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Sacrificing Judicial Sovereignty for Credibility: An Examination of International Arbitral Awards and Dispute Settlement Provisions under Bilateral Investment Treaties in Developing Countries

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ABSTRACT

Over the years, international arbitration has gained global recognition as the preferred means of resolving investors-state disputes (ISDs)1. Bilateral Investment Treaties (BITs) contain provisions promoting international arbitration of ISDs under the pretext that they serve as an investment incentive to entice foreign investors. Although research efforts have advanced our knowledge on the international arbitration of ISDs, there has been surprisingly no investigation of the impacts of international arbitration of ISDs on the judicial sovereignty of developing host states. This paper sets out to investigate the impacts of international arbitration of ISDs as promoted by BITs on the judicial sovereignty of developing host states. We assume that ISDs settlement provisions under BITs operate to deprive developing host states of their judicial sovereignty over disputes between foreign investors and host States. A doctrinal analysis of primary data in the form of arbitral awards and BITs' provision on the international arbitration of ISD with particular focus on BITs to which Cameroon is a party; and secondary data reveals that the international arbitration of investor-state disputes which BITs promote, is gradually depriving host states' judicial institutions of their rights to resolve investment disputes involving foreign investors. Finally, the article recommends some possible ways through which this loss of judicial sovereignty can be prevented.

Keywords: *Bilateral Investment Treaties, Investor-State Disputes Settlement Provisions, Developing Host States, Judicial Sovereignty, International Arbitration*

INTRODUCTION

Many countries have embarked on ambitious efforts to conclude BITs which are considered as the most preferred legal framework for protecting foreign direct investment (FDI) in the world. Developing countries like Cameroon sign BITs in order to make their investment climate more attractive to foreign investors. This is so because foreign investors are often worried about the quality of developing host countries' institutions and enforceability of their laws[1]. As a result, BITs provide a means for the observation of the principle of *pacta sunt servanda*[2] by contracting states in that they

[1]Aisha Ally Sinda, (2010), «Foreign Direct Investment in Tanzania: Implications of Bilateral Investment Treaties in Promoting Sustainable Development in Tanzania», Master Thesis, University of Pretoria, P. xi, at http://upetd.up.ac.za/thesis/available/etd-10052010-163604/unrestricted/dissertation.pdf, accessed (27/08 /2012).

See also DAVID J. MCLEAN, (2009), «Toward a new international dispute resolution paradigm: assessing the congruent evolution of globalization and international arbitration», U. Pa. J. Int'l L, Vol. 30:4, p. 1088, at http://latham.com/upload/pubContent/_pdf/pub2704_1.pdf, (accessed 25/04/2012).

[2]*Pacta sunt servanda* is a Latin expression which means agreements must be kept. It is a principle in international law which says international treaties should be upheld by all the signatories. The rule is based upon the principle of good faith. The basis of good faith indicates that a party to a treaty cannot invoke provisions of its domestic law as a justification for a failure to perform. Known variously as the umbrella clause, *pacta sunt servanda* is a principle found in many BITs that requires each contracting state to observe all investment

guarantee FDIs access to international arbitration[3]. However, BITs in guaranteeing FDIs access to international arbitration by implication, rub host states of their judicial sovereignty. This gives rise to two main legal issues. First, do BITs impose obligations on host states to resort to international arbitration in the event of an investment disputes?, Second, do the obligations under BITs threaten the judicial sovereignty of host countries?

Record[4] shows that foreign investors have the tendency to drag host states before international tribunal institutions in the event of a breach of an investment contract. This article therefore examine the guarantee FDI enjoys within the framework of BITs with respect to resorting to international arbitration, and how such guarantee may constitute a limitation or an erosion of the judicial sovereignty of capital importing countries. This was done by making a doctrinal analysis of some BITs, supported by renowned jurisprudence of international arbitration tribunals.

The question which comes to mind is, why would developing countries consent to BITs that potentially entail massive costs and constrain their ability to regulate foreign investors[5]? Developing countries sign BITs with developed countries as a response to competitive pressures for investment with other developing countries[6].

While BITs contemplate a two-way flow of investments between the state parties to the treaty, in practice, it is usually a one-way flow between a capital-exporting (developed) state and a capital importing (developing) state[7].

obligations it has assumed with respect to investors from the other contracting state. The principle could further be explained to mean the duty of every state to conscientiously and completely fulfil its international obligations. In modern times the principle has been incorporated in the UN Charter and numerous international documents. For example, the Preamble and Article 2 of the UN Charter emphasize the duty of states to respect and carry out obligations arising from agreements and other sources of international law. The principle was legally established in the Vienna Convention of the Law of Treaties, which proclaimed that "every existing agreement is compulsory for its participants and must be conscientiously carried out by them." Failure to observe the principle of *pacta sunt servanda* is considered a breach.

[3]Arbitration is a voluntary process of dispute resolution where a neutral third party renders a final and binding decision after each side has an opportunity to present its view. This method is especially useful in international business transactions where parties are often unfamiliar with foreign legal systems. Unlike a judicial process, arbitration is conducted outside the court system by impartial arbitrators who are selected by the parties based on criteria that best fits the nature of the contract.

[4]Moltke Von Konrad, (2000), An International Investment Regime? Issues of Sustainability, The International Institute for Sustainable Development (IISD), Canada, P. 20, at http:// www.iisd./pdf/ investment.pdf, (accessed 25/04/ 2012). See also UNCTAD, (2003), «Dispute Settlement: Investor-State», Geneva, United Nations Publication, IIA issues paper series, Sales No.E.03.II.D.5, P. 13, http://unctad.org/en/docs/ iteiit30_en.pdf, accessed (11/06 /2012).

[5]Lauge N. Skovgaard Poulsen, (June 2011), «Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries, and Bounded Rationality», Ph.D Thesis, The London School of Economics and Political Science, London, P. 254, http://etheses.lse.ac.uk/141/1/Poulsen_Sacrificing_sovereignty_by_chance.pdf, (accessed 22/03/ 2013).

[6]Ibid., P. 286.

[7]There is no official legal definition of a developing country, and different organizations use different classifications, which makes the distinction between developing and developed countries a difficult one. Particularly in studies over time, any classification is bound to be imperfect. We take as my starting point, the World Bank's historical income classifications, which are listed at: http://econ.worldbank.org// EXTERNAL/DATASTATISTICS/0,content MDK :20487070~menuPK:64133156~pagePK:64133150~ piPK:64133175~theSitePK:239419,00.html (last accessed: 10 February, 2011). On this basis, a developing country may be defined as one which the World Bank has not classified as a 'high-income' country for the majority of the period listed in its World Development Indicators, starting in 1987 and ending in 2009; Afghanistan, Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Azerbaijan, Bangladesh, Barbados, Belarus, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Rep., Costa Rica, Côte d'Ivoire, Croatia, Cuba, Czech Republic, Djibouti, Dominica, Dominican Republic, DR Congo, DR Korea, Ecuador, Gabon, Gambia, Georgia, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Zambia, and Zimbabwe, just to name a few. Accordingly 'developed countries' include here not only Western countries but also countries like Korea and the United Arab Emirates.

The rationale on the part of the capital-exporting country for the treaty itself is the promise of protection for the capital invested abroad. On the part of the developing country, it is hoped that these treaties will result in the inflow of foreign investments, and thereby contribute to its economic development. Most recent, publicly available awards[8] in ISDs have been decided under the auspices of the International Centre for Settlement of Investment Disputes (ICSID)[9].

The ICSID has witnessed a particularly sharp increase in filings over the past decades, spreading across most regions of the world and economic sectors[10]. The graph below shows the ICSID caseload from 1972 to December 31, 2012. Investor-state arbitration has grown under many other rules systems as well, although growth is difficult to measure because, unlike in ICSID cases, the existence of such arbitrations may remain confidential and unknown to the public. The numerous cases brought against Argentina have been a source of criticisms, and the recent withdrawals of Ecuador and Bolivia from the ICSID Convention demonstrate further concern about the system[11].

Despite these challenges, the pace of investor-state arbitration has shown little sign of slowing.

A Case for Investor-State Dispute-Settlement

International investment policy-making efforts to attract FDI and benefit from it continue to intensify[12]. This is evidenced by the proliferation of BITs with numerous and attractive provisions. Perhaps the most important feature of the modern BIT has been the willingness of host states to submit ISDs to international arbitration. It is a central feature in foreign investors' considerations in localizing their investments. It is only through a proper and effective dispute settlement scheme that FDI can avoid losing invested capital following a breach of contract by host states[13].

While these countries have signed numerous investment treaties with Western countries, their role in 323 BIT negotiations is arguably often that of capital exporters, and it is therefore not unreasonable to group them in the 'developed country' category, which includes; Andorra, Aruba, Australia, Austria, Bahamas, Bahrain, Belgium, Bermuda, Brunei Darussalam, Canada, Cyprus, Denmark, Finland, France, Germany, Greece, HongKong, Iceland, Ireland, Israel, Italy, Japan, Korea, Kuwait, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Qatar, Singapore, Slovenia, Spain, Sweden, Switzerland, Taiwan, United Arab Emirates, United Kingdom, and United States.

[8]Examples are: CMS Gas Transmission Company v Argentine Republic, (ICSID Case No. ARB/01/8), 42 ILM 788 (2003), Técnicas Medioambientales Tecmed SA v United Mexican States, Award 43 ILM 133, ICSID (AF).(2004), MTD Equity Sdn. Bhd. and MTD Chile S.A. vs. Republic of Chile, ICSID Case No ARB/01/7 Award, (2004), CMS Gas Transmission Company v Argentine Republic, ICSID Case No. ARB/01/8, Award, (2005), ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary, ICSID Case No. ARB/03/16, Award, (2006), El Paso Energy International Company v Argentine Republic, Decision on Jurisdiction, ICSID Case No. ARB/03/15, (2006), Siemens A.G. v Argentina Republic, ICSID Case No. ARB/02/08, Award, (2007), etc. In 2010, the number of known treaty-based investor–State dispute settlement (ISDS) cases filed under international investment agreements (IIAs) grew by at least 25, bringing the total number of known treaty-based cases to 390 by the end of 2010. Of the 25 new disputes, 18 were filed with the ICSID. See generally UNCTAD, (March 2011), «Latest Developments in Investor–State Dispute Settlement», IIA ISSUES NOTE No. 1, United Nations, P. 1, at http://unctad.org/en/ /webdiaeia 20113_en.pdf, (accessed 25/04/2012), UNCTAD, (28-29 May 2013), «Recent Developments in Investor-State Dispute Settlement (ISDS) Updated for the Multilateral Dialogue on Investment», IIA ISSUES NOTE No. 1, United Nations, P. 1, at http://unctad.org/ en/Docs/ webdiaeia 20113_en pdf, (accessed 25/04 /2012).

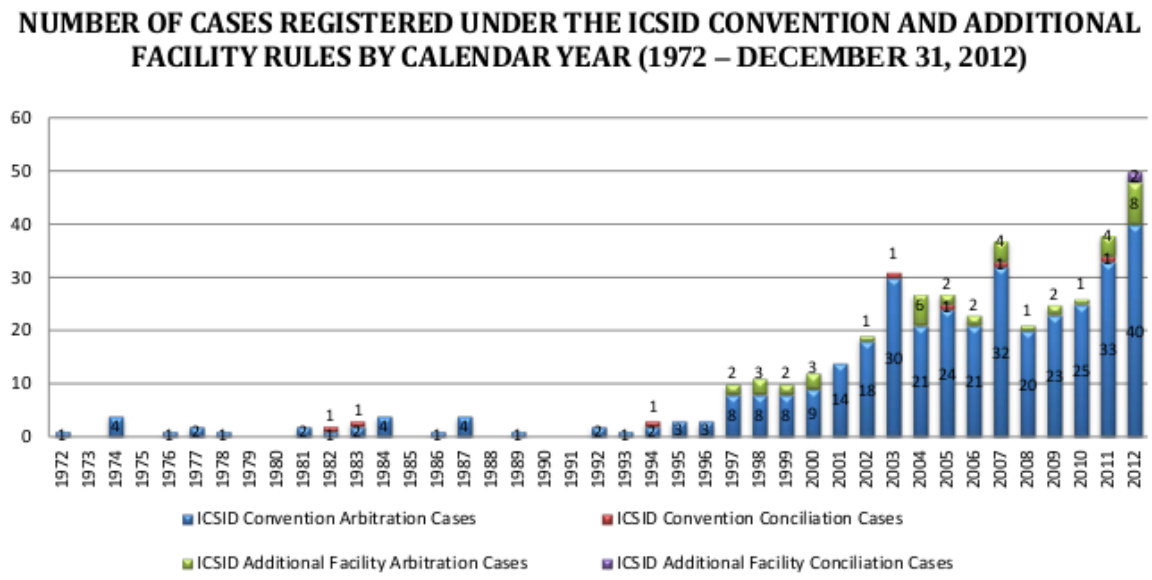
[9]Tondapu, Gautami S, (2010), «International Institutions and Dispute Settlement: The Case of ICSID», Bond Law Review, Volume 22 Issue 1, Article 4, p. 13, at: http://epublications.bond.edu.au/blr/vol22/iss1/4, (accessed 25/04/2012).

[10]The ICSID caseload has increased in the last 15 years. This reflects the substantial growth in cross-border investment in the last two decades and the increased number of international investment agreements offering investor-state disputes settlement (ISDS).

[11]Ibid., PP. 60-61.

[12]UNCTAD Series on International Investment Policies for Development, (2005), «Investor-State Disputes arising from Investment Treaties: A Review», New York and Geneva, United Nations Publication, P. 3, http://unctad.org/en/ docs/ iteiit20054_en.pdf, (accessed 07/07/2012).

[13]Akonumbo Atancho. N., (August 2008), «Foreign Direct Investment and Legal Policy Options in Cameroon», Ph.D. Thesis, University of Yaounde II-SOA, P. 416.



Source: *https://icsid.worldbank.org/ICSID/FrontServlet, (accessed 25/04/2012).*

Many states are now more receptive to the concept of surrendering judicial sovereignty in order to achieve economic growth and to establish an investor friendly market. Investor-state arbitration has seen a dramatic rise in popularity and acceptance so much so that it has become a prerequisite for developing countries to attract serious foreign investors[14]. International arbitration is as of today, the most convenient and preferred means for the settlement of international investment disputes[15], though it is expensive for the host state especially where it loses. Whichever way the balance weighs, it is evident that so long as developing countries like Cameroon require considerable inflows of FDI to help achieve development, they are bound to constantly strive to instil a conducive atmosphere for investment such as, aligning with multilateral institutional arbitration mechanisms[16].

The Cameroon Investment Charter has shown reference to such mechanism for the settlement of investment disputes.[17] So too does the defunct 1990 Investment Code and BITs signed by Cameroon. The case of *Klöckner v. Cameroon*[18] before the ICSID mechanism was reminiscent of this approach. The dispute therefore clearly portrayed Cameroon's willingness to be subjected to international dispute settlement mechanisms.

Evolution of Investor-state Dispute Settlement under International Law

Traditionally, dispute settlement under international law has involved disputes between States. However, the rise of private commercial activity undertaken by individuals and corporations engaged in international trade and/or investment has raised the question whether such actors should be entitled to certain direct rights to resolve disputes with the countries in which they do business[19]. Generally, only States can bring claims under international law, given that they are the principal subjects of that system[20]. Private non-State actors including corporations now have the international legal

[14]Thomas J. Pate, «The Past, Present and Future of the Arbitral Clause in Foreign Investment Legislation: In Pursuit of "The Balance"», P. 8, http://www.desolapate.com/publicaciones/The%20Past%20Present%20and%20Future%20of%20the%20Arbitral%20Caluse%20in%20Foreign%20Investment%20Legislation,%20In%20Pursuit%20of%20The%20Balance.pdf, (accessed 31/05/2012).

[15]Akonumbo Atancho. N., op. cit., P. 526.

[16]Ibid., PP. 525-526.

[17]See for example Art. 11(1) of the charter.

[18]Klöckner Industries Anlagnen Gmbh et al. v United Republic of Cameroon et al. ICSID case ARB/81/2; (1985) 10 Y.C.A 71; (1986) II Y.C.A 162.

[19]See Daniel S. Meyers, (July 2008), «In Defense of the International Treaty Arbitration System», From the SelectedWorks of Daniel S Meyers, P. 4, http://www.glin.gov/download.action?fulltext Id=162756 & documentId=193275&glinID=1932 75, (accessed 31/05/2012).

[20]See Beckman Robert and Butte Dagmar, «Introduction to International Law», P. 1, at http://www.ilsa.org/jessup/intlawintro.pdf, (accessed 25/04/2012).

personality and so can bring claims against states for the vindication of their legal rights[21].

The remedy of diplomatic protection[22] has notable deficiencies from an investor's perspective. First, the right of diplomatic protection is held by the home country of the investor and, as a matter of policy, it may decide not to exercise this right in defence of an investor's claim. The home State may also choose not to pursue the investor's claim for reasons that have more to do with the broader international relations between the home and host countries than with the validity of the investor's claim[23]. In addition, there are practical limitations on the process of diplomatic protection[24].

Given these difficulties, foreign investors often decline diplomatic protection where they have the option of securing remedies more directly by means of investor-State dispute-settlement mechanisms. Bilateral initiatives are meant to increase investors' confidence in the reliability of the legal and regulatory framework[25]. The kinds of disputes that may arise between an investor and a host State will often involve disagreements over the interpretation of their respective rights and obligations under the applicable investment agreement. In addition, they may involve allegations unrelated to the contract such as, for example, the failure to provide treatment according to certain standards or failure to provide protection required by a treaty[26]. Some BITs provide for state-to-state arbitration between the Parties in case of a dispute regarding the interpretation or application of the treaty[27].

The arbitration rules of ICSID are most commonly referenced in BITs[28]. Often, treaties will offer additional recourse to other sets of rules, including those of the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC) and, most often, the United Nations Commission for International Trade Law (UNCITRAL)[29]. In instances where more than one set of arbitration rules are available in a treaty, investors typically enjoy the ability to choose which to use. As a consequence, this opens the door to so-called rules-shopping as different arbitration rules may provide for differing levels of transparency, different applicable law, and varying levels of post-arbitration judicial review[30].

Obligations of Investor-state Dispute Settlement (ISDS) under BITs

ISD settlement is the mainstay of the current investment regime[31]. The complex operations of

[21]M.N. Shaw, «International Law», 6th ed., Cambridge University Press, Cambridge 2008, 2, cited by YAMALI NURULLAH, «What is meant by state recognition in international law», General Directorate of International Laws and Foreign Affairs, Ministry of Justice Turkey, P. 3, at http://www.justice.gov.tr/e-journal/pdf/ LW708 1.pdf, accessed (11/06/2012).

[22]Like individuals, companies are usually considered as having the nationality of the State in whose territory they are registered. Under the principle of *nationality of claims*, if a national of State A is injured by State B through internationally unlawful conduct, State A may make a claim against State B on behalf of its injured national. This is known as the doctrine of *diplomatic protection.* See generally Beckman Robert and Butte Dagmar, «Introduction to International Law», P.2, at http://www.ilsa.org /jessup/intlawintro.pdf, (accessed 25/04/2012).

[23]Ibid.

[24]Ibid., See also Jason Chuah, (2005), «Law of International Trade», London, Sweet & Maxwell, 3rd ed., P. 654.

[25]International Investment Rule-Setting: Trends, Emerging Issues and Implications, prepared by the UNCTAD secretariat, 2006, P. 9, available at http://archive.unctad.org/en/docs/c2d68_en.pdf, (accessed 11/06/2012).

[26]Daniel S. Meyers, op. cit., P. 4.

[27]See generally Art.VIII of Cameroon/US BIT in this regard.

[28]These are the ICSID rules and the so-called ICSID Additional Facility rules. See Antonio Parra, (2000), «ICSID and Bilateral Investment Treaties», ICSID News, Volume 17, No. 1. See also Art. VII(3) of Cameroon/US BIT.

[29]Antonio Parra, (1997), «Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment», 12 ICSID Review – Foreign Investment Law Journal, P. 297.

[30]Luke Eric Peterson, (2004), «All Roads Lead out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties», in L. Zarsky, ed., International Investment for Sustainable Development: Balancing Rights and Rewards, Earthscan.

[31]Roos van Os & Roeline Knottnerus, (October 2011), «Dutch Bilateral Investment Treaties: A gateway to 'treaty shopping' for investment protection by multinational companies», Stichting Onderzoek Multinationale Ondernemingen Amsterdam, SOMO, P. 24, http://www.s2bnetwork. org/fileadmin/dateien/downloads/Dutch_Bilateral_In

a modern enterprise give rise to a host of legal problems that may lead to disputes[32]. Today, most BITs to which Cameroon is a party contain provisions that allow investors to have recourse to international arbitration. In this respect, Article 10 of the BIT between Cameroon-Belgio-Luxembourg Economic Union makes recourse to the ICSID Centre. It provides that any investment dispute shall preferably be resolved amicably, by direct agreement between the parties to the dispute and, failing this, by conciliation between the Contracting Parties through diplomatic channels. In the absence of an amicable settlement, by direct arrangement between the Parties or by conciliation through diplomatic channels within six months of the date of notification, the dispute shall, at the request of the investor concerned, be submitted to ICSID for conciliation or arbitration. To this end, each Contracting Party hereby gives its irrevocable advance consent to the submission of any dispute to the Centre. Such consent implies a waiver of the requirement that internal administrative or judicial remedies first should have been exhausted[33].

Article VII (2) and (3) of the Cameroon/United States BIT is also instructive. It provides that in the event of an investment dispute between a Party and a national or company of the other Party, the parties shall first seek to resolve the dispute by consultation and negotiation. The parties may, upon the initiative of either of them and during the course of their consultation and negotiation, agree to rely upon non-binding, third party procedures[34]. If the dispute cannot be resolved through consultation and negotiation, the dispute settlement procedures agreed upon in advance shall be used. With respect to expropriation by either Party, any dispute settlement procedures specified in the investment agreement between such Party and the national or company of the other Party shall remain binding and shall be enforceable in accordance with the terms of the investment agreement and the relevant provisions of the domestic laws of such Party and treaties and other international agreements regarding enforcement of arbitral awards to which such Party has subscribed. If the dispute has not been resolved in accordance with the aforementioned procedures, the national or company concerned has the option to submit the dispute in writing to the ICSID for settlement[35].

The Necessity of International Arbitration

The stakes of international arbitration are rising. In cases between investors and states, at least seven arbitral awards have topped one hundred million dollars in the past five years, while several pending cases involve claims for billions of dollars[36]. The damages phase of investor-state arbitration provisions in BITs presents a variety of challenges, particularly because arbitration clauses provide a gateway for the erosion of the sovereignty of capital importing countries as they give foreign investors the right to bypass national dispute settlement mechanisms to bring claims before international arbitration institutions against host states for breaches of contract and treaty provisions. Empowered by thousands of BITs, investors have increasingly submitted disputes against states to arbitration. By the end of 2010, the number of total known investor-state disputes submitted to arbitration was 390, at least twenty-five more than the year before[37].

The importance of international arbitration in settling investment disputes stems from the fact that in the event of difficulties in determining the applicable law and competent jurisdiction for a dispute of international nature, parties may resort to arbitration[38]. This is also of great

vestment_Treaties.pdf, (accessed 31/05/2012).

[32]UNCTAD, (2004), «International Investment Agreements: Key Issues», op. cit., P. 35.

[33]Article 10 of the BIT between Cameroon-Belgio-Luxembourg Economic Union (1980).

[34]See See James Mouangué Kobila, (Mars 2004), «Le Cameroun Face à l'Évolution du Droit International des Investissements», Thèse de Doctorat, Université de Yaoundé II-SOA, P. 227.

[35]Article VII (2) and (3) of the BIT between Cameroon-United States of America (1986). See also article 9 of the BIT between Cameroon and United Kingdom (1985), article 8 of the BIT between Cameroon and Togo, article 9 of the BIT between Cameroon and Morocco (2007), article 8 of the BIT between Cameroon and China (1997), article 8 of the BIT between Cameroon and Switzerland (1963), article 9 of the BIT between Cameroon and mauritius (2001) etc.

[36]Joshua B. Simmons, (2013), «Valuation in Investor-State Arbitration: Towards a more Exact Science» in John Norton Moore, «International Arbitration: Contemporary Issues and Innovations», Martinus Nijhoff Publishers, The Netherlands, Vol. 5, P. 55.

[37]Ibid.

[38]Jean-Marie Tchakoua, (Août-Septembre 1997), «L'Arbitrage et les Investissements Internationaux en Afrique Noire Francophone: Un Mot sur la

importance to the investors in that it can prevent the state from violating the investor's right if the dispute was to be settled nationally. This is so because the state can rely on the principle of sovereignty and immunity[39]. The offer to resort to arbitration is a kind of incentive which entices foreign or international investors. There is no doubt that the value of FDI in a country depends on that country's adherence or ratification of the Washington Convention on the Settlement of Investment Disputes Between states and the nationals of other contracting states of March 18, 1965[40]. Arbitrators can pass good awards without being paralyzed[41]. As an alternative dispute settlement mechanism, arbitration is a fast and confident means for parties to have their differences settled. It is also free and discretional[42]. The case of *Klöckner v. Cameroon*[43] before the ICSID mechanism was reminiscent of this approach and clearly portrayed Cameroon's willingness to be subjected to international dispute settlement mechanisms.

In *Klöckner v. Cameroon*, the award concerned a project to construct a fertilizer factory following the proposal by the German multinational – Klöckner, to the Cameroon government. Klöckner undertook to supply and erect the factory, to be responsible for its technical and commercial management for at least five years and to be a 51% shareholder in the joint venture with the société Camerounaise des Engrais (SOCAME). The government of Cameroon, on its part, undertook to provide a developed site for the factory, as well as, guarantee payment of a loan arranged by Klöckner covering the price of the factory. After 18 months of unprofitable and sub-capacity production under Klöckner's management, the factory was closed down in 1978. An attempt was made by government to save the enterprise in 1980 but it was an economic failure and the fertilizer factory was definitely closed down in 1981. When Klöckner filed its request for arbitration against Cameroon and SOCAME in April 1981, it claimed the outstanding balance of the price for supplying the factory, which was reflected in promissory notes issued and guaranteed by the government of Cameroon in 1976. The residual debt, including interest as of the hearing of July 1983, stood at an equivalent of FF 207 million.

Although the *Klöckner award* was subsequently annulled[44], the various arguments raised by the ICSID tribunal are interesting enough to show how foreign multinationals like Klöckner are tied to respect their contractual obligation. Klöckner breached the contract by failing to reveal or make disclosure which pushed the Cameroonian party into further error. If the court accepts the existence of an international law of development that seeks to protect the host state as well in view of the benefit intended to be brought by the investment to boost its development projects, the court would hold in favour of the host state[45]. However, under many legal systems, states have a recognized right to possibly exercise its sovereignty as a contractual party to unilaterally change, terminate or repudiate the contract. But it is also an almost universally accepted and perhaps equitable practice that, this can only be tolerated, if done *bona fide* in pursuit of a public purpose (rather than for commercial reasons) and that, it must be accompanied by just compensation where existing rights are affected[46].

THE EROSION OF JUDICIAL SOVEREIGNTY UNDER BITS

BITs provide foreign investors with the ability to bypass national legal systems, in favour of international arbitration[47]. Even where contracts between an enterprise and a state expressly limit recourse to local dispute settlement options, this may not restrict foreign investors from opting for international arbitration in situations where a BIT has also been concluded by the investor's home state and host state. Several recent ICSID cases have underscored this point by upholding jurisdiction to hear treaty claims, notwithstanding the fact that the foreign investor

Compétence de l'Arbitre», in Juridis Périodique n° 31, P. 67.

[39]Ibid.

[40]Ibid.

[41]Ibid., P. 71.

[42]Fipa Jacques, (2001), «Les Garanties d'Execution au Cameroun des Sentences Arbitrales Rendues dans l'Espace OHADA», Mémoire de DEA, Université de Dschang, P. 2.

[43]Klöckner Industries Anlagnen Gmbh et al. v United Republic of Cameroon et al. ICSID case ARB/81/2; (1985) 10 Y.C.A 71; (1986) II Y.C.A 162.

[44](1986) H.Y.C.A. 162; (1986).1 ICSID Rev. 89. cited by Akonumbo (A. N.), P. 327.

[45]Akonumbo (A. N.), ibid. PP. 330-331.

[46]Ibid. P. 331.

[47]Luke Eric Peterson, «Bilateral Investment Treaties and Development Policy-Making», op. cit., P. 21.

was party to a contract which specified that contract claims would be the exclusive province of a given domestic court[48].

Despite their best efforts, governments are finding that, once they have concluded investment treaties containing open offers to investor-state arbitration, they cannot prevent foreign investors from taking their claims out of the local legal system. Proponents of this form of international arbitration sometimes describe it as an important safety valve in the event that foreign investors may not be able to receive a fair hearing in a host government's courts[49]. In addition to permitting investors to by-pass local court systems, investment treaties also insulate arbitration proceedings from extensive review by local court systems[50]. Thus, governments acceding to investment treaties need to be aware that these agreements may serve to internationalize disputes and, in so doing, ensure that foreign investors may detour around domestic legal systems and laws applicable in that system[51]. The recent opting out of the BIT-regime by Ecuador leaves much to be desired by developing countries who suffer great loses year in year out from the international arbitration of investor-state disputes[52].

ISDs can have substantial financial implications, with respect to both the costs of the arbitration proceedings and the awards rendered[53]. Some claims involve large sums. Furthermore, defending against claims that may not ultimately be successful costs money. A cursory review of decisions in recent awards suggests that the average legal costs incurred by governments are between $1 million and $2 million, including lawyers' fees, the costs for the tribunal of about $400,000 or more, and the costs for the claimants, which are about the same as those for the defendant[54]. Of course, there can also be potential positive impacts of the increase in arbitrations. Perhaps the most identifiable one would be an increase in confidence with regard to investing in developing countries that comply with their treaty obligations directly or pursuant to arbitration decisions.

The question is whether the government could have entered into an agreement that would empower an investor from a foreign nation to sue for compensation on account of a delay in our judicial system. If the agreement has such an effect, does it not amount to surrendering our sovereignty? If those who entered into such treaties had applied their minds, they could very well have avoided the arbitration clauses[55].

The growing diversity of the BIT universe poses new challenges. The risk of incoherence is particularly great for developing countries that lack expertise and bargaining power in investment rule-making, and that may have to negotiate on the basis of divergent model agreements of their negotiating partners[56]. Political movements and NGOs have spoken against the use of BITs, stating that they are mostly designed to protect the foreign investor[57]. Hence, developing countries accept restrictions on their sovereignty in the hope that the protection leads to an increase in FDI[58]. For

[48]Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3) Annulment Decision of July 3, 2002, 41 ILM 1135 (2002); CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003, 42 ILM 788 (2003).

[49]Luke Eric Peterson, «Bilateral Investment Treaties and Development Policy-Making», op. cit., P. 22.

[50]Ibid.

[51]Dezalay and Garth, (1996), «Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order», University of Chicago Press, P. 93–95.

[52]Lauge N. Skovgaard Poulsen, op. Cit., P. 286.

[53]UNCTAD, (2006), «International Investment Rule-Setting: Trends, Emerging Issues and Implications», United Nations Publication, P. 9, available at http://archive.unctad.org/en/docs/c2d68_en.pdf, (accessed 11/06/2012).

[54]Ibid.

[55]White Industries Australia Limited and the Republic of India (2011): In the Matter of an Uncitral Arbitration in Singapore under the Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments.

[56]United Nations Conference on Trade and Development, (2007), «Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking», op. cit., P. 144.

[57]Rose-Ackerman, Susan Tobin and Jennifer, (May 2, 2005), «Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties», Yale Law & Economics Research Paper No. 293, P. 3. Available at SSRN: http://ssrn.com/abstract=557121 or http://dx.doi.org/10.2139/ssrn.557121. (accessed 26/05/2012).

[58]Neumayer, Eric & Spess, Laura, (2005), «Do Bilateral Investment Treaties Increase Foreign Direct

example, foreign investors have recourse to international arbitration tribunals to settle any claims resulting from what they believe to be unfair treatment of their property. Domestic investors are left to the local property rights enforcement systems[59].

Hence, developing countries enhance the credibility of their commitments by consenting in investment treaties to arbitration of their disputes with foreign investors. As a result, investors have gained standing to pursue arbitration against states. The growing number of arbitration claims shows that investors are more confident with international arbitration. Today, if a government measure harms a foreign investment, a foreign investor will likely have greater confidence in international arbitration than in domestic courts of the host state. Challenges to legitimacy include inconsistent decisions, preferential treatment of foreign investors over domestic investors, and intrusions on the regulatory sovereignty of states. Despite these challenges, the pace of investor-state arbitration has shown little sign of slowing.

Investment Treaties Arbitration as a Threat to National Judicial Sovereignty

A critical analysis of BITs raises the question whether these treaties have any provisions on the respect for instance, of the judicial sovereignty of host countries[60]. Many developing countries conclude BITs in order to attract foreign investment and limit at the same time their own power to settle investment disputes[61]. In this respect, it is a challenge, especially for developing countries, to strike a balance between attracting FDI and retaining dispute settlement autonomy[62]. An award passed by an arbitral tribunal in Singapore has criticised the Supreme Court of India for its delay in handling cases and directed the Government of India to compensate an investor from Australia for such a hold-up. This hits at the root of the country's judicial sovereignty[63].

Dispute settlement clause (umbrella clause)[64]are example of BITs' provisions that operates to erode or limit state sovereignty. In accordance with the principle of national sovereignty over activities occurring on the territory of a State, most countries have traditionally maintained that investor-State disputes should be resolved in their national courts. In its strict formulation, this position means that foreign investors ought not, in principle, to have the option to pursue investor-State disputes through internationalized methods of dispute settlement[65]. Critics such as Vandevelde[66] admit that BITs seriously restrict the ability of host states to regulate foreign investment. International disputes of the 1920s and 1930s reflect a certain tension between national autonomy and international controls. This is undeniably supported by the *Neer claim*, resolved by the Mexican-United States General Claims Commission in which it was held that:

Investment to Developing Countries?», London, LSE Research Online, P.1, http://eprints.lse.ac.uk/ archive/00000627, (accessed 19/07/2012).

[59]Rose-Ackerman, Susan and Tobin, Jennifer, op. cit., P. 9.

[60]Leyla Davarnejad, (27-28 March 2008), «Strengthening the Social Dimension of International Investment Agreements by Integrating Codes of Conduct for Multinational Enterprises», OECD Global Forum on International Investment, P. 3, http://www. oecd.org/dataoecd/10/5/40352144.pdf, (accessed 16/06/2012).

[61]Developing countries sign BITs with developed countries as a response to competitive pressures for investment with other developing countries. However, BITs are more hazardious if we take a cursory look at their negative impacts on developing host states.

[62]Ibid., P. 4. See also James Mouangué Kobila, op. cit., P. 49.

[63]P. K. Suresh Kumar a senior advocate at the High Court of Kerala, Kochi, http://www.judicialreforms. org/component/content/article/70-international-news/738-globalisation-and-the-judicial-sovereignty-of-india.html, (accessed 11/06/2012).

[64]Rudolf Dolzer, (2005), «The impact of international investment treaties on domestic administrative law», International Law and Politics, Vol. 37, P. 957, http://www.law.nyu.edu/ ecm_dlv3/groups/public/@nyu_law_website__journals__journal_of_international_law_and_politics/documents/documents/ecm_pro_059628.pdf, (accessed 31/05/2012).

[65]UNCTAD, (2003), «Dispute Settlement: Investor-State», Geneva, United Nations Publication, P. 26, http://unctad.org/en/docs/iteiit30_en.pdf, (accessed 11/06/2012).

[66]Vandevelde, K (2000), «The Economics of Bilateral Investment Treaties», Harvard, International Law Journal, 41 (2), cited by Neumayer, Eric & Spess, Laura, op. cit., P. 11.

The propriety of governmental acts should be put to the test of international standards... the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency[67].

UNCTAD noted that the WTO delegates should be aware that treaty-based investor state arbitration could give rise to 'different and even conflicting rulings on the same issue. This was due, for example, to overlapping membership of different agreements and had indeed become a real issue, as had been witnessed in recent arbitration cases[68]. The usual conflicting awards on claims of the same nature makes the national courts the preferred forum for the settlement of investor-state disputes.

Lack of Consistency in the Interpretation of Substantive Provisions by Arbitration Tribunals

Another key problem in BITs is that the balance of power between treaty parties and tribunals that interpret investment treaties is defective[69]. Investment arbitration can be plagued by a troubling lack of consistency in the interpretation of the substantive provisions from one case to another.

This was most clearly illustrated in relation to two treaty claims mounted against the Czech Republic - *CME v Czech Republic* and *Ronald Lauder v Czech Republic* by a broadcasting firm and its major shareholder. Two separate tribunals examined virtually identical facts in the *CME* and *Lauder* arbitrations, yet reached contradictory conclusions as to whether the Czech authorities had violated key agreement rules such as those on non-discrimination and expropriation[70].

Not only can tribunals reach widely divergent conclusions in parallel cases, but arbitrators are under no strict legal obligation to follow the path made by earlier arbitral awards. Although earlier awards will tend to be "persuasive" for subsequent tribunals, they do not serve as binding precedents indeed with conflicting awards having been handed down in cases such as those against the Czech Republic, it would be impossible for subsequent tribunals to follow precedents. Little wonder one well-known Swiss arbitrator has warned that investment treaty arbitration is in danger of becoming a "legal casino[71]."

Similarly, Non-governmental organizations criticize the lack of democratic control and accountability of investment arbitrations, the inability of non parties to influence arbitral proceedings, and the threat that investment protection is accorded preference over state regulatory policy concerns[72].

A Way Forward to the Problems posed by BITs

Legal science has reacted to the discontent expressed in relation to BITs and arbitration by discussing solutions to the manifold challenges this field of investment law is facing[73]. Apart

[67]LFH Neer & Pauline Neer (USA) v United Mexican States US-Mexico Claims Commission (1926) IV RIAA 60, Para 4.

[68]WTO WGTI, Report on the Meeting held on 16 - 18 September 2002, WT/WGTI/M/19, 3 Dec, 2002, par. 198. Cited by Lauge N. Skovgaard Poulsen op. cit., P. 202.

[69]In theory, treaty parties are supreme when creating the law and tribunals are supreme when applying it in particular cases. In practice, this separation is never complete. How treaty parties interpret and apply the law affects what tribunals decide in particular cases. And tribunal awards in particular cases informally contribute to the interpretation, and thus the creation, of the law. As a result, some interpretive balance exists between treaty parties and tribunals, though neither enjoys ultimate interpretive authority in all circumstances. See Anthea Roberts, (2010), «Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States», The American Journal of International Law, Vol. 104, PP. 179, http://www.asil.org/ajil/Apr2010selected-3.pdf, (accessed 19/07/2012).

[70]See Charles N. Brower, (Oct. 7, 2002), «A Crisis of Legitimacy», available at: http:// www. whitecase .com/article_international _adr_10_7 _2002.pdf, (accessed 30/05/2012).

[71]Jacques Werner, (Oct. 2003), «Making Investment Arbitration More Certain – A Modest Proposal», Journal of World Investment, Vol. 4, No. 5.

[72]Ibid.

[73]Schill W. Stephan, (2011), «Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach», Virginia Journal of International Law, Vol. 52, Number 1, P 68, available

from the radical response to exit the system of international investment protection altogether, suggestions for institutional reform abound, ranging from a return to state-to-state dispute resolution, via introducing a common appeals body in order to review investment treaty awards, to establishing a permanent international investment court[74].

Returning to the settlement of investment disputes in inter-state relations would allow states not only to jointly control the composition of arbitral tribunals, but also to filter the disputes tribunals entertain. This solution would allow states to exclude frivolous claims. Foreign investors, as a consequence, would be deprived of the most important right granted under investment treaties, namely the right to initiate investment arbitration and hold states liable for breaches of investment treaty commitments independent of an intervention by their home state[75].

Another solution consists of the establishment of a permanent international court for foreign investment disputes. This would allow states alone to determine the composition of the bench, which arguably would lend such an institution increased legitimacy. A standing court would have the advantage of centralizing control of the interpretation and application of investment treaties in a single body, thereby reducing inconsistencies and fragmentation, and increasing the predictability of investment jurisprudence[76].

Hence, achieving the necessary balance between investment protection and state sovereignty, and addressing demands for transparency, openness, and predictability in investment arbitration, can be achieved. On this note, developing nations are advised to undertake significant "due diligence" before agreeing to be bound by further such investment treaties.

CONCLUSION

In as much as BITs promote the interests of the foreign investor, they greatly limit states' judicial sovereignty in particular and their regulatory power in general. In concluding BITs, developing countries are therefore 'trading sovereignty for credibility'[77].

The flaw with investor-state arbitration in BITs is that it constitutes a powerful mechanism for investors to challenge government regulation. Clarification of the obligations in BITs, would address the concern that investor-state arbitration is a threat to domestic sovereignty[78].

A possible solution to this is to enhance the role of domestic dispute settlement bodies. If transparent, reliable and objective local dispute settlement mechanisms are available, the need for international dispute settlement might be less urgent. This may help to reduce the overall costs of dispute settlement by providing local solutions. To that end, it seems necessary to develop and improve local capacity for judicial institutions and practices.

Investor-state arbitration clauses, if they are necessary in BITs should not be an optional dispute settlement mechanism for parties to choose in the event of a breach. Instead, it should be resorted to if investment disputes are not resolved by the two parties themselves through local remedies within a certain period. Where this happens, both parties must consent to submit the dispute for arbitration. On the other hand, the introduction of a requirement that the foreign investor exhaust local remedies before having recourse to international methods of dispute settlement could create difficulties.

at http://www.vjil.org/assets/pdfs/vol52/issue1/Schill_Final.pdf, (accessed 11/06/2012).

[74]Ibid.

[75]Ibrahim F.I. Shihata, Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, 1 ICSID REV. 1, 1 (1986). Cited by Schill W. Stephan, ibid., P. 68.

[76]See generally Schill W. Stephan, op. cit., PP. 68-69.

[77]Elkins, Z., Guzman, A. & Simmons, B. (2004), «Competing for Capital: The diffusion of Bilateral Investment Treaties», 1960-2000. Working paper. University of Illinois, University of California at Berkeley and Harvard University, P. 4, cited by Neumayer, Eric & Spess, Laura, op. cit., P. 11.

[78]Andrew Paul Newcombe, (1999), «Regulatory Expropriation, Investment Protection and International Law: When Is Government Regulation Expropriatory and When Should Compensation Be Paid?», Masters Thesis, University of Toronto, P. 174, available at http://italaw.com/documents/RegulatoryExpropriation.pdf, accessed (11 June 2012).

A possible disadvantage of such a requirement is that the investor, after an unsatisfactory outcome, may have recourse to international arbitration, subjecting the host countries National court system to a possible review by an international tribunal[79].

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[79]UNCTAD Series on International Investment Policies for Development, (2005), «Investor-State Disputes arising from Investment Treaties: A Review», op. cit, P. 58.