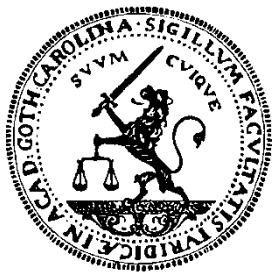

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Arbitration on whose terms?

- A TWAIL analysis of investor – state arbitration through Bilateral Investment Treaties

LAGF03 Essay in Legal Science

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Contents

Summary

This thesis examines the arbitration mechanism of the Convention of the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID convention) and how it is used in Bilateral Investment Treaties (BITs). This is done from a Third World Approach to International Law (TWAIL) perspective. The main hypothesis of TWAIL is that inequality is embedded in international law, which legitimizes a dominance of the global north over the global south. With this outset, the question of what type of relations the arbitration mechanism furthers is analysed.

The question posed in this thesis is answered by looking at the historical emergence of the ICSID convention and of BITs as well as at the parallel discussions on the topic between the United Nations and the World Bank. To understand how states used these BITs in practice, model treaties of the 1990's are studied and articles of the ICSID convention reviewed. To understand what effects it may have for private investors and host states, a specific case is analysed.

The thesis finds that the development during the post-colonial era reflects that the ICSID-convention that entered into force in the 1960's, has an investor friendly outset that gives great advantages to investors in the global north. Of historical reasons these investors are private companies from former colonial powers. Furthermore, this structure is strengthened during the 1990's when BITs are concluded seemingly automatically without any positive effects for the host states importing capital.

The thesis reaches the conclusion that the ICSID convention mechanism for arbitration in BITs furthers an unequal relationship between the global north and the global south, which establishes a dominant position of the global north. Moreover, while constituting international law, its legitimate system promotes unfair structures.

Sammanfattning

Denna uppsats studerar skiljeförfarandemekanismen i *Convention of the Settlement of Investment Disputes Between States and Nationals of Other States* (ICSID-konventionen) och hur den används i bilaterala investeringsavtal (BITs). Ämnet analyseras utifrån *Third World Approach to International Law* (TWAIL), vars synsätt utgår från att det finns en strukturell orättvisa i folkrätten och en dominans av staterna i *the global north* över de i *the global south*. Med denna utgångspunkt är målet med uppsatsen att besvara vad för relationer detta system i folkrätten befrämjar mellan *the global north* och *the global south*.

Uppsatsens frågeställning har besvarats genom att undersöka utvecklingen av ICSID-konventionen och BITs samt de parallella diskussioner som förts mellan Förenta Nationerna och Världsbanken. För att förstå användningen av BITs i praktiken har användning av modellavtal under 1900-talet studerats och vissa av ICSID-konventionens artiklar granskats. För att förstå vilka följder det kan få för såväl investerare som en värdstat, har ett specifikt fall analyserats.

Uppsatsen finner att utvecklingen under den post-koloniala perioden vittnar om att ICSID-konventionen, som trädde i kraft på 1960-talet, har en investerarvänlig utgångspunkt som gynnar investerare i *the global north*, vilka av historiska skäl är privata företag från de forna kolonialmakterna. Strukturen befästs under 1990-talet då BITs ingicks på löpande band och utan positiva effekter för den kapitalimporterande värdstaten.

Uppsatsen konstaterar att ICSID-konventionens mekanism för skilje-förfarande befrämjar en orättvis relation mellan *the global north* och *the global south* och befäster *the global north's* dominans. Slutsatsen är att även om detta system är legitimt och *de facto* gällande folkrätt, så innebär det att orättvisa strukturer etableras och bibehålls.

Abbreviations

BIT	Bilateral Investment Treaty
FDI	Foreign Direct Investment
ICJ	International Court of Justice
ILC	International Law Commission
ICSID	International Centre for Settlement of Investment Disputes
ISDS	Investor-State Dispute Settlement
ITO	International Trade Organisation
MFN	Most Favoured Nation
NIEO	New International Economic Order
NT	National Treatment
TWAIL	Third World Approach to International Law
UN	United Nations
UNGA	United Nations General Assembly

1. Introduction

1.1. Background

Investor-state arbitration is a form of settling legal disputes arising from Foreign Direct Investments (FDIs) made by a private investor from a home state in a host state. This can occur when the government in the host state decides to e.g. expropriate investor property without or with insufficient compensation. With the amount of FDIs increasing since World War II it has become imperative to form regulations in international law. One way of doing this is through Bilateral Investment Treaties (BITs). Since the first concluded BIT in 1959, between Germany and Pakistan, the total today amounts to a cluster of 2,369 BITs in force.[1] A cornerstone in BITs is the settlement-of-dispute clauses to resolve disputes between a private investor and a host state. This has been essential for the development of international investment law.

The mechanism for resolving disputes in BITs alert many questions for the international legal scholar in terms of the effect they have on the involved parties and the world community as a whole relative to its intentions. It especially raises questions concerning the relations between developed first world states and developing third world states often referred to as the global north and the global south, respectively.

1.2. Subject and Purpose

International law is the subject of this thesis and its purpose is to add to the field of Third World Approach to International Law (TWAIL) by analysing a certain form of Investor-State Dispute Settlement (ISDS), namely arbitration based on the 1965 Convention of the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID

[1] ”Investment Dispute Settlement Navigator” *investmentpolicyhub.unctad.org*, last modified 10 May, 2017, http://investmentpolicyhub.unctad.org/IIA.

convention) when this is incorporated in BITs. This is a field of international law that has not received much attention by researchers.

The main hypothesis of TWAIL is that there is inequality imbedded in international law between the global north and the global south. This makes it a well-suited perspective to use when analysing the arbitration mechanism provided by the International Centre for Settlement of Investment Disputes (ICSID) as it is a part of international law often occurring in BITs between states. In order to give an accurate picture of the BITs of the world it should be mentioned that north-north state BITs have evolved during recent years in parallel with an increase in south-south BITs.[2] Despite this, classic north-south BITs are still in majority, where capital exporting states of the global north conclude BITs with capital importing states of the global south.[3]

By investigating its main historical background, practical use and its impact in a concrete case, the ICSID arbitral mechanism incorporated in BITs will be set against the hypothesis of TWAIL. The purpose of this thesis is therefore to disclose possible unequal relations that are structurally present in international law between the global north and the global south.

1.3. Question

TWAIL scholars suggest that international law in force furthers inequality between the states of the global north and the global south. The TWAIL hypothesis will in this thesis be the basis for analysing the question of what kind of relation between the global north and the global south that is furthered through BITs with the ICSID arbitration mechanism incorporated.

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[2] UNCTAD, *World Investment Report 2002, Transnational Corporations and Competitiveness* (Geneva: United Nations, 2002), 8.

[3] Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010), 96.

1.4. Delimitations

The question posed constitutes the framework for this thesis. Yet, delimitations will be imposed to pin-point the issue at hand.

Firstly, due to the extent of this thesis not all the BITs can be analysed. To immerse in this subject, the thesis will focus on one state and its use of BITs, namely Germany. Germany has been keen to conclude BITs and is also an appropriate study subject because it was possible to find sufficient information to support an analysis. Secondly, used sources of international law are limited. The generally accepted sources of international law are found in art. 38 in the Statute of the International Court of Justice (ICJ). Due to the extent of this thesis only one of the three sources of law, namely international conventions, will be examined leaving out international customary law and general principles of law. Thirdly, when it comes to concrete studies of BITs and cases, arbitration delimitates itself by being secretive. This makes it impossible to get a full view of the case law at hand. Despite this, enough material has been accessed to support an analysis of *Bernhard von Pezold and others v. Zimbabwe.* This case will therefore be the subject to the case study in this thesis.

1.5. Theoretical and methodological framework

TWAIL will in this thesis serve as a theoretical framework through which the ICSID arbitration mechanism will be viewed and the material used disassembled. The content of TWAIL will further be explained in the second chapter of this thesis. Thereafter, the history and emergence of this specific part of international law will be discussed. This is not done in comparison to other dispute mechanisms, but to understand why the ICSID arbitration mechanism in international investment law looks as it does today. This has been complemented with an analysis of relevant articles in the ICSID convention and a case study method in order to analyse the practical consequences of this investment dispute mechanism.

1.6. Material

For the purpose of this thesis, unveiled material connected to ICSID arbitration and how it is used in BITs will be analysed. Arbitration is confidential and owned by the parties to the arbitration and is seldom made public. Despite this, the full award for the case against Zimbabwe has been accessed and constitutes a primary source for the case analysis. This is used to analyse the case against Zimbabwe. Meetings where the ICSID was created and United Nations (UN) resolutions together with relevant literature on the subject are used to explain the background of ICSID arbitration. The commentary to the ICSID convention is used to further understand the meaning of regulations in the ICSID convention. This material has been used together with the literature on TWAIL theory, providing the perspective for this thesis.

1.7. Outline

This thesis is structured thematically and chronologically. After the presenting chapter, the second chapter will focus on TWAIL and how it can be used as a tool for critical examination of international law. The third chapter, covering the history of ISDS through the ICSID convention, will follow along with the background to the many BITs signed between states of the global north and the global south in the 1990's. This chapter will also delve in the practical use and consequences of BITs. The fourth chapter will address the ICSID convention with focus on the jurisdiction of the Tribunal and other relevant regulations, followed by a fifth chapter discussing the joint claim against Zimbabwe where the jurisdiction in the case came from a BIT between the states. The thesis will then be concluded in a sixth chapter with an analysis and thereafter a conclusion.

2. Third World Approach to International Law

TWAIL is a tool for critical examination of international law.[4] This approach took its modern form in 1996 when a group of Harvard Law students shed new light on the post-colonial way of viewing international law.[5]

The global south subordination to the dominating European and western powers is the foundation on which the TWAIL critique is built.[6] TWAILers take a fundamentally oppositional view of international law and the current world order with the purpose of eliminating the powerlessness of the global south and creating just and fair norms. It is thus an intellectual confrontation, reaction and opposition to current international law, seeking to analyse the structures of international law and fundamentally reconstruct the legal world order.[7] It is based on observations of history of international law, the theory behind it and its practical use. International law is needed according to TWAILers, but the current system is illegitimate and legitimizes a subordination of the global south.[8]

TWAILers see colonisation as a century long pattern legitimizing the domination of the global north.[9] The legitimization of this world order has remained into the post-colonial era by e.g., inherited legal structures.

[4] James T. Gathii, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography", *Trade, Law and Development* 3, 1 (2011): 27.

[5] Mohsen al Attar and Rosalie Miller, "Toward an Emancipatory International Law: the Bolivian Reconstruction", *Third World Quarterly* 31, 3 (2009): 2.

[6] Karin Mickelson, "Taking Stock of TWAIL Histories," *International Community Law Review* 10, 4 (2008): 357-8.

[7] Makau Mutua, "What is TWAIL?", Proceedings of the 94th Annual Meeting of the American Society of International Law, 31-40 (2000): 38.

[8] Ibid, 31.

[9] Gathii, "TWAIL: A Brief History, " 35.

Organizations in this era such as the UN and the International Bank for Reconstruction and Development (the World Bank) that are apparently neutral, is according to TWAILers upholding post-colonial structures by being institutionalized and led by the western world.[10]

The approach TWAIL takes has no organization and very loose borders, and may therefore be better described as a network than a school of critical thinking. The advantage of this is that it creates a flexible and adaptable tool for critical examination avoiding inhibitory effects of strict borders. This flexibility comes with the disadvantage that TWAIL lacks a united doctrine.[11]

Even though there is no clear doctrine or formal boundaries for the approach TWAIL has some uniting factors of viewing international law, making up an umbrella under which TWAIL can be used in many different ways. One of these factors is the historical method used and the conviction that the domination of the states of the global north during the colonisation cannot be isolated from the world order today.[12] Another is the perception of TWAIL as a broad opposition against an unjust global order[13]

TWAIL is not an individual method and can therefore be used to influence scholars of other schools. Using the TWAIL core values, the approach can be applied together with e.g. Marxism, feminism and critical race schools.[14]

[10] Mutua, "What is TWAIL?" 37.

[11] Gathii, "TWAIL: A Brief History, " 32.

[12] Ibid, 34.

[13] Mutua, "What is TWAIL?" 36.

[14] Gathii, "TWAIL: A Brief History, " 37.

3. Historic developments of the International Centre for Settlement of Investment Disputes in BITs

The arbitration mechanism of the ICSID convention was created as a procedural mechanism to cope with the problem of an unfavourable investment climate.[15] To fully understand and analyse this part of international law it is essential to understand the history and development of these regulations.[16]

3.1. The informal empire

The 19th century European colonisation of the global south stemmed from European interests and investments in the regions and its natural resources. This was required for the industries developing in the global north states at the time.[17] A prime example is the commercial companies in the Victorian Empire during the 19th century. The global south was seen as a strategic place for commercial and military interests to strengthen the global Victorian Empire. The mind-set of this expansion was the conception that the British were vastly superior to the Latin, Oriental, Asian and African peoples.[18]

Instead of an apparent colonisation, the 19th century take over by the British was commercial. The aim was to strengthen the overall power and influence and not to formally colonise the states of the global south. One reason for this was the British treasury's unwillingness to spend money on the

[15] Salacuse, *The Law of Investment*, 93.

[16] Ibid, 46.

[17] Ronald Robinson, John Gallagher and Alice Denny, *Africa and the Victorians* (London: Macmillan & Co Ltd, 1961), 1.

[18] Robinson, Gallagher, Denny, *Africa*, 2-3.

colonies, leaving the job of establishing and upholding power to competitive private companies.[19] Easily put, the British found a formal colonisation too expensive; the more financially effective way was to let private companies take an indirect control of these states, leading to FDIs by private companies.[20] Thus, this laid the foundation for the economic globalization of today.

In this era, international law was beginning to develop. FDIs were however protected by diplomacy, or if this was not sufficient, by force.[21] The combination of threat of force followed by diplomacy was e.g. used by the British to protect their interests in Latin America during the late 19th and early 20th century.[22]

The use of an informal empire to strengthen world power was not only used by the British but also by other developed European states. This era is known as "The Age of Empire", a time of European global governance over the global south.[23] Consequently, it paved the way for the states in the global north to establish an informal control of the riches in the global south through private commercial investments that would remain even after the era of informal empires.

3.2. Post-colonial developments

In the aftermath of World War II, the playing field for the FDIs of the global north capital-exporting states was changing and major differences in the world order set new themes to the discussion and view on FDIs.

[19] Ibid, 462.

[20] Ibid, 7.

[21] Salacuse, *The Law of Investment*, 83.

[22] Charles Lipson, *Standing guard: protecting foreign capital in the nineteenth and twentieth centuries* (Berkeley: University of California Press, 1985), 54.

[23] Mutua, "What is TWAIL?" 34.

3.2.1. A new political arena

After World War II, the socialist ideology thrived, leading many states to get a hostile approach to FDIs as a capitalist figment not in line with the socialist ideology. Another important change was the decolonisation of former European colonies, leading to new emerging states that were very protective of their sovereignty. These states had a hostile attitude towards investors coming from former colonial powers, fearing that the western states would control commerce and domestic affairs of the new state.[24] The distrust was mutual. The investors from the global north and former colonial powers did not trust the local judicial systems of the emerging states thinking they were biased and corrupt.[25]

The growing socialism and decolonisation led to a wave of nationalisation of property in the socialist and decolonised states generating many investment disputes.[26] Sovereignty of natural resources and compensation in the case of expropriation hence became a question of paramount importance.[27] Various attempts were made to find new grounds for investment arbitration to solve the disputes. Efforts made were amongst others the 1948 Havana Charter for an International Trade Organization (the Havana Charter) that allowed the International Trade Organization (ITO) to regulate international investments in addition to trade. However, this proved not to be an efficient enough approach and the Havana Charter did not measure up to the level required to meet the problems with international

[24] Robert Gilpin with assistance of Jean M. Gilpin, *The Political Economy of International Relations* (Princton: Princton University Press, 1987), 247-8.

[25] Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties* (The Netherlands: Kluwer Law International, 2009), 24.

[26] Kenneth J. Vandevelde "A Brief History Of International Investment Agreements" in *The Effect Of Treaties On Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, And Investment Flows*, eds. Karl P. Sauvant and Lisa E. Sachs. 1st ed. (Oxford: Oxford Scholarship Online, 2009), 11.

[27] John Rapley, *Understanding Development: Theory and Practice in the Third World* (the United States of America: Lynne Rienner Publishers, Inc, 1996), 44-5.

investment law of the time.[28] Another attempt to strengthen arbitration was the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York convention). The aim of this convention was to make the enforcement of arbitral awards more effective by making it harder for domestic courts to refuse to enforce an arbitral award.[29] It did not completely solve the problem with investment disputes, but played an important role in strengthening arbitration.

3.2.2. Sovereignty over natural resources

During the post-colonial era, the newly established UN also concerned itself with this discussion in the UN General Assembly (UNGA). This resulted in a number of resolutions concerning state sovereignty over natural resources.[30] The first resolution emphasised that a state should refrain to impede the sovereignty of any other state.[31] In later resolutions on the subject, UNGA made it possible to expropriate property of foreign investments if it was of public benefit and given that an appropriate compensation was paid.[32] Even though there was enough support to pass these resolutions it struck discord concerning its interpretation, above all the meaning of "appropriate compensation" to investors in the event of an expropriation.[33] These discussions in UNGA led to initiatives from the World Bank.

[28] Salacuse, *The Law of Investment*, 88.

[29] Newcombe and Paradell, *Law and Practice,* 25.

[30] Ibid, 26.

[31] G.A. Res. 626 (VII) / 7 UN GAOR Supp. (No. 20) at 18 / UN Doc. A/2332 (1952).

[32] G.A. Res. 1803 (XVII) / 17 UN GAOR Supp. (No.17) at 15 / UN Doc. A/5217 (1962).

[33] Stephen M. Schwebel, "The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources," *American Bar Association Journal* 49, 5 (1963): 463-9.

3.2.3. Involvement of the World Bank

The World Bank was created along with the International Monetary Fund (IMF) after the World War II, initially to rebuild Europe.[34] It has its headquarters in Washington, D.C. and has up until today, with an Australian as the only exception, only had presidents from the USA.[35]

Previously involved in work concerning investment disputes, the World Bank decided to create the ICSID convention to constitute the ICSID in 1965.[36] This was a mechanism for investment arbitration that would serve as neutral ground and a more modest approach to investment disputes where disagreement and discord that had followed the UNGA resolutions and other efforts would be avoided.[37] The World Bank motivated this mechanism with a need for protection of private capital moving cross borders as FDIs.[38] Without the ICSID, FDIs would be hampered due to the mistrust of investors in states of the global north vis-a-vis the domestic courts and laws of the host states in the global south. Recognizing that the preferable method of resolving investment disputes was in fact local law, the World Bank argued that an arbitral mechanism was needed since many of the investors believed that the domestic law systems in many host states were simply not trustworthy.[39]

The ICSID convention was to be ad hoc and entirely voluntarily.[40] When agreed to this however, the parties of the convention would be obliged to abide to the convention and its rules according to the maxim *pacta sunt*

[34] "History" *worldbank.org,* last modified 27 April, 2017, http://www.worldbank.org/en/about/archives/history.

[35] "Past Presidents" *worldbank.org*, last modified 27 April, 2017, http://www.worldbank.org/en/about/archives/history/past-presidents.

[36] Vandevelde, "A Brief History", 18-19.

[37] ICSID, *History of the ICSID Convention Vol II-1,* 74.

[38] Ibid, 73.

[39] Ibid, 75.

[40] Ibid, 75.

servanda.[41] Furthermore, the strong ties between the ICSID arbitration mechanism and the World Bank would give incentive to respect the award, in order to remain on good terms with the World Bank.[42]

In 1966 as the ICSID convention came into force it was the first complete mechanism to manage investment disputes between host states and foreign investors. It was considered a true innovation.[43] As a "one stop shop", practical and investor friendly, the ICSID convention became incorporated into dispute-settlement clauses in many BITs now being concluded. The ICSID arbitral mechanism became a normal form of ISDS.[44]

3.2.4. Further developments

In parallel to the increasing usage of the ICSID convention the discussion of resource sovereignty continued in UNGA in the 1970's, resulting in the New International Economic Order (NIEO)[45]. This became possible largely due to the increasing numbers of socialist states in UNGA and enabled states to expropriate invested property without a compulsory compensation. Instead compensation was based on the domestic law of the host state.[46] However, the states wanting to expropriate in this manner were still bound by their other international legal commitments. States wanting to protect their FDIs responded by concluding more BITs through BIT programs.[47] During the 1980's, the world witnessed an increase in BITs that reached its peak in the 1990's, which could be seen as a "BIT boom".

[41] Ibid, 79.

[42] Christoph H. Schreuer "The World Bank/ICSID Dispute Settlement Procedures" in *Settlement of Disputes in Tax Treaty Law*, eds. Michael Lang and Mario Züger. 1st ed. Kluwer Law International, 2002, 4.

[43] Salacuse, *The Law of Investment*, 92.

[44] Ibid, 94.

[45] G.A. Res 3201 (S-VI) / 6 UN GAOR Supp. (No.1) at 3 / UN Doc. A/9559 (1974).

[46] Ibid.

[47] Vandevelde, "A Brief History", 13.

3.3. The 1990's "BIT-boom"

In the 1990's, the world witnessed a massive increase in the number of investment BITs that rose from 446 in 1990 to 1941 by 2000.[48] Especially in Europe BITs became a popular way to secure investments in emerging economies. The reason for this is not quite clear but a contributing factor is considered to be the existing European aid programmes for the global south tying states together. Hence entering BITs to secure investments was a natural and favourable way to further strengthen the economic ties.[49]

Not only states of the global north saw the benefit in investment BITs. With the fall of the iron curtain, several states that previously had not welcomed FDIs now saw its potential to bringing capital to their states and to enable their financial development.[50] FDIs had become increasingly important with the development of technology and capital mobility and became the main way to import capital. Governments lending money did not present itself as an option since the 1980's debt crisis ruled out the possibility of global north states investing in the global south, leaving private FDIs as the sole alternative.[51] If a state wanted economic development, FDIs and consequently investment BITs were a necessity hardly anyone could afford to abstain.[52] When the global south states grasped this chance, the increase in investment BITs became massive.[53]

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[48] "Quantitative data on bilateral investment treaties and double taxation treaties," *unctad.org,* last modified 26 April 2017, http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Quantitative-data-on-bilateral-investment-treaties-and-double-taxation-treaties.aspx.

[49] Salacuse, *The Law of Investment*, 95.

[50] Ibid, 96.

[51] Vandevelde, "A Brief History", 21-22.

[52] Karl Joachim, "The Promotion and Protection of German Foreign Investment Abroad", *ICSID Review - Foreign Investment Law Journal* 11, 1 (1996): 1-2.

[53] Salacuse, *The Law of Investment*, 96.

3.3.1. Model BITs

During the 1990's "BIT boom", BITs between states were often concluded from model agreements to make the process swift. The 1991 German Model Treaty on the Encouragement and Reciprocal Protection of Investment (the German Model Treaty) will in the following be addressed, but the majority of the global northern states have similar regulations and model treaties. [54]

Art. 1 of the German Model Treaty gives a wide definition of investments defining it as "every kind of asset" followed by a non-exhaustive list of what an investment could be. Moreover, the German Model Treaty contains other instruments to protect an investment. Amongst others, both national treatment (NT) and most-favored-nation treatment (MFN) are secured to the investor according to art. 3(1). Art. 11 of the German Model Treaty constitute the dispute-settlement clause between the investor and the host state. If the parties cannot agree during the six months amicable period or agree to an ad hoc arbitration, the case shall be submitted to the ICSID. Notably, if the investor and the host state cannot agree, an ICSID arbitration is the only option.

The BITs concluded by Germany with provisions such as the ones just mentioned also allows for an investment guarantee supported by the German government. This can be used for any investment under the definition 'an investment' in the BIT. The insurance covers the risks of e.g. expropriation or cases where the host state in other ways does not comply with the regulations in the BIT between the states. This insurance can be renewed periodically and the only restriction is that at least 5 % of the investment remains uninsured. [55]

[54] Karl, "The Promotion and Protection" 3.

[55] Ibid, 26.

3.3.2. The practical use of BITs in the 1990's

In order to delve into the question raised in this thesis, the practical effects are important. The following discussion is mainly supported by a UN study of BITs in practice during the mid 1990's.[56]

BITs were concluded to protect investments, but also with the motivation that BITs would facilitate capital import to global south states.[57] Yet, during at least the 20th century, little if any connection could be seen between the number of BITs and the capital income through FDI. On the contrary, this was of subordinate significance. To argue that FDI and the number of BITs has a connection in the sense that a higher number of BITs would lead to a higher capital inflow in the form of FDI is thus false.[58]

Considering the vast number of BITs concluded the numbers of ISCID cases are few. Although the ICSID convention came into force in 1966, the ISCID only handled 14 cases up until April 1998.[59] To the few cases up until the new millennia the study brought up an interesting point of view; the cloudy practical use of investment BITs. There is no system to analyse how host states or private investors are using BITs. The informal usage of investment BITs therefore becomes interesting. In the initial stages of a potential investment dispute, BITs have been referred to, and may have provided, a base for a settlement even before a dispute arises.[60] An interesting development however is that the number has rapidly increased since this study was conducted and today the number of ICSID cases is 426.[61]

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[56] UNCTAD, *Bilateral Investment Treaties of the mid-1990s,* (Geneva: United Nations, 1998).

[57] Ibid, 1.

[58] Ibid, 141-2.

[59] Ibid, 140.

[60] Ibid, 140.

[61] "Investment Dispute Settlement Navigator" *investmentpolicyhub.unctad.org*, last modified 27 April, 2017, http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution.

4. The Convention of the Settlement of Investment Disputes Between States and Nationals of Other States

A BIT containing an ICSID clause triggers the ICSID convention and its rules. This next chapter will address the ICSID convention and analyse the regulations and what they mean for an investor in a host state. Focus will be on relevant articles on jurisdiction, the applicable law in a case and the enforcement of an award.

4.1. Jurisdiction of the Tribunal

The jurisdiction for the ICSID is regulated in art. 25-27. According to art. 25 the Tribunal does only have jurisdiction over disputes concerning investments and claims brought to the Tribunal by either judicial or natural persons according to art. 25(2). The definition is generally given in the BITs with an ICSID provision.[62] It is often very broad, containing a non-exhaustive list of what a typical investment is.[63] Also necessary to the jurisdiction of the ICSID is consent of the parties that can be given in various forms e.g. through a BIT.[64] This consent is irrevocable, though hardly ever disputed due to the maxim of *pacta sunt servanda*.[65] Once the Tribunal has jurisdiction over the dispute, the ICSID convention prohibits the parties from seeking relief anywhere but at the ICSID to create a more effective procedure. [66] Lastly, the gain of the jurisdiction of the Tribunal means a loss of diplomatic protection according to art. 27 to make an ICSID

[62] Christoph H. Schreuer et al., *The ICSID Convention - A Commentary* (Cambridge: Cambridge University Press, 2009), 122.

[63] Ibid, 122-3.

[64] Ibid, 205-6.

[65] Ibid, 254.

[66] Ibid, 82.

procedure free from any political involvements and give direct access to the investors to put forward claims before a Tribunal.[67]

4.2. Applicable law

The powers and function of the Tribunal is regulated in art. 41-47, where the applicable law in ICSID cases is regulated in art. 42. The ICSID convention merely lays down rules for the procedure and does not contain material regulations, making it flexible for the Tribunal.[68] The Tribunal is to follow the law chosen by the parties. If no such choice has been made the domestic law of the host state and international law will be applicable. However, due to uncertainty regarding the existence of such an agreement this method is not always followed.[69] BITs in general have however provision on applicable law agreements.[70] If this does not exist in a BIT, instead of referring to the method set out in the article, the Tribunal has treated claims as containing an implicit choice of international law.[71]

4.3. Enforcement and recognition

The ICSID results in an award, with provisions in art. 48-49. Arbitration is generally undisclosed. ICSID arbitration is no exception and the award is confidential until the parties decide to make it public. The motivation for this has been that the private nature of arbitration enables companies to avoid disclosing sensitive company information to the public.[72]

In order for the award to have any effect, the ICSID convention provides rules for recognition and enforcement of the award in art. 53-55. The award is binding to the parties according to art. 53. The rules further prohibits parties to seek relief in any other forum after an award from the Tribunal or

[67] Ibid, 416.

[68] Ibid, 550.

[69] Ibid, 554.

[70] Ibid, 576.

[71] Ibid, 578.

[72] Ibid, 584.

to review the award through any other instrument than the one given in the ICSID convention.[73] A unique feature of the ICSID convention is art. 54 on enforcement of awards.[74] It does not contain a rule of internal review of domestic courts, providing a more accessible enforcement provision than, e.g., the New York Convention.[75] Art. 55 further strengthen the enforcement of awards by activating state immunity.[76] A failure to comply with an award by an invocation of this article will however still be seen as a violation of the ICSID convention and could ultimately lead to a procedure in the ICJ.[77]

[73] Ibid, 1097.

[74] Ibid, 1117-8.

[75] Ibid, 1118.

[76] Ibid, 1152.

[77] Ibid, 1153-4.

5. Bernhard von Pezold and others v. Zimbabwe

The following case against Zimbabwe constitutes an example of the effects of BITs with ICSID provisions.[78] This case is extensive and therefore not every claim raised will be discussed here, merely claims and discussions relevant to the purpose within the delimitations of this thesis.

5.1. Background

During the 2000's the Zimbabwean government enforced land polices to enable expropriation of land from owners from former white colonial powers to the Zimbabwean people.[79] The von Pezold family and the Zimbabwean-registered company Border Timbers Ltd. connected to the family had invested in agricultural estates in Zimbabwe since 1988. In 2005, the Zimbabwean government expropriated the land and equipment of the investors leading to the claim filed to the ICSID in 2010. Political uncertainty also led to an alleged abuse of a member of the von Pezold family. It was heard as a joint case with the claimants being the von Pezold family and the company Border Timbers Ltd.[80]

5.2. Legal grounds for jurisdiction

The von Pezold Family had both Swiss and German Citizenships, resulting in the 1996 Agreement between the Swiss Confederation and the Republic of Zimbabwe on the Promotion and Reciprocal Protection of Investments (Swiss-Zimbabwean BIT) and the 1996 Agreement between The Republic of Zimbabwe and The Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments (German-

[78] *Bernhard von Pezold and others v. Zimbabwe* ICSID Case No. ARB/10/15. Dispatched to the parties 28 July 2015. Available at https://www.italaw.com/sites/default/files/case-documents/italaw7095_0.pdf.

[79] Ibid, para 103-7.

[80] Ibid, para 9-14.

Zimbabwean BIT) being applicable on the case. The German-Zimbabwean BIT has a dispute-clause similar to the model article presented above.[81] Similar provisions exist in art. 11 of the Swiss-Zimbabwean BIT.[82]

5.3. Arguments in the process

The state disputed the tribunal's jurisdiction in every possible way, arguing amongst other that the investment was not an investment under ICSID convention because it lacked an element of risk.[83] Furthermore, the state argued that the company was not under foreign control, as required of the convention in art 25(2) since Border Timbers Ltd. was registered in Zimbabwe.[84] These arguments were however rejected and the tribunal claimed jurisdiction of the case.[85]

As mentioned in the background to the case,[86] the Zimbabwean Government aimed at reclaiming what they saw as land owned by "white settlers" but rightfully belonging to the Zimbabwean people. With this outset, the government argued that expropriation of the German/Swiss property was a proportionate conduct under the margin of appreciation. However, the tribunal found that no exception under international law could motivate racial discrimination, making the expropriation discriminatory.[87]

The claimants arguing that there was no public purpose with the expropriation since the property was promised to the political elite of Zimbabwe raised a question of discrimination. Naturally, the state disputed this, comparing the political elite to freedom fighters arguing this was payment for their role in the liberation of Zimbabwe, giving the

[81] See sub-chapter 3.3.1.1.

[82] Ibid, para 86-7.

[83] Ibid, para 288.

[84] Ibid, para 206-7.

[85] Ibid, para 215.

[86] See sub-chapter 5.1.

[87] Ibid, para 451-468.

expropriation a public purpose. The tribunal however found that this actually was the case, finding the expropriation racially discriminatory and that the public purpose did not exist.[88]

Since the property of the German/Swiss investors had not been transferred to any third party, the claimants argued for restitution of the property instead of compensation appropriate for the expropriation.[89] This argument was well received by the tribunal, finding it to be appropriate and achievable. The tribunal struggled to find legal support for this, but motivated it under the International Law Committee (ILC) articles. The decision was nevertheless on vague grounds as the ILC articles are not applicable for investor-state disputes but for inter-state claims. Yet, it was considered to guide the tribunal in this question.[90] The tribunal added that compensation should be paid if the state did not follow the restitution order.[91]

5.4. The award

Apart from the restitution claim, which the tribunal included in the relief as the most appropriate solution, the tribunal also found it necessary to issue a compensation for lost productivity of the company. When calculating the compensation for productivity, the state failed to present a credible calculation of its own, leaving the tribunal to proceed from the model of the claimants. Based on the calculations of the claimants the tribunal however discounted the amount with 20 %, finding accuracy of the calculation model used by the claimants to be uncertain.[92] In addition to this, moral compensation was issued both to the human and corporate claimants. For one member of the von Pezold family, Heinrich von Pezold, a USD 1 million compensation was awarded for a supposed kidnapping operation.

[88] Ibid, para 648-657,

[89] Ibid, para 744.

[90] Ibid, para 681-700.

[91] Ibid, para 765.

[92] Ibid, para 810.

The corporate moral damages were motivated with ICSID case law, resulting in a USD 1 million corporate compensation for moral damages.[93]

The total of the compensation owed by the state to the investor was depending on the willingness or chance of the state respecting the restitution award within the 90-day limit set out by the tribunal. According to analytics however, this did not seem to be the case. If this is the case, it will leave Zimbabwe with a debt to its investors amounting to approximately USD 196 million to the von Pezold family and approximately USD 125 million to the corporate claimants.[94]

[93] Ibid, para 918-21.

[94] Ibid, para 926-933.

6. Analysis

The purpose of this thesis was to analyse ICSID arbitration through the critical school of TWAIL. The question asked was what kind of relation between the global north and the global south that is furthered through this particular part of international law. This analysis addresses this question by looking at the collected material and analysing how this part of international investment law stands against the TWAIL hypothesis.

The global expansion of private companies along with a conception of superiority is the foundation on which FDIs of today were built on during the informal empire. Even though World War II changed the world in many ways, FDIs were still important and the foundation of the legal world order followed into the post-colonial era.

The UN discussions on the problem of sovereignty and natural resources were as one could expect not a walk in the park. To avoid the unpleasantness of politics, the World Bank created the ICSID as a technical mechanism that was *prima facie* neutral. As a result, the discussions in the UN in the 1970's on natural resources and expropriation seemed to have reduced importance since the problem of resolving these issues emerging from investments had already been given a solution in international law. When viewing this history, it seems that the World Bank created a shortcut whereby avoiding and reducing political influence. Notably, the World Bank that institutionalized this mechanism was created in Europe and is an organization of the global north with western view and values.

With this foundation laid for the ICSID, the 1990's resulted a rapid development of private FDIs. This lead to an increasing role of ICSID where BITs were signed seemingly automatically. Drawn up by states in the global north, model treaties with broad scopes were clearly investor-friendly providing much protection for the investors. The BITs seem to presume that

the investor is the weaker party in need of protective instruments. This could however stand out as a false presumption since many companies with investments in foreign states have both the incentive and means to dispute in an arbitral proceeding. In fact they are often covered by insurance in the case of e.g. expropriation that eliminates the risk of the investment. Thus, private companies perhaps have a greater advantage than, e.g., a state that is developing financially and not wanting to take the risk of losing in a procedure.

Despite that entering a treaty is voluntary, it is appropriate to problematise whether or not this in fact was so for the parties in question when entering and after entering a BIT. The fear of missing out on possible FDIs seems to have made BITs a necessity for a state wanting economic growth. When constituting the ICSID the World Bank stressed that the procedure was ad hoc and completely voluntary. Notably however this was only voluntary when agreeing to the ICSID as dispute resolution centre in, e.g., a BIT after which a state party was bound to this under the maxim *pacta sunt servanda*. Thus, what would seem as voluntary agreements and mechanisms might be criticised as the actual alternatives were scarce and the choice not to conclude BITs almost unreasonable to consider.

The practical use of BITs in the 1990's is interesting. Even though BITs were considered favorable for both parties, the UN study shows that BITs were not linked to an increase of FDIs to a state. In practice this means that the state of the global north securing protection for their private investors while the global south does not secure FDIs. The other trend was the informal use of BITs.[95] One could easily imagine that a weaker party, even when right, would not want to risk a high award and therefore choose a slightly unfavorable settlement instead of losing if bringing claims to the ICSID Tribunal.

[95] See sub-chapter 3.3.2.

Even though ICSID cases were a rarity during the 1990's the numbers have increased rapidly in recent years. The reasons for this are not investigated in this thesis. Speculating however, as BITs only became important first during the 1990's it is plausible that the possibilities for private investors to bring claims and what it meant in terms of what they could win out of it became clear some years after the BITs came into force.

The aim when constituting the ICSID was to create an effective forum for disputes. This aim has undoubtedly been reached. The enforcement regulations of the ICSID convention are very effective. However, political pressure is made possible through this part of the convention, which in the worst case can result in an ICJ procedure for not complying with the ICSID convention.

The power to bring claims creating multi-million dollar awards is given through BITs with an ICSID clause to private companies. Consequently, as seen in the Swiss/German claims against Zimbabwe, this can lead to a sovereign state being in large debt to private entities. Also, the case against Zimbabwe is a concrete example of how the ICSID system brings public issues into the confidential arena of arbitration. That this case became public is due to the parties' choice to make it public, it could just as well have been kept from the public eye. Since this clearly is an area of international law with large awards and questions concerning the public it is startling how secretive it is. Not only is it delimitating the public from getting involved in issues concerning them. It also makes it more difficult for researchers to fully analyse and comprehend the effects of this system. It is worth questioning if the companies wish to keep its disputes private is worth the loss of public observation of matters that concern them e.g., natural resources of states.

7. Conclusion

The main hypothesis of TWAIL is that there is inequality imbedded in international law between the global north and the global south. From my analysis of the history ICSID mechanism, the practical use of ICSID in BITs and exemplified by a case, it is possible to say that this particular mechanism furthers relations between the global north and the global south that correspond to what the general TWAILer think. This current system in international law seems to be upholding a relation favouring the party investing in another state, which of historical reasons are capital-exporting states in the global north. The historical events, practical impacts and case law in this thesis are not in any way exhaustive. Nevertheless, from the research conducted they seem to be the most important and crucial factors that have had an impact on the way investors-state arbitration has developed and is being used.

The argument in this thesis is not that the conduct of the World Bank or states of the global north is unlawful or in any way not in accordance to international law. The ICSID mechanism and BITs are in fact international law in itself. However, the system seems to be upholding and furthering a world order established by capital exporting states of the global north that is facilitating power and control over natural resources in the global south.

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