Managing Investment Disputes in an Energy Transition Era: The Influential Role of the Arbitral Concept of a Fair and Equitable Treatment Standard on New Energy Investments in Nigeria *

ABSTRACT

For several reasons, the new energy transition from fossil fuel-dominated energy to cleaner energy sources has garnered momentum in recent times. Clean energy sources are already paving the way for an energy revolution around the globe. At record levels, many nations have embarked on the transition to clean energy, leading to a rapid increment in investments by governments and energy companies/investors. In a similar fashion to fossil fuel investments, this will inevitably lead to new contracts and agreements from which conflicts and disputes between governments and investors may arise. Due to the peculiarity of the sector and the shortfalls of court adjudication, these disputes will be resolved by international arbitration in the International Centre for Settlement of Investment Disputes (ICSID). In its' published arbitral decisions in past and recent times, the ICSID has developed the concept of a Fair and Equitable Treatment Standard to protect investors against harsh and arbitrary treatment from host governments. This paper will interrogate how this significant concept seeks to protect existing energy investments and boost new ones amidst the energy transition to create an investible atmosphere in Nigeria.

Keywords: Energy transition, International Arbitration, Fair and Equitable Treatment Standard, Energy Sector, Energy Security, Low to Zero Carbon, Clean Energy

Introductory Background

The energy sector is unquestionably one of the most crucial for the economic development and prosperity of any country[1] including Nigeria.

***Iyowuna Milton Abibo** is currently the Principal Partner and Team Lead of the Departments of Energy and Environmental Law and Alternative Dispute Resolution of the law firm of Abibo and Co (Legal Practitioners and Arbitrators). He is an aspiring doctoral researcher and currently a volunteer/part-time lecturer of Energy and Natural Resources Law at the Institute of Petroleum and Energy Studies of the University of Port Harcourt, Rivers State, Nigeria.

In recent times, there has been an intense clamour for an energy transition from fossil fuel-dominated energy to cleaner energy sources. The main triggers for this craving have been traceable to two major factors: enhancing energy security and achieving low/zero carbon emission goals following the overwhelming scientific evidence of climate change.[2] More so, the energy transition has also been driven by secondary factors such as population growth, urbanization, and economic development,[3] and has recently been aggravated by the Covid-19 pandemic and the Russia-Ukraine war.

Some nations have gone as far as creating energy transition programmes. For instance, Nigeria has designed an Energy Transition Plan (ETP) to confront the dual crises of energy poverty and climate change and deliver SDG-7 by 2030 and net-zero by 2060 while prioritising the provision of energy for development, industrialization, and economic growth.[4] This, of course, entails the control of all greenhouse gases (GHG) and the use of cleaner/greener energy sources. Of necessity, therefore, will be fundamental changes to our energy production and use, with the reduction or total elimination of GHG from the atmosphere across the value chain to the fullest extent practicable.[5]

Cleaner energy sources such as renewable energy and to a great extent, natural gas are already driving an energy revolution in the world as they are believed to reduce carbon footprint and increase energy security, particularly in rural areas which in most of Nigeria continue to be disadvantaged. More so, these cleaner energy sources are reputed to diversify the energy mix, reduce dependence on fossil fuel, create huge

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[1] Daniel Yergin, The Prize: The Epic Quest for Oil, Money, and Power (Free Press 2009) 769-70; Raphael Heffron, Energy Law: An Introduction (Springer 2015) 47

[2] Victoria Nalule, Transitioning to a Low-Carbon Economy: Is Africa Ready to Bid Farewell to Fossil Fuels? In the Palgrave Handbook of Managing Fossil Fuels and Energy Transitions (pp. 261–286). Palgrave Macmillan, Cham, 2020; IPCC (Intergovernmental Panel on Climate Change). 2021. "Summary for Policymakers." In Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Geneva: Cambridge, UK: Cambridge University Press. In Press.

[3] Anteneh Dagnachew, Andries Hof, 'An African Vision for the Continent's Energy Transition' PBL Netherlands Environmental Assessment Agency the Hague, 2022. < https://www.pbl.nl/sites/default/files/downloads/pbl-2022-an-african-vision-for-the-continents-energy-transition_4979.pdf> 10 September 2022

[4] Nigeria's Energy Transition Plan, 'Nigeria's Pathway to Achieve Carbon Neutrality by 2060' <https://energytransition.gov.ng/> accessed 20 January 2023

[5] Franziska Muller, et al, 'Assessing African Energy Transitions: Renewable Energy Policies, Energy Justice, and SDG 7' (2021) Politics and Governance (ISSN: 2183–2463) 9(1), Pg 119–130

amounts of well-paying green jobs, and secure Nigeria's relevance in the global energy market, amongst other benefits.[6]

As nations embark on the transition to cleaner energy sources at a record level, governments and energy companies/investors are increasing investments in cleaner technologies with mega development projects ongoing. Just like investments in traditional fossil fuels, this will inevitably give rise to new contracts from which conflicts and disputes between the government and investors may arise. The expediency of this transition, therefore, requires strategic preparation for dispute resolution in a manner that would significantly boost, rather than dissuade new investments.

Arbitration has been strongly recommended by bilateral and multilateral treaties and conventions,[7] and has interestingly become the most accepted mechanism for investment dispute settlement. In the energy sector, international arbitration is commonplace in commercial agreements, and particularly invoked in investor-state disputes due to the peculiarities and demands of the sector and the recommendation by the Energy Charter Treaty (ECT).[8] It can be argued that the status of arbitration as the best dispute resolution mechanism for investments will likely remain beyond the energy transition era due to its efficiency in resolving such disputes.

Notably, the International Centre for Settlement of Investment Disputes (ICSID) has been firmly established as the forum of choice for international investment disputes including from the energy sector.[9] This paper aims at analysing the interpretation of the Fair and Equitable Treatment Standard provided by published energy arbitration decisions from the ICSID and will consider how this concept protects existing energy investments and boost new ones in Nigeria amidst the energy transition by positively influencing the confidence of investors.

The Prevalence of International Arbitration in the Energy Sector

As earlier indicated, international arbitration is the preferred mode of dispute resolution in many economic/investment-driven sectors. The energy sector - a greatly significant

[6] V. Emodi and N. Ebele, 'Policies Enhancing Renewable Energy Development and Implications for Nigeria' (2016) 4(1) Sustainable Energy 7; Oluwaseun Ojo, 'An Overview of the Legal and Regulatory Framework for Renewable Energy Projects in Nigeria: Challenges and Prospects' (2017) 1(1) Unilag Law Review 1
[7] Peter Cameron, *International Energy Investment Law: The Pursuit of Stability* (Oxford 2010) 182
[8] ibid
[9] ICSID (n 22)

and necessary sector in the modern world - stands out among them.[10] The energy industry is typically unique in that it invests in large, capital-intensive projects, usually makes investments that are in the national interest, and typically uses long-term contracts that can be subject to a variety of changes including circumstantial, governmental, or regulatory changes. These factors expose the sector to inevitable disagreements and disputes especially between investors and governments.[11]

Energy-driven investments are vulnerable to the political and regulatory risk of government interference with the rules of a subsisting investment before an investor realises the expected profit on the investment.[12] This especially occurs when a new government revokes the contract entered by its predecessor(s) with foreign investors, thereby making investors the ultimate victims of domestic political permutations[13]. Ultimately, this transmutes to a dispute that leads to arbitration (since arbitration is the preferred mode of dispute resolution for the sector). In these arbitrations, investors seek restitution or compensation from governments because of a breach of international investment law.[14]

Arbitration is a legally binding process that developed because of the delays and risks associated with litigation. It is widely recognised in many municipal systems and is arguably faster and cheaper when compared to litigation.[15] Its flexibility allows parties to control the process by choosing their arbitrators, selecting the kind and scope of their arbitration process, and making a choice on the venue and forum, and this appears to be a major attractive feature.[16] International arbitration is arbitration that involves the citizenry of more than one country and therefore involves an interplay across national borders.[17]

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[10] Anibal Sabater and Mark Stadnyk, 'Tracing the Evolution of International Investment Law Through the Catalyst of Energy Disputes' (2018) OGEL 16.3 <www.ogel.org/1875-418X> accessed 10 March 2022

[11] Timothy Martin, Foreword, *in* J. Gaitis (ed.), The Leading Practitioners' Guide to International Oil & Gas Arbitration. (Juris Publishing 2015)

[12] Peter Cameron, *International Energy Investment Law: The Pursuit of Stability* (Oxford 2010) 182

[13] Thomas Walde, 'Energy Charter Treaty-Based Investment Arbitration: Controversial Issues' (2004) 5 J. World Investment & Trade 5

[14] Elizabeth Whitsitt and Nigel Bankes. 'The Evolution of International Investment Law and Its Application to the Energy Sector' (2013) 51 Alta L Rev 207

[15] J. G. Merrills. International Dispute Settlement, 5th edn (Cambridge University Press 2011) Chapt. 5

[16] Timothy Martin 'Dispute Resolution in the International Energy Sector: An Overview' (2011) 4(4) Journal of World Energy Law and Business 332

[17] Funmi Adekoya, 'Is International Arbitration Truly International – The Role of Diversity' (2018) TDM 5 <www.transnational-dispute-management.com/article.asp?key=2597

In the energy sector, four principal grounds make international arbitration the most viable channel of dispute resolution. First, subjecting disputes to the hearing and determination of national courts is widely unacceptable to investors and the reason is not far-fetched. In national courts, one cannot overrule a possible influence of state actors which may result in a likelihood of bias or a disregard for the rule of law in favour of the government. This, it can be argued, can be a bane of direct foreign investment in the country because such an investment climate will be unacceptable to foreign investors.[18] There is, therefore, a famous assertion that international arbitration enthrones a high level of neutrality on the basis that it is promoted by an international forum with no direct link to either party. Except where parties agree otherwise, albeit rarely, this is the expectation in all commercial disputes with parties from different nationalities.

Take this real-life scenario as an example. If the investment dispute in ICSID that arose between Shell Nigeria Ultra Deep Limited and Nigeria was subjected to the authority of a Nigerian court, Shell would have likely expressed great concern because of the fear that the Nigerian state, being a major gladiator, will use its influence on its' court to Shell's detriment.

Second, certainty and finality of dispute resolution especially in commercial disputes are guaranteed in international arbitration.

Third, arbitration awards can be recognised and enforced in foreign jurisdictions; an advantage that court judgments do not possess.[19] Virtually all commercial and investor-state awards are regulated by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")[20]; one of the most widely adopted treaties in history. The recognition and enforcement of arbitral awards is a mandatory duty of state parties to the New York Convention, although this mandate is subject to very minimal exceptions. In commercial matters on investment, the issuance of investor-state awards is carried out under the aegis of the ICSID Convention, which itself can boast of not less than 154 contracting states. ICSID awards can be enforced in any contracting state as a judgment from the highest local court without necessarily following the recognition and enforcement process enumerated in the New York Convention, although this is not the case in the practical sense. Only very limited, stringent grounds can be given to support a refusal to enforce an ICSID award.[21] Under the ICSID Convention, the enforcement of awards in the

[18] Sabater (n 10)
[19] Martin (n 16)
[20] UNCITRAL, Status <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 22 March 2022
[21] Sabater (n 10)

national courts of contracting states is the prerogative of both private parties and states.[22]

Fourth, the energy industry is highly technical and therefore requires the use of extraordinary technical expertise. The use of arbitration in energy disputes will create room for the appointment of prominent energy experts to resolve the substance of a dispute.[23]

Nonetheless, it is pertinent to note that the attitude of adverse parties can make arbitration an expensive and time-consuming venture, creating a striking resemblance between an arbitration process and litigation.[24] However, such a situation can be averted if parties are prudent enough to employ several management tactics in international arbitration.

In essence, the energy sector has become a model sector for the use of international arbitration in dispute resolution. Arbitration is also prevalent in the settlement of inter-state land and maritime boundary disputes, and these areas are also notably related to energy.[25] The importance and complex nature of the issues, the prominence of the disputing parties, and the amount of the claims are significant factors that contribute to the prevalence of arbitration in the energy sector.[26]

Presently, there is great uncertainty about the future of investment arbitration. As disputes submitted to investment arbitration have become historically high, their outcome has also become very unpredictable largely because it is an area of law that is constantly evolving.[27] In essence, the extent of protection given to investors within the international investment regime remains quite uncertain.[28] Of paramount importance, therefore, is the knowledge of how the international investment regime creates a fundamental balance between protection for investors and their investments on one hand and the government or state interest on the other hand.

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[22] Merrills (n 15)
[23] Sabater (n 10) 6
[24] Martin (n 16)
[25] See The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), PCA, Award, 12 July 2016.
[26] Marine de Ballieul, 'The Three Hottest Energy Arbitrations of 2017' (2018) <http://arbitrationblog.kluwerarbitration.com/2018/01/04/three-hottest-energy-arbitrations-2017/html> accessed 10 March 2022
[27] Sabater (n 10)
[28] Elizabeth Whitsitt and Nigel Bankes. 'The Evolution of International Investment Law and Its Application to the Energy Sector' (2013) 51 Alta L Rev 207

With the use of arbitration, the international investment regime has predominantly provided this protection, and energy arbitration has significantly developed the Fair and Equitable Treatment Standard that seeks to provide a balance of interest between investors and governments, thereby promoting foreign energy investments in Nigeria amid the global energy transition.[29]

The International Centre for Settlement of Investment Disputes (ICSID)

A. The History of ICSID

The ICSID was established in 1965 by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, otherwise known as the Washington Convention.[30] The Washington Convention came into force in 1966 after enjoying the facilitation of the Executive Directors of the International Bank for Reconstruction and Development (now known as the World Bank) and largely supported by a significant number of national governments.[31] The principal motivation for the establishment of the ICSID was the promotion of economic development and the creation of a conducive environment for international investment for private investors and host states by providing confidence in the process of dispute settlement, although subject to parties' consent.[32] An ICSID arbitration is seen as completely independent and depoliticised since it is regulated by an international treaty and not national law.[33] The institution is also believed to possess an extensive experience in the field of international investment dispute settlement having pragmatically tackled related issues in a majority of cases in this area.[34]

It is pertinent to note the stark contrast between the pre and post-ICSID eras. Before the formation of the ICSID, only the national state of an investor party could make a representation on his behalf in the event of a dispute with another state, and after all local remedies had been exhausted. This was done under the principle of diplomatic protection, and in effect, became an inter-state dispute. What was essentially a dispute between a private investor and state became a dispute between two states and could create an unnecessary floodgate of disputes in this category.[35] This created inevitable teething problems as there was no guarantee that the national state would initiate or

[29] ibid 208
[30] ICSID, 'About ICSID' <https://icsid.worldbank.org/en/Pages/about/default.aspx.html> accessed 12 March 2022
[31] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Student edn, Sweet and Maxwell 2003) 54
[32] ICSID (n 30)
[33] Redfern (n 31) 55
[34] ICSID (n 30)
[35] Redfern (n 31) 9

participate in the case, and prudently too. Even if it did, there was a likelihood that the matter will be resolved through diplomatic pressure that appear unsatisfactory to the investor, leaving the investor in an extremely precarious situation.[36] The birth of the ICSID and its convention was at great variance with the pre-ICSID period. It gave investors direct access to dispute resolution (mainly arbitration) in a matter against a state party, and vice versa, even though diplomatic protection could still be invoked and yield positive results in some instances.[37] This was a welcome innovation because it culminated in the displacement of what would otherwise have been a floodgate of inter-state disputes. Since its inception to June 30, 2021, ICSID has administered over eight hundred cases. In the year 2021 alone, the ICSID administered about 332 matters; the highest figure in a single year.[38] Both a large number of submitted disputes and increasing signatories to the convention are significant pointers that prove the success of the ICSID. Unarguably, no international arbitral institution can claim such profound origins as the ICSID. The origin of the ICSID is fundamentally unique, and its practice and procedure are specifically tailored to consider the peculiar features of international investment disputes.

B. ICSID's Peculiar Role

ICSID administers the settlement of disputes by arbitration, conciliation, and fact-finding. Its proceedings are carefully designed to consider the peculiar features of international investment disputes to maintain a balance between the interests of disputing parties.[39] The proceedings also provide a fair hearing to parties and access to a self-enforcing channel for awards derived from the convention. However, this can only be effective if signatory states waive their sovereign immunity from claims, and their domestic courts show a willingness to enforce the awards without review, even though this is sometimes ignored.[40]

The proceedings of the ICSID are administered under the ICSID Rules and other Rules for arbitration cases such as the UNCITRAL Arbitration Rules.

Although the ICSID's functions were originally envisaged to cover investment disputes between investors from Convention signatories and state signatories, the ICSID's role

[36] ibid
[37] Merrills (n 15)
[38] ICSID, 'ICSID Releases New Caseload Statistics for the 2021 Fiscal Year,' < https://icsid.worldbank.org/news-and-events/news-releases/icsid-releases-new-caseload-statistics-2021-fiscal-year> accessed 15 March 2022
[39] ICSID (n 30)
[40] Martin (n 16)

has evolved in three major ways.[41] First, in 1978, the ICSID Administrative Council initiated the Additional Facility Rules[42] which expanded the scope of dispute resolution services to include fact-finding and an additional ground to determine cases where only one of the parties to the dispute may be a Convention signatory or an investor from a signatory state. It can be said that the latter aspect is a huge milestone because it critically expanded the number of possible ICSID-based arbitrations. However, it is pertinent to note that the "Additional Facility" arbitrations would not have the same effect as the ICSID Convention awards in terms of enforcement but can take advantage of the nearly identical Arbitration Rules and the extensive administrative services offered by the ICSID.[43]

The ICSID can also be utilized in the resolution of disputes between states under investment treaties and free trade agreements and offers a wide range of case administrative services.[44]

Between July 1, 2020, and June 30, 2021, ICSID accounted for a record of 70 new cases in FY2021 under its procedural rules for the settlement of international investment disputes. Arbitrations under the ICSID Convention registered the largest share of new cases (67 cases), followed by arbitrations applying the ICSID Additional Facility Rules (two cases). One conciliation case was registered under the ICSID Convention.[45] No fact-finding proceedings have ever been utilized since its inception.[46]

The tremendous increase in the number of cases handled by the ICSID has been generally attributed to the popularity of arbitration in the investment regime, the upsurge in foreign direct investments, the increase in the number of investment treaties, and the large membership of contracting states to the convention.[47] It can be rightly said that these factors were responsible for the transmission of the ICSID from initial obscurity to present-day limelight.

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[41] Susan Franc, 'The ICSID Effect - Considering Potential Variations in Arbitration Awards' (2011) 51 Va J Int'l L 825

[42] ICSID, "ICSID Additional Facility Rules", ICSID Doc. ICSID/ 11 (Apr. 2006) [hereinafter ICSID Additional Facility Rules]

[43] Franck (n 41)

[44] ICSID (n 38)

[45] ICSID (n 38)

[46] Franck (n 41)

[47] Ugljesa Grusic, 'The Evolving Jurisdiction of the International Centre for Settlement of Investment Disputes' (2009) 10 J. World Investment & Trade 69 (2009); David Sedlak, 'ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?' (2004) 23 Penn State International Law Review 147

According to the ICSID, the surge in its' arbitration services is a result of its large membership and extensive referrals to its arbitration facilities. It is beyond doubt that the institution plays a significant role in international investment and economic development and is the leading international arbitration institution specially reserved for investor-state dispute resolution.[48] This perspective is strongly supported by data from other sources. According to a study of publicly available arbitration awards, the ICSID has conveniently resolved about 75% of ITA disputes. Likewise, a United Nations Conference on Trade and Development (UNCTAD) publication of 2009 disclosed that the ICSID has determined nearly 65% of cases in the investment regime.[49]

C. ICSID's Jurisdiction

The mere fact that a state is a signatory to the ICSID Convention does not mandate it to submit to the proceedings of ICSID. This is because the jurisdiction of ICSID is quite narrow[50] and restricted to disputes falling under article 25(1) of the Convention which stipulates in unmistaken terms as follows:

> *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre…*[51]

It seems crystal clear from the aforesaid provisions of Article 25(1) of the Convention that three criteria must be fulfilled to invoke the jurisdiction of the ICSID.

First, the article demands that both parties must agree to have recourse to the centre and such agreement must be in writing. The ICSID requires the consent and approval of a contracting state to validate the participation of an agency or subdivision of the

[48] Franck (n 41) 840; Christoph Schreuer, 'The Development of International Law by ICSID Tribunals' (2016) 31 (3) ICSID Review, 728–39
[49] See UNCTAD, 'IA Monitor No. 1 (2009): Latest Developments in Investor-State Dispute Settlement' (2009) UN Doc. UNCTAD/WEB/DIAE/IA/2009/6/Revl 2-3
[50] David Krawiec, 'Sempra Energy International v. The Argentine Republic: Reaffirming the Rights of Foreign Investors to the Protection of ICSID Arbitration' (2009) 15 Law & Bus. Rev. Am. 311
[51] ICSID Convention, art 25(1)

state unless the ICSID is notified that no further consent is needed from the state.[52] However, it can be argued that such notification is not necessary since an agency of a state is legally empowered to act on behalf of that state in trust.

Second, the said article requires that the dispute between the parties arose out of an investment, but for several reasons, the Convention failed to define what constitutes an investment. Different criteria have been applied by different tribunals, and this has triggered a significant level of controversy and uncertainty.[53] Practically, the ICSID tribunals have given a broad meaning to the term 'investment' and have indicated that it may extend to any realm of economic activity. However, the tribunals have maintained that parties may set out in their agreement the basic transaction(s) to be considered as investments, and a contracting state may communicate her choice not to submit specific classes of disputes to its' jurisdiction.[54]

Third, a contracting state (or its agency or subdivision) and a national of another contracting state must be the parties to the dispute. However, the Additional Facility Rules[55] have significantly extended the ICSID's jurisdiction to include cases where only one of the parties to the dispute is a Convention signatory or an investor from a signatory state, even though the enforcement mechanism would not be as potent as one arising from the ICSID Convention.[56] On the face of the article, it also appears that investors from a contracting state can invoke the jurisdiction of the ICSID, even though the validity of this argument appears unpredictable.

There is some form of peculiarity in the parties involved in a dispute before the ICSID. Since the parties involved are either foreign investors or sovereign states, it can be argued that they possess a high level of prominence, sophistication, financial wherewithal, and access to effective legal representation,[57] even though it can be argued that this position is a mere assumption and may not always be practical.

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[52] Martin (n 16); Dolzer, R and Christoph Schreuer. *Principles of International Investment Law*, (Oxford 2008)
[53] See, for example, Phoenix Action, Ltd. V Czech Republic, ICSID Case No. ARB/06/5 39 (Apr. 15, 2009)
[54] Grusic (n 47)
[55] ICSID (n 42)
[56] Franck (n 41)
[57] Alex Grabowski, 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15 Chi J Int'l L 287

D. Legitimate concerns about the ICSID

Following persistent scrutiny, stakeholders and commentators have raised a plethora of concerns about the ICSID. In several of these cases, there have been concerns that examine the integrity of the institution; at other times, the ideology, procedure, and structure of the ICSID have been questioned.[58]

One concern that is constant, intriguing, and having significant implications for the ICSID's integrity has been expressed by a few developing countries like Ecuador which claim that the ICSID was indirectly created by wealthy, developed countries with a selfish desire to cater for the interest of their citizenry abroad to the detriment of developing states.[59] These protesting countries allege that the ICSID arbitration appears to provide ample protection to capital exporter states and their investors' interest, rather than holistically provide fairness and equity. Here, the perception is not that the ICSID arbitrators are constantly compromised, but that they are likely to interpret the Convention or any Treaty in favour of wealthy developed states.[60]

Another related concern that has been expressed by critics is the relationship that exists between the ICSID and the World Bank. Some stakeholders and commentators have expressed worry that the ICSID maintains close ties with the World Bank, multinational companies, and major international financial corporations despite presenting itself as a depoliticised, autonomous institution.[61]

Furthermore, some critics mainly from a few developing states contend that the proceedings of the ICSID are programmed to work against poor, developing countries. To this end, their concern is that ICSID hearings always take place in expensive cities such as Washington and London, which are inconvenient for poor, distant countries. Complaints have also been made about the fact that developing states do not have the economic and financial ability to sustain the principle of investment law that requires them to pay "prompt, fair and effective" compensation to foreign investors for expropriation.[62] The cost and complexity of the ICSID proceedings are also issues that have been raised by some critics who believe that developing countries are not in a financial position to bear the cost of an ICSID arbitration.[63]

[58] Leon Trakman, 'The ICSID Under Siege' (2013) 45 Cornell Int'l L.J. 603
[59] Franck (n 41) 844
[60] Trakman (n 58) 608
[61] Ibid 612; Franck (n 41) 845
[62] Trakman (n 58) 612
[63] Ibid 616

E. Can the ICSID survive this public scrutiny?

In response to the various allegations and criticisms of the ICSID, proponents of investor-state arbitration and the ICSID have exonerated the institution from any wrongdoing. These proponents are of the view that the ICSID merely expedites the settlement of investment disputes with the use of independent and impartial arbitrators and nothing more.[64]

A further defence of the ICSID has been enunciated by some proponents including Judge Charles Brower and Stephan Schill who contend that criticisms by developing countries like Ecuador are personal, illegitimate, and do not reflect the minds of a majority of developing countries.[65] More so, these proponents also accuse some developing countries of exposing themselves to calculated risk by entering into agreements that are not in their economic favour out of desperation, and the ICSID should not be blamed for decisions arising therefrom.[66]

Another possible vindication for the ICSID is the ever-growing number of its member states, especially developing countries. Proponents believe that this is evident in the certainty and stability of the ICSID's jurisprudence, which appears much better than applying different domestic laws for investment disputes.

In defence of the criticism relating to the high cost of an ICSID arbitration, proponents have contended that the cost of arbitration in the ICSID is uncertain. Assuming but not conceding that the cost is high, the parties involved (that is a sovereign state and investor company) are juristic persons which have large financial muscle and network.[67]

It can be argued that although the ICSID's affiliation to the World Bank may appear unconscionable or prove a serious miscalculation, this fact alone does not affect the legitimacy of the ICSID's proceedings or Awards. Indeed, the ICSID is a vehicle that preserves the sanity of investment law, regardless of its' exaggerated shortcomings, and its energy disputes have contributed immensely to the development of arbitral case law and the international investment regime.

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[64] Ibid 610
[65] Franck (n 41) 848
[66] Trakman (n 58) 626
[67] Ibid 617; Grabowski (n 49)

The Robust Provision of a Fair and Equitable Treatment (FET) Standard in ICSID Energy Arbitrations and its Implication on New Energy Investments in Nigeria amid the Energy Transition

The requirement of host governments to accord fair and equitable treatment to investors is a prominent feature of many investment treaties.[68] The FET standard emanates from international law, is the most invoked treaty obligation before investment tribunals, and the one most found to be violated by host governments. That is to say that, most claims by investors against a host government substantially involve an infringement of the requirement of a FET standard.[69] It has been asserted that the flexibility and parameters of the FET standard began to render protection against expropriation as inconsequential in arbitral practice.[70] To emphasize the importance of the FET concept, it is commonly provided at the outset of investment treaties. For instance, Article II(2)(a) of the United States–Argentina BIT states as follows:

'Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.'[71]

To a great extent, investors have taken advantage of provisions on FET to protect their investments from arbitrary, unjust, and abusive actions of a host government, notwithstanding the treatment of the government towards other investors.[72]

The thought-provoking question is this: What does fair and equitable treatment entail? Despite its appearance in most investment treaties and frequent invocation in investment arbitration, the meaning of the phrase 'fair and equitable treatment' remains

[68] UNCTAD, "Fair and Equitable Treatment: A Sequel, Series on Issues in International Investment Agreements II" (UN, 2012) <http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf> accessed 11 March 2022, pp. 17–35 (identifying the five 'most important and widespread approaches to the FET standard in treaty practice').

[69] UNCTAD submits that the fair and equitable treatment standard 'could be employed to challenge the refusal of expected government support [and] the withdrawal of market-creating mechanisms.' UNCTAD, 'Investing in a Lowcarbon Economy' (2010) World Investment Report 137.

[70] A. Diehl, *The Core Standard of International Investment Protection* (Kluwer Law International 2012) 8

[71] Treaty between the United States and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed on 14 November 1991, entered into force on 20 October 1994, Art. XIV(1).

[72] Yulia Selivanova. 'Changes in Renewables Support Policy and Investment Protection under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for the Current Arbitration Cases' (2018) 33(2) ICSID Review 433

largely unclear and undefined.[73] Neither the ICSID Convention nor any international treaty has concisely and precisely defined the term. The risk is that, the standard is objective and is unavoidably left to the whims and caprices of an individual tribunal, and this often results in divergent decisions. It can be said that the determination of what is fair and equitable is dependent on the peculiar facts and circumstances of each case, and the perception of members of an arbitral panel.

The term 'Equitable' has been interpreted to include what is 'fair', 'just', and right, in consideration of the facts and circumstances of the individual case'.[74]

The standard for determining a fair and equitable treatment and the core elements of the obligation has been developed by ICSID arbitral tribunals and includes:

- legitimate expectations of the investor and stability/predictability of the legal framework
- the principle of good faith, and
- the absence of arbitrary and discriminatory treatment.[75]

i. The Legitimate Expectations of the Investor and Stability of the Legal Framework: An Innovation of Legendary and Venerable ICSID Energy Decisions

Energy-related arbitral decisions in the ICSID have carefully formulated the idea of protecting an investor's legitimate expectations as a basic criterion of the FET standard. These informed decisions have stimulated an understanding of how and when an investor's legitimate expectation is protected in disputes across many economic sectors. By so doing, energy disputes have provided some guidelines that will help determine the type of government actions that give rise to legitimate expectations, and when a breach of those expectations can incur state liability.[76]

The far-reaching influence of the 'legitimate expectations of an investor' can be evidenced in several ICSID energy cases. These cases have held that a state party will be in breach of the obligation of a FET where it breaches the expectations that were

[73] Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 J World Invest Trade 357, 364

[74] See the case of National Grid PLC v Argentine Republic, UNCITRAL Case 1:09-cv-00248-RBW, Award (3 November 2008) para. 68, referring to Black's Law and Concise Oxford Dictionaries and Mondev International Ltd v United States of America (ICSID Case No ARB(AF)/99/2), Award (11 October 2002) para. 118.

[75] Selivanova (n 72); Redfern (n 31) chapt.8

[76] Sabater (n 10)

taken into account by an investor, at the time of investing, thereby depriving the investor of significant economic benefits of the investment.[77]

In this regard, two well-celebrated energy cases; CMS v. Argentina,[78] and LG&E v. Argentina[79] with almost identical facts have created a benchmark to be followed by disputes arising from a wide range of economic sectors. In CMS v. Argentina, CMS, a United States corporation, had purchased shares in an Argentine gas transportation company that operated under a government licence. In LG&E, three US corporations had acquired equity stakes in several Argentinian gas companies. Argentina privatized many public utilities after these investments were made. Both companies instituted separate actions against Argentina in the ICSID alleging that the privatization of their companies and freezing of utility rates amounted to violations of the company's rights under the U.S.-Argentina Bilateral Investment Treaty.[80]

CMS, in particular, argued that it had clear contractual rights. The company further argued that the value of its' shares fell drastically by 90 percent, and revenues also witnessed a fall of 75 percent due to the Argentine Government' act of freezing the rate and converting the currency from the dollar to pesos. The company claimed to have borrowed in dollars to invest in Argentina — and contended that it invested $1 billion in rebuilding and enlarging the country's gas pipeline network — and needed to be reimbursed in dollars.[81]

Argentina argued that its arrangement with both companies did not provide a guarantee of a profitable outcome or an assurance that tariffs would be recorded in dollars. More importantly, the government raised the defence of necessity by claiming that the country faced a national emergency, prompting it to embark on desperate measures to save the country from total collapse. In both cases, the companies argued that the measures adopted by the government were tantamount to expropriation and a violation of the FET.

Although the claim of expropriation was dismissed by both tribunals, the claim of a violation of the FET obligation was passionately considered and subsequently upheld in ways that have sharpened the investment law and its application in disputes relating to other economic sectors. The ICSID panels held that a guarantee that utility rates

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[77] Selivanova (n 72) 439
[78] *CMS Gas Transmission Co. v The Republic of Argentina, Decision on Jurisdiction, ICSID Case No. ARB/01/8, IIC 64 (2003)*
[79] *LG & E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case
No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, 30 April 2004.
[80] ibid; CMS (n 78)
[81] ibid

would be calculated in dollar was part of the privatization deal and that all the investor companies heavily relied on that representation. In a salient victory for investors, the tribunals concluded that the sudden transformation of the legal framework of the utility sector to contradict the earlier representation constituted a denial of FET.[82]

The CMS tribunal regarded Argentina's action as a failure to provide a stable and predictable framework required under the BIT and therefore a breach of the obligation of providing fair and equitable treatment to foreign investors. The tribunal went further to graciously award compensation in favour of the company.[83]

The LG&E tribunal interpreted the radical changes to the business and legal framework in the gas sector after reliance by investors as a destruction of the attractive element of the investment. The tribunal stated as follows: 'Argentina had prepared with the investment banks [charged with the privatizations] an attractive framework of laws and regulations that addressed the specific concerns of foreign investors with respect to country risks involved in Argentina.' The annulment of the framework that provides for the calculation of tariffs in dollars or at a level equivalent to a reasonable rate of return contravened the FET standard.[84]

As recent as 25th January 2021, the ICSID tribunal in BayWare. Renewable Energy GmbH and BayWare Asset Holding GmbH v. Spain,[85] gave a Final Award against Spain with damages in favour of the claimants to the tune of EUR 22 million in an arbitration arising from renewable energy generation. In that case, the claimant, an investor in a wind plant, filed an arbitration against Spain under the ECT for changing the regulatory framework for renewable energy. In what is now referred to as one of Spain's renewable energy sagas, the tribunal, in its decision held that the action of Spain constituted a breach of the FET by violating the obligation of stability under Article 10(1) of the ECT.

In a slightly dissenting decision, arbitrator Grogera Naon explained that the removal of the previous regulatory framework which the claimants heavily relied on at the time of investing was a breach of the claimants' legitimate expectations, and as such, imposed a "disproportionate, unreasonable and unexpected economic burden" on the claimants.[86]

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[82] Ibid; CMS (n 78); See also *Sempra Energy International v Argentine Republic*, Award, ICSID Case No. ARB/02/16, IIC 304 (2007), at [284], endorsing the criteria set out in *Pope & Talbot Inc. v Government of Canada*, Award on Damages, UNCITRAL, 31 May 2002, IIC 195 (2002).
[83] ibid
[84] LG & E (n 79) para. 133.
[85] ICSID Case No. ARB/15/16
[86] ibid, dissent, para. 24 -29

The ICSID energy arbitration has recognised the protection of an investor's legitimate expectation as the heart of the FET standard, and this has been followed by tribunals hearing disputes from other sectors. In determining whether the measures of a state violated the standard, the effect of the measure on the investors' reasonable expectations; and whether the state has made frantic moves to avoid meeting those expectations that it created or reinforced through its acts are factors that are commonly examined by tribunals.[87]

A significant question in the concept of legitimate expectations interrogates the type of state actions that creates legitimate expectations of an investor. Can conventional policies, such as those applying to all investors in a particular economic sector create legitimate expectations for an investor? Or does a state need to make an express, unequivocal representation to that investor? The tribunal in the LG&E case has clearly stated that expectations do not necessarily derive from a contract but maybe delineated from both express or implied assurances made by the state and which the investor depended upon at the time of investing.[88] The LG&E decision is quite notable because, it did not restrict the interpretation of legitimate expectations to representations of a state addressed directly to an investor, and this has been emulated by investment tribunals within and outside the ICSID.

Another key question relates to when the investors' legitimate expectations can be said to have been conceived. The ICSID tribunal in the two landmark cases against Argentina – CMS Gas and LG and E seems to have addressed this question. A significant issue in both cases was whether the timing of the investor's legitimate expectations could affect the legitimacy of the investors' expectations. The tribunals in both cases held that the time when the 'investment was decided and made' by the investor was the appropriate time for determining an investor's expectation.[89] This position has been endorsed as an acceptable yardstick by tribunals within and outside the ICSID that determine disputes emanating from several other economic sectors.

The CMS and LG & E cases have also shown that transparency, consistency, stability, and predictability of the legal and regulatory framework are central to the FET standard.[90] By so doing, the cases have established the right of an investor to anticipate that the legal framework in existence at the time of investing will remain unchanged, at least not to his detriment.

[87] Redfern (n 31)
[88] Selivanova (n 72)
[89] CMS (n 78) para. 275
[90] ibid

More so, the tribunal in Occidental v Ecuador persevered on this point when it held that the host state has a duty to, in the best way possible, maintain the legal and business background that existed at the time of investing.[91]

To enjoy this protection, the LG & E tribunal went further to set criteria that must be met by investors to establish that they indeed had legitimate expectations. Apart from being reasonable, an investor's expectation must be legitimate in the circumstance, and an investor cannot be protected from the ordinary business risks that his investment may face.[92]

ii. Investors' Obligation to Act in Good Faith and Comply with Domestic Law: A Product of Highly Revered ICSID Energy Decisions

Whereas a host state is expected to meet the legitimate expectations of an investor, an investor is not without any responsibility. An investor is expected to reciprocate the gesture of the host state by acting in good faith and complying with all applicable laws and regulations of the state.[93] The concept of good faith has long been accepted in international arbitral practice, although there is a dearth in a clear definition of the concept. It has been said, and rightly too, that the concept has become an integral element of legal culture and, for that reason, cannot be jettisoned.[94]

Although the ICSID convention does not expressly require parties to act in good faith, informed ICSID decisions in energy arbitrations have inspired how it should be applied in resolving disputes from other economic sectors. The concept of good faith was highlighted in the landmark ICSID decision in Plama Consortium Limited v. Republic of Bulgaria[95] which involved claims submitted to the ICSID arbitration under the Energy Charter Treaty (ECT) by Plama Consortium Limited ('Plama') a Cypriot company which purchased shares in a Bulgarian company, owning an oil refinery in Bulgaria.

The Bulgarian company had been dependent on the preceding privatization and remained in a five-year post-privatization control period. During this period, the company was required to obtain the approval of the Bulgarian Privatization Agency to exercise its right to sell its shares. The approval was obtained by Plama who now agreed

[91] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No ARB/06/11 (5 October 2012) para 191.
[92] LG & E (n 79) Decision on Liability at [130 – 31]
[93] Bruno Zeller and Richard Lightfoot, 'Good Faith: An ICSID Convention Requirement' (2018) 8 Victoria U L & Just J 17
[94] ibid
[95] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No ARB/03/24 (27 August 2008) Pt IV (B)(3)

with the Privatization Agency to acquire the company's shares. The approval of the Privatization Agency was granted because of Plama's representation that it was a group of two large and experienced international companies with the technical and financial ability necessary to operate the refinery. Afterward, Plama concluded the share purchase and initiated means to operate the refinery. The success of the project was hampered, and Plama Consortium commenced ICSID arbitration against Bulgaria where it claimed that the interference of Bulgaria in the smooth operation of the oil refinery was in contravention of the Energy Charter and the BIT between Cyprus and Bulgaria.

Amidst the arbitration and in response to several jurisdictional objections that had been raised by Bulgaria, Plama conceded to the fact that it was not a group of two large and experienced international companies as it represented but rather belonged to a single individual French national. In response, Bulgaria objected to jurisdiction because Plama had intentionally obtained the consent of the Privatization Agency to acquire the investment by fraudulent misrepresentation. Bulgaria contended that, as a consequence, the obtained consent was a complete nullity and, therefore, that the Plama cannot claim ownership or control of the investment (that is the shares in the Bulgarian company).

The tribunal accepted Bulgaria's factual allegation that Plama was guilty of fraudulent misrepresentation and unlawful behavior for representing to the Bulgarian Government that the investor was a group of two major experienced companies, which was true at the initial stage of negotiations. However, the two companies soon fell out, and Plama deliberately failed to inform Respondent of the change in circumstances, which the Tribunal believed to be a critical factor that would have influenced the decision of the Privatisation Agency. When the Privatisation Agency of Bulgaria consented to Plama's purchase of shares, it had no reason to believe that Plama was not a group of two large companies as it represented, and the true owner of Plama, a private individual, failed to notify the Privatisation Agency of this critical, significant development. As stated by the tribunal, 'Bulgaria had no reason to suspect that the original composition of the consortium … had changed to an individual investor acting in the guise of that 'consortium', and no duty to ask.'

The tribunal held that Plama's behavior was in contravention of the provisions of Bulgarian law and international law and stated in clear terms that the ECT should be interpreted in a manner that does not undermine the rule of the law. The tribunal held that the protections of the ECT cannot shield investments that are 'contrary to domestic or international law,' even though the ECT does not categorically provide that investment must be made in compliance with a particular law.

The tribunal thought that granting protection to Plama would be against the principle *Nemo auditor propriam turpitudinem allegans*, which connotes that nobody should be allowed to benefit from his wrongdoing.[96]

From this decision, it can be argued that the ICSID tribunal, in this significant energy decision, has rightly established that the protection of the legitimate expectations of an investor cannot apply to an investment that was made in bad faith, or contrary to law.

By implication, it can therefore be rightly said that the concept of good faith imposes certain pre-conditions that investors must meet before accessing fair and equitable treatment. An investor is required to comply with the law of a state party and must supply the correct information. An investor must be guiltless.

Indeed, this concept has been applied in a multitude of international investment disputes within and outside the ICSID in energy and non-energy disputes. For instance, the tribunal in Yuko v. Russia[97] (a case decided by the Permanent Court of Arbitration) recognised Plama v. Bulgaria[98] as a leading case concerning the principle of good faith.[99]

The ICSID energy decision in Plama v. Bulgaria has proven to be an ambassador and exemplar of the concept of good faith and its' yardstick in international arbitration and today's international investment regime.

iii. Investors' right to freedom from arbitrary and discriminatory treatment: Another landmark innovation from ICSID Energy decisions

In most investment treaties, there is a long-established presence of provisions against arbitrary and discriminatory treatment of an investor by the host state. However, investment treaties are significantly silent on the definition of the terms 'arbitrary' and 'discriminatory'.[100] Although both terms usually co-exist within the same clause in investment treaties, the two standards are quite different from each other. An investor is not required to establish that an action is both arbitrary and discriminatory; a breach of either standard will suffice.[101]

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[96] ibid, par 143
[97] *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227, Final Award (18 July 2014)
[98] Plama (n 95)
[99] Aloysius Llamzon, 'CASE COMMENT: Yukos Universal Limited (Isle of Man) v The Russian Federation: The State of the 'Unclean Hands' Doctrine in International Investment Law: Yukos as both Omega and Alpha' (2015) 30(2) ICSID Review 315, 319
[100] Redfern (n 31)
[101] Whitsitt (n 14)

In El Paso Energy International Company v. The Argentine Republic[102], El Paso contended that several measures (particularly, withholdings of exportation of crude oil, foreign exchange regulations, and a specification policy) taken by Argentina to address the economic crisis of 2001 harmed its investments and were inconsistent with Argentina's assurances assumed at the time of investing. El Paso argued that Argentina's numerous actions were in contravention of the US-Argentina BIT, including the prohibition against arbitrariness and the FET standard. The tribunal rejected El Paso's claim that Argentina's response to the economic crisis was politically motivated and therefore arbitrary. Whilst recognizing the existence of several measures that can be employed by a state in response to crises, the tribunal was of the view that the measures adopted by Argentina to address its economic situation at the time were reasonable, consistent with the primary objective, and not arbitrary.[103]

In Sempra v. Argentina,[104] a case with almost similar facts, Sempra had strongly contended that the measures adopted by Argentina were arbitrary on grounds that they violated its' "rights and reasonable expectations, lacked proportionality, and were in violation of the law." The tribunal found, however, that the principal requirement for a finding on arbitrary behaviour is that the actions complained of are shown to amount to "impropriety".

Sempra also raised an allegation of discrimination against Argentina's measures in that they unequally imposed liabilities on the foreign-owned gas sector. In dismissing this claim, the tribunal held that Sempra had failed to prove that its' treatment was different from that accorded to other investors in a comparable situation, which, it can be argued, is a question of fact dependent on the surrounding circumstances. Although Sempra failed to establish this claim, it can be argued that this protection will cover an investor who can sufficiently prove the existence of a clear bias against him.

Conclusion

As the energy transition continues to be in view, international arbitration will be commonplace in investor-state disputes arising from new investments. Disputes of this nature are commonly handled by the ICSID – an international body set up by the World Bank to preside over disputes arising from international investments between investors and host governments. Since the inception of the ICSID, energy-related cases have maintained a steady lead in the institution numerically and on an efficiency basis. More importantly, the international investment regime has also been developed and highly influenced by the ICSID energy arbitration in the sense that ICSID energy arbitration

[102] *El Paso Energy International Company v Argentine Republic* (2011), Case No ARB/03/15 (ICSID), Award [El Paso] at para. 320-22.
[103] ibid
[104] CMS (n 78)

has developed or re-affirmed significant concepts that are commonly applied in various sectors of the regime, one of which is the concept of an Equitable and Fair Treatment Standard. By so doing, the ICSID energy arbitration has given investors more assurance of protection from harsh treatment by host governments. This has also proven crucial for the development and extension of investment protection across other economic sectors unrelated to energy. However, the thorny issue is whether state parties/governments are willing to abide by unfavourable decisions. Although the concept of a Fair and Equitable Treatment Standard is notably outstanding, the cooperation of sovereign state parties/governments is needed to solidify this achievement especially when decisions do not favour them.