REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT IN AFRICA:

CREATION OF MULTILATERAL INVESTMENT COURT OR MAINTAINING STATUS QUO

PREPARED BY:

ADEKUNBI OLUWASEUN OGUNDE

SOLANGE-GERDA AMMAH

Very few arbitral awards have generated intense debate like the US$6.6billion[1] award in *Process and Industrial Developments Limited vs. Federal Republic of Nigeria*[2]. This case is significant because it highlights all the concerns with the current investor-state dispute settlement (**ISDS**) mechanism, which is the focus of this paper. As African countries increasingly appear as respondents before international tribunals[3], they are becoming acutely aware of a "*backdoor*" erosion of their sovereignty[4] and there is now a knee –jerk reaction to reject the current system in its entirety[5]. The question is, will the creation of a multilateral investment court provide the solution?

The ISDS is a procedural mechanism that allows investors bring arbitral proceedings directly against their host countries on the basis of free trade agreements, investment treaties or contracts[6]. While the ISDS is often associated with international arbitration under the ICSID rules, it can also take place under other rules such as the ICC or the UNCITRAL rules. At the core, African governments are worried that the ISDS mechanism is silently chipping away at their sovereignty and governance[7]. Further, while this is not unique to Africa, the UNCITRAL Working Group III also sets out other concerns with the ISDS which pertain to the[8]:

(i) Consistency, coherence and predictability of decisions;

(ii) Independence and impartiality of arbitrators; and

(iii) Costs and duration of cases.

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[1] Approximate. The exact sum of the Final Award is **US$6,597,000,000**. As at March 16th 2018, interest had accrued at the rate of 7% per annum on the Final Award in the amount of **US$2,303, 889,287.67**

[2] **Process & Industrial Developments Limited vs. Federal Republic of Nigeria and Ministry of Petroleum Resources of the Federal Republic of Nigeria**. Final Award is available to view at: https://pacer-documents.s3.amazonaws.com/36/194469/04516479471.pdf.

[3] According to the **International Centre for Settlement of Investment Disputes (ICSID) Caseload Statistics (ISSUE 2018-2),** the percentage of cases involving a Middle East, North Africa or Sub-Saharan African country filed since its inception till June 30, 2018 is 26%. Report available to view at: https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-2%20(English).pdf

[4] For instance, in a ruling on **the P & ID case (UK proceedings)**, Bryan J stated that he did not believe the fact that the defendant (Nigeria) was a sovereign state had any "***real weight***" and that Nigeria is a "***litigant like any other litigant***".

[5] For instance, SADC member states recently amended the **Annex 1 to the Finance and Investment Protocol (2006 amended 2016)** to, inter alia, remove ISDS by international arbitration, and replaced it with the use of domestic courts and tribunals. South Africa enacted the **Protection of Investment Act 22 of 2015** which limits ISDS to mediation or arbitration via domestic courts, tribunals or statutory bodies. Tanzania has recently enacted several legislations namely **Public Private Partnership (Amendment) Act, No. 9 of 2018**; **Natural Wealth and Resources (Permanent Sovereignty) Act 2017**; and the **Natural Wealth and Resources (Review and Re-Negotiation of Unconscionable Terms) Act 2017** which exclude ISDS arbitration. The **Nigeria-Morocco Bilateral Treaty 2016** also provides for the use of a joint committee and domestic courts of the host state before resorting to international arbitration.

[6] See Investor-State Dispute Settlement, Practical Law (Glossary) available to view at: https://uk.practicallaw.thomsonreuters.com/0-624-6147?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1

[7] See Talkmore, C (2018), "***Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protoco***l" published on tralacBlog (Perspectives on Africa's trade and integration), available to view at: https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html

[8] See UNCITRAL Working Group III (Investor- State Dispute Settlement Reform) 36th Session, "***Possible Reform of Investor-State Dispute Settlement (Note by the Secretariat)"*** available to view at: https://undocs.org/en/A/CN.9/WG.III/WP.149

The idea of a multilateral investment court is not novel - it has been proposed and abandoned in the past[9]. However, to address the above concerns, the EU recently proposed a similar initiative (which can be adopted in Africa) with the following features:[10]

(i) First instance and appellate tribunals having their rules of procedure;

(ii) Full time and independent adjudicators appointed, tenured and remunerated in a similar manner as adjudicators in international courts; and

(iii) Automatic enforcement of arbitral awards at domestic level.

The proposed multilateral investment court will no doubt address some of the concerns – particularly, it will ensure consistency of awards as well as reduce the costs of proceedings. Yet, the model has some shortcomings. In the context of Africa, it does not address the main concern regarding threat to sovereignty – it simply replaces the international tribunals. Further, as canvassed by Zárate, there are legitimacy issues in the appointment of adjudicators[11]. Zárate argued that the appointment of adjudicators may likely be subject to the political constraints and veto that the International Court of Justice or World Trade Organization appointments suffer today and this could leave small economies at a disadvantage[12].

Yet, the answer is not to maintain status quo. Perhaps, a better solution is to reform the current ISDS regime to include:

(i) clear interpretation directives in order to avoid unintended lawmaking;

(ii) appellate body to hear appeals on investment matters[13];

(iii) robust rules on suitability of arbitrators; and

(iv) doctrine of precedent for investment arbitration.

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[9] For instance, the **Organisation for Economic Co-operation and Development** proposed a **Multilateral Agreement on Investment** with an objective to provide a broad multilateral framework for international investment regimes and the establishment of an independent multilateral investment court but negotiations was discontinued in April 1998.

[10] The European Union proposed a multilateral investment court in the proposal dated 18 January 2019 and titled "***Submission of the European Union and its Member States to UNCITRAL Working Group III (Establishing a Standing Mechanism for the Settlement of International Investment Disputes)***". Available to view at: http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf

[11] José M. Zárate (2018),"***Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?",*** 59 Boston College Law Review 2765, available to view at: https://lawdigitalcommons.bc.edu/bclr/vol59/iss8/9

[12] José M. Zárate (2018),"***Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?",*** 59 Boston College Law Review 2765 (supra)

[13] Please note that in 2004, ICSID proposed the creation of an international appellate body to hear appeals but there was insufficient data to support the proposal at that time.

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CASE

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WORKING PAPERS AND PROPOSALS

(i) EU "***Submission of the European Union and its Member States to UNCITRAL Working Group III (Establishing a Standing Mechanism for the Settlement of International Investment Disputes)*** (2019); and

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STATUTES

(i) Finance and Investment Protocol (2006 amended 2016) (**SADC Member States**)

(ii) Natural Wealth and Resources (Permanent Sovereignty) Act 2017 (**Tanzania**) and;

(iii) Natural Wealth and Resources (Review and Re-Negotiation of Unconscionable Terms) Act 2017 (**Tanzania**);

(iv) Nigeria-Morocco Bilateral Treaty 2016;

(v) Public Private Partnership (Amendment) Act, No. 9 of 2018 (**Tanzania**); and

(vi) Protection of Investment Act 22 of 2015 (**South Africa**)