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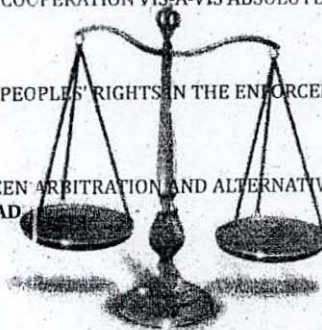
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A CRITICAL ANALYSIS OF THE MECHANISMS FOR SETTLEMENT OF INVESTMENT DISPUTES IN INTERNATIONAL ARBITRATION*

Abstract

This paper analyses the mechanism for settlement of investment dispute in International Arbitration. The paper adopts doctrinal and analytical approach to legal research. The study examines the provisions of the International Centre for Settlement of Investment Dispute (ICSID) being the most recognised platform for settlement of investment dispute. However, references were made to similar institutions for comparison. The study reveals that Investment Treaties - either multi or bilateral treaty (BITs) are entered into to provide avenue for settlement of investment dispute that may arise between states or their nationals to the treaty. The paper argues that certain provisions of ICSID and other institutional mechanisms for settlement of investment dispute contain compulsory arbitration thereby negating the concepts of consent and party autonomy which are salient elements of international arbitration. The paper concludes with recommendations that the offending provisions of ICSID should be reformed in tandem with jurisprudence of arbitration proceedings.

Key words: Mechanisms, Settlement, Investment, ICSID, Disputes and International Arbitration.

1. Introduction

Over time, it is generally accepted that conflicts and/or disputes form part of everyday existence and activities of man in his interaction with his society in whatever manner. However, what is still evolving is the way these disputes could be resolved to the satisfaction of parties without the common feeling of victor-vanquished outcome associated with traditional litigation. To this end, international arbitration has become one of the central features of contemporary legal practice for resolving investment dispute between a host state and foreign investors. International arbitration is considered as the most important way to resolve investment dispute because it gives two sided benefits namely: It gives the foreign investor confidence to go to arbitration in case of any dispute as the procedure in arbitration is far easier compared to the national courts and also protects the host state in many ways whenever such a dispute arises.¹ Many efforts had been made to organise the arbitration at the international as well as regional levels especially regarding the settlement of investment disputes. However, almost all the investors are worried about the implementation of arbitral awards after the dispute is resolved by the arbitration. Hence, in the bid to look for a more swift and effective means of resolving whatever form of dispute that may arise, contracting parties usually incorporate an arbitration clause in their contract which will serve as a means of resolving their disputes rather than going into litigation. Similarly, developing countries had opened and continued opening further their economies to encourage and secure the inflow of Foreign Direct Investment (FDI) from developed economies.² Most countries, in their efforts to revive economic activity have reduced bureaucratic obstacles and interventions in their economies and embarked on privatisation programmes by putting in place proactive investment measures such as signing International Investment Agreements (IIAs) at the bilateral, sub-regional, regional and inter-regional levels.³

Investment arbitration, although is arbitration, differs from commercial arbitration in fundamental ways. For instance, as far as public international law is concerned, the New York Convention which 'only' deals with the recognition and enforcement of foreign arbitral awards is applicable to commercial arbitration. Conversely, for investment arbitration, treaties of public international law provide the

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¹FE El Hajraoui & D Ed-Daran, 'The Enforcement of Investment Arbitral Awards under International Law and Moroccan Law' (December 2015) 3, 2, *Journal of Law and Criminal Justice*, 55

² The efforts to attract FDI and benefits from it have been intensified due to the support of United Nations Conference on Trade and Development (UNCTAD) Series on International Investment Policies Development, (2005) United Nations, New York and Geneva, 3.

³ See the Preface to *Foreign Direct Investment in Africa: Performance and Potential*, United Nations Conference on Trade and Development (1999) Publication No UNCTAD/ITE/IIT/Misc 15.

fundamental framework, particularly bilateral instruments such as BITs⁴, and multilateral instruments such as ICSID Convention, the Energy Charter Treaty (ECT), and regional instruments like North American Free Trade Agreement (NAFTA) and Central American Free Trade Agreement (CAFTA). Despite the significant strides made by developing countries in changing arbitration law and practice⁵ and introducing adjectival laws that are consistent with acceptable international standards,⁶ foreigners engaging in commercial intercourse with business counterparts from developing countries still exhibit a strong reluctance in litigating or arbitrating their disputes in *fora* located in developing countries.⁷

This paper is aimed at analysing the mechanism for settlement of investment dispute in International Arbitration. The paper examines the provisions of ICSID being the most prominent with wide coverage for settlement of investment disputes. However, references are made to similar institutions for comparison. The objective is to determine whether or not certain provisions of ICSID and other institutional mechanisms for settlement of investment dispute negate important elements of international arbitration such as party autonomy and consent? The paper is arranged in seven sections. Following this introduction, section two presents the emergence of investment disputes arbitration. In section three, the paper analyses the provisions of ICSID and similar Institutions, section four highlights the applicable law to investment dispute arbitration. Section five discusses the enforcement of investment disputes awards. Section six is a critique of institutional arbitration for settlement of investment dispute, while section seven concludes with recommendations.

2. Emergence of Investment Dispute Arbitration

Historically, an individual or corporation wishing to assert a claim against a foreign state for breach of customary international law could not do so directly.⁸ Instead, the individual or corporation concerned had to rely upon its government taking up the claims on its behalf. Hence, during the early period, investor-state disputes that could not be resolved by direct investor-state dialogue or proceedings in domestic courts were either not settled or were handled by home State espousal of the claim via diplomatic processes or, at times, by the threat or use of military force.⁹ In the course of the 19th century, influential individuals or corporations would convince their government to send a small contingent of warships to moor off the coast of the offending state until reparation¹⁰ was forthcoming. This form of 'gunboat diplomacy' was exercised frequently by European powers on behalf of their subjects. For example, when faced with Venezuela's default on its sovereign debt in 1902, the government of Great Britain, Germany and Italy sent warships to the Venezuelan coast to demand reparation for the losses incurred by their nationals.¹¹ However, the Argentine jurist and diplomat, Carlos Calvo¹² criticised this system and advocated that people living in a foreign nation should settle

⁴ B Karl-Heinz 'Commercial and Investment Arbitration: How Different are they Today?' (2012) 28.4 *The Journal of the London Court of International Arbitration*, 577-578

⁵ AA Olawoyin 'Charting New Waters with Familiar Landmarks: The Changing Face of Arbitration Law and Practice in Nigeria' (2009) 26 *Journal of International Arbitration* 373.

⁶ In Nigeria, most of the component states have overhauled their High Court Civil Procedure Rules to incorporate measures such as case management, pre-trial conference and front loading of court processes to fast track litigation.

⁷ CN Fondufe and S Mansuri, 'Doing Deals in Africa – Reflections on What Is Different and What Is Not' (2013) 14 *Business Law International* 163.

⁸ A Redfern, M Hunter, N Blakaby and C Partaside, *Law and Practice of International Commercial Arbitration* (4th Ed, London: Sweet & Maxwell, 2004) p. 474

⁹ OT Johnson & J Gimblett, 'From Gunboats to BITs: The Evolution of Modern International Investment Law' (December 2011) *Yearbook on International Investment Law and Policy*, 56; B Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) *Vanderbilt Journal of Transnational Law*, 780; PO Idornigie, 'Investment Treaty Arbitration and Emerging Markets: Issue, Prospects and Challenges' Third Inaugural Lecture Series, Nigerian Institute of Advanced Legal Studies <<http://nials-nigeria.org/pub/>> accessed on 20 February 2017.

¹⁰ The act of making amends for a wrong one has done, by providing payment or other assistance to those who have been wronged

¹¹ A Redfern, M Hunter, N Blakaby and C Partaside *op cit*;

¹² Carlo Calvo was an Argentine publicist and historian, who devoted himself to the study of law. In 1860 he was sent by the Paraguayan government on a special mission to London and Paris. Remaining in France, he published his thesis *Derecho internacional teorico y practico de Europa y America* in 1868. The thesis was adopted by the First International Conference of American States in 1889.

their claims and complaints by submitting to the jurisdiction of the local courts and not using diplomatic pressure or armed intervention. This was known as the '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 the state.¹³

In an effort to promote foreign investment and instill confidence in the stability of the investment environment, States promulgated treaties that created substantive obligations.¹⁴ These efforts primarily began with the forerunner of the modern investment treaty – the Treaty of Friendship, Commerce and Navigation (FCN Treaty), which was between Italy and Columbia in 1894.¹⁵ 'Gunboat diplomacy' was finally laid to rest at the Second International Peace Conference of The Hague in 1907 when the Convention on the Peaceful Resolution of International Disputes was signed. This convention provided the framework for the conclusion of bilateral arbitration treaties. Hence, in the event of a dispute between two states arising out of a particular interest of a national of the other state, an independent arbitral tribunal would be formed. In effect, a state could espouse the claim of its national.¹⁶ In the case of *Panevezys-Saldutskis Railway*,¹⁷ the Permanent Court of International Justice held *inter alia* that 'in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international laws'. However, this decision was criticised by Professor Brierley,¹⁸ as unsatisfactory procedure from the individual claimant's point of view. He argued that the claimant has no remedy of his own and the state to which he belongs may be unwilling to take up his case for reasons which have nothing to do with its merit; and even if it is willing to do so, there may be interminable delay, if ever, the defendant state can be induced to let the matter go to arbitration. The validity of Professor Brierley's concerns and the inevitable 'politicisation' of disputes 'leaving investors, particularly small and medium size enterprises, with little recourse save what their government cares to give them after weighing the diplomatic pros and cons of bringing any particular claims led to a radical development of more structured investment agreements such as BITs and other multilateral agreements such as NAFTA and ECT.¹⁹ Furthermore, the reform also provided the platform for the creation of ICSID mechanism through the conclusion of the ICSID Convention in 1965²⁰ as well as other international arbitral institutions like the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). The reformation further encouraged the formulation of new procedural rules such as those of the United Nations Commission on International Trade Law (UNCITRAL).²¹

¹³ *Ibid.* see also LB Scott (ed.), *The International Conferences of American States (1889-1928)*, (New York: Carnegie Endowment, 1931), p. 40

¹⁴ See KJ Vandeveldde, *United States Investment Treaties: Policy and Practice*, (London: Kluwer Law International, 1992) 7-22.

¹⁵ FCN Treaty between Italy and Colombia 1894 *Arabian Journal of Business and Management Review (OMAN Chapter)* Vol. 4, No.2.

¹⁶ JL Brierley, *The Law of Nations*, (6th Ed. London: Oxford University Press, 2003) p 277

¹⁷ Series A/B 76, p. 16.

¹⁸ JL Brierley, *op cit*

¹⁹ M Sornarajah, *International Law on Foreign Investment*, (Cambridge: Cambridge University Press, 1994) pp. 231-237; GA Alvarez & WW Park, 'The New Face of Investment Arbitration: NAFTA Chapters 11' (28 Y + 4) *J. I* (4L. 365 2003) pp. 366-367. These Treaties apply regionally and did not have wider coverage like ICSID.

²⁰ ICSID was created through the Convention on the Settlement of Investment Dispute between States and National of other States. It was drafted between 1961 and 1965 in the framework of the – International Bank for Reconstruction and Development (IBRD). The Convention's text was adopted by the IBRD's Executive Directors on 18 March, 1965. It entered into force on 14 October, 1966. It created the International Centre for Settlement of Investment Disputes. There are currently 158 signatory States, and 147 Contracting States have ratified the Convention. See C Schreuer, 'International Centre for Settlement of Investment Disputes (ICSID)', <www.univie.ac.at/Intlaw/wordpress/pdf/100-iscid-epil.pdf> accessed on 20 February 2017; ICSID, 'Background Information On The International Centre for Settlement of Investment Disputes (ICSID)' <arbitragem.pt/conselhos/arb-investimento/faqs/icsid_faqs.pdf> accessed on 20 February 2017.

²¹ WL Craig, WW Park & J Paulson, *International Chamber of Commerce Arbitration*, (3rd Ed. 2000), pp. 661-78. On the working of UNCITRAL, see H Holtzmann & JE Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (1989) pp. 4.-6.

The inclusion of rights and obligations in treaties marked a paradigm shift from power-based dispute resolution to the development of a rights-based system of neutral adjudication. This change affected two main areas of international investment law: First, it offered a new, mutually agreed set of substantive rights of foreign investors for rights including expropriation, national treatment and fair and equitable treatment.²² Second, for the first time, States offered foreign investors a dispute resolution system that permitted investors to enforce directly their new substantive rights against a host government.²³

3. Analysis of Investment Dispute Arbitration Institutions

3.1. Investment Dispute Arbitration under International Centre for Settlement of Investment Dispute (ICSID)

This is an international arbitration Centre that facilitates the settlement of investment disputes. The ICSID Convention established the Centre endowed with separate international legal personality.²⁴ The Convention is a Multilateral International Treaty (MITs) and its primary purpose is to stimulate economic development through the promotion of private international investment.²⁵ It also has the mandate to provide facilities for the conciliation and arbitration of international investment disputes. Arbitration and conciliation under the Convention are entirely voluntary and require consent of both the investor and State concerned. Hence, once such consent is given, it cannot be withdrawn unilaterally and it becomes a binding undertaking.²⁶ ICSID is a neutral facility and it does not decide the cases. The independent arbitrators and conciliators appointed to each case hear the evidence and determine the outcome of the dispute before them.²⁷ The Preamble to the Convention succinctly states as that ‘...no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration’.

In principle, the Convention recognises the sanctity of consent and party autonomy in arbitration. Hence, once parties have agreed that their dispute should be resolved through arbitration at ICSID, it becomes binding. The jurisdiction of ICSID is governed by Article 25 (1) of the Convention, which provides *inter alia* that ‘the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment’. The implication of this provision according to Schreuer is that disputes arising from ordinary commercial transactions will fall outside the jurisdiction of the Centre.²⁸ In practice, there is a thin line between an ‘investment’ and an ‘ordinary commercial transaction’ and there has apparently been only one case where the ICSID Secretariat – which is the first instance to determine whether a dispute submitted to the Centre may be considered as one arising ‘directly out of an investment’ – refused to register a request for arbitration on the basis that it did not involve an investment and thus fell manifestly outside the jurisdiction of the Centre.²⁹ In determining jurisdiction of the Centre, Tribunals have held consistently that questions of jurisdiction are not subject to the law applicable to the merit of the case but that questions of jurisdiction are governed by their own system which is defined by the instruments containing the parties’ consent to jurisdiction.³⁰ Another

²² G Sacerdoti, ‘Bilateral Treaties and Multilateral Instruments in Investment Protection’ (1997) 269 *Recueil Des Cours*, 65

²³ GV Harten & M Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’ (2006) 17.1 *European Journal of International Law (EJIL)*, 121-150: 124.

²⁴ Articles 1 and 18.

²⁵ C Schreuer, *op cit*, p.1

²⁶ ICSID, ‘Background Information on the International Centre for Settlement of Investment Disputes (ICSID) <arbitragem.pt/conselhos/arb-investimento/faqs/icsid_faqs.pdf> accessed on 20 February 2017.

²⁷ *Ibid.*

²⁸ C Schreuer, *op cit*, p 135; see also ST Lynch, ‘The International Centre for Settlement of Investment Dispute: Selected Case Studies’, 7. Issue 2 *Maryland Journal of International Law*, 34.

²⁹ Under Article 36 (3), the Secretary-General is empowered to refuse registration of a dispute for arbitration when it appears such a dispute is manifestly outside the jurisdiction of the Centre, for example, where the parties are not contracting parties to the ICSID Convention. See TT Shihata & AR Parra, ‘The Experience of the International Centre for Settlement of Investment Dispute’ (1999), *ICSID Rev. Foreign Inv. L. J.* 299 at 308.

³⁰ See C Schreuer ‘Jurisdiction and Applicable Law in Investment Treaty Arbitration’ (2014) 1.1, *McGill Journal*

jurisdictional requirement of the Convention is the consent of both parties to submission of the particular dispute to the Centre. This provision is the cornerstone of the jurisdiction of ICSID. Hence, consent requirement cannot be waived and none of the party can withdraw the dispute unless by mutual consent of other party. The consent must be submitted expressly in writing to the Centre.³¹ If the consent is by a subdivision of a contracting state, then it must be approved by the state and documented. Procedurally, institution of arbitral proceedings before ICSID is through the filing of request addressed to the Secretary-General.³² The request will contain information: on the issues in disputes, identity of the parties and their consent to arbitrate.³³ Upon successive grant of arbitration request and service to the other party, the arbitral tribunal constituting a sole arbitrator or any uneven number of arbitrators will be appointed by the parties.³⁴ Where the parties are not satisfied with the number and appointment of arbitrators, they are at liberty to appoint one arbitrator each and the third, who shall be the president of the tribunal, shall be appointed by agreement of the parties.³⁵ It is worth noting that there are basically two important limitations to the jurisdiction of ICSID. The first limitation is contained in Article 25 which allows a contracting state to exclude any class or classes of dispute from the Centre's jurisdiction. For instance, Jamaica only excluded investment dispute regarding natural resources, while Saudi Arabia, excludes dispute relating to oil and sovereign acts. The second limitation is contained in Article 26, which allows the contracting state to require exhaustion of local administrative or judicial remedies as a pre-condition for arbitration by the Centre. At the end of every arbitral proceedings, an award is made. Unlike litigation where judgment is given, an award is the case in arbitration.

3.1. Investment Dispute Arbitration under the Energy Charter Treaty (ECT)

The ECT was signed on December 17, 1994 and entered into force on April 16, 1998. It was adopted with a view to pursuing, on a legal binding basis, the objectives and principles of the European Energy Charter of December 17, 1991.³⁶ The Treaty's Preamble defines these objectives as including, in particular the creation of commitments as 'a secure and binding international legal basis' and of a 'structural framework required to implement the principles enunciated in the European Energy Charter'. The principles referred to are in particular the promotion and development of an efficient energy market throughout Europe, and a better functioning market'. Unlike ICSID, the chief feature of ECT is the promotion and protection of investments in the energy sector.³⁷ Hence, Part III of the Treaty titled: 'Investment Promotion and Protection' offers protection that is similar to that accorded the most BITs, including such rights as the fair and equitable treatment, the most constant protection and security of

of Dispute Resolution, 3-4; In the case of *CMS v Argentina*, Decision on Jurisdiction (17 July 2003) at paras 42. ICSID, ILM 788. The Respondent sought to rely on its national company law to contest the standing of shareholders in a company. The Tribunal rejected this attempt and held that: 'The applicable jurisdictional provisions are only those of the ICSID Convention and the BIT, not those which might arise from national legislation. See further *Ambiente Ufficio SPA v Argentina*, Decision on Jurisdiction and Admissibility (8 February 2013) at paras 134, 153, 233-246, 257, 514-515, ICSID, ORIL IIC 576; *Burimi SRL v Albania*, Award (29 May 2013) at paras 92-165, ICSID, ORIL IIC 593; *Churchill Mining PLC v Indonesia*, Decision on Jurisdiction (24 February 2014) at para 86, ICSID, ORIL IIC 634; *Planet Mining Pty Ltd v Indonesia*, Decision on Jurisdiction (24 February 2014) at para 86, ICSID, ORIL IIC 635.

³¹ See Article 25 (1) of ICSID and the case of *Cable TV v St. Kitts & Nevis*, ICSID Award of January 13, 1997, in that case, the tribunal ruled that reference to an ICSID clause on domestic proceedings did not amount to consent to arbitration.

³² Article 36 (1)

³³ Article 36(2)

³⁴ Article 37(2)(a)

³⁵ Article 37(2)(b)

³⁶ T Walde, 'International Investment under the 1994 Energy Charter Treaty – Legal, Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern Countries', (1195) 29. 5, *JWT*, 8 328. The treaty, reprinted at (1995) 34 ILM 360, was concluded in 1994 and entered into force in 1998. As of 1 Jun. 2008, forty-six states and the EC have ratified the ECT, including most European states. Australia, Belarus, Iceland, Norway and Russia have signed the treaty but not yet ratified it. A number of other states, including Canada, China, a number of Middle Eastern states and the US are observers. See T. Wälde, Ed. *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (London: Kluwer Law International, 1996) 14; R Happ, 'Dispute Settlement under the Energy Charter Treaty' (2003) 45 *GYL* 331; T. Wälde, 'Energy Charter Treaty-based Investment Arbitration – Controversial Issues' (2004) 5 *JWIT* 373; P Cameron, *International Energy Investment Law* (Oxford: Oxford University Press,) 25.

³⁷ See Article 1 (6)

investment, the prohibition of discriminatory measures, the most-favoured-nation treatment and the payment of prompt, adequate and effective compensation for any nationalisation, expropriation or measure having an effect equivalent to the nationalisation or expropriation. The Treaty further provides for binding international dispute settlement, in particular with respect to investment dispute. Under Article 26 of the Treaty, disputes relating to the investment of an investor can be referred to international arbitration if they have not been settled amicably between the disputing parties. The contracting party must 'give its unconditional consent to submission of a dispute to international arbitration or conciliation.'³⁸ The investors are then given the option to choose amongst ICSID arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce or the Arbitration Rules of UNCITRAL.³⁹ Article 26 (1) of ECT provides for dispute resolution as regards 'dispute between a contracting party and an investor of another contracting party relating to an investment of the latter in the area of the former, which concern an alleged breach of an obligation of the former under Part III. This provision, unlike ICSID, shows that the ECT has adopted a broad approach in identifying the types of investors and of investment that can benefit from its substantive protection.

3.2. Investment Dispute Arbitration under the North American Free Trade Agreement (NAFTA)
 A significant development in the 1990s was the conclusion of the NAFTA in 1992. The NAFTA is a comprehensive free trade agreement between Canada, Mexico and the US covering, among other things, goods, services, government procurement and investment.⁴⁰ NAFTA was unique at the time because of the breadth of its coverage and its provision for investor-state arbitration between an OECD Member States and nationals of another OECD Member State. Although the investor-state arbitration provisions were originally included in NAFTA at US insistence in order to protect US investors in Mexico, a number of high profile claims have been made against the US and Canada. Over forty-five claims have been commenced under NAFTA Chapter Eleven, resulting in a series of important IIA orders, decisions and awards addressing procedural and jurisdictional issues, as well as the substantive scope of investment protections.⁴¹ NAFTA gives investor from a member country the opportunity to arbitrate investment grievances with the government of another NAFTA country, regardless of whether an agreement to arbitrate actually exists in a negotiated investment concession.⁴² The private right to direct action eliminates recourse to traditional state-to-state negotiations, in which a foreign investor asks for his country intervention against the host state. The first part of Chapter II of NAFTA imposes the substantive norms for cross-border investment, forbidding discrimination against investors from another member country⁴³ and requiring 'fair and equitable' treatment as well as compensation for nationalised property.⁴⁴ An entity incorporated and with substantial business activity in a NAFTA country qualifies as an investor without regard to any 'origin of capital' limitation.⁴⁵ Thus, a Mexican Corporation owned by French shareholders qualified as an investor under NAFTA. The second portion of Chapter II of NAFTA goes on to provide arbitration as a remedy for a host state's breach of its duties.

³⁸ Article 26 (3)

³⁹ C Riberio (Ed), *Investment Arbitration and the Energy Charter Treaty*, (New York: JurisNet, LLC. A Publication of the Arbitration Institute of the Stockholm Chamber of Commerce, 2009) p. 56

⁴⁰ A Newcombe & L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (The Netherlands: Kluwer Law International BV, 2009), p. 53.

⁴¹ M Kinnear, AK Bjorklund & J Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* (The Netherlands: Kluwer Law International, 2006); HC Alvarez, 'Arbitration under the North American Free Trade Agreement' (1999) 16 *AI* 393; C Brower, II, 'Investor-State Disputes Under NAFTA: The Empire Strikes Back' (2001) 40 *CJTL* 43; JC Thomas, 'A Reply to Professor Brower' (2002) 40 *CJTL* 433; C Brower, II, 'Beware the Jabberwock: A Reply to Mr. Thomas' (2002) 40 *CJTL* 465; GA Alvarez & WW Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11' (2003) 28 *YJIL* 365; CH Brower, II, 'Structure, Legitimacy, and NAFTA's Investment Chapter.' (2003) 36 *VJTL* 37.

⁴² T Weiler, 'The Ethyl Arbitration: First of Its Kind and a Harbinger of Things to Come' (2000) 11, *American Review of International Arbitration* 187

⁴³ Under Article 1102 of NAFTA, each member must treat NAFTA investors and their investment no less favourably than its own investors as such, an investor of other country enjoy most-favoured- nation-treatment

⁴⁴ Articles 1102, 1105 and 1110 of NAFTA

⁴⁵ Articles 1113 (2) 201 and 1139 of NAFTA; in *Feldman (AKA Karpa) v United Mexican States*, 40 ILM 615 (2001), it was held that a permanent residence in Mexico did not deprive a US citizen if the right to arbitrate claims concerning tobacco export tax rebates

An aggrieved investor may choose either (i) arbitration supervised by ICSID or (ii) a proceeding conducted under arbitration rules adopted by UNCITRAL.⁴⁶ Dispute raising common questions of facts or law may be consolidated into a single arbitration.⁴⁷ An aggrieved party in NAFTA arbitration seeking to have the award set aside may raise the issue of arbitral forum and this will have significant impact on the role played by courts at the arbitral situs.⁴⁸

3.3. Investment Dispute Arbitration under the Nigerian Investment and Promotion Commission (NIPC) Act.⁴⁹

Nigeria is a party to the ICSID Convention which she ratified on the 23rd of August, 1965. By Article 69 of the ICSID Convention, 'each contracting State shall take such legislative or other measures as may be necessary for making the provision of the Convention effective in its territories'. The NIPC Act was the country's way of complying with Convention stipulation in that the Act has been domesticated in the country in accordance with section 12 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Section 26 of NIPC specifically recommends settlement of investment disputes in certain sectors in which it applies by means of arbitration as follows:

26 (1) Where a dispute arises between an investor and any Government of the Federation in respect of an enterprise, all efforts shall be made through mutual discussion to reach an amicable settlement.

(2) Any dispute between investor and any Government of the Federation in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions may be submitted at the option of the aggrieved party to arbitration as follows:-

(a), in respect of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified in the Arbitration and Conciliation Act; or

(b). in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties;

(c). in accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties

(3). Where in respect of any dispute, there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Dispute Rules shall apply.

The above provisions show the Nigeria position on the application of the provision of ICSID Convention and can be interpreted as substantial compliance and application of ICSID Arbitration Rules in Nigeria. Hence, the argument of Bukar⁵⁰ that the provision of section 26 (3) of NIPC Act is not sufficient compliance with the Convention cannot be said apposite.⁵¹

4. Applicable Law in Investment Dispute Arbitration

The inquiry into the law 'applicable' to a dispute seems, on its face, a fairly simple question: identifying the law that will govern the resolution of the dispute. Given the fundamental principle of party autonomy

⁴⁶ Article 1116, 1120 and 1113 of NAFTA. See R Dolzer & M Stevens, *Bilateral Investment Treaties* (1995) 130 – 46; AC Smutny, 'Arbitration before the International Centre for Investment Dispute', (2002) 3 *Bus Law Int'l* 367

⁴⁷ D Williams, 'Challenging Investment Treaty Arbitration Awards: Issues Concerning the Forum' (15 May, 2002), presented at ICCA Congress XVI, London, p. 5

⁴⁸ D Vagts, 'The United States and its Treaties: Observances and Ereach', (2001) 95 *American Journal of International Law*, 313; See *M & C Corp v Erwin Behr GMBH & Co.* KG, 87 F. 3d 844 (6th Cir. 1996).

⁴⁹ Cap N117, Laws of the Federation of Nigeria 2004

⁵⁰ B Bukar, 'Mandatory and other Forms of Arbitration under some Selected Oil, Gas and Investment Legislation in Nigeria', (February, 2008) *Oil & Energy Law Intelligence*. <<http://www.ogel.org/journal-advancepublication-article.asp?key=224>> accessed on February 2, 2017.

⁵¹ See *SPP v Egypt* Decision on Jurisdiction 1, 27 November 1985, 3 ICSID Reports 112, where a similar provision under the Egyptian Code was held qualified as sufficient consent by the Government to the ICSID Convention

in international arbitration,⁵² the arbitrators' inquiry is primarily guided by the determination of whether the parties themselves have chosen the law governing their dispute.⁵³ It is only in the absence of such choice that the arbitrators must determine the law that will apply to the dispute. The framework of the analysis is therefore discernible. The choice of law process must first be distinguished from the arbitrators' subsequent investigation concerning the determination of the content of the law that will apply and the manner in which such content must be evidenced.⁵⁴ Equally, it is distinct from the review, at the back end of the arbitral process, of the manner in which the arbitrators have applied or failed to apply such law to the merits of the dispute.⁵⁵ Finally, a further distinction must be made between the substance of the dispute and the procedure governing the arbitration: choice of law is essentially concerned with the substance of the dispute, the conduct of the arbitration not being subject to any particular national legal system but allowing for a great degree of freedom for the parties (including their choice of the arbitration rules which will govern the arbitral process); and, in the absence of agreement between them, the arbitrators. Under the ICSID Convention, the most important provision on applicable law in investment arbitration is Article 42(1) which provides thus: '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 the conflict of laws) and such rules of international law as may be applicable'.

The parties' agreement to arbitrate may include the legal system or the rules of law that will govern the substance of their dispute. In the case of non-ICSID arbitration such as the UNCITRAL, Arbitration Rules of the Stockholm Chamber of Commerce and ICC Rules, the issue of applicable law is primarily governed by the law designated by the parties. In the absence of which, the tribunal is to apply the law that it determines to be appropriate.⁵⁶ In line with these rules, the choice of law effectuated in investment treaties often covers a variety of models on the basis of the law of the host State and international law.

5. Enforcement of Investment Dispute Awards

Under Article 48 of the ICSID Convention, the award of the tribunal shall be in writing and shall be signed by members of the tribunal who voted for it.⁵⁷ The award shall deal with every question submitted to the tribunal, and shall state the reasons upon which it is based⁵⁸. However, ICSID shall on no account publish the award without the consent of the parties⁵⁹. Confidentiality is guaranteed here as the decision from the arbitration is not made public unlike litigation where the judgments are reported. The award is binding on the parties and will be recognised by contracting states signatory to the ICSID Convention.⁶⁰

The enforcement of an award of ICSID is set forth in Articles 53–55 of the ICSID Convention. Article 53 addresses the parties to the dispute and provides amongst others that the award is binding on them and shall not be subject to appeal or to any other remedy except those provided for in the Convention.⁶¹ However, in spite of provision of Article 53, a disputant to whom the award favours must go to court in the state where his/her investment lies and enforce the award against the other party. The court will

⁵² See generally S F Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?' (2015) 6. 1, *Afe Babalola University: J. of Sust. Dev. Law & Policy*, 222-246.

⁵³ Y Banifatemi, 'The Law Applicable in Investment Treaty Arbitration' (2010) <www.shearman.com/-/media/Files/NewsInsights/Publications?2010/06/The-Law-Applicable-in-Investment-Treaty-Arbitration?Files/View> accessed on 20 February 2017, p. 191

⁵⁴ Ibid; J Crawford, *Treaty and Contract in Investment Arbitration*, The 22nd Freshfields Lecture on International Arbitration, November 29, 2007, p. 2.

⁵⁵ E Gaillard, *The Extent of Review of the Applicable Law in Investment Treaty Arbitration*, in *Annulment of ICSID Awards*, IAI Series on International Arbitration NO. 1, p. 223.

⁵⁶ See Article 33(1) of the UNCITRAL Arbitration, see also Article 22(1) of the Arbitration Rules of the Stockholm Chamber of Commerce.

⁵⁷ Article 48(2) of ICSID Convention

⁵⁸ Article 48(3)

⁵⁹ Article 48(5)

⁶⁰ Article 54

⁶¹ Note also that regardless of choice of procedure, an award under the ECT is also binding and final see Article 26 of the ECT and sections 24-32 of the Arbitration and Conciliation Act, Cap A18, LFN 2004.

treat the award as if it were a final judgment. In the case of non-compliance with the award by the host state, the right to diplomatic protection by the investor's home state revives. Hence, recognition and enforcement may be sought in the host state or in the investor's state of nationality or any state that is a party to the ICSID Convention. Although, 'execution of ICSID award is governed by the laws governing the execution of judgments in force in the State whose territories such execution is sought. However, the domestic courts have no power to review or set aside the award of a tribunal for want of jurisdiction, it can only verify the authenticity of an award.⁶²

6. A Critique of International Institutional Investment Arbitration

The main disadvantage of institutional arbitration is that it tends to be expensive. Where the amount in dispute is large and the administrative charges are on *ad valorem* basis, the amount payable is bound to be equally large. Besides, delays are bound to occur as a result of bureaucratic machinery of the institution for processing certain steps in the arbitral proceedings.⁶³ Also, only legal disputes arising directly out of an investment will be entertained at the Centre and parties in dispute must be parties to the ICSID Convention. These limitations brought about a lot of problems as there are certain situations whereby parties in dispute may not meet the jurisdictional requirements of ICSID. Again, investment dispute under the ICSID must flow directly from investment dispute. However, nowhere in the Convention is the word 'investment' defined to give a uniform idea of type of investment contemplated by the Convention.

In an attempt to address the above problems and increasing ICSID patronage by states or investors that have not ratified the ICSID Convention, ICSID Additional Facility Rules was adopted in 1978 which opened access to the Centre a number of additional cases. The latest amendments of the Additional Facility Rules adopted by the Administrative Council of the Centre came into force on April 10, 2006. These forms of additional cases are stipulated under Article 2 of Additional Facility Rules, which allows conciliation or arbitration of investment disputes where only one side is either a party to the ICSID Convention or a national of a party to the ICSID Convention and legal disputes which do not directly arise out of an investment provided that the underlying transaction is not an ordinary commercial transaction. This provision has reduced the stringent jurisdictional requirement of Article 25 in that there is no requirement in the Additional Facility that dispute must arise directly out of an investment dispute, rather, the transaction need only have features which distinguished it from an ordinary commercial transaction.⁶⁴ Although the Additional Facility Rules was introduced to confer more jurisdictions on the Center, however, such exercise can be said to be futile as the Rules itself ousted the application of the Convention. For instance, Article 3 of the Additional Facility Rules 2006 as amended provides *inter alia* that the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre and that none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein. This, in a way is inimical to the coverage of ICSID in investment dispute.

Furthermore, the jurisdiction of ICSID cannot be invoked except by consent of parties to its proceeding. Again, after parties have willingly consented to the jurisdiction of the Centre, none of them can withdraw the dispute unless by mutual consent of other party. This provision is derogatory of the concept of party autonomy; hence, any aggrieved party should be allowed to withdraw the dispute at any time on good reason shown irrespective of denial of consent by the opposing side.

⁶² See Article 54 (2) (3); see generally AC Smutny, DA Smith & and M Pitt, 'Enforcement of ICSID Convention Arbitral Awards in U.S. Courts' (2016) 43, *Pepperdine Law Review*, 652. See Article 55 of ICSID Convention; E Baldwin, M Kantor & M Nolan, 'Limits to Enforcement of ICSID Awards' (2006) 23 *Journal of International Arbitration*, pp. 1-24; JJ COE, JR., *International Commercial Arbitration: American Principles and Practice in a Global Context* (1997) 296, 302-06, 332-33.

⁶³ For example ICC Arbitration.

⁶⁴ M Coleman, H Aldridge & T Innes, 'Choosing an Arbitral Forum for Investor-State Arbitration' (January 27, 2015) Steptoe & Johnson,

7. Conclusion

There is no doubt that the machinery of the ICSID is a viable weapon and very popular to facilitating the settlement of investment disputes. The establishment of the center has successfully removed the clog in the wheel of individuals desiring to seek reparation for wrong suffered. However, there are much to be done to cover the wide range of technicalities inherent in the provisions of ICSID, especially the jurisdiction of the Centre and its enforcement procedures. This is because, where investors realise that there exist none or partial protection benefits for investors, such investor would most certainly move to another territory with better protection than getting stuck with dispute settlement cases. The attempts to correct the shortcoming of ICSID led to the making of Additional Facility. However, the jurisdiction of the ICSID should be extended expressly to cover both investment and non-investment disputes once one of parties is a member of the Convention and where the dispute has international colouration rather through any additional facilities that do not have the force of law and even seem to oust the jurisdiction of the Centre itself. The combined perusal of the provisions of Articles 25 of ICSID, 26 of ECT, Chapter II of NAFTA and section 26 of the Nigerian NIPC Act revealed that investment dispute arbitration as it were, is not necessarily of the free volition of parties thereto, particularly, investors who are parties as a result of their nationality, place of incorporation or of business. The mandatory provisions of Articles and sections as noted in this paper are clearly against the concept of party autonomy, which is the backbone of arbitration proceedings. It is strongly recommended that the provisions of ICSID and similar Institutions saddled with resolution of investment dispute should be reformed to create a conducive atmosphere for parties to arbitral proceedings.