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REEVALUATING DEVELOPING STATES CONTINUED ENGAGEMENT WITH THE BILATERAL INVESTMENT TREATY REGIME

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ABSTRACT

This article questions the raging popularity of Bilateral Investment Treaties (BITs) among developing countries. Whereas a review of international investment jurisprudence shows that developing states lose more than they benefit by signing up for BITs. Essentially, BITs guarantee returns on investments for foreign investors without any guarantee for similar returns for the host country. Therefore, it is herein postulated that developing states are better off withdrawing from BITs as that would, contrary to expectations, not jeopardize their development.

Keywords: Bilateral Investment Treaties, Foreign Direct Investments, Arbitral Tribunals, Investment Agreement, investor-state arbitrations, international investment jurisprudence

INTRODUCTION

Many developing states embrace the Bilateral Investment Treaties (BITs) regime on the assumption that foreign investors will not invest in states that have not signed up with BITs which they (foreign investors) believe prevents developing countries from breaching promises contained in the investment agreement with impunity; And on the assumption that the "assurances" deemed inherent in BITs will encourage flood of foreign investment into their states.

The fear about developing states' legal capacity to renege promises or contractual obligations to foreign investors stems from a hazy interpretation of the purport of the 1962 United Nations General Assembly Resolution 1803 (XVII) (UNGA Resolution 1803 (XVII))[1] that established permanent sovereignty over natural resources, and the 1974 United Nations General Assembly Resolution 3281 (XXIX) (CERDS)[2] that affirmed the right of a state to nationalize, expropriate, or transfer ownership of foreign property.

This article argues that those assumptions and accordion fears are faulty and legally, morally baseless. Neither UNGA Resolution 1803 (XVII) nor CERDS has the intendment to equip developing states with the capacity to renege on promises. Consequently, developing states are not legally and morally at liberty to renege on their contractual promise to foreign investors with impunity; nor does the absence of BITs preclude foreign investment. Similarly, BITs do not, on their own, guarantee an absence of breach of agreement. Just as BITs neither encourage a flood of Foreign Direct Investments (FDIs) into developing states[3] nor guarantee economic development for host developing states. Furthermore, the

[1] U.N. Doc. A/5217 (Dec. 14, 1962)
[2] G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States (Dec. 12, 1974) [CERDS].

[3] See Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?* LAW & SOC. REV. (2008). See also *Jason Webb Yackee* "Pacta sunt servanda and state promises to foreign investors before bilateral investment treaties: myth and reality." 32 Fordham International Law Journal 1550 (2008).

Available at: https://ir.lawnet.fordham.edu/ilj/vol32/iss5/5

jurisprudence on international investment had remained significantly unchanged in the face of UNGA Resolution 1803 (XVII), CERDS, and BITs. However, the incursion of BITs into international investment jurisprudence has aided the compromise of state sovereignty as well as eroded the protection UNGA Resolution 1803 (XVII) and CERDS offered developing states against the prying eyes of spurious and dubious foreign investments schemes - for which reason, it is herein proposed that developing countries should jettison BITs so as to retain their sovereignty and the protection offered them by UNGA Resolution 1803 (XVII), and CERDS. This is more so because of the absence of tangible and credible evidence to prove that BITs encourage the flow of foreign investments[4] or that developing countries cannot develop without foreign investments. Besides, BITs only promote enforceability of state promises to foreign investors through guaranteed access to international arbitration and to peculiar causes of action in the event of a breach of promise.[5]

The article is partly empirical by its reliance on the review of arbitrary awards from international arbitral tribunals, and partly doctrinal by its reference to sundry literature on the subject. The article is presented in sections: section one presents an overview of BITs regime. Section two addresses the issues as to whether developing states are at liberty to renege their contractual promise to foreign investors with impunity. Section three looks at the attitude of arbitral tribunals to explore the relevance of arbitration as an appropriate forum for resolving investor-state disputes. Section four explores the operations of BITs-supported FDIs in developing states in order to ascertain whether they ensure the development of developing states. Section five explains how the incursion of BITs into international investment jurisprudence has compromised state sovereignty and eroded the protection UNGA Resolutions 1803 (XVII), and CERDS offered developing states against the prying eyes of spurious and dubious foreign investment schemes. Section six explored how the behaviour of foreign investors impinges on the BIT regime. Section seven is a concluding thought on the subject of the article.

Overview of BITs

BITs are among the many recent developments in international law creating a remarkable regime disrupting international trade and calling for attention. The perception that BITs save foreign investors from the vagaries of governance of developing states and developing states' perception that BITs guarantee foreign investment inflows, saw to its popularity, acceptance, and consequential rapid growth starting from the mid-1990s.[6]

BITs streamline substantive and procedural mechanisms aimed at protecting foreign investments. Most of the mechanisms relate to recourse to arbitration, the right to submit an investment dispute with the host government directly to international arbitration, investors right of action against a host government that has fallen short of its obligations due on an investment agreement, adoption in the developing states of market-oriented domestic policies that treat private investment fairly, equal treatment of foreign and indigenous companies, nondiscrimination against foreign companies, better of national treatment or most favoured nation treatment for foreign investors, right to transfer funds into and out of the host state without delay using a market rate of exchange, limitation on host governments ability to require foreign investors to adopt inefficient and trade distorting practices, right for foreign investors to engage the top *managerial personnel* of their choice regardless of nationality, disputes resolution governed by the terms of the relevant treaty and international law (not necessarily by the law specified in contracts related to the investment), jurisdiction in neutral grounds outside the host state, enforcement of investor-state arbitration tribunals awards in any of the countries that are signatories to the New York Convention on the

[4] On whether BITs encourage FDIs. Literature is divided. Many are uncertain that BITs actually improve FDIs see Sornarjah M. (1986). State responsibility and bilateral investment treaties. Journal of World Trade Law, 20, 79 – 98; Salacuse, JW. & Suleivan, Nicholas P. (2005). Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain. Harvard International Law Journal, 46, 67 – 130; Tobin, J & Rose-Ackerman, S (2005). Foreign direct investment and the business environment in developing countries: the impact of bilateral investment treaties. Yale Law School Center for law, economics and public policy research paper no. 293. Others appear to be certain that BITs improve FDIs see Neumayer, Eric & Spess, Laura (2005). Do bilateral investment treaties increase FDI to developing countries? LSE online. Hhttp://eprints.lse.ac.uk/archive/00000627

[5] *Jason Webb Yackee* "Pacta sunt servanda and state promises to foreign investors before bilateral investment treaties: myth and reality." Op cit

[6] At present, there are well over 2800 international agreements. about 150 countries have entered into one or more investment treaties. See the Basics of Bilateral Investment Treaties Powerful Protection - and Dispute Settlement Options - for International Investors https://www.sidley.com/en/global/services/global-arbitration-trade-and-advocacy/investment-treaty-arbitration/sub-pages/the-basics-of-bilateral-investment-treaties/

recognition and enforcement of foreign arbitral awards,[7] and "adequate" / substantive compensation. Also, part of BITs is the ubiquitous umbrella clauses that seek to equate a country's violation of local law to the violation of an international obligation.[8]

As a disruptive mechanism, BITs have encouraged the proliferation of Investment Arbitral Tribunals.[9] It has also encouraged the proliferation of investment arbitration many of which are conducted by institutions with unique allegiance to and either owned or affiliated with multilateral lending institutions. For instance, the International Centre for the Settlement of Investment Disputes (ICSID) is an Investment Arbitral Tribunals affiliated with the World Bank.[10] Whereas the International Chamber of Commerce (ICC) was founded by a group of industrialists, financiers, and traders.

BITs permit transnational corporations to bypass domestic courts and sue sovereign states before international tribunals. A procedure that is condemnable for its capacity to consume millions of taxpayers' money in legal expenses and compensation, and prevents governments from acting in the best interests of their citizens.[11]

[7] The Basics of Bilateral Investment Treaties Powerful Protection and Dispute Settlement Options for International Investors https://www.sidley.com/en/global/services/global-arbitration-trade-and-advocacy/investment-treaty-arbitration/sub-pages/the-basics-of-bilateral-investment-treaties/; see also bilateral investment treaties and related agreements https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/

[8] Umbrella Clauses in Investment Arbitration 01/05/2022 by Aceris Law LLC. https://www.acerislaw.com/umbrella-clauses-in-investment-arbitration/

[9] As of December 31, 2022, ICSID had registered 910 cases under the ICSID Convention and Additional Facility Rules. See **The ICSID caseload - statistics issue 2023-1.** www.icsid.worldbank.org

[10] See the 1965 Convention on the settlement of investment disputes between states and nationals of other states. Please note that non-BIT investment disputes can also be referred to the ICSID for arbitration.

[11] Change EU investment policy - now is the time! public interest, social and environmental policies under threat, 2011. https://www.tni.org/en/publication/change-eu-investment-policy-now-is-the-time

Are developing states at liberty to renege on their contractual promise to foreign investors with impunity

Jurisprudence on international investment law does neither vest, support, nor suggest that developing countries are at liberty to renege on promises or contractual obligations to foreign investors. In particular, and contrary to popular perception, the UNGA Resolution 1803 (XVII), and the CERD) did not vest, support, or suggest the same.

The UNGA Resolution 1803 (XVII) only sought to establish the right of peoples and nations to exercise permanent sovereignty over their natural wealth and resources in the interest of their national development and the well-being of the people of the state concerned;[12] and to ensure that the exploration, development, and disposition of such resources, as well as the import of the foreign capital required for these purposes, are agreeable to the peoples and nations. Generally, to ensure that the exploitation of a country's natural resources by external help benefits the people and does not impair the State's sovereignty over its natural wealth and resources.

On its part, CERDS affirmed the right of a state to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference;[13] the right to freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities; right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities; right not to be compelled to grant preferential treatment to foreign investment; and right to nationalize, expropriate, or transfer ownership of foreign property[14] (which BITs detest). However, nationalization, expropriation, or transfer of ownership of foreign property is subject to the payment of appropriate compensation.[15] The Argentinian Arbitrations,[16] the Kuwait[17] and Libya cases,[18] which had nationalization of foreign property as

[12] Article 1 of UNGA Resolution 1803 (XVII)
[13] Article 1 of CERDS.
[14] Article 2 of CERDS
[15] Article 2(c) of CERDS

[16] The Argentinian Crisis Arbitrations International Investment Law: An Analysis of the Major Decisions (edited by Hélène Ruiz Fabri and Edoardo Stoppioni, Hart Publishing 2022) 119–134

[17] Kuwait v. American Independent Oil Co. (Aminoil), 21 Int'l Legal Materials 976 (1982) [Aminoil award].

a subject, illustrate that developing states are not at liberty to renege on their contractual promise(s) to foreign investors with impunity. In the case of Libya - Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic;[19] BP Exploration Company (Libya) Ltd. v Government of the Libyan Arab Republic;[20] and the Texaco Overseas Petroleum Company/California and the Government of the Libyan Arab Republic[21] - the three different Arbitral Tribunals that handled the cases found Libya liable for breach of contract. In the matter of 1978 Kuwaiti nationalization of its oil concession to the American Independent Oil Co. (Aminoil),[22] *Aminoil's* contention that Kuwait's 1978 nationalization of its oil concession breached their 1948 concession agreement[23] was upheld, and the Tribunal ruled against Kuwait.

In those instances, the legal question was around the permanent sovereignty resolutions as provided by the 1962 UNGA Resolution 1803 (XVII) and CERDS. The usual outcome has pointed towards the fact that developing states are not at liberty to renege on their contractual promise to foreign investors with or without impunity.

Attitude of Arbitral Tribunals

It has been contended for developed states that UNGA Resolutions do not necessarily amount to customary international law. Awards from Arbitral Tribunals support that position, as it is obvious that UNGA Resolutions have seemingly no impact on international tribunals' willingness to enforce state promises to foreign investors, even in the face of UNGA Resolution 1803 (XVII) and CERDS.[24] The legal significance of UNGA Resolutions, CERDS in particular, was destroyed in the *TOPCO* Award in which the Arbitrator appeared to have taken no interest in Libyan contentions based on rights afforded by the UNGA Resolution 1803 (XVII) and CERDS. In his analysis of the *TOPCO* Award, Jason's eulogized the Sole Arbitrator's (Dupuy's) position on UNGA Resolutions and opined that "the *TOPCO* Award remains the most extensive rejection of CERDS' international legal significance."[25] That statement appears to suggest that Arbitral Tribunals are bent on ignoring host developing states' concerns while handing down juicy awards to foreign investors. That position is, however, not unexpected.[26] Global issues concerning and dealing with the South have always been fraught with high-level uncertainties.[27]

Amid the contention that UNGA Resolutions do not necessarily amount to customary international law, Arbitral Tribunals appear to pick and choose what part of the UNGA Resolutions to adopt for their awards.[28] In the American Independent Oil Co. Award (*Aminoil* Award),[29] the Arbitrator's conclusion that Kuwait was of duty to provide "appropriate" compensation for Aminoil was among other laws (Kuwaiti and international law, including general principles of law) based on CERDS.[30] In the *TOPCO* Award, the Arbitrator was happy to cite UNGA Resolution 1803 (including Libyan, Koranic law, and international law) to support his postulation that Libya's entering into an agreement with a foreign investor was an exercise of sovereignty;[31] and that foreign investment agreement has to be observed in good faith.[32] Dupuy (the sole Arbitrator in that case) dismissed Article 2 of CERDS as lacking legal binding force simply because CERDS enactment was not supported by developed countries.[33]

[18] Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic (April 12, 1977), 20 Int'l Legal Materials 1 (1981) [LIAMCO award]; BP Exploration Company (Libya) Ltd. v. Government of the Libyan Arab Republic, 53 Int'l L. Rep. 297 (1979) [BP award]; Texaco Overseas Petroleum Company/California and the Government of the Libyan Arab Republic (Jan. 19, 1977), 17 Int'l Legal Materials 1 (1978) [TOPCO award].

[19] (April 12, 1977), 20 Int'l Legal Materials 1 (1981) [LIAMCO award] - the Libyan government breached her concession contracts with the Libyan American Oil Company

[20] 53 Int'l L. Rep. 297 (1979) [BP award].

[21] (Jan. 19, 1977), 17 INT'L LEGAL MATERIALS 1 (1978) [*TOPCO* award] – the breach was due to the Libyan government's nationalization of their companies' assets without compensation as required by Article 2(c) of CERDS

[22] Kuwait v. American Independent Oil Co. (Aminoil), 21 INT'L LEGAL MATERIALS 976 (1982) [Aminoil award].

[23] The concession agreement was modified and supplemented in 1961 and informally modified again in 1973 then the breach.

[24] See the Libyan cases

[25] *Jason Webb Yackee* "Pacta sunt servanda and state promises to foreign investors before bilateral investment treaties: myth and reality. Op cit, p 43

[26] See discussion on how developed states belittle issues that concern developing states in Odoeme, C.V. Developed States Attitude towards the Development of International Law and Maritime Security in Africa: Living with an Elephant. Nile University Law Journal, Vol. 2 No.1 November 2020 p46 - 64; see also Odoeme, C.V. & Chijioke, C.O. Sanctions in international law: morality and legality at war. Commonwealth Law Review Journal, Annual Volume 7, May 2021, 102 – 120

[27] See Odoeme, C.V. Corporate accountability in the Nigerian oil and gas sector: coping with uncertainties. Commonwealth Law Bulletin Vol. 39, No. 4, Dec 2013, p 741 - 765.

[28] See Rosalyn Higgins, Problems and process: international law and how we use it 143 (1994)

[29] *Kuwait v. American Independent Oil Co. (Aminoil)*, 21 International Legal Materials 976 (1982) [*Aminoil* award].

[30] Ibid

[31] See Texaco Overseas Petroleum Company/California and the Government of the Libyan Arab Republic (Jan. 19, 1977), 17 Int'l Legal Materials 1 (1978) [TOPCO award]. Para 67

[32] Ibid. Para 68

[33] Ibid. Para 85 - 86

Assuming without conceding that UNGA Resolutions 1803 and CERDS are just "recommendations" or serve as evidence of customary international law,[34] and "aspirational statement of policy,"[35] consistent reference to them in BITs (although the whole attempt has always been to exclude their applicability) and consequential reliance on them for awards by Arbitral Tribunal has enabled them to have legal effect to become considered state practice which therefore qualifies them to join the league of items in customary international law.

Many investor-state arbitrations, particularly those involving developing states, are questionable. The P&ID v Nigeria Arbitration[36] is a case in point. In 2010, the Nigerian Ministry of Petroleum Resources signed a contract for the construction and operation of a new gas processing facility with P&ID, a company incorporated in the British Virgin Islands. Under the contract, Nigeria was to supply natural gas ("wet gas") at no cost to P&ID's facility. For its part, P&ID was to construct and operate the facility. It would process the gas to remove natural gas liquids, which P&ID was entitled to, and return lean gas to Nigeria at no cost, which would be suitable for use in power generation and other purposes. At the Arbitration, holding against Nigeria, the Arbitrator awarded P&ID the sum of USD 6.6 billion in damages plus interest of 7% per annum. The interesting thing about this award is that even at the point of arbitration, P&ID had not put a boot on the ground - P&ID had not commenced construction of the facility or even purchased a site on which the facility could be built. This award and others like it[37] "raise more profound questions about whether arbitration is ever an appropriate forum for resolving investor-state disputes." As well as the issue of whether investor-state arbitrations should be conducted in private.[38]

Similarly, is it not worrisome that there is no equivalent rule on transparency for contract-based investor-state arbitration as there is for Treaty-Based Investor-State Arbitration pursuant to the 2014 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration?[39] This dichotomy is discriminatory and encourages irresponsibility littering Investor-State Arbitration procedures and awards. Different levels of transparency are expected in treaty-based investor-state arbitration and contract-based investor-state arbitration, all involving FDIs. This points to the question of whether investor-state arbitration does not support corruption and facilitates bribery and money laundering.

Other issues in contention herein include:

Should Arbitral Tribunals, in investor-state arbitrations, be blind to extenuating circumstances (such as bribery and corruption; Lawyers and state officials participating in the tribunal unjustly benefiting or being conduits for which reason they fall short of their expectations in a matter by absurd incompetence) surrounding a matter before them simply because arbitration is for the resolution of issues raised by parties before the tribunal to which they have submitted themselves?

Is it sustainable for Arbitral Tribunals, in investor-state arbitrations, not to look beyond the state as a corporate entity, particularly where it is obvious that irregularities in a state's case may be for private interest?

Is it sustainable for Arbitral Tribunals, in investor-state arbitrations to dismiss, as technical and irrelevant, arguments based on host states laws even when they have some merit?[40]

BITs and FDIs in developing states

Do BITs encourage a flood of FDI into developing states? Does the absence of BITs preclude foreign investment? Do BITs guarantee economic development for host developing states? Do BITs guarantee the absence of breach of agreement? The answer to these raging questions is no. BITs neither encourage a flood of FDI into developing states[41] nor does their absence preclude

[34] See Nico Schrijver, sovereignty over natural resources: balancing rights and duties. Cambridge University Press (1997)

[35] *Jason Webb Yackee* "Pacta sunt servanda and state promises to foreign investors before bilateral investment treaties: myth and reality. Op cit. p 19

[36] Federal Republic of Nigeria v Process & Industrial Developments Limited [2020] EWHC 2379 (Comm)

[37] See Zhongshan Fucheng Industrial Investment Co Ltd (Zhongshan) v Republic of Nigeria. In this BIT induced arbitration, an additional award of USD75,000 was made as "moral" compensation for issues relating to police discharge of its official responsibility in what was tagged "egregious behaviour of the Nigerian police."

[38] Jonathan Bonnitcha "Corruption and confidentiality in contract-based ISDS: the case of P&ID v Nigeria" March 23, 2021 https://www.iisd.org/itn/en/2021/03/23/corruption-and-confidentiality-in-contract-based-isds-the-case-of-pid-v-nigeria-jonathan-bonnitcha/

[39] UNCITRAL. (2014). *UNCITRAL rules on transparency in treaty-based investor-state arbitration*. https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf

[40] See Jonathan Bonnitcha "Corruption and confidentiality in contract-based ISDS: the case of P&ID v Nigeria" op cit

[41] See Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?* op cit. See also *Jason Webb Yackee* "Pacta sunt servanda and state promises to foreign investors before bilateral investment treaties: myth and reality." Op cit

foreign investment. Similarly, BITs neither encourage nor guarantee economic development for host developing states nor guarantee the absence of breach of agreement.

The Liquefied Natural Gas (LNG) project development in Nigeria, dominated by foreign investors, is a case in point of how FDIs operate in developing states. The possibility is that the host country is not going to exactly benefit much from the LNG production in terms of availability and pricing of LNG for domestic use, in the domestic market. The foreign investment scheme is mired in bribery scandals involving foreign investors and local government officials,[42] to the detriment of the project. The Nigerian LNG project has seen two British citizens[43] indicted for allegedly trying to bribe Nigerian officials to obtain more than $6 billion of contracts to build liquefied natural gas facilities in Nigeria by the US Department of Justice through the US District Court for the Southern District of Texas. They were indicted for violation of the Foreign Corrupt Practices Act and some sections of the FCPA.[44]

In 2002, the European Commission reached (what it described) a "landmark agreement" with the Nigerian LNG Ltd to lift the territorial sales restrictions and profit splitting mechanism clause contained in the original BIT contract (including not inserting them in future contracts) on the guise that it violated EU competition rules.[45] Yet the agreement is to be executed in Nigeria, and ought to be governed by Nigerian laws as proposed by CERDS; yet again, the Nigerian market, the immediate beneficiaries of the project, have not been saturated with LNG and accordion benefits.

In 2008, Siemens AG, a German entity, pleaded guilty to violating the books and records provisions of the FCPA; Siemens Argentina pleaded guilty to conspiracy to violate the books and records provisions of the FCPA; and Siemens Bangladesh Limited and Siemens S.A. - Venezuela each pleaded guilty to conspiracy to violate the anti-bribery and books and records provisions of the FCPA. As part of the plea agreement, the Siemens companies paid a total sum of $450 million in criminal fines. The U.S. Securities and Exchange Commission (SEC) also brought a civil case against Siemens AG, alleging that it violated the anti-bribery, books and records, and internal controls provisions of the FCPA.[46] The Nigerian component of the Siemens scandal is yet to be put to rest.

A few years after the inception of the Nigerian government BIT relationship with P&ID for the development of her natural gas (2020), through arbitration, P&ID was awarded USD 6.6 billion in damages plus interest of 7% per annum against Nigeria for breach of contract - a contract P&ID did not take any reasonable step to execute.[47] In fact, at the time of the award, P&ID had not attempted to secure a piece of land on which the facility could be built. This event explains the basic disposition of foreign investors to development in developing states. P&ID did not invest a kobo in Nigeria with respect to the project (except perhaps for bribes and preliminary legal and technical services), yet they set out to reap billions of dollars in "profit" on phantom LNG projects.

Technically, foreign investments seldom lead to development in developing states. They have rather led them into debt that deepened their underdevelopment. In the same vein, BITs, or Bilateral Investment Contracts (BICs) do not guarantee an absence of breach of agreement by themselves. The breaches are just inherently necessary. The BITs and BICs regimes have anti-development dispositions. In the end, BITs and BICs regimes are designed to protect only the foreign investors' investments (and returns) in projects they have little or no interest in their success. BITs only promote the enforceability of state promises to foreign investors through guaranteed access to international arbitration and to peculiar causes of action in the event of a breach

[42] See Marubeni pays US $54.6 million to settle Nigeria LNG bribery case. https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/natural-gas/011812-marubeni-pays-us-546-million-to-settle-nigeria-lng-bribery-case

[43] Jeffrey Tesler and Wjociech Chodan

[44] See DOJ charges pair in Nigerian LNG project bribery investigation. https://www.ogj.com/home/article/17275597/doj-charges-pair-in-nigerian-lng-project-bribery-investigation

[45] See Commission settles investigation into territorial sales restrictions with Nigerian gas company NLNG. 12th December 2002. https://ec.europa.eu/commission/presscorner/detail/en/IP_02_1869

[46] Former Siemens Executive Pleads Guilty To Role in $100 Million Foreign Bribery Scheme. https://www.justice.gov/opa/pr/former-siemens-executive-pleads-guilty-role-100-million-foreign-bribery-scheme

[47] The award was recently set aside by a UK court.

of promise.[48] Therefore, developing countries do not necessarily need BITs and BICs-supported FDIs to develop. They can do without foreign investments, an inward look for development may be a way out, albeit incrementally.

BITs and international investment jurisprudence

The incursion of BITs into international investment jurisprudence has aided the compromise of state sovereignty by the empowerment of ad hoc Tribunals, vesting of jurisdiction away from the host state (contrary to CERDS) and on foreign nonstate actors - supranational institutions.[49] It has as well eroded the protection UNGA Resolutions 1803, and CERDS offered developing states against the prying eyes of spurious and dubious foreign investment schemes.

Argentina, Libya, and Nigeria's travails at the hands of Arbitral Tribunals, and the proliferation of investment arbitrations are among the leading causes of rising discontent with the developing states intercourse with the BIT system,[50] and its impact on investment jurisprudence. Then, inconsistencies in the decisions by arbitral tribunals are threatening the legitimacy of BITs[51] as well as the strong perception that BITs, through arbitrary tribunals, favour foreign investors unfairly.[52] Investors are hiding under BITs (or their equivalent e.g., Free trade agreements) to question states' authority within their territory. For instance, pursuant to NAFTA, a United States investor bid to challenge the Canadian Prime Minister for not keeping to his campaign pledge to oppose raising taxes on Canadian energy income trusts.[53] Similarly, a European mining investor initiated an arbitration proceeding challenging South African Black Empowerment legislation that sought to counteract the historical legacy of apartheid by increasing black participation in the economy.[54]

Furthermore, Arbitrary Tribunals are making new and fascinating pronouncements that are making them very attractive to foreign investors. At present, the ICSID has about 123 cases, whereas the ICJ (which decides international disputes between states) has 14 cases.[55] This development is worrisome to developing states, international law scholars, and statesmen by the fact that the pronouncements of the Arbitrary Tribunals are rapidly creating legal authorities that dominate international investment law. The fear is that soon decisions of Arbitrary Tribunals will define international law.

Arbitrary Tribunals seem to have succeeded in aligning the BITs with the Hull's Rule[56] in the settlement of matters relating to compensation in state versus foreign investor investment disputes. Although the contestation over the best phrase "prompt," "adequate," or "effective" in the determination of compensation appears to have been settled,[57] the desire to recover investments should a developing state enforce CERDS or introduce policy(ies) that will jeopardize returns on their investments,[58] still rages. Currently, BITs sustain the US approach to the 1938 Mexico's nationalization of US interests in her

[48] *Jason Webb Yackee* "Pacta sunt servanda and state promises to foreign investors before bilateral investment treaties: myth and reality." Op cit

[49] *See, e.g.*, Robert Stumberg, *Sovereignty by Subtraction: the Multilateral Agreement on Investment*, 31 Cornell Int'l L. J. 491, 494-5 (1998) (discussing the "sovereignty tradeoffs" posed by investment treaties, and arguing that the failed attempt to construct a "multilateral agreement on investment" represented a "depart[ure] from the fundamental values of federalism in the U.S. Constitution.").

[50] *Jason Webb Yackee* "pacta sunt servanda and state promises to foreign investors before bilateral investment treaties: myth and reality." Op cit, p 8

[51] Susan D. Franck, *Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Fordham L. Rev. 1521 (2005).

[52] See Vicki Been and Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protection and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 55 (2003). See also Olivia Chung, *The Lopsided International Investment Law Regime and its Effects on the Future of Investor-State Arbitation*, 47 VA. J. INT'L L. 954 (2007).

[53] See www.naftatrustclaims.com, a propagandistic website established by the aggrieved United States investor and containing links to incriminating YouTube videos of the Prime Minister promising at a news conference not to change the tax regime.

[54] See Luke Eric Peterson, *European mining investors mount arbitration over South African Black Empowerment*, Investment Treaty News (Int'l Institute for Sustainable Development, Winnipeg), Feb. 14, 2007, *at* http://www.iisd.org/investment/.

[55] For statistics on the ICJ's caseload, see http://www.icj-cij.org/docket

[56] See details in "Note of Secretary of State Hull of August 22, 1938," 5 FOREIGN REL. U.S. 647, 677 (1938).

[57] It is yet to be settled what "prompt, adequate, and effective" means. Some literature has it as "full" see Frank G. Dawson & Burns H. Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation?* 30 Fordham L. Rev. 730, 737-38 (1962); "JUST" see Georg Schwarzenberger, *The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary*, 9 J. PUB. L. 147, 161 (1960); "fair market value" see Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 Cornell Int'l L.J. 201, 232 n.208 (1988).

[58] Particularly, in the natural resources sector believed to have very high probability of government leeway to appropriate investments by virtue of the UNGA Resolution 1803, and CERDS; and where investments may not be easily moved out of the host country

Petroleum Industry, from which Hulls Rule emerged. To justify their position, and to erase the supposed advantage vested in developing states by the UNGA Resolution 1803 and CERDS developed countries have argued that UNGA Resolution 1803 and CERDS's position on compensation is compatible with Hull's Rule by the fact that investors are entitled to "appropriate" compensation in case of expropriation or nationalization by the host government. Their position here is that whatever was considered "appropriate" compensation under UNGA Resolution 1803 and CERDS could only amount to "adequate" compensation under international law.[59]

The intriguing matter herein is how developed states are quick to accept UNGA Resolution 1803 and CERDS in part i.e. that Article 3 of UNGA Resolution 1803 (including Article 2 of CERDS) affirmed that host state promises to investors are legally binding, whereas Article 4 of UNGA Resolution 1803 articulated the right of investors and host states to agree to settle compensation disputes through international adjudication.[60] But they question nearly every other provision of UNGA Resolution 1803 and CERDS. Arbitral Tribunals constituted for investor-state arbitration under the BITs (and BIC) regime adopt that position. As opined by Jason, article 4 of UNGA Resolution1803 "was particularly significant, as international adjudicators were more likely than the host state's municipal courts or authorities to take the view that promises to investors should indeed be upheld, and that "appropriate" compensation for a breach was, generally speaking, something approximating full compensation."[61] Whence the preference for international arbitration over municipal courts or the ICJ.

The outcome of the just concluded Nigeria v P&ID[62] appeal against the arbitral award by an arbitral tribunal, in a proper court, speaks to the enticement for arbitrary tribunals for foreign investors. The fact that the contract between Nigeria v P&ID was vitiated by fraud (which is a basic disposing factor for contracts) has always been there. Most probably ignored by the arbitral tribunal for the purpose of handing down a juicy arbitral award to P&ID, whose penchant for bribery has been laid bare by the court judgment.

Inadvertently, Article 4 of UNGA Resolution 1803 and Article 2(c) of CERDS)[63] have encouraged the growth of the BIT regime in terms of the proliferation of Arbitration Tribunals to the detriment of International Courts and or Municipal Courts. This is solely because of foreign investors' insistence on the inclusion of arbitration clauses in BIT (BIC) agreements. Then, even with the existence of seemingly robust regulations of arbitration and arbitration tribunals, inconsistencies in decisions and awards tend to support developing countries' prejudice towards the BIT regime.[64] Other issues of interest in CERDS, particularly Article 2(c), which used the permissive "should" in relation to compensation to be paid in case of nationalization … of foreign investment, make issues of compensation more contentious.

Inadvertently, (my imagination because I am yet to find a justification) on the part of developing countries (or acting under duress) and advertently on the part of the West, BITs now provide an avenue to jettison UNGA Resolutions dealing with the issue herein and restoring the regime of the Hull's Rule. And by some stroke of happenstance, many years after (from the 1990s) many developing states are still willing to embrace the BITs making themselves susceptible to the sin they were redeemed of.

In disregard of CERDS assertion that no State shall be "compelled" to grant preferential treatment to foreign investment,[65] and the suggested possibility of the use of "other peaceful means" (which includes arbitration) to settle disputes arising from issues of compensation for nationalization if "freely and mutually agreed" by all states concerned (I add foreign investors), developing states enter BIT (BIC) contracts that do not necessarily benefit them, and they often struggle to survive. Granted that foreign investors, e.g., Transnational Corporations, may have the upper hand or overbearing (undue) influence in the conception of BITs or BICs that may suggest the presence of "compulsion" or absence of freedom contemplated by Article 2 of CERDS, it is disturbing that developing states still fall victim.

The Cartel Theory[66] appears to be the only reasonable explanation for this strange occurrence (BITs prime position in international investment jurisprudence), necessitating the query "shouldn't developing countries

[59] See Robin C.A. White, *A New International Economic Order*, 24 INT'L & COMP. L. Q. 542, 545 (1975)

[60] See Pacta sunt servanda and state promises to foreign investors before bilateral investment treaties: myth and reality." Op cit p 15

[61] Ibid

[62] The Federal Republic of Nigeria v Process & Industrial Developments Limited. In the High Court of Justice, the Business and Property Courts of England & Wales, King's Bench Division, Commercial Court. Neutral Citation Number: [2023] EWHC 2638 (Comm). Claim Nos. CL-2019-000752 and CL-2018-000182

[63] … "other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."

[64] See Gillian White, *A New International Economic Order?*, 16 VA. J. INT'L L. 323 (1975).

[65] Article 2(a)) CERDS

[66] See Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998).

pull out of bilateral investment treaties." In an attempt to justify developing states' participation in BITs, Jason criticized Guzman's description of developing states' participation in BITs as a paradox - which description tends to support the view that developing states have no need to participate in BITs.[67]

Investor (investment) Behaviour

International law (at least the customary type) did not contemplate of a state entering a contractual relationship whether with another state or a non-state actor that would erode its sovereignty. This extends to the possibility of ceding a part of its territory to another and or forfeiture of a strategic investment(s). CERDS codified this position of international law which it tagged "permanent sovereignty" and extended its application to "possession, use and disposal, over all its wealth, natural resources and economic activities."[68] CERDS did not by this set out to encourage impunity as some writers might want to suggest (see Jason) but to assert as sacrosanct the character of state sovereignty.

However, as characteristic of international investors, efforts have consistently been made through their state's national governments or governments of other states they have an overwhelming influence over to erase or whittle down the stand on sovereignty. To subvert the import of state sovereignty, foreign investors have done literally everything in the books to avoid any opportunity to have sovereignty as the subject matter or interfere with any dispute that could be brought before the ICJ. To wit, they get their governments (of developed states) to cede some level of their foreign economic activities to subnational entities (transnational corporations) and empower them to deal with state backing. This venture and the profit motive behind it is the additional reason for the rise in BITs and the arbitrary tribunals they support. The history of the IMF and the World Bank spells it all. It is for this purpose that opposition was sponsored against the UNGA Resolution on permanent sovereignty over natural resources and CERDS. It is also the rationale for investors' interests in BITs and the economic schemes they support e.g., Free Trade Agreements like NAFTA, AGOA etc.) Investors' behaviour could explain the US-sponsored opposition against UNGA Resolution 1803 (XVII).

Investors behaviours are seen in many outrageous efforts made by foreign private investors to question states' authority in matters within states own territory or that relate to states dealing with their own citizens within their own territory e.g. the US deployment of Hulls Rules in her challenge of Mexico's nationalization of her petroleum industry in 1938, the suit questioning South Africa over its Black Economic Empowerment legislation aimed at increasing black participation in the economy,[69] a United States investor attempt to sue Canada under the investment chapter of NAFTA after the Canadian prime minister reneged on a campaign pledge to oppose raising taxes on Canadian energy income trusts,[70] as well as the proliferation of Arbitrary Tribunals (spewing new, fascinating, interesting phony pronouncements under the BIT regime).

Generally, foreign investors, through BITs coax sovereign "developing" states to abdicate some of their sovereignty by their acceptance to be bound by agreements which international law forbids. And curiously too the jurisdiction over disputes that may arise from such agreements is vested in arbitrary tribunals that are the creation of BITs, arbitrary tribunals supported by BITs and under rules of arbitration enacted, championed, and promoted by BITs. This contravenes the international law regime created by UNGA Resolution 1803 (XVII) and CREDS, and dangerous to developing countries that have little or no influence over the development of the BITs regime, Arbitrary tribunals' composition, rules, and enforcement mechanisms. Meanwhile, they are at the destination of many spurious international investments, and the receiving end of international investment dispute resolutions.

While avoiding the debate as to whether CERDS offers developing countries the lead way to defect from international contractual obligations while reserving the right to determine what compensation is "appropriate," the outcome of developing countries' contractual relationships with foreign investors and development institutions leaves much to be desired. It is very worrisome to note that developing countries' relationship with Brentwood "lending" institutions such as the IMF and World Bank has left developing countries in a state of "*amakaneme*"[71] that eventually ended up in an economic mess. Whereas the IMF and World Bank were at the forefront of economic recovery and growth in the UK after

[67] Jason's contention is that Guzan's contribution was on a false premise, which he identified as an assumption that customary international law ever actually reflected the Hull Rule. See details of Jason's contention in *Jason Webb Yackee* "Pacta sunt servanda and state promises to foreign investors before bilateral investment treaties: myth and reality." Op cit. p20

[68] Article 2 of CERDS]

[69] See 19 Luke Eric Peterson, *European mining investors mount arbitration over South African Black Empowerment.* Op cit.

[70] See www.naftatrustclaims.com, a propagandistic website established by the aggrieved United States investor and containing links to incriminating YouTube videos of the Prime Minister promising at a news conference not to change the tax regime.

[71] A deep state of confusion where the party involved is lost between rough choices that consumes his time and resources without yielding any desirable result(s)

the economic woes brought about by the 2nd World War, their relationship with the so-called developing countries has achieved the exact opposite. An example is the pains visited on Nigerians by the 1986 IMF-instructed Structural Adjustment Program, which persists till today. As well as an unbearable debt burden that has strangled every attempt at economic development in Nigeria and other developing countries that have obtained loans from the IMF or sought to develop with the help of a foreign investment scheme;[72] Often leading to the distortion of peace and security.[73]

These may hold the key to explaining the high probability of developing states reneging on the contractual promises due to foreign investments within their countries. The focus should be on why foreign investments in developing states do not lead to economic recovery, rather than economic doom, which sustains the possibility and high probability of reneging on promises. If that is to be the case, then the term "renege" as associated with developing states' response to foreign investment should rather be looked at as "frustration." In that way, a more robust assessment mechanism would have been structured for the purpose of analyzing the performance of foreign investments in developing states.

Conclusion

BITs provide some comfort for foreign investors through their capacity to help secure guarantees from developing states for the safety of investments. BITs could serve as a determinant of the direction of the flow of foreign investment as foreign investors tend to favour states that subscribe to BITs more than those that do not.[74] BITs apply to all BIT-based investment agreements regardless of whether or not the foreign investor sought and obtained any guarantees from the affected country beforehand. Yet many foreign investment disputes have been resolved in favour of foreign investors based on general principles of law[75] without reference to BITs or despite CERDS. The cases include the United States of America v Republic of Guatemala (Shufeldt's Case),[76] Czechoslovakia v RCA,[77] Petroleum Development (Trucial Coast) Ltd. v the Sheikh of Abu Dhabi arbitration (1952),[78] Saudi Arabia v Arabian American Oil Company (ARAMCO) (ad hoc),[79] Sapphire International Petroleum Ltd. v National Iranian Oil Company (NIOC) [Sapphire award],[80] Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic [the LIAMCO award][81] among many others. Again, the application of the cartel theory may serve the same purpose either way. Whereas there would be no retaliation by other cartel members (as Jason predicts for developing states defecting from the CERDS regime) sticking to the rules of engagement and adhering to agreed or unwritten conditions for lending could be the unwritten code for retention of membership or association with Lending Clubs e.g., the Paris Club, and the protection they could offer to members. It would not be surprising to find that some foreign investors may be more interested in countries defaulting than they are in countries keeping to the terms of the investment contract. China's behaviour in her debt diplomacy in Africa may serve as a credible example.

Ironically the economic model peddled by the West is that countries cannot develop without foreign investment (I guess that applies only to the so-called "developing" states of this century). It is for that reason they posit that developing states are better off signing up to BITS.[82] It is obvious that such postulation stands logic on its head. How did countries develop before CERDS and before BITs? How about the home countries of the foreign investors - which foreign investors invested in then, and how did they deal with the realities of foreign investment?

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[72] See for instance Shell's implication in environmental rascality and human rights abuse in the Niger Delta -

[73] Odoeme, C.V. Obasi, O.C, & Unogwu, E.C(2025).: Accomplishing Peace and Security in Africa: The Human Security Imperative. OMANARP INTER. Law. Vol.1, Issues 2 Pp. 1-14, May 2025.

[74] See Eric Neumayer and Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 World Dev. 1567 (2005).

[75] See Article 38 of the Statute of the Permanent Court of International Justice and in Article 38 of the Statute of the International Court of Justice.

[76] 24 AM. J. International law 799 (1930). The sole arbitrator held that the Government of Guatemala having recognized the validity of the contract for six years and received all the benefits to which they are entitled under the contract and allowed the cessionary to go on spending money on the concession, is precluded from denying its validity.... It is perfectly competent for the Government to enact any decree and for any reasons they see fit; but where such a decree, based even on the best of grounds, works injustice to an alien subject, the Government ought to make compensation for the injury inflicted, and cannot invoke any municipal law to justify their refusal to do so. *See* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 Yale L. J. 111 (1991).

[77] 30 AM. J. International law. 523 (1936)

[78] Petroleum Development Ltd. v. Sheikh of Abu Dhabi., vol 18, 1957, pp. 144 - 161 DOI: https://doi.org/10.1017/CBO9781316151457.056 [Opens in a new window], Cambridge University Press 1957

[79] 17 international legal materials 117 (1963).

[80] 35 Int'l L. Rep. 136 (1967).

[81] (April 12, 1977), 20 Int'l Legal Materials 1 (1981) [*LIAMCO* award]

[82] See Ryan J. Bubb & Susan Rose-Ackerman, *BITs and bargains: Strategic aspects of bilateral and multilateral regulation of foreign investment*, 27 Int'l Rev. L. & ECON. 291, 292 (2007).

The point is that developing states stand a higher chance of developing without recourse to annoying foreign investment promises should they not sign in or pull out from BITs. The rationale is that it takes jurisdiction out of arbitrary tribunals who have shown aversion to sovereignty - and whose awards have injured state sovereignty through a process identified as "reverse veil-piercing. A process that finds relevance in the concept of internationalization" of investment contracts.[83] Chances are that ICJ would look more favorably at issues relating to sovereignty and more reluctant to do otherwise. This is particularly the case with agreements that turn out to be detrimental to the developing state. The ICJ may be more disposed to upholding CERDS over BITs.

Developing countries should consider entering into agreements that do neither fetter their authority nor impinge on their sovereignty. Such agreements would most favorably be governed by their respective municipal laws. They may as well withdraw from the BIT regime.[84] As evident, foreign investors are not charity organizations so invest for profit. That being the case, they would also be willing to take the chance of signing agreements governed by municipal laws rather than keep the money uninvested. Besides, many such investors are either involved in money laundry or shady business deals with the government officials of the developing states they operate in, or exert undue influence in the formation of governments, regime change, or the enactment of laws including signing up to BITs, insertion of arbitration clauses in sovereign agreements, situating venue in countries where they have better footing, as well as the selection of the so-called neutral, authoritative decision-makers-international arbitrators, and the content of BIT regime.

While enforcing state promises to foreign investors the doctrine of *pacta sunt servanda* must be tempered by the principle of *rebus sic stantibus* (changed circumstances) to enable countries to minimize losses or in special circumstances avoid undue liabilities. Where liability must be established against a state, the state must be allowed the opportunity to determine what "appropriate" compensation is, and the amount of compensation calculated on an equitable basis in accordance with the circumstances relevant to each particular case."[85]

If BITs occasion hardship in supposedly benefiting developing states or bring about further underdevelopment, it should be considered exiting BITs in favour of investment agreements that are case-specific and between known parties, rather than the current BIT regime that tends towards the creation of a universal investment law that conflicts with customary international law.

BITs as legal instruments are designed to protect developed states' investment interests[86] in developing states by promoting market-oriented policies and authorizing foreign investors to challenge host governments' legislation, regulations, and policies relating to the environment, social security/welfare, economy, democratic governance, human rights, regional cooperation they consider could harm the profitability of their investments. To that end, BITs created an unequal and unhealthy relationship between foreign investors and the developing states they operate. BITs often disregard environmental protection, social and political rights as well as labour rights in host developing states, hushed by the desire to develop with the assistance of foreign investment. BITs do not reserve any obligations for foreign investors such as a guarantee of the profitability of the foreign investment to the host country.[87] Neither do BITs apportion commensurate responsibilities to foreign investors nor encourage accountability.[88] These introduced confusion in international trade by its departure from organized international trade relations under the auspices of the WTO.

[83] Karl-Heinz Böckstiegel, Arbitration and state enterprises (1984). *Arbitration International*, Volume 1, Issue 2, 1 July 1985, Pages 195–200, https://doi.org/10.1093/arbitration/1.2.195

[84] *See In Dispute: Bolivia's ICSID withdrawal raises fear of mass exodus*, FDI MAGAZINE, Dec. 3, 2007, *available at* www.fdimagazine.com (discussing Bolivia's withdrawal from ICSID and discontent with the ICSID system among other developing countries); see also Ann Capling and Kim Richard Nossal, *Blowback: Investor-State Dispute Settlement Mechanisms in International Trade Agreements*, 19 GOVERNANCE 151 (2006) (describing Australia's successful resistance to including an investor-state arbitration provision in its recent FTA with the United States).

[85] Taric Fouad A. Riad, *Host Countries Permanent Sovereignty over Natural Resources and Protection of Foreign Investors (Some Reflections on the Recent Kuwait/Aminoil Arbitration Case)*, 39 Revue Egyptienne De Droit International 35, 79 (1983). Riad's claim is similar to that of Sornarajah, a well-known and respected critic of strong international legal rights for foreign investors. *See generally* M. Sornarajah, *Compensation for Nationalization of Foreign Property: The Emergence of New Standards*, 13 J. World Trade L. 108 (1979).

[86] It includes state-owned corporations, state-sponsored corporations, state-supported corporations, quoted corporations, etc.

[87] See the negative impact of privatization on developing countries or foreign investment in Mexico and Japan

[88] See Odoeme, C.V. Corporate accountability in the Nigerian oil and gas sector: coping with uncertainties. Commonwealth Law Bulletin Vol. 39, No. 4, Dec 2013, p 741 - 765.

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