AN IN-DEPTH ANALYSIS OF ARBITRATION UNDER THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

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ABSTRACT

The phenomenal increase in global world trade and investment has now elevated arbitration as the principal method of resolving international investment disputes involving states, corporations and foreign investors. The concept of arbitration crept into international investments to harmonize investment dispute settlement mechanism, by employing specialized international arbitration practitioners and institutions. Hitherto, the international law on foreign investment lacked clear court rules on investment promotion and protection for foreign investors in their relationship with host states. This paper using the doctrinal methodology, examined the role of arbitration under the International Center for The Settlement of Investment Disputes (ICSID) as a source for the provision of a harmonized legal framework for the resolution of investment disputes between the host states and the foreign investors. The paper upon its findings recommends parties right of appeal against an award based on the substantive and manifest wrongs in the process of the awards, but not only on the issues of legitimacy of the process of the awards; and a reduction in the overall costs of the ICSID arbitration proceedings to make international disputes resolution through arbitration affordable to international foreign investors.

Keywords: In-Depth Analysis, Arbitration, International, Center, Settlement, Investment, Disputes.

1. Introduction

The overarching importance and growth of international investments, trade and commerce globally have brought about the rapid development of a new field of international law that appropriately defines the obligations of host states towards foreign investors. This obligation has positively created assured and uniform procedures for resolving investment disputes between foreign investors and host states. This has in a way, imposed duties and responsibilities upon the foreign investor on one hand and the host state on the other. This duty and responsibility hinge more upon the host state; who more often than not, are more prone towards reneging upon the signed investment agreements between them and the foreign investors.[1]

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[1] C. F Dungan, and others, Investors-States Arbitration. (Oxford University Press.2008)

International and foreign investments circle around the constant flow of capital and other resources such as managerial, technological and marketing expertise across different geographical and jurisdictional borders; who operate different legal and regulatory systems. Disputes are inherent in the course of investment contracts between states and the foreign investors. The bedrock of these disputes is centered upon the expropriation of property of the foreign investor and the amount of compensation. These disputes are further magnified by the impact of globalization and trade liberalization schemes which in turn, gave rise to the astronomical rise in the volume of foreign investments.

The establishment of International Center for the Settlement of Investment Disputes (ICSID) in 1965,[3] gave a sure foundation to the adoption of arbitration as the preferred choice for the settlement of investment disputes arising out of the contractual relationships between host states and foreign investors. Investor-state arbitration under the framework of the ICSID paves way for private parties to arbitrate disputes with states bypassing national jurisdictions that might be perceived as biased, nonobjective and independent. The ICSID, though does not directly interfere in the arbitration process and procedures, but provides enabling rules to guide the arbitration tribunal towards rendering recognizable and enforceable awards.[2]

2. Arbitration as a Concept In Investment Dispute Resolution:

International arbitration is regulated by international law. So also, when a transaction involves a host state and foreign investor, the conflict of law rules is invoked.[3] The concept of arbitration as a dispute resolution mechanism involves and is largely centered upon party autonomy. This is endorsed by the parties drawing up the arbitration agreement which could be in the form of a clause that would look into uncertain future disputes or a submission agreement that entertains the present investment and trade disputes that have arisen between the contractual parties.[4] In either of these, the conflict of law rules and the engagement of international laws shape the arbitral procedures that govern the settlement of investment disputes between the host state and the foreign investors

[2] Article 44 of the ICSID Convention provides that arbitrations will be conducted in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration, except as the parties otherwise agree.
<https:/icsid.worldbank.org> accessed 5 March, 2024

[3] This portends that arbitration owes no obedience to national and domestic laws of states since its procedures are purely delocalized. In most circumstances, the arbitration tribunal is under obligation to apply the law chosen by the parties in the spirit of party autonomy. <http://arbitrationblog.kluwearbitration.com> accessed 6 March, 2024 @ 17:01pm.

[4] This is a standard and fundamental rule in the arbitration agreement between the parties who exercise autonomy in their agreement arbitrate- see the UNCITRAL AND ICSID ARBITRATION RULES.

Despite the phenomenal growth in international trade and investments between host states and the foreign investors and, the subsequent creation of so many investment treaties, there is no multilateral legal framework that regulates the relationship between host states and international investors. The aftermath of this is that there is no agreement or a convention at the multilateral level that regulates international investments.[5] Resort to the conflict of law rules and the application of international laws of engagement in international investment arbitration is pronounced when an arbitration is perceived to be international. International in the sense that there are certain flavours that could be ascertained from the arbitration agreement such as, the nationalities of the parties, place of arbitration, the location of the subject matter and the proposed place of enforcement of the awards. The harmony and uniformity brought about by the ICSID convention in the absence of a global/multilateral legal framework to govern the relationship between the host state and foreign investors, is further buttressed by the enactment of investment laws in various jurisdictions and the encouragement to states to enter into bilateral investment treaties (BITS).[8]

3. The Concept of ICSID and the Case for Creating A Multilateral Investment Dispute Settlement Mechanism

The need to promote international state investments and give added assurance to foreign investors of the protection and safety of their investments in states-investor investment relationships; formed the idea by the world bank to step into this arena in 1966. [6] The worldbank brought about the more desired impetus to state-foreign investors relationship by setting up the International Center for the Settlement of Investment Disputes (ICSID). Where two or more parties are involved in international investment and commercial relationships, disputes are bound to take the center stage. This most often is due mainly to the different interpretations given to the investment agreement by the state and foreign investors.[7]

This is more when it is understood that international and foreign investments involve the constant flow of capital and other resources across different geographical boarders who operate divergent legal and regulatory systems. Here, the states operate under different socio-economic, political and cultural systems.

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[5] P.O, Idornigie, Commercial Arbitration Law and Practice in Nigeria (LawLords Publishers 2015)

[8] n7

[6] Apart from the ICSID, there are other international arbitration institutions with extant rules and procedures that governs arbitration such as, the UNCITRAL ARBITRATION RULES.

[7] Most often, issues such as the applicable law to be applied by the arbitration tribunal in the arbitral proceedings could create a conflict between the parties.

These disputes are further magnified by the impact of globalization and trade liberalization which invariably increased the volume of foreign-international investments involving independent states and foreign investors. The International center for settlement of the Investment disputes (ICSID) became a panacea to handle and resolve disputes emanating from state and investor marriage by the provision of enabling framework and rules. The power and opportunity for a foreign investor to sue a host state in the event of an investment dispute arising between them under the auspices of the ICSID was the avenue to guarantee against the expropriation of his property and funds under the operation of the municipal laws of the host state. The assurance of the recognition and enforcement of the arbitration awards, reinforces the belief of the foreign investor in the operations of international arbitrations as investment dispute mechanism particularly under the windows of the international center for the settlement of investment disputes. This center which was created in 1966 in pursuant to the 1965 Washington Convention,[8] provides regulated framework and mechanism for the effective resolution of investment disputes in which a host state and foreign investor are parties with the added provision of Additional Facility Rules for States that are not parties to the disputes.

The International Center for the Settlement of Investment Disputes (ICSID) acts only as unbiased forum and does not in any way directly arbitrate disputes between contractual parties. It only provides the much-needed facilities and legal framework for the impartial arbitration of international investment disputes between host states or its agencies and the foreign investor. Furthermore, states enjoy benefits of becoming members of the ICSID as they can nominate persons or representatives for the ICSID

Panel of Arbitrators and also can equally make designations and notifications for the purposes of the ICSID Convention. As of 21 June, 2021, 164 States have signed the ICSID Convention. Out of this number, only 155 States have deposited their instruments of ratification thus enabling such states to attain the status of contracting states by virtue of the entry into force of the convention for each of such states.[9]

The case for the creation of a multilateral investment disputes settlement mechanism, stems from the fact that, despite the existence of bilateral treaties, there is no multilateral legal framework that regulates the relationship between states and international investors. Various attempts previously made to provide a broad multilateral framework for international investments which could ultimately set enviable heights for investment

[8] The Washington Convention done at Washington on 18 March 1965, entered into force on 14 Oct., 1966 http://sice.oas.org>icsid> accessed 5 March, 2024.

[9] Contracting State means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force; <https://www.lawinsider.com>, See also icsid.worldbank.org accessed 12 March, 2024 @ 12:15pm. Nigeria signed the convention on 01 July, 1965 and ratified it on 23 July, 1965.

regime liberalization and protection, failed. [10] This failure had a follow up consequence of the absence of effective multilateral disputes settlement mechanism and procedures to resolve multilateral investment disputes. This is so as a consequence of the absence of any treaty or instrument that regulates international investment at the multilateral level. The ICSID convention became a panacea by accommodating various bilateral and multilateral investment treaties which usually provide clauses for the settlement of investment disputes through arbitration. Much as the ICSID arbitration procedures have improved the state-investor dispute resolution mechanism, it is advocated by this paper the need for the creation of a more permanent dispute settlement structure that would cure ills of the current *ad-hoc* system which has its attendant problematic and systemic implications. The creation of a permanent dispute settlement structure, could address the problem of lack of coherence, particularly in disputes concerning long term treaty obligations of states.[11]

Noteworthy, is the fact that the present ICSID states-foreign investor disputes settlement mechanism does not guarantee the right of appeal against the arbitral decisions and awards of tribunals that have operated under the umbrella rules of the ICSID. This means therefore, that ICSID decisions can be legally wrong, but cannot be corrected.[12] This paper advocated for a standing review mechanism such as in the form of appellate tribunal which would invariably build up a more coherent case law thereby setting judicial precedents for other arbitration tribunals to follow under similar circumstances. This would ensure a more added coherence and predictability in the new system (a genuine multilateral investment dispute settlement mechanism).

The new advocated multilateral investment dispute mechanism by way of reformation of both the procedural and substantive issues in investment dispute settlement, could be the avenue to ensure legitimacy, transparency, efficacy and predictability in the dispute resolution mechanism. This would ensure and guarantee a fully inclusive approach

[10] Roberto Echandi 'Bilateral Investment Treaties and Investment Provisions in Regional Trade Agreements: Recent
Developments in Investment Rulemaking' in Katia Yannaca-Small (ed) Arbitration under International Investment
Agreements: A Guide to Key Issues (OUP 2010) 3, in P.O. Idornigie, *Commercial Arbitration Law and Practice in Nigeria.* (LawLords Publishers 2015)

[11] Host states upon entering into investment deals with another foreign states or investor, must demonstrate the willingness to enforce the obligations and legal rights contend in such treaties or agreements. Such a state is bound by her action <https://treaties.un.org> accessed 04 May, 2024 @ 17:45pm.

[12] The award is final and binding and can be recognized and enforced in any ICSID Member State. There is no appeal against an award, but there are limited post-award remedies available under the convention. <https://icsid.worldbank.org> accessed 12 May, 2024.

towards investment dispute resolution taking into account the various positions and interests of the host states and foreign investors.

4. Factors Responsible for the Creation of the International Center for the Settlement of Investment Disputes and Functions of the ICSID

The need for the establishment of the ICSID was to solve the problems that arose due to the following factors:

Rise in cross border foreign investments and the increasing number of bilateral and multilateral investments thereby setting the legal standards of treatment of foreign investors.

In the absence of an agreement (International Instruments) to the contrary between the foreign investors and the host state, the investment disputes were subject to the domestic law of that state and the redress of grievances which the investor may seek by direct access to that state is equally determined by the domestic laws of that state.[13]

Where the investor feels aggrieved by the actions of the host state, he may invoke the diplomatic protection of his native state or he may request his native state to espouse his case and bring a claim before an international tribunal. Unfortunately, in some countries, the foreign investor may as a condition of entry, be required to wave diplomatic protection and even if his native state is willing to espouse the investor's case, it may find that the host state is unwilling to submit to the jurisdiction of an international tribunal.

The absence of adequate machinery for arbitration often frustrates attempts to agree on appropriate settlement of investment disputes. Tribunals set up by private organizations such as the International Chamber of Commerce are mostly unacceptable to states and the only international arbitral tribunal, the Permanent Court of Arbitration is not open to private claimants.

The advantage of the parties to select arbitrators who crave their confidence and also possess the necessary expertise and qualifications facilitated the arbitration process.

The ICSID carries the advantages of provision of standard clauses and rules of procedure, plus the assured institutional support for the conduct of proceedings leading to the recognition and the enforcement of awards by states.

The need for the foreign investor to gain a direct access to an effective international forum in the event of a dispute with the host state and, the additional advantage for the

[13] History of ICSID, Documents concerning the origins and the formulation of the convention on the settlement of investment disputes between states and nationals of other states, Vol II, Document 1 – 43.

host state to increase and improve her investment climate by subjecting to international arbitration under the ICSID, gave a push to the creation of ICSID.

5.Contenders to ICSID Arbitration: Disputes and Parties

5.1 Disputes:

Be it of note that the International Center for the Settlement of Investment Disputes (ICSID) provided no definition of *legal dispute or investment*. In this paper, we define dispute to be a misunderstanding or difference of opinion or disagreement in all or the various parts of the contractual terms between the host state and the foreign investors in their trade and investment deals. Furthermore, the International Court of Justice defined *dispute as: " A disagreement on a point of law or fact, a conflict of legal views or interest between parties".*[14] To this extent, the ICSID has equally relied on this definition in its arbitration proceedings.[15]

5.2 Parties; States/Investors:

Investors in arbitration proceedings are defined as being either natural person (individual) or legal persons (companies or states).[19] Typically, investment treaties provide for foreign investors to initiate disputes against a host state in relation to certain investments. A host state may be able to make counterclaims against an investor if the counterclaim is closely related to the investor's claims.[20] Recent cases have also recognized some ability of states to make claims against investors, depending on the wording of the dispute settlement clause and the availability of a relevant claim. [16] However, the general rule is that only the investor can initiate the dispute.[17] This is so because, it is usually the host state that customarily breach the terms of the contract. Before initiating the arbitration proceedings and upon serving the request for arbitration to ICSID and the other party, the investor must demonstrate the existence of a legal dispute which invariably must have its roots in the investment contract between him and the host state to which both parties must have consented in writing to submit to ICSID.[18]

[14] <https://www.icj-cij.org> contentious> accessed 03 May, 2024, @ 11:16am.

[15] *Impregilo v Pakistan*, ICSID Case N0.ARB/03/3 of 22 April, 2005. The dispute was the determination of rights under a concession agreement through a joint venture company under a construction arbitration.

[19] <https://www.iisd.org> accessed 5 April, 2024 @ 11:45am [20] Article 46 ICSID Convention.

[16] Urbaser S.A. v Argentine Republic, para 1143. ICSID Case No. ARB/07/26.

[17] <info.legal at untobaccocontrol.org> accessed 6 May, 2024.

[18] Articles 1 & 25, ICSID Convention.

6. Rules Of Procedure for Arbitration Proceedings Under ICSID

6.1 Establishment and Working of the Arbitration Tribunal:

The foremost step to be taken by the parties to the arbitration proceedings is the constitution of the tribunal upon a due notification of the registration of the request for arbitration. This is in consonance with the principle of party autonomy.[19] In constituting the members of tribunal, steps are taken to ensure that the majority of the tribunal members are nationals of states other than the state party to the dispute or that of the foreign investor. However, this rule can be circumvented upon the agreement of the parties. This is done partly to ensure transparency and independence of the tribunal in carrying out their assignment. The parties have a duty to notify the Secretary General of the ICSID secretariat of the number and mode of appointment of the members of the tribunal to which they had previously agreed upon.

The request for appointment of the members of the tribunal by either of the party must be communicated to the other within 10 days specifying a sole arbitrator or an uneven number of arbitrators.[20] The other party may either accept such proposal or amend it. Under the provisions Section 37(2)(b) of the ICSID convention, the secretary general could intervene upon a request by either of the party to appoint the members of the tribunal within 60 days of failure of the parties to do so. This power reverts back to the chairman of the Administrative Council in the event the parties fail to constitute the arbitral tribunal within 90 days after the service of notice to arbitrate. One of the such appointed arbitrators, is designated as the president of the arbitration tribunal**.**

6.2 Acceptance of Appointment: Under rule 5 of the ICSID Arbitration Rules, each arbitrator that eventually accepts his appointments as a member of the arbitration tribunal, must sign an acceptance letter. Thus, the tribunal shall be deemed to be fully constituted and the proceedings to arbitrate on the substantive issues is taken to have begun on the day of such acceptance.[26]

6.3 Disqualification, Resignation and Replacement Of Arbitrators:

Under rules 7 & 8 of ICSID Arbitration Rules, either of the parties, may replace an appointed arbitrator any time before the tribunal is fully constituted. Also, an appointed arbitrator, under any serious incapacitation, may resign his appointment. A party to the arbitration proceedings, has the inherent rights to propose the disqualification of an arbitrator pursuant to the tenets of Article 57 of the ICSID Convention. Any gap in the

[19] ICSID Convention Chapter 4, S.2

[20] Rules 1&2 of the ICSID Arbitration Rules. [26] Rule 6 ICSID Arbitration Rules.

membership of the tribunal upon notification to the secretary general, is appropriately filled by the same method by which such an appointment was previously made.[21]

6.4 Working of the Tribunal; The arbitration tribunal mandatorily, must hold its first session within 60 days after its constitution or as otherwise agreed by the parties. Such a session normally holds at the ICSID Center or any other mutually agreed place.[22]

6.5 Sittings And Deliberation of ICSID Tribunal; The sittings and deliberation of the tribunal is usually presided by its president and is done in private. Only members of the tribunal and the parties who may be represented by their advocates or agents, take part in the deliberations of the tribunal. [23] Under the concept of arbitration without privity, which connotes a paradigm shift in the nature of arbitration consent, arbitral proceedings are available to parties that are not directly contracted in the investment dispute.[24] Decisions are taken by majority votes in the arbitration proceedings.

6.6 Preliminary Procedures and Pre-Hearing Conference; Normally, the arbitral proceedings consist of two distinct phases of written and oral procedures. The written procedure complements the parties request for arbitration and made up of pleadings which are filed within limits set by the tribunals. The oral procedure on the other hand, consists of the hearings of the parties and their advocates by the tribunal.[31] The pleadings consist of a memorial by the claimant, a counter memorial by the other party, a reply by the claimant and a rejoinder by the other party. Before the actual filling of these pleadings, the tribunal president engages the parties and their advocates in a pre-hearing conference where issues such as: the number of the members of the tribunal required to constitute a quorum at its sittings, the language to be used in the proceedings, the number and sequence of the pleadings and the time limits within which such pleadings are to be filed, the number of copies desired by each party of instruments filed by the other, and the manner in which the cost of the proceedings is to be apportioned and determination of the way of custody of records of hearing are sorted out. The pre-hearing conference could also be an avenue for the parties to reach an amicable settlement of the dispute without even tolling the full length and breathe of the actual arbitration process.

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[21] Rules 10 & 11 of the ICSID Arbitration Rules.

[22] Article 63 ICSID Convention, and Rule 13 ICSID Arbitration Rules.

[23] Rule 18 ICSID Arbitration Rule.

[24] <https://dergipark.org.tr> accessed 6 April, 2024 @ 12:06pm. [31] Rules 29 & 32 of ICSID Arbitration Rules.

6.7 Documentations; All applications, pleadings and sundry written observations must be filed in the form of a signed original. All corrections or any correction to these documents must within the provisions of Rule 25 of the ICSID Arbitration Rule, be made before the final award is rendered. Article 45 of the ICSID Convention subsequently makes a provision for either of the parties to raise a prompt objection to any rules or agreements applicably to the arbitration proceeding that has not been complied with or otherwise consider such rights waved.

6.8 Costs of the Arbitral Proceedings; Although the International Center for the Settlement of Investment Disputes (ICSID) charges the parties certain administrative fees in accordance with its regulations, the costs of individual arbitration proceedings are borne by the parties concerned. Under Rule 28 of the ICSID Arbitration Rules, the Secretary General determines the fees of the arbitrators. For ease of convenience, the costs of a particular proceeding consist of three elements; the charges for the use of the ICSID facilities, fees and expenses of the arbitrators and the expenses incurred by the parties in view of the arbitration proceedings.

6.9 Witnesses, Experts and Other Evidential Rules: The rule against surprise by either of the party upon the other party is observed by the ICSID regulations. Each party much furnish exact information regarding any evidence which the party intends to produce and rely upon. The Secretary General, the tribunal and the other party must be put on notice. The tribunal reserves the right of admissibility and weight to be attached to any evidence under Rule 34 of the ICSID Arbitration Rules. Notwithstanding any issues to the contrary, the testimony and evidence of experts and other witnesses shall be examined by the parties before the tribunal under Rule 36 of the ICSID Arbitration Rules.

6.10 Closure of the Arbitration Proceedings: Before the closure of the proceedings upon the final presentation of their cases by the parties, the tribunal reserves the rights to make an order to visit any place connected with the disputes to conduct further inquiry there. Under Rule 37 of the ICSID Arbitration Rules, the tribunal can permit the submission of *amicus curiae* briefs by non-disputing parties. This is done after due consultation with the contending parties. A non-disputing party under this guise is allowed to file a written submission regarding a matter within the scope of the dispute.

6.11 Ancillary Claims and Interim Measures: After the commencement of the proceedings, either party may take steps to preserve the res and other specified rights through a request put to the tribunal to execute provisional measures in this regard.[25]

[25] Rule 39 of ICSID Arbitration Rules.

Sequel to this right, a party can also present an additional or counter claim arising strictly out of the subject matter of the dispute provided that such claims lie within the jurisdiction of the tribunal to adjudicate.[26]

6.12 Preliminary Objections: If any of the parties (particularly the respondent) raises objections to the tribunal's jurisdiction, the tribunal is bound to suspend the proceedings on the merits under Rule 41 of the ICSID Arbitration Rules, such objections must be submitted not later than at the time counter memorial is due. Where the merits of the proceedings clash with the jurisdictional powers of the tribunal, the question of the jurisdiction is decided first and whereby the tribunal finds out that it has jurisdiction, the proceedings are thus resumed on the merits.

6.13 Default Ruling: The non-participation of a recalcitrant party, will not stall the proceedings. If one party fails to present its case, the other party may request the tribunal to proceed and render an award. Before taking such steps, the tribunal has to examine all questions of jurisdiction and competence and decide whether the appearing party's submissions are well grounded in law and in fact.[27] Relatively also, if before the award is rendered, the parties agree on an amicable settlement of the disputes or decide to discontinue with the proceedings; upon a written request to the Secretary General and the tribunal, such a request embodying a signed text of their settlement could be translated into an award.

6.14 Awards: The ICSID awards are binding and final and it is limited to the parties to the arbitration proceedings. The parties are under a legal obligation to comply with the awards. All states parties to the ICSID Convention are under an obligation to recognize and enforce such awards as if they were final judgements of states local courts under Article 53(1) of the ICSID Convention. The written award is set up and signed within 120 days after the closure of the proceedings. The award encompasses a summary of the proceedings detailing out the decisions of the tribunal on every question submitted to it together with the reasons upon which the tribunal's decision is based. In case of non-compliance with the award by the host state, the foreign investor's rights to diplomatic protection by his home state revives. The procedure for the enforcement of ICSID awards is governed by the law on the execution of judgements in each country. The domestic courts of each state can only verify that such award is authentic but has no powers to question the jurisdiction of the arbitral tribunal. State's immunity is regulated by customary international law and also by national legislation. Thus, the obligation to

[26] Rule 40 of ICSID Arbitration Rules.

[27] 34 Article 45 of
ICSID Convention.

enforce the pecuniary obligations arising from ICSID awards does not in any way affect the immunity from execution of the awards that a state may enjoy. Each state's laws relating to sovereign immunity from execution continue to apply under Article 55 of the ICSID Convention. This constitutes a procedural bar to the awards enforcement but does not affect the state's obligation to comply with it. To this end, states immunity syndrome does not alter the fact that non-compliance with an award is a breach of the ICSID Convention.

6.15 Annulment: The ICSID awards are not subject to setting aside or of scrutiny by domestic courts. But upon the registration of an application for annulment, the ad-hoc committee of the ICSID may annul an award upon the request of either party.[28] Annulment merely removes the original decision without replacing it. This is so because annulment is concerned only with the legitimacy of the process by which decision is taken and not with its substantive correctness.

Grounds for annulment could be based upon any of these;

a.) When the tribunal was not properly constituted.

b) When the tribunal exceeds its powers.

c)Incidence of corruption by any or all the members of the tribunal.

d)When there is a complete departure from the fundamental procedural rules.[29]

e) Failure by the arbitration tribunal to state the reasons on which the award is based.[30]

Either of the party may before the disposition of the application for annulment, request for a stay of enforcement of part or all of the award to which the application relates under Rule 54 of the ICSID Arbitration Rules. Where this request is granted, the party may seek for a resubmission of the same dispute to a new tribunal upon a written request to the Secretary General. The rectification of the award comes within 45 days after it was rendered upon a written request by either of the party.

[28] Article 52 of ICSID Convention.

[29] *Wena Hotels Ltd v Arab Republic of Egypt.* ICSID Case No: ARB/98/4, Decision on annulment of Feb., 5, 2007, Para 57

[30] Klockner Industrie – Anlagen GmbH & Ors v United Republic of Camaroun and Societe Camerounaise des Engrais: ICSID Case No: ARB/81/2, 3 May, 1983.

7.Enforcements of Foreign Arbitral Awards In Nigeria

International arbitration has become a major focus in international investments between the states and foreign nationals owing to its just and effective means in resolving commercial and investment disputes. Being assured of this mechanism, the foreign investor is confronted with the willingness of the Nigerian courts (particularly the Supreme Court of Nigeria) to enforce foreign arbitration awards considering the ease or difficulty of doing so. Time is of the essence to the foreign investor wishing to enforce an arbitral award in Nigeria.

Nigeria is a contracting party to the International Center for the Settlement of Investment Disputes (ICSID) Convention. Nigeria signed the ICSID Convention on 13th July, 1965, and it came into force in Nigeria on 14 October, 1966. Nigeria also, enacted the ICSID (Enforcement of Awards) Act on 29

November, 1967 for the enforcement of ICSID awards. This legislation supports the enforcement in Nigeria of an award by the ICSID. The Act provides that an ICSID award shall be enforced in Nigeria as if it were an award contained in a final judgement of the Supreme Court of Nigeria only if a copy of such an award, duly certified by the Secretary General of the ICSID, is filed in the Supreme Court of Nigeria by the party seeking its recognition and enforcement.

Foreign Arbitral Awards can be enforced in Nigeria through five major ways:

7.1 By An Action Upon the Award: --- In *Toepher Inc. of New York V Edokpolor* (Trading as John Edokpolor & Sons).[31], it was rightly held by the Supreme Court of Nigeria, that a foreign arbitral award could be enforced in Nigeria by suing upon the award, even in the extreme situation of the non-existence of a reciprocal treatment in the country where the award was obtained. All the plaintiff needs to prove in order to succeed in this action is to prove these:

The existence of the arbitration agreement.

The proper conduct of the arbitration in accordance with the agreement, and

The validity of the award.

The defendant may equally challenge the award based upon these points relied upon by the plaintiff with additional grounds like a challenge of the jurisdiction of the arbitral tribunal. Here, issue of time is of great concern to the foreign investor as this procedure could take more than a year to conclude in Nigeria.

[31] [1965] All N.L.R.307

7.2 By Registration Under the Foreign Judgement (Reciprocal Enforcement) Act 1990: -- A judgement or award obtained in a foreign nation could be enforced in Nigeria within six years of the award or the judgement under the Foreign Judgement (Reciprocal Enforcement) Act 1990 Nigeria. This Act stipulates certain conditions to be met by the plaintiff as follows:

The judgement or award must have been registered in a Nigerian court with jurisdiction to hear the dispute.

The judgement or award must be final and conclusive as between the parties and there must be payable there under a sum of money, not being a sum payable in respect of a fine or other penalty.

It is of importance to note that it is only countries which accord reciprocal treatment to Nigeria as designated by the Minister of Justice, would be recognized. However, there is a leeway for the defendant under the provisions of section six of the Act, to set aside the judgement or award if the court is satisfied that:

The Act has not been complied with, or
The original court had no jurisdiction,
The judgement or award was fraudulently obtained, or
That the enforcement would be contrary to public policy, or
On the grounds of *Rex Judicata,* or
That the rights under the judgement are not vested in the person by whom the application for registration was made.

7.3 Under Section 51 of the Arbitration and Conciliation Act, 1990 (ACA): -- This section of this Act, provides that;
i)An arbitral award shall, irrespective of the country in which it is made be recognized as binding and subject to this section (s.51) and ii). section 32 of this Act, shall, upon application in writing to the court, be enforced by the court. iii). The party relying on award or applying for its enforcement shall supply the following: iv.) The duly authenticated original award or a duly certified copy thereof: v.) The original arbitration agreement or a duly certified copy thereof: vi. Where the award or arbitration agreement is not made in the English language, a duly certified translation thereof into the English language.
Section 52 went further to provide a list of grounds for refusing recognition or enforcement of the awards such as (when the recognition or enforcement of the award is against public policy of Nigeria). These grounds further provide undesirable hindrances to the timely enforcement of the arbitration awards.

7.4 Enforcement Under the New York Convention, 1958: -- By virtue of section 54 of the ACA 1990, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958, applies in Nigeria. Nigeria under reciprocity, recognizes and enforces only awards made in reciprocal Contracting States.

7.5 Enforcement Under the Center for the Settlement of Investment Disputes (ICSID): -- Nigeria ratified the ICSID Convention on 23 August, 1965 and domesticated it when she reenacted it as a local legislation vide the International Center for the Settlement of Investment Disputes (Enforcement of Awards) Act, 1990, Cap 19 Laws of the Federation of Nigeria 1990.

This process is channeled through the Supreme Court of Nigeria so as to erode much hindrances to recognition and enforcement of foreign arbitration awards. There is little or no room for objections to the enforcement of the arbitration awards. The uplifting point of this segment of the Act is the provision that an ICSID award shall be enforced in Nigeria as if it were an award contained in the final judgement of the Supreme Court of Nigeria when, a duly certified copy by the Secretary General of ICSID, is filed in the Supreme Court by the party seeking the recognition and enforcement of the award.

8.Relevant Investment Dispute Agency

The state agency in Nigeria that must be served with process in a dispute with a foreign investor is the office of the Attorney General of the Federation and the Minister of Justice. The International and Comparative Department of the Federal Ministry of Justice is the central depository of treaty preparatory materials. The unique nature of the ICSID award is that it is not subject to any judicial challenge, rather it is intended to have automatic recognition and enforcement by the national court of a contacting state like Nigeria. Evaluating the provisions of the Nigerian domestic law regime, one would observe that Nigeria is in full and total compliance with the obligations created by the Washington Convention.

8.1 Nigerian Investment Promotion Commission (NIPC) And Foreign Investments

The Nigerian Investment Promotion Commission (NIPC) is an agency of the federal government of Nigeria established under NIPC Act, Cap N117 Laws of the Federation of Nigeria 2004, to encourage, promote and coordinate investment in Nigeria. Nigeria's investment treaty program is governed by the Nigerian Investment Promotion Commission whose main objective is to promote the attractiveness of Nigeria as a conducive investment destination. The NIPC also strives to put in place such measures designed to ease the conduct of business within Nigeria. Thus, the NIPC established the One Stop Investment Center (OSIC) as an investment facilitation mechanism that brings all relevant government agencies such as the Nigerian Customs Service (NCS) into one location, to provide efficient and transparent services to foreign investors.

There are also within Nigeria other several sector specific laws that indirectly regulate foreign investors and foreign investments: such as the Nigerian Oil and Gas Industry Content Development Act and the Coastal and Inland Shipping (Cabotage) Act. But the state agency that regulates and promotes inbound foreign investments is the Nigeran Investment Promotion Commission.

9.Nigerian's Prevailing Attitude Towards Foreign Investments

The Nigerian laws on Investment Regulation and Promotion anchored around the Nigerian Investment Promotion Commission, aim to protect foreign investors and their investments from nationalization, expropriation or compulsory acquisition. Nigeria also provides incentives (like tax holidays) for foreign investors and also creates above all, an effective dispute resolution process for investor-state arbitration. Foreigners are therefore welcome to invest in Nigeria in all areas except those areas listed on the negative lists as contained in the Nigerian Investment Promotion Commission Act,[32]. The negative list includes such investment areas like any business that produces arms and ammunition, narcotic drugs and so on.

The compliance foreign investor is assured the freedom to freely repatriate capital interest, profits and dividends in any freely convertible currency of his choice. In as much as Nigeria encourages foreign investment, she is still trying within her resources to encourage indigenous participation in the major sectors of the economy like oil and gas, ICT and also, encourages collaboration between Nigerian companies and their foreign multi-national counterparts with a view to increasing the local contents of the Nigerian economy. The NIPC Act which encourages Foreign Direct Investments (FDI) also prescribes that in the event of any investment disputes arising between the foreign investor and the state, such would be resolved by arbitration under the convention on the settlement of investment disputes between states and nationals of other states (ICSID Convention 1965), where attempts at amicable resolution fail.

To fulfil her reciprocal obligations under the ICSID, Nigeria has signed and thus became a party to many bilateral investment treaties (BITs) with countries like Netherlands, South Africa and Turkey. Nigeria is also a party to some multi-lateral treaties with states within the ECOWAS and the OIC investment agreement, 1981.

10. Nigeria's Investment Arbitration Cases

Nigeria so far has been involved in three cases at the ICSID in respect of her investment treaties viz:

Guadalupe Gas Products Corporation v Nigeria[33] ; *Shell Nigeria Ultra Deep Limited v Federal Republic of Nigeria*[34]*; Inter Ocean Oil Development Company and Inter Ocean*

[32] Cap N117, laws of the federation of Nigeria 2004

[33] . *(ICSID Case No. ARB/78/1,* this case was however discontinued on 22 July, 1980.

Oil Exploration Company v Federal Republic of Nigeria[35].It bears mentioning that this arbitration, though administered by ICSID, did not involve any investment treaty. Rather, it was commenced on the basis of investment protections provided for under the Nigerian Investment Promotion Commission Act. One pending proceeding against Nigeria is *Eni International BV, Eni Oil Holdings BV and Nigerian Agip Exploration Limited v Federal Republic of Nigeria*[36].Thus far, Nigeria has a history of using default mechanisms for the appointment of arbitral tribunal, namely the ICSID Arbitration Rules. Nigeria does not usually appoint specific arbitrators. She usually defends herself against investment claims through private counsels appointed under the instruction of the Attorney General and Minister of Justice of the federation. Nigeria has a history of compliance with investment treaty awards rendered against it. The enforcement of ICSID awards cannot be challenged in Nigerian courts except on grounds stipulated in Article 52 of the ICSID Convention, because the convention does not derogate from the laws governing a member state's immunity. However, there is no information that suggests that the defense of sovereign immunity has been used by Nigeria.

11. Nigerian Supreme Court Position on Arbitration Awards

Nigeria through the auspice of the Supreme Court has demonstrated greater certainty and enforceability of arbitration awards. The earlier Court of Appeal decision on Customary Arbitration in the case of *Okpuruwu v Okpokam* [37]jettisoning the concept of customary arbitration has been abandoned in favour of a more auspicious view of customary arbitration in the Supreme Court decisions of *Agu v Ikewibe* [38]and *Nwuka v Nwaeche* [39] (demonstrating the binding effect of a Customary Arbitration Award). The Supreme Court in these decisions, was of the view that the decision of a Customary Arbitration Panel is binding on parties who submit to customary arbitration when the arbitration is conducted in line with the customs of the people under fair hearing. Again, in the recent case of *Umeadi v Chibunze* [40]the Supreme Court held that:

[34] *(ICSID Case No. ARB/07/18),* this case was discontinued on 11 August, 2011.

[35] . *(ICSID Case No. ARB/13/20),* Award: 6 October, 2020.

[36] . (ICSID Case No. ARB/20/41).

[37] [1991] 3 N.W.L.R (Pt.180)385

[38] [1991]3 N.W.L.R (Pt.180)385

[39][1993]5 N.W.L.R (Pt.293)296;

[40] [2020] LPELR-49566(SC),

> *''Where the parties decide to be bound by traditional arbitration resulting in oath taking, Common Law principles in respect of proof of title to land no longer apply. In such Situation, the proof of ownership or title to land will be based on the rules set by traditional arbitration''.*

Here the Supreme Court justified the awards on domestic arbitration by demonstrating that an acceptance of traditional arbitration as binding on parties such as to make the decisions final as to the substance of the disputes. Simultaneously, the Supreme Court endorsement of enforcement of International Arbitration Awards under the Foreign Judgements (Reciprocal Enforcements) Act in the case of *Toepher Inc. of New York v Edokpolor* [41]in conjunction the with the provisions of Section 25 of the NIPC Act[42] which provides for guarantee against expropriation of the foreign investors funds in the case of disputes arising, indicate Nigeria's binding obligation towards the acceptance and fulfilment of International Arbitration Awards in Nigeria.

12. **Conclusion and Recommendations**

The International Center for the Settlement of Investment Disputes (ICSID) has been in the forefront among the institutional umbrellas for the settlement of state-foreign investors investment disputes. This responsibility has been successfully carried out by the ICSID through the provision of enabling institutional rules of arbitration. Amongst the successes achieved under the ICSID Arbitration Rules, the adoption of the Additional Facility Rule which is a detailed and extensive body of rules fashioned for proceedings that are not otherwise under the jurisdiction of ICSID, has paved the way for the ICSID to fill some of the lacunae left by the limited traditional ICSID jurisdictional scope. However, the draw back in this rule is that awards rendered under the Additional Facility Rule are subject to review by states domestic courts. Another commendable feature of the ICSID Arbitration Rule is the concept of Arbitration Without Privity which enables a foreign investor to rely on the arbitration clause embedded in the investment treaty between his host state and his home state, despite the fact that no arbitration agreement exists between the two states, to initiate arbitration proceedings. This paper However, this paper advocates the parties right of appeal against an award based on the substantive and manifest wrongs in the process of the awards but not only on the issues of legitimacy of the process of the awards. Fervently also, this paper further advocated for a reduction in the overall costs of the ICSID arbitration proceedings to make international disputes resolution through arbitration much affordable to the international foreign investors. This paper recommends parties

[41] *Supra.*
[42] NIPC Act 2004

right of appeal against an award based on the substantive and manifest wrongs in the process of the awards but not only on the issues of legitimacy of the process of the awards; and a reduction in the overall costs of the ICSID arbitration proceedings to make international disputes resolution through arbitration affordable to the international foreign investors.