Towards an effective and efficient Multilateral Investment Court in Sub-Saharan Africa: Combating Corruption.

By:

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Introduction

The following is an extract from the foreword of the United Nations Convention against Corruption (UNCAC) by the then Secretary General of the United Nations Kofi A, Annan:

> Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing

world that its effects are most destructive. It is apparent, based on this statement, that corruption is a global challenge.

Pointedly, although the problem of corruption is widespread, in Sub-Saharan Africa, corruption is endemic. There is surmounting evidence that corruption is rapidly impairing political, economic and social development in the Sub-Saharan region of Africa. The effects of corruption on economic growth and economic efficiency have discouraged foreign investment in that part of the African continent. Given the prevalence of corruption, the establishment of a Multilateral Investment Court (MIC) would be noble and timeous in Sub-Saharan Africa. The MIC would offer a platform for a strong dispute-resolution mechanism in dealing with corruption, and this would be mutually beneficial to foreign investors and Sub-Saharan African states. Foreign investors need to hedge their investments and the African states need foreign investment for their economies to grow. An assurance of an independent and efficient corruption-related dispute settlement mechanism would boost investor confidence, thereby attracting investment and development in the region.

An overview of corruption in Sub-Saharan Africa

In 2004, corruption reportedly cost Africa approximately $48 billion annually, a figure which increased to $140 billion by October 2022. Past and present global surveys of corruption conducted by anti-corruption institutions such as Transparency International's Corruption Perception Indices, Mo Ibrahim Foundation's Governance in Africa Reports, and Afrobarometer, among others, proved that most Sub-Saharan African countries are generally among the most corrupt countries in the world. The current prevailing levels of corruption in most Sub-Saharan African countries raise great concern. The 2021 Corruption Perception Index (CPI) indicates that Sub-Saharan African countries have an average score of 33 out of 100. Unfortunately, the score has not improved much since then. The least three African countries on the CPI are Guinea at 17%, Somalia at 13% and South Sudan at 11%.

Corruption in Sub-Saharan Africa appears to be driven chiefly by political leaders. For instance, the late President of Gabon, Omar Bongo's deposits in banks in Cyprus, Dubai, France, Greece, Switzerland, and the United States added up to $280 million. In Nigeria, about $400 billion was stolen and stashed

away in foreign banks by past corrupt leaders before the return to democratic rule in 1999, while the former Nigeria's Economic and Financial Crimes Commission (EFCC) Chairman, Nuhu Ribadu claimed that over 64 trillion naira (about $507 billion US dollars) were looted by past leaders. In some corruption cases, it would be a close relative of the country's leader who perpetrates corruption. For example, in Equatorial Guinea, President Teodoro Obiang Nguema Mbasogo's son, Teodoro Obiang Junior, spent millions of dollars of State funds to finance his extravagant lifestyle, which included a luxurious property in Malibu, a Gulfstream private jet, Michael Jackson memorabilia and an incredible car collection. In a bid to protect those assets acquired through corruption and to avoid prosecution, it has been observed that several political leaders in Sub-Saharan Africa perpetually seek re-election. When the stakes for remaining in office are so high, candidates float the election process by buying votes or rigging an election, as was observed in Nigeria's 2007 elections.

Effects of corruption on investment in Sub-Saharan Africa

Of note, some economists, in the 1970s, claimed that certain types of corruption could be a necessary evil because they loosen rigid bureaucracy and allow for a faster way of transacting business. Another view is that corruption has the biggest role in supplementing the income of millions of people in Africa, especially for those lacking political and social support While this can be true, it has to be noted that corruption in investment transactions is at a grand scale, and mostly benefits people who are politically affiliated. These benefits are unlikely to trickle down to those at the bottom of the social ladder.

Investors typically find themselves in a dilemma when dealing with political and business leaders in Sub-Saharan countries. Where corruption has become institutionalised, they may face retribution for refusing to participate, while at the same time, they face prosecution for participating in the corrupt act. In most cases, State officials who would have unsuccessfully solicited for the bride would retaliate against the investor for refusing to comply with the demand. Yet, because contracts procured through corruption are voidable, the investor stands to lose again if the other party chooses to invalidate the contract. The case of *World Duty Free v Kenya* stands as a good example in this respect because, in the end, the investor lost the contract and compromised their integrity as well. The Claimant paid the then President of Kenya approximately

ten million United States dollars as a personal donation, while they were negotiating an investment contract. In this case, it was concluded that the 'payment must be regarded as a bride made to obtain a favourable conclusion to the investment contract. It was thus concluded that it did not constitute a legitimate donation.

The Need for a MIC in Sub-Saharan Africa

Currently, there is no dispute resolution forum that can attend to investment corruption cases in Sub-Saharan Africa. There are three leading anti-corruption instruments in Africa the Southern Africa Development Community (SADC) Protocol against Corruption of 2001, the African Union Convention in Preventing and Combating Corruption of 2003 (AUCPCC) and the Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption (ECOWAS Protocol). All these three have failed to provide a dispute resolution mechanism for investment corruption cases. The United Nations Convention against Corruption (UNCAC) which is widely held to be a universal anti-corruption legal instrument, does not adequately address the problem highlighted in this paper. Article 66 of the UNCAC deals with dispute resolution and it states that 'States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation.' If the two parties fail to settle their dispute through negotiation, they can refer it for arbitration upon submission of a written request by one of the parties. If the arbitration fails to resolve the dispute within six months, the parties or one of the parties can refer the dispute to the International Court of Justice. The dispute resolution mechanism is only used in handling conflicts in the interpretation of the provisions of the Convention among Member States and not in prosecuting corruption acts. Therefore, any corruption that occurs at the international level is left to be dealt with through traditional arbitration, which process is fraught with shortcomings. These challenges include the following.

The definitional challenge

Definitional challenges arise because corruption is not a precise term with a universally accepted definition. Even international law lacks consensus on whether a conduct constitutes corruption or not. Related to this, tribunals have faced the challenge of defining the alleged conduct as corruption based on the

applicable law.

Proof of alleged corruption

This alludes to the standard, burden, and methods of proof. More often, the evidence in corruption cases is hidden, requiring the arbitrators to infer corruption from circumstantial evidence. While the use of indirect evidence is permissible, disagreement arises over the role of so-called “red flags” or “indicators” of corruption.

Role of the tribunal

The current role of arbitrators is not clear with some scholars indicating that arbitrators in cases of corruption related to foreign investors face risks as accessories to criminal activity if they fail to investigate issues of corruption. Compared to national investigating authorities, arbitral tribunals possess limited powers to compel the production of evidence and to conduct searches. As such some corruption cases are not being dealt with thoroughly due to these limited powers.

Consequences

Because arbitrators are applying different laws depending on the jurisdiction of the parties, their orders have brought about different consequences in the precedence of *corruption cases*. For example, in the World Duty-Free case, it was held (applying English and Kenyan law) that the claimant’s corruption required the dismissal of its claim, Yet in the *Spentex Netherlands B.V. v Republic of Uzbekistan, ICSID* case, the tribunal dismissed the claim on jurisdictional grounds based on its finding of corruption but ordered the state to financially contribute to an anticorruption institution or face an adverse cost order.

Emerging issues

Corruption is an evolving phenomenon and new discourses on the matter are constantly emerging. Therefore, national laws, regional laws and arbitrators are not abreast of the changing features of corruption.

Combating corruption through the MIC.

Corruption is thriving in most of Sub-Saharan Africa because of several factors. According to Transparency International, Sub-Saharan African countries are still a long way off in their fight against corruption. While most Sub-Saharan countries do have strategies and mechanisms to fight corruption which include anti-corruption agencies and legal frameworks, most of these strategies deal with corruption from within a country's borders. problem with national mechanisms to fight corruption is that they do not have trans-border jurisdictions and they can be manipulated to serve the desires of the politics of the day. Thus, there is a need to deal with corruption from beyond a country's borders. Combating corruption from the perspective of Sub-Saharan Africa must be a regional priority and the establishment of MIC must be a vehicle for this course. The rampant corruption related to foreign investment in Sub-Saharan Africa has brought out an apparent gap in the dispute resolution process in investment matters.

A MIC will assist in setting evidential standards for corruption cases. To this effect, Tussopov gives an example of considering red flags as proof in corruption cases that have a bearing on investment. The practice of considering red flags as evidence is not novel in international law as it was applied in a prominent international investment case of *Metal-tech Ltd v Republic of Uzbekistan*.

Tussupov further views the setting up of a MIC as a way of creating a solid platform to uniformly deal with corruption cases. This would help in restoring or rather building the integrity of the investor-state dispute resolution forum. The effectiveness and efficiency of the MIC in combating corruption will be enhanced by its independence and its resourcefulness in engaging and collaborating with anti-corruption agencies. Such collaboration would enable the MIC to utilise more investigative powers in handling its corruption cases. The consideration to involve investigative agencies in dealing with corruption cases found an emergency in a dissenting view from Vicuna in *Siag v Egypt*. In this case, the dissenting Arbitrator made it clear that the involvement of Interpol could have possibly assisted in examining the allegations brought by the parties before the tribunal. An MIC would also operate under rules or guidelines that would be binding to the judges/ arbitrators as well as to the parties. Such rules or guidelines could assist in clarifying current grey areas of evidence, disclosure, and cooperation. Considering the above discussion, it is

important to expedite the establishment of a MIC in Sub-Saharan Africa.

The Challenges likely to be faced by the MIC

The MIC will likely face several challenges through its corroboration with other law enforcement agencies and the Interpol. The challenges include the following.

Lack of strong domestic legal framework

According to Tussupov the existing international investment laws and arbitration standards are not being supported by a strong domestic legal framework to combat corruption within Sub-Saharan countries. Even in instances where Sub-Saharan Countries have criminalised corruption and yet they have neglected to provide a platform for cooperation in trans-border corruption crimes which are investment-related. This however can be overcome through lobbying for legal reform.

Political influence

Political interference is another factor exacerbating corruption. Political interference comes in different forms, including bribes, blackmail, threats, and murder. This is a serious challenge because most people who are involved in corruption are politically affiliated. However, since the MIC will not be confined to one country this can water down political influence and politicians might feel obliged to act against corruption to avoid prosecution and tarnishing their integrity.

Evidentiary challenge

There is also a problem of finding enough proof to lay criminal charges against perpetrators of corruption. Perpetrators of corruption may escape from their countries to circumvent justice. This challenge can be averted by appealing for assistance to Interpol. Interpol, as a global policing agency, can assist in transnational corruption cases. Through Interpol, red notices can be issued to facilitate the cooperation of other countries to extradite any fugitive. Once an individual has been placed on red notice, they will not be able to travel freely, open bank accounts or do business in another country. Such punitive actions, although they may violate the right of an accused to be innocent until proven

guilty, would help bring fugitives to justice. However, it is worrying that there is a global trend in which Interpol is being abused and used to serve the interest of the government. The MIC will have to monitor the cases in which they are dealing to ensure a speedy resolution to investigations and adherence to the letter of the law.

Conclusion

Corruption is rampant in Sub-Saharan Africa, and it costs the entire continent around $140 billion each year. Such a loss adversely impacts the economic growth of the region and causes investors to lose confidence in the region. Although national anti-corruption bodies, policies and courts have been established in the region, they do not instil confidence in potential investors in the region. This is so because most African judiciary systems and independent bodies are state captured. These scenarios and the state of corruption in Sub-Saharan Africa grant motive for the creation of a Multilateral Investment Court in Sub-Saharan Africa. This move is anticipated to yield significant benefits in combating corruption in Sub-Saharan Africa.

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