

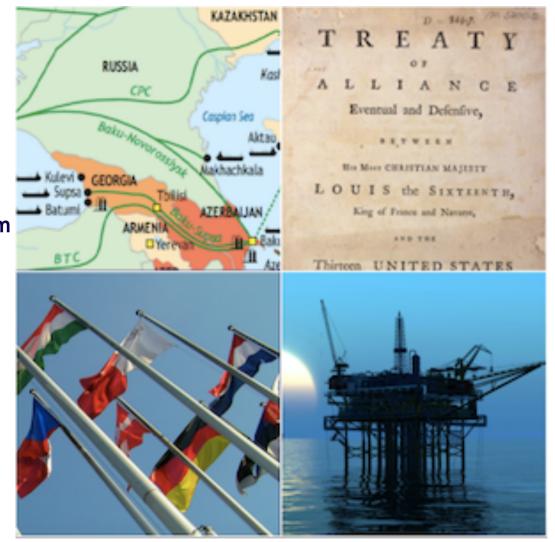
# Corruption and Investor-State Disputes – Unites Nations Convention Against Corruption Perspective

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#### Why Should the States Care?

- The system of investor-State enables private business to assert direct claims against governments in international arbitration
- Tribunals consisting of private arbitrators appointed for each case decide whether the host state breached it obligations.
- Awards of such tribunals are final and mandatory and may reach may reach hundreds of millions or even tens of billions of dollars
- Awards touch upon sensitive areas such as protection of environment, regulation of major financial institutions or expropriation for public purpose.

#### Effect of corruption

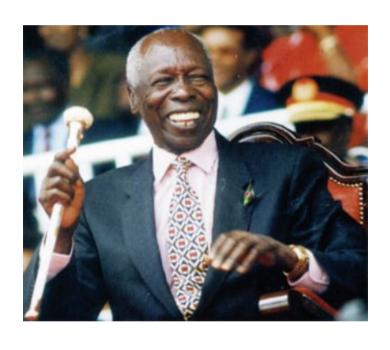
- Allegations of corruption can lead to tribunals saying they have no jurisdiction or that the claim is inadmissible, or can lead to decisions that States failed to provide fair and equitable treatment of investors or breached other rules of international law.
- Remedies in the form of damages to the investor, share in costs of proceedings or even a "recommendation" to make a payment to a UN anticorruption agency

## Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, 8 March 2017



- "(a) did Claimants make an overpayment as a part of the purchase price; and (b) was that overpayment made to Ms Karimova?
  ... (c) was Ms Karimova an 'official' of the Government and (d) was the overpayment intended 'for performance or non-performance of certain action, which the official must or could have officially performed, in the interests of the person giving a bribe'?"
- Tribunal does conclude that President's daughter was recipient of any alleged overpayment
- Although Ms Karimova was intended target of the alleged overpayment, corruption under Uzbek law not proven as she had no official role at the time

## World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, 4 October 2006



- Claimant alleged Kenya violated various contractual obligations and international law by illegally taking and destroying Claimant's property
- The Claimant filed a document in the arbitral proceedings that revealed the Claimant previously had made a covert payment to the former President of Kenya, Daniel arap Moi, in order to conclude the 1989 Agreement.
- Tribunal: the Claimant had no right to pursue or recover under any of its pleaded claims, all of which arose from that 1989 Agreement (para. 179).

#### **Economic Crimes in Investor-State Disputes**

- The State is a party to arbitration, but also regulates, enforces laws, adjudicates and investigates crimes on its territory.
- In addition, State representatives may also be involved in committing economic crimes relevant to the disputes.
- Allegations of economic crimes raise complex questions on the border of public and private law, including whether investor-state tribunals have jurisdiction if the underlying investment was acquired by illegal means.
- How far the tribunals should go in examining allegations of economic crimes and whether the limits lie to their deference to actions of domestic courts?

#### International Consensus without details

- Despite the apparent consensus on international level that crimes such as corruption, bribery, money laundering, international regulations often lack either the necessary detail or the binding force.
- This means that international tribunals often rely on national law and their own understanding of the effect of economic crimes on investor-state disputes.
- UNCAC should play a greater role because of its detailed provisions and universal coverage

### **Key Problems**

- Inconsistent approaches some tribunals want to blame the states, other tribunals want to blame the investor, other tribunals want to blame both
- **Two parallel universes**: international investment law and anti-corruption efforts
- Treaties are normally silent on corruption and bribery
- Some recent treaties do make direct references to the UNCAC (2013 Austria-Nigeria BIT; 2010 Austria-Tajikistan BIT; 2010 Austria-Kazakhstan BIT; 2015 Burkina Faso-Canada BIT; 2013 Guatemala-Trinidad and Tobago BIT)

#### What needs to be done

- Clarify position of States of the applicability of the UNCAC
- Analyze the existing treaties and decisions of investor-state tribunals with the view of compliance of their approaches with the UNCAC
- Reform international investment agreements with clear stipulations of the UNCAC
- Develop recommendations how to approach the issues of corruption consistently with the UNCAC and the ILC Articles on State Responsibility
- Convey the findings to States, arbitrators and other stakeholders

#### Read more and contact

- Yarik Kryvoi, 'Economic Crimes in International Investment Law', International and Comparative Law Quarterly, Volume 67, Issue 3, pp. 577-605 (2018)
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