



# CORRUPTION AND INVESTMENT ARBITRATION IN AFRICA

BY:  
KENNETH OHENE-MANU  
AND WILFRED MUTUBWA



## **OVERVIEW OF CORRUPTION IN AFRICA AND SOURCES OF LAW**

Corruption is indeed a serious canker in world with Africa being no exception. Countries on the continent continue to lose billions of dollars every year through acts of corruption. According to Transparency International, one of the foremost anti-corruption watchdogs in the world, out of the ten most corrupt countries in the World, six of them are countries in Africa.<sup>1</sup> In a survey conducted by the African Union in 2002, it was also estimated that African Countries lost up to 150 billion United States Dollars a year to corruption.<sup>2</sup> There are various sources of laws on corruption. These sources include International Conventions such as the UN Convention Against Corruption, the African Union Convention on Preventing and Combating Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Other sources on the law of corruption include national laws of states such as the United States Foreign Corrupt Practices Act and the United Kingdom's Bribery Act.

In Africa most countries have domestic laws that are supposed to tackle corruption. Unfortunately and perhaps surprisingly, corruption has found its way into Investment Arbitration across the world and in Africa.

## **ISSUES THAT ARISE FROM CORRUPTION AND INVESTMENT ARBITRATION**

In contemporary times, there has been an increase in allegations and perceptions of corruption in Investment Arbitration in developing countries including several countries in Africa.<sup>3</sup> There are several issues that arbitral tribunals in investment arbitration are faced with and have to address when allegations of corruption arise. The first issue that usually arises is on the tribunal's jurisdiction and the arbitrability of issues of corruption.<sup>4</sup> The question that arises in relation to corruption in investor-state arbitration is whether or not an investor that has 'allegedly' engaged in corruption is still entitled to enjoy the benefits of a Bilateral Investment

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<sup>1</sup> Transparency International, 'How Corruption Weakens Democracy'

<[https://www.transparency.org/news/feature/cpi\\_2018\\_global\\_analysis](https://www.transparency.org/news/feature/cpi_2018_global_analysis)> accessed 10 June 2019

<sup>2</sup> BBC News, 'Corruption 'costs Africa billions'', <<http://news.bbc.co.uk/1/hi/world/africa/2265387.stm>> accessed 10 June 2019

<sup>3</sup> Mark W. Friedman, Floriane Lavaud and Julianne J. Marley, 'Corruption in International Arbitration: Challenges and Consequences' Global Arbitration Review, 2017

<sup>4</sup> Younna Schuch, 'Tackling Corruption in International Arbitration – Key Issues and Challenges', Young Arbitration Review, 2011

Treaty (BIT) entered into by its home state with the host state. The general trend is that because corruption is illegal in most civilized jurisdictions, investments procured with corruption 'sin' against domestic law. This has led to the case where corruption has been used as a shield by states to challenge the jurisdiction of tribunals.<sup>5</sup> Another issue that normally arises is the burden of proving corruption and the standard of proof to be applied at the arbitral tribunal. There are generally two standards of proof of corruption before investment arbitration tribunals.<sup>6</sup> The first standard of proof is the proof to a balance of probability and proof beyond reasonable doubt. Tribunals usually adopt the 'clear and conniving evidence' measure of proof when considering allegations of corruption.<sup>7</sup>

### **CORRUPTION IN INVESTMENT ARBITRATION USED AS A SHIELD OR A SWORD**

The issue of corruption in investment arbitration could either be deployed as a 'shield', that is a defence by state respondents in an investment claim or as a 'sword' and used by investors to bring a claim against the host state.

#### **Corruption in Investment Arbitration as a 'shield'**

The issue of corruption has been successfully used by states as defence during investment arbitrations. It has successfully been used by the Republic of Kenya in the ICSID case of *World Duty Free Company Limited vs Republic of Kenya*.<sup>8</sup> In this case, the ICSID tribunal held that World Duty Free, a company which had brought an action against the Government of the Republic of Kenya at ICSID, was not entitled to maintain an investment claim under a contract infected with corruption. Evidence was led to the fact that World Duty Free had obtained a contract with the Government of Kenya for *inter alia*, the construction of duty free complexes by paying a bribe of Two Million United States Dollars to the former President of Kenya. In its conclusion the ICSID tribunal stated that it was not in a position to enforce claims founded on a contract procured by corruption. Other cases at ICSID not involving African countries such as

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<sup>5</sup> *ibid.*

<sup>6</sup> Dr. Khrushchev Ekwueme, 'Corruption in the Context of Investment Arbitration' (Presentation delivered at the Maiden Edition of the Africa Arbitration Academy held in London, United Kingdom on 13<sup>th</sup> June, 2019).

<sup>7</sup> *ibid.*

<sup>8</sup> ICSID Case No. ARB/00/7, Award (Oct. 4 2006)

*Metal-Tech v Republic of Uzbekistan*<sup>9</sup> have had arbitral tribunals having the same view as the *World Duty Free* case.

### Corruption in Investment Arbitration as a 'sword'

There have been instances where corruption has been relied upon by investors to bring a claim against the host state. This mostly occurs when host states employ retaliatory measures to 'punish' investors from refusing to pay bribes to the government.<sup>10</sup> There is however a very high evidentiary hurdle that an investor has to clear to prove corrupt conduct on behalf of a state.<sup>11</sup> The ICSID tribunal in *EDF (Services) Limited v Romania*<sup>12</sup> stated that in the absence of clear and incontrovertible proof and evidence of corrupt conduct which can directly be pointed to the state, a breach of protections offered by the state cannot be argued. The tribunal however acknowledged that if the host states' regulatory measures are driven by ill will toward an investor as a result of the investor's refusal to pay a bribe to state officials, there will be a breach of the principles of transparency and legitimate expectations.

### Conclusion

The treatment of corruption in investment Arbitration by investment tribunals and parties to investment arbitration remains a very topical issue. Depending on who is making the allegation of corruption and the circumstances of the facts of the dispute, the final determination of the arbitral tribunal may vary. Pertinent issues such as states 'getting away with' the corrupt acts of their agents and using same a defence in arbitration proceedings as in the case of Kenya, continue to stir up a lot of debate among commentators of international arbitration.

Originality – 30/40

Depth – 20/30

Presentation – 20/30

**Total – 70%**

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<sup>9</sup> ICSID Case No0. Arb/10/

<sup>10</sup> Ekueme (n 6)

<sup>11</sup> Edmund Bao, 'Corruption as a 'Sword' in Investor Arbitrations', (Kluwer Arbitration Blog, 2018)

<sup>12</sup> ICSID Case No. ARB/05/13

## **TABLE OF CASES**

1. EDF (Services) Limited v Romania ICSID Case No. ARB/05/13
2. Metal-Tech v Republic of Uzbekistan ICSID Case No. Arb/10/
3. World Duty Free Company Limited vs Republic of Kenya ICSID Case No. ARB/00/7, Award (Oct. 4 2006)

## **TABLE OF LEGISLATION**

1. African Union Convention on Preventing and Combating Corruption
2. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
3. United Kingdom Bribery Act
4. United Nations Convention Against Corruption
5. United States Foreign Corrupt Practices Act

## **JOURNAL ARTICLES**

1. BBC News, 'Corruption costs Africa Billions', <<http://news.bbc.co.uk/1/hi/world/africa/2265387.stm>> accessed 10 June 2019
2. Ekueme K. Dr., 'Corruption in the Context of Investment Arbitration' (Presentation delivered at the Maiden Edition of the Africa Arbitration Academy held in London, United Kingdom on 13<sup>th</sup> June, 2019.
3. Friedman M., Lavaud F. and Marley, 'Corruption in International Arbitration: Challenges and Consequences' Global Arbitration Review, 2017
4. Schuch Y., 'Tackling Corruption in International Arbitration – Key Issues and Challenges', Young Arbitration Review, 2011
5. Transparency International, 'How Corruption Weakens Democracy'

<[https://www.transparency.org/news/feature/cpi 2018 global analysis](https://www.transparency.org/news/feature/cpi_2018_global_analysis)> accessed 10 June 2019