs of UK, US, France, Germany, etc and their modern BITs.

Basic Features of Bilateral Investment Treaties

A **bilateral investment treaty** (BIT) is an **agreement** establishing the terms and conditions for private **investment** by nationals and companies of one state in another state. In other words, it is a treaty between states containing reciprocal undertakings on the facilitation, promotion and protection of investments of nationals in the territories of the other contracting state. The BITs became the natural successors to the Friendship Commerce and Navigation Treaties.

All BITs can be categorized into generations. The BITs in Nigeria can thus be categorized into two generations – first generation are those concluded between 1990 and 2012 and second generation are those concluded between 2013 and 2016.

The first generation BITs are traditional BITs without provisions on powers of the host state to regulate, provide for health, environment, labour, human rights and other reform-oriented and sustainable development provisions. The second generation BITs are improvements on the first generation with provisions which are consistent with the reform agenda of the United Nations Conference on Trade and Development (UNCTAD). The overarching objective of the reform agenda is the right of the host state to regulate investment for public policy objectives and safeguard the environment.

Prior to the non-investment treaty cases registered from 1972, the first investment treaty case – *Asian Agricultural Products Limited v Sri Lanka* was registered in 1987 but was not decided until 1990. However as at 1 January, 2020 the total number of cases registered by ICSID is 745. Note that the ICC, PCA and LCIA also conduct ISDS cases.

Similarly, the world's first BIT was signed in 1959 between Pakistan and Germany. The growth in this form of dispute resolution in the two decades since then has been exponential. The growth is further reinforced by the fact that as at end of 2019, 2,895 BITs have been signed with 16 concluded in that year.

Today, Nigeria has entered into 29 BITs, out of this number only 15 are force. As a country at the threshold of industrialization and creating the legal and institutional framework for the attraction of foreign direct investment, it is hoped that efforts will be made to ensure that all the 29 BITs are in force. The BITs are with:

a) Algeria
b) Austria
c) Bulgaria
d) Canada
e) China
f) Egypt
g) Ethiopia
h) Finland
i) France
j) Germany
k) Italy
l) Jamaica
m) Korea, Republic of

n) Kuwait
o) Morocco
p) Netherlands
q) Romania
r) Russian Federation
s) Serbia
t) Singapore
u) South Africa
v) Spain
w) Sweden
x) Switzerland
y) Taiwan Province of China
z) Turkey
aa) Uganda
bb) United Arab Emirates
cc) United Kingdom

Out of this number only fifteen (15) are in force. They are:

a) United Kingdom
b) France
c) Netherlands
d) Republic of Korea
e) Switzerland
f) Romania
g) South Africa
h) Italy
i) Spain
j) Finland
k) Germany
l) China
m) Serbia
n) Sweden
o) Taiwan

Most BITs have a duration of 10 years with sunset/survival provisions of another 10 years. Some BITs not in force (unratified BITs) have exceeded their initial term. BITs in this category are: Egypt (2000), Algeria (2002), Bulgaria (1998), Ethiopia (2004), Jamaica (2002) and Uganda (2003).

Other than the UNCITRAL, ICSID, the UNCTAD has proposed several reforms of the BITs. Indeed from the World Investment Reports of 2015 till date, the UNCTAD has carried out sustainable development reform agenda.

Initially, the primary purpose of the ICSID Convention was the promotion of FDIs. However statistically, there is no link between BITs and FDIs as shown by South Africa. Furthermore, in determining the role of BITs, we must consider the provisions of a first generation BIT. A BIT has substantive provisions and procedural provisions. The substantive provisions in the old generation BIT include:

- Preamble
- Definitions – investor, investment
- Admission
- Scope of the Agreement
- Substantive Rights:
  - Fair and Equitable Treatment
  - Full Security and Protection
  - National Treatment
  - Most-favoured nation treatment
  - Protection from expropriation – direct and indirect
- Compensation for Damages & Loss
- Transparency
- Transfers
- Umbrella Clauses
- State to State Disputes
- Duration

The procedural provisions – dispute resolution clauses that will be discussed hereunder.

In the second generation BITs, the substantive provisions are qualified and circumscribed in addition to provisions on anti-corruption, health, environment, labour, human rights, sustainable development goals and the rights of states to regulate, among others.

International Convention for the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID- The Washington Convention), 1965

The ICSID Convention created the ICSID Centre. The goals of the Washington or ICSID Convention include the creation of an institution designed to facilitate the settlement of disputes between states and foreign investors and was seen as a major step towards promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wished to attract it.

At its establishment, the main attraction of the Washington Convention was that unlike diplomatic protection, a system was instituted under which non-State entities – corporations or individuals – could sue States directly, in which State immunity was much restricted, under which international law could be applied directly to the relationship between the investor and the host state, in which the operation of the local remedies rule was excluded, was neutral and self-contained, demonstrated transparency, had clear and reasonable cost schedules, a body sponsored by the World Bank and in which the tribunal's award would be directly enforceable within the territories of the State parties. Nigeria signed the Convention on 13 July, 1965 and ratified it on August 23, 1965 and ICSID now has 154 member states and 163 signatory states. Forty-three African countries have ratified the ICSID Convention. However, Nigeria has been involved in three ISDS disputes including the Malabu dispute under the Nigeria-Netherlands BIT. All these developments provide a right of direct recourse to investors and not subject to the political considerations inherent in the diplomatic protection era.

It was also noted that investment disputes were, as a rule settled through administrative, judicial or arbitral procedures available under the laws of the country in which the investment concerned is made. However, experience shows that disputes may arise which the parties wish to settle by other methods; and investment agreements entered into in recent years show that both States and investors frequently consider that it is in their mutual interest to agree to resort to international methods of settlement. This is the era referred to as 'de-politicisation of investment disputes'.

It was assumed that private capital will continue to flow to countries offering a favourable climate for attractive and sound investments, even if such countries did

not become parties to the Washington Convention. Furthermore, adherence to the Washington Convention by a country would provide additional inducement and stimulate a large flow of private international investment into its territories, which is the primary purpose of the Washington Convention.

It was thought therefore that the Washington Convention would maintain a careful balance between the interests of investors and those of host states and offered a neutral dispute resolution forum to investors that are wary of nationalistic decisions by local courts and to host states that are wary of self-interested actions by foreign investors.

Dispute Resolution Clauses

Dispute resolution clauses in BITs include

- ✓ Cafeteria style – litigation, arbitration under domestic law, regional centres, UNCITRAL, ICSID, ICC, LCIA, etc – these are the options open to the parties.
- ✓ Fork-in-the-road – in a cafeteria style, once a forum is chosen, others are foreclosed
- ✓ Recourse to ICSID only – ISDS eg Nigeria-Netherlands
- ✓ Exhaustion of Local Remedies.

Thus all BITs provide for dispute resolution mechanism. Such mechanism can be litigation before domestic courts/tribunal or arbitration under various rules. However, the most prominent is arbitration under the ICSID Convention or the London Court of Arbitration or the Arbitration Rules of the International Chamber of Commerce (ICC) or under UNCITRAL Arbitration Rules or Regional Centres. Thus where arbitration is under ICSID, the jurisdictional requirements provided in Article 25 of the ICSID Convention must be fulfilled. Thus if an investor opts to pursue treaty claims under section 25 of the ICSID Convention, what are the jurisdictional issues usually faced? They are:

- ✓ The existence of a treaty
- ✓ That the claimant is a protected investor/national as defined in the treaty
- ✓ That the investment is the protected investment as defined in the treaty
- ✓ Consent to arbitrate under the ICSID Convention
- ✓ Applicable Law

- ✓ A breach of the substantive provisions in the treaty, for example, expropriation.

The scope of the jurisdiction for any investment treaty tribunal is necessarily circumscribed by the dispute settlement clause of the applicable investment treaty. Article 9 of the Nigeria-Netherlands BIT 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 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.

It is the treaty provision that contains the state's consent to submit a defined category of disputes (jurisdictioin *ratione materiae*) with qualifying claimants (jurisdiction *ratione personae*) to arbitration. States can give their consent by treat, statute or contract. 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

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.

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. 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

ISDS Reform

At its 48th Session in 2015, UNCITRAL noted the cooperation and coordination of efforts by similar organizations active in the field of international arbitration and conciliation. In relation to ISDS, UNCITRAL noted a number of challenges in ISDS and proposals for reform formulated by a number of organisations. UNCITRAL was also conducting a study on whether the UN Conventions on Transparency in Treaty-Based Investor-State Arbitration (the Mauritius Convention) could provide a useful model for possible reforms in the field of ISDS in conjunction with interested organisations like the Centre for International Dispute Settlement (CIDS).

At its 49th Session in 2016, UNCITRAL had an update on the work done by CIDS. The CIDS considered two approaches, namely, (a) a permanent international dispute settlement body providing direct access to private parties and state parties alike for investment related matters, and (b) an appeal mechanism for investor-state arbitral awards.

At its 50th Session on 3-21 July, 2017, UNCITRAL considered possible future work in the field of dispute settlement regarding the reforms of the ISDS. The current ISDS regime and its origin were reviewed. In particular, it was recalled that the ISDS regime had been developed to allow a foreign national – individual or a company – to bring a claim directly against a sovereign state, in a significant break from traditional mechanisms which were founded on the institution of diplomatic protection.

Importantly, the ISDS regime resulted in the "de-politicization" of investment disputes and effectively removed the risk of such disputes escalating into inter-State conflicts. While there are growing number of BITs , there are growing numbers of ISDS cases. However, the ISDS regime attracted strong and growing criticisms in various parts of the world. Concerns are diverse –

a) Arbitrator - appointment, impartiality and independence
b) Potential impairment of the State's rights to regulate in the public interest
c) Inability to correct factual and legal errors in awards
d) Lack of transparency and issues of legitimacy

e) Absence of consistency and coherence in the decisions of ad hoc tribunals
f) Frivolous Claims

The arguments in favour of ISDS include:

- Provides an additional avenue of legal redress to covered foreign investors and enforces the substantive treaty obligations.
- Allows foreign investors to avoid national courts of the host State if they have little trust in their independence, efficiency or competence.
- Avoids recourse to diplomatic protection (investors do not need to convince their home State to bring claims or exercise diplomatic protection).
- Ensures adjudication of claims by a qualified and neutral tribunal.
- Removes any state immunity obstacles that may complicate domestic legal claims in some States.
- May be faster than domestic court procedures in some countries.

The arguments against ISDS include the following:

- It grants foreign investors greater rights than those of domestic investors, creating unequal competitive conditions.
- Exposes host States to legal and financial risks, without bringing any additional benefits, and can lead to regulatory chill.
- Lacks sufficient legitimacy (i.e. modelled on private commercial arbitration, lacks transparency and raises concerns about arbitrators' independence and impartiality).
- Fails to ensure consistency between decisions adopted by different tribunals on identical or similar issues.
- Does not allow for correcting erroneous decisions either errors of fact or law
- Is very expensive to users.
- Holds little additional value in the presence of well-established and well-functioning domestic legal systems.
- Investors may gain access to ISDS procedures using corporate structuring, i.e. by channeling an investment through a company established in an intermediary country with the sole purpose of benefitting from a TIP concluded by that country with the host state.
- An ICSID award is not subject to any appeal according to Art 53 of the Convention but can be annulled on very strict grounds under Art 52 otherwise awards are final and binding and enforced by final courts in the jurisdiction of the contracting states.

- Can an appellate body add legitimacy to the whole system?

Various reform proposals have been put forward. For instance South Africa opted to review its BITs to determine whether there is a link between the BITs and foreign direct investment in South Africa. As they could not establish any like, they terminated 49 BITs and passed the Protection of Investment Act 22 of 2015. Under this Act, no more provisions on most-favoured nation treatment nor fair and equitable treatment. Secondly, no more ISDS but resolution of disputes through mediation and national courts and administrative bodies.

Nigerian Response – Model BIT (2015)

In 2015, Nigeria drafted a Model BIT that is reform-oriented. The Nigeria-Morocco BIT(2016) emphasized sustainable development, right to regulate and consultations and negotiations through a Joint Committee prior to mediation and arbitration. The significance of this BIT can be appreciated if compared with the Nigeria-Netherlands BIT (1992). In the Model BIT (2015), there is a provision for a Joint Committee. One of the functions of the Joint Committee is dispute resolution. Although there is provision for ISDS, attempts at amicable settlement and mediation must be explored by the Joint Committee before reference to arbitration.

Proposed Reform

The UNCITRAL Working Group III has proposed the following ISDS reforms:

a) No ISDS – omitting ISDS (eg in favour of domestic courts and/or SSDS
b) Standing ISDS Tribunal – Replacing the system of *ad hoc* arbitrations and party-appointed arbitrators with a standing court-like tribunal (including an appellate system) consisting of adjudicators with fixed terms – 're-politicising dispute settlement'
c) Limited ISDS –
    i. requiring investors to pursue local remedies (for 18 months or more) or to exhaust local remedies before turning to arbitration
    ii. Limiting treaty provisions subject to ISDS and/or excluding certain policy areas from ISDS
    iii. Setting a time limit for submitting ISDS claims (limitation period)
d) Improved ISDS procedures

i. Enhancing the State role in ISDS – binding joint interpretations, non-disputing party participation, review of draft arbitral award, submission of counterclaims

ii. Enhancing the suitability and impartiality of arbitrators or adjudicators, rules on qualifications, code of conduct, rules on conflict of interest, 'double hatting' prohibitions
iii. Enhancing the efficiency of dispute settlement: early dismissal of frivolous claims, consolidation of claims, time limit on maximum duration of proceedings, voluntary alternative dispute resolution procedures
iv. Opening ISDS proceedings to the public and third parties, transparency rules, amicus curiae participation
v. Limiting remedial powers of tribunals – legal remedies, types of damages

In World Investment Report (WIR) 2016, UNCTAD published a Road Map for International Investment Agreement (IIA). The Road Map sets out five action areas, namely

- ✓ Safeguarding the right to regulate while providing protection
- ✓ Reforming Investment Dispute Settlement
- ✓ Promoting and Facilitating Investment
- ✓ Ensuring Responsible Investment
- ✓ Enhancing Systemic Consistency

This was Phase 1 of the reform. UNCTAD has since then moved to Phase 2 of the reform. The thrust of Phase 2 is modernising the existing stock of old generation BITs. By end of 2016, there over 2,500 BITs that were in force and virtually all known ISDS cases were based on these BITs. UNCTAD has presented and analysed 10 policy options for Phase 2 reform, namely,

- **Jointly interpreting treaty provisions** – this clarifies the content of a treaty provision and narrows the scope of interpretative discretion of tribunals
- **Amending treating provisions** – modifies an existing treaty's content by introducing new provisions or altering or removing existing ones
- **Replacing outdated treaties** – substitutes an old treaty with a new one
- **Consolidating the IIA work** – abrogates two or more old IIAs between parties and replaces them with a new, plurilateral IIA
- **Managing relationships between coexisting treaties** – establishes rules that determine which of the3 coexisting IIAs applies in a given situation
- **Referencing global standards** – fosters coherence and improves the interaction between. IIAs and other areas of international law and policy

- **Engaging multilaterally** – establishes a common understanding or new rules among a multitude of countries, coupled with a mechanism that brings about change in one go.
- **Abandoning unratified old treaties** – conveys a country's intent to not become a party to a concluded but as yet unratified treaty
- **Terminating existing old treaties** – releases the parties from their obligations under a treaty
- **Withdrawing from multilateral treaties** – similar in effect to termination, but leaves the treaty in force among the remaining parties who have not withdrawn.

Concluding Remarks

The reform spearheaded by UNCITRAL and ICSID are essentially in the procedural provisions. I think that attention should also be directed at the substantive provisions in line with the reform Agenda of UNCTAD. If the substantive provisions are properly drafted, there will be less room for controversies and claims.

In my view, as a country, Nigeria has not really benefitted from entering into BITs. Those in force are the first generation BITs with standard clauses on fair and equitable treatment, full security and protection, national treatment, most-favoured nation treatment and expropriation that are controversial. Nigeria needs to overhaul all its International Investment Agreements (IIAs) or Treaties with Investment Protection (TINs) in line with the reform agenda of UNCTAD, UNCITRAL and ICSID.