

‘MATCH FIXING’ IN INVESTOR STATE ARBITRATION: *PROCESS & INDUSTRIAL DEVELOPMENTS LIMITED V FEDERAL REPUBLIC OF NIGERIA*

John S Nyanje*

1. Introduction

Match fixing has been defined in organised sports as the act of playing or officiating a match with the intention of achieving a pre-determined result, which is seen as violating the rules of the game and often the law.¹ It sometimes takes the form of a player deciding to commit certain errors during the match in order to achieve a certain result. This is mostly influenced by bribery and blackmail from bookmakers.² It seems that investor-state dispute settlement (ISDS) is now so lowly valued that it would be comparable to the rot of match fixing in competitive sports. *Process & Industrial Developments Limited (P&ID) v Federal Republic of Nigeria*³ is a classic example of how the rot and corruption in ISDS is endemic especially in Global South states. It is an example of how players in an ISDS case can collude to achieve a desired outcome at the expense of truth and justice.

* LLB (Africa Nazarene); LLM (MIDS). PhD and research/teaching fellow for the multiplicity cluster for excellence on research in African international economic courts.

¹ Gallardo Alfonso Myers, ‘Corrupción en el deporte. Represión penal ¿necesaria?’, in Carrillo Ana and Gallardo Alfonso Myers (eds) *Corrupción y delincuencia económica: prevención, represión y recuperación de activos*, Universidad de Salamanca, Ratio Legis, 2015, 195-216.

² Gallardo, ‘Corrupción en el deporte. Represión penal ¿necesaria?’, 195-216.

³ See *Process and Industrial Developments Ltd v Ministry of Petroleum Resources of the Federal Republic of Nigeria*, (Part Final Award on Liability), 15 July 2015; See also *Federal Republic of Nigeria v Process & Industrial Developments Limited*, (Award on Merits), EWHC 2379 (Comm), (4 September 2020).

As I have argued elsewhere, it is not in dispute that ISDS sits at the lowest levels of confidence today than it has ever done since its inception.⁴ Currently, ISDS comes under intense criticism from almost all states in the world. This criticism targets different aspects of ISDS, from the excessive powers of investors to institute claims independently, to the constitution of arbitral tribunals and the lack of consistency and predictability of decisions, as well as the huge sum of money awarded to investors as damages in these disputes.⁵ This case, *P&ID v Nigeria*, certainly constitutes a classic example of these questions that reformers of the ISDS system demand.

Indicative of the gravity of the situation, corruption in ISDS has been addressed at head of state level at the United Nations (UN) General Assembly. During the 74th General Assembly of the UN in New York, President Muhammadu Buhari of Nigeria stated the following:

Organised criminal networks, often acting with impunity across international borders present new challenges where only collective actions can deliver genuine results.... This is true in the battle against violent extremism, against trafficking in people and drugs and against corruption and money laundering.... The present Nigerian government is facing the challenges of corruption head-on. We are giving notice to international criminal groups by the vigorous prosecution of the P&ID scam attempting to cheat Nigeria of billions of dollars.⁶

To many in attendance at the UN General Assembly when President Buhari mentioned Process and Industrial Developments Ltd (P&ID) they may have thought that it was an organised crime group (it could as well be). But this was a multi-national company awarded one of the biggest natural gas projects in Africa that was estimated to be worth almost 7 billion dollars and which was engaged in protracted legal battle with Nigeria.

⁴ John Nyanje, 'Hegemony in investor state dispute settlement: How African states need to approach reforms', *Afronomiclaw.org*, 7 September 2020.

⁵ Nyanje, 'Hegemony in investor state dispute settlement: How African states need to approach reforms'.

⁶ Quoted from Damilare Famutiwa, 'P&ID: President Buhari issues strong warning to international firms', *Nairametrics*, 25 September 2019.

2. Corruption in ISDS

Traditionally, corruption in ISDS has operated as a shield in the sense of how an investor makes an investment in the host country and how the host state uses corruption as a shield to defend itself from the manner in which the investments are made. Perhaps, it is instructive to consider the notorious case of *World Duty Free Co Ltd v Republic of Kenya*⁷ which is the *locus classicus* on corruption cases in ISDS. The case amongst similar others,⁸ has generated debate in the academy and amongst practitioners. Whilst the consequences of the same allegation for the respondent state remains shrouded in obscurity, a lot of emphasis has been placed on the allegation of corruption, the burden and standard of proof,⁹ the duties of the tribunal faced with the allegations¹⁰ and the consequential bar on the investor's claims.¹¹

As has been argued by David Orta and others,¹² a survey of the last two decades of ISDS awards involving corruption issues suggests a clear roadmap for states to avoid liability. States can raise corruption allegations at virtually no risk, as even with presumptions or no direct evidence, a tribunal may find corruption to have occurred. In so doing, states can gain effective immunity from liability for acts that may constitute violations of international investment law, with no consequences for the state's own illicit acts. This landscape has raised serious concerns of fairness and has given rise to criticism of the

⁷ *World Duty Free Company v Republic of Kenya* (Award on Merits) ARB/00/7, ICSID, (4 October 2006).

⁸ *Siemens AG v Argentine Republic* (Award on Merits) ARB/02/8, ICSID, (6 February 2007); *Azpetrol International Holdings BV, Azpetrol Group BV and Azpetrol Oil Services Group BV v Republic of Azerbaijan*, (Award on Merits), ARB/06/15, ICSID (8 September 2009); *Metal-tech Ltd v Republic of Uzbekistan*, (Award on Merits), ARB/10/3, ICSID, (4 October 2013).

⁹ See Florian Haugeneder, 'Corruption in investor-state arbitration', 10(3) *Journal of World Investment and Trade* (2009) 323-339; Carolyn B Lamm, Rahim Moloo and Hansel T Pham, 'Fraud and corruption in international arbitration' in MA Fernandez-Ballesteros and David Arias (eds), *Liber amicorum Bernardo Cremades*, La Ley, Madrid, 2010, 699-731.

¹⁰ Doug Jones, 'The remedial armoury of an arbitral tribunal: The extent to which tribunals can look beyond the parties' submissions', 78(2) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* (2012) 102-122.

¹¹ Mohamed Abdel Raouf, 'How should international arbitrators tackle corruption issues?', 24(1) *ICSID Review – Foreign Investment Law Journal* (2009) 116-136.

¹² David Orta, Brian Lowe and Lucas Loviscek, 'Allegations of corruption in investment treaty arbitration: The need for reform', *Expert Guides*, 2019.

predictability and legitimacy of ISDS, making apparent the need for substantial reforms.

In the instance of *P&ID v Nigeria*, the corruption described above is coupled with allegations of lawyers being bribed by investors to not defend the case dutifully in order to have the investor easily win the case. This is what we term as ‘match-fixing’ in ISDS.

This case review will delve into assessing corruption in ISDS and how tribunals and courts have determined such questions. The review will look into the arbitration proceedings in *P&ID v Nigeria* as well as the proceedings in the English and US courts that have now unveiled the challenges and setting aside of the award on the basis of corrupt practices by P&ID as well as Nigerian officials and lawyers.

The first part of the case review is the introduction and overview of corruption in ISDS. The second part of the case review will look into the facts of the case, the different proceedings and the different legal issues raised at the different proceedings of the case, primarily the arbitration and the proceedings before the English courts. The brief will then conclude with what the case offers for the future of ISDS in African states.

3. The mafia-like plot

The story of P&ID is so fantastic as to sound straight from a Sicilian mafia book. In 2008 the Nigerian government invited bids for development of infrastructure to solve its decades long problems with gas flaring. However, the Nigerian government hardly found takers among international oil companies (IOCs) when it laid out its proposal despite it being one of Africa’s more vibrant economies. Instead, thirteen small and virtually unknown companies were finally granted concessions for the project. One of these was P&ID. Where Nigeria’s trusted international energy partners feared to tread, an obscure company boldly ventured.¹³

¹³ Fikayo Akerodolu, ‘Nigeria and P&ID: The story behind the \$9.6 billion judgement’, *Stears Business*, November 2019.

On paper, P&ID was an engineering and project management company. Its founders and principals, Michael Quinn and Brendan Cahill, both Irishmen, claimed to have over 60 years of combined experience of project management and execution in Nigeria. In reality, P&ID was nothing but a shell company registered in the British Virgin Islands with no operational history. It did not even have a website yet it was given a mandate to undertake one Africa's biggest gas projects.¹⁴

Michael Quinn was known to have strong ties with senior government officials and even presidents in Nigeria. P&ID was not Quinn's first government contract. In 2001, Quinn was involved in a failed contract to repair and upgrade 36 British-made scorpion tanks in Nigeria. The Irishman had charged the Nigerian army for tank parts that were never delivered, costing the government millions of dollars and earning him a considerable fortune. Quinn was eventually charged with espionage and handling secret military materials in 2006, but the case was dropped within the year amid claims from some prosecution lawyers that the government had intervened.¹⁵

In the period after award of the contract, P&ID's ownership was transferred to two Cayman Islands-based funds, VR Advisory Services Ltd, which has a 25% stake, and Lismore Capital which owns 75%. Lismore Capital is owned by a London based lawyer who acted for P&ID during the arbitration.¹⁶

3.1 Arbitration proceedings

The legal dispute between Nigeria and Process & Industrial Developments Limited (P&ID) arose over a purported repudiation by Nigeria of a gas supply and processing agreement ('GSPA') entered into on 11 January 2010 by both parties for the various obligations of production of gas in Nigeria.¹⁷

¹⁴ Akerodolu, 'Nigeria and P&ID: The story behind the \$9.6 billion judgement'.

¹⁵ Akerodolu, 'Nigeria and P&ID: The story behind the \$9.6 billion judgement'.

¹⁶ Spotlight on corruption, 'Sham litigation or legitimate investor claims? The extraordinary case of *P&ID v Nigeria*'.

¹⁷ BBC, 'Nigerian Government ordered to pay \$9bn to private gas firm,' 16 August 2019, (analysing the *Nigeria v P&ID* case, the BBC discusses the dispute and the final arbitral award issued against Nigeria).

The terms of the GSPA are such that Nigeria was to arrange for the supply of wet gas (natural gas) to P&ID's gas processing facility, which it intended to build in Nigeria. In exchange, P&ID would process the wet gas and return approximately 85% of it to the Government of Nigeria ('the Government') in the form of lean gas.¹⁸ The GSPA arrangement was also such that it required the Government of Nigeria to construct pipelines and arrange facilities to transport the wet gas to P&ID's facilities. The Government of Nigeria, failed to construct the pipelines for the transportation of the wet gas and delayed the agreement for three years.¹⁹

P&ID viewed this failure as a repudiation of the contract²⁰ and commenced, in August 2012, an arbitration action against Nigeria before a London tribunal. In July 2015 the tribunal decided that the Government had repudiated the agreement by failing to meet its obligations.²¹

3.2 The evidence and proceedings

At the tribunal hearing, Michael Quinn explained that P&ID had already invested \$40 million on preparatory engineering work to make sure they could execute the project even before the contract was awarded. Interestingly, Theophilus Danjuma, the billionaire one-time Defence Minister and a former friend of Quinn's, revealed in a Bloomberg interview that his company had spent the \$40 million and Quinn was only a consultant.²² He also claimed that Quinn applied for the gas contract without his knowledge.²³ Apart from the money invested, Quinn also claimed that the company had secured (but not

¹⁸ *Process and Industrial Developments Ltd v Ministry of Petroleum Resources of the Federal Republic of Nigeria* (Part Final Award on Jurisdiction), para 3 (2014), (hereinafter *P&ID v Nigeria* 2014). 'Lean gas,' also referred to as 'dry gas,' is 'natural gas that contains a few or no liquefiable liquid hydrocarbons'. What is natural gas? *NatGas.info*, 20 January 2021.

¹⁹ *Process and Industrial Developments Ltd v Ministry of Petroleum Resources of the Federal Republic of Nigeria* (Final Award), para 49 (2017), (hereinafter *P&ID v Nigeria* 2017).

²⁰ In the *P&ID v Nigeria* arbitration action, P&ID 'wrote to the ministry alleging that it had repudiated the GSPA and accepting the repudiation.' See *P&ID v Nigeria* 2014, para 6.

²¹ *Process and Industrial Developments Ltd v Ministry of Petroleum Resources of the Federal Republic of Nigeria*, Part Final Award on Liability, para 78 (2015), (hereinafter *P&ID v Nigeria* 2015).

²² Orta and others, 'Allegations of corruption in investment treaty arbitration'.

²³ Orta and others, 'Allegations of corruption in investment treaty arbitration'.

purchased) land from the Cross River government, as specified in the agreement. In addition, P&ID had gotten confirmation from Addax Petroleum, the oil & gas upstream company that would supply some of the gas, and secured financing for the gas processing facility.²⁴ In short, P&ID was ready to proceed and communicated as much to the Nigerian government the same in May 2010.

Nigeria's lawyers argued otherwise, stressing that P&ID should only be awarded nominal damages (i.e., they should not be compensated for lost future earnings). The government's argument was two-fold: that P&ID had not met its obligations either and that at the onset of arbitration proceedings, it should have sought to mitigate its loss by pursuing other investment opportunities.²⁵

3.3 The award

In 2017, the London tribunal awarded damages to P&ID in the sum of \$6.597 billion with interest at the rate of 7% starting from 20 March 2013. The sum had increased to \$10 billion as of September 2020.²⁶ As has been argued by Ohio Omiunu,²⁷ if enforced, the award would also create contingent liabilities for Nigeria because it poses a significant threat to Nigeria's economy, with the damages amounting to over 20% of the country's foreign exchange reserves as of December 2020,²⁸ and 10% of the total public debt stock for the third quarter of 2020.²⁹

²⁴ Orta and others, 'Allegations of corruption in investment treaty arbitration'.

²⁵ Orta and others, 'Allegations of corruption in investment treaty arbitration'.

²⁶ Oludara Akanmidu, 'Explainer: How Nigeria got hit with a \$9.6 billion judgment debt in London', *The Conversation*, 10 September 2019; (Akanmidu chronicles the series of events that resulted in the judgment debt awarded against Nigeria and also highlights the potential negative impact on Nigeria's foreign reserve).

²⁷ Ohio Omiunu and Oludara Akanmidu 'Reflections on *Nigeria v Process & Industrial Developments Limited*', *New York Journal of International Law and Politics* (May 2021).

²⁸ See *The Nation*, '\$9.6bn judgment: Fraudulent target on our foreign reserve – FG', (30 August 2019); (The article highlights the damaging effect of the judgment debt on Nigeria's foreign reserves. The Minister for Information and Culture Lai Mohammed is quoted saying that '\$ 9.6 billion (about N3.5 trillion) translates to 20 per cent of the nation's foreign reserves.').

²⁹ Nigeria's total public debt stock for the third quarter of 2020 stood at N32.223 trillion or USD84.574 billion; Debt Management Office Nigeria, 'Public debt stock as at 30 September 2020', *Press Release*, 31 December 2020.

4. Proceedings before English courts

Two years after the Final Award was delivered, P&ID filed an application for enforcement in England. On 16 August 2019, an English court ruled in favour of P&ID's application for enforcement of the award which had increased to US\$ 9.6 billion due to the interest on the award.³⁰ However, on 26 September 2019, the court granted Nigeria permission to appeal against its decision and stay enforcement considering Nigeria's investigations into P&ID, and suggestions of fraud, tax evasion and conspiracy.

Thereafter, on 5 December 2019, Nigeria commenced challenge proceedings under Section 67 and 68(2) (g) of the English Arbitration Act 1996 and filed an application for extension of time to bring the challenge.³¹ Nigeria based its application for extension of time on investigation and evidence of alleged bribery from procurement of the contract to arbitration proceedings resulting in the award. Nigeria asserted that it has a *prima facie* case of fraud against P&ID, which justifies the extension of time required to challenge the arbitral award.³²

Nigeria's lead counsel, Mr Howard QC, focused on three key aspects in his submissions. First, he argued that P&ID fraudulently obtained the GSPA by paying bribes to Nigerian government officials. Second, he argued that Mr Quinn (the former chairman of P&ID) gave perjured evidence to the tribunal to give the impression that P&ID was able and willing to perform its obligations under the GSPA. Third, Mr Howard asserted that Nigeria's counsel in the arbitration failed in bad faith to challenge Mr Quinn's false evidence. More shockingly, Howard QC argued that the arbitration counsel for Nigeria had colluded with P&ID to defend the case thinly such that the tribunal would find

³⁰ See *Process & Industrial Developments Ltd v Federal Republic of Nigeria* (Judgment of the High Court of Justice of England and Wales) EWHC 2241 (Comm) (Eng.) (2019).

³¹ *Federal Republic of Nigeria v Process & Industrial Developments Limited (Nigeria v P&ID 2020)* (Judgment of the High Court of Justice of England and Wales) EWHC 2379 (4 September 2020). Nyanje, 'Hegemony in investor state dispute settlement: How African states need to approach reforms'.

³² Nyanje, 'Hegemony in investor state dispute settlement: How African states need to approach reforms'.

in favour of P&ID.³³ Overall, he asserted that the GSPA was obtained by fraud as part of a larger scheme to defraud Nigeria.³⁴

On 4 September 2020, Sir Ross Cranston found that there was a strong *prima facie* case that the GSPA was procured by bribery and granted FRN's applications for an extension of time to challenge the Awards and for relief from sanctions to adduce new evidence.

On 23 January 2023, the substantive application to set aside the Awards began before Mr Justice Robin Knowles in the Commercial Court. Oral closing arguments were concluded on 9 March 2023.

4.1 The determination by the Court

In what can now be termed as a landmark judgement on extension of time in challenges of arbitration awards by English courts, the Court in determining the application, took note of the Kalmneft factors,³⁵ which are factors to be considered material in exercising discretion to extend the time limits for challenging an award. These include: the strength of the application, the length of the delay, whether the respondent contributed to the delay, and whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined. The strength of Nigeria's case on the merit was particularly relevant to the court's discretion.

4.1.1 Fraud in the GSPA and in the arbitration proceedings

The Court held that there was a strong *prima facie* case of bribery involved in procurement of the contract and in the arbitration proceedings. Payments were made to senior officials of Nigeria's Federal Ministry of Petroleum Resources whose positions ensured the approval of the GSPA notwithstanding its deficiencies. Although some of the payments were explained as payments for medical expenses or bonus payments for unrelated projects, the Court found that there was no evidence to support these assertions.

³³ *Nigeria v P&ID* 2020, para 211.

³⁴ *Nigeria v P&ID* 2020, para 211.

³⁵ The Kalmneft factors were adopted from Colman J's judgement in *AOOT Kalmneft v Glencore* [2001] 2 All ER (Comm) 577, [2002] 1 Lloyd's Rep 128.

Regarding the arbitration proceedings, the Court found that there was a strong *prima facie* case that one of the witnesses for P&ID – Mr Quinn – had given perjured evidence. It further stated that there is a possibility that Nigeria’s counsel at the jurisdiction and liability stages of the arbitration had been corrupted. Payments were made by counsel to government officials involved with the GSPA and the Court accepted Nigeria’s submission that these payments were made to buy their silence in relation to the arbitration and settlement negotiations.

4.1.2 Delay in raising challenge

On this issue of whether Nigeria took too long on raising the challenge and whether the finding of evidence would warrant an extension, the Court found that Nigeria had made a good case that ‘it did not know and could not with reasonable diligence have discovered the grounds it now advances.’³⁶ Although the Court admitted that Nigeria’s investigation of P&ID proceeded with a stronger sense of urgency after August 2019 when enforcement of the award was granted, it ultimately found from the circumstances, that the alleged fraud was deliberately concealed and that Nigeria had exercised reasonable diligence in its investigation and pursuit of settlement. The Court noted that although the delay in this case was extraordinary and weighs heavily on the side of the balance against extension of time, other factors bring down the balance in favour of granting the extension.

4.1.3 Public policy and finality

Section 68 (2)(g) of the 1996 English Arbitration Act provides for fraud and public policy considerations as criteria for challenging an arbitration award for serious irregularity. However, Nigeria’s significant delay in bringing this challenge within the statutory time limit (28 days as stipulated under the Arbitration Act) was a significant hurdle to surmount.³⁷ This is especially

³⁶ *Nigeria v P&ID* 2020, para 233.

³⁷ By virtue of Section 70(3) of the Arbitration Act, a challenge brought under Section 68 must be filed within 28 days of the contested arbitral award. If there has been any arbitral process of appeal or review, the challenge must be brought within 28 days of the date on which the claimant was notified of the outcome. 1996 Act, *supra* note 14, § 70(3).

so, considering that speed and finality are deemed essential features of arbitration under the English Arbitration Act.³⁸ Indeed, P&ID argued that given the length of time since the final award was issued, it would be 'unprecedented' for the courts to grant the extension of time requested by Nigeria.³⁹

Addressing the public policy of finality and non-intervention, the Court stated that there is no rule of law which automatically prioritizes the finality of arbitral awards over the public policy of refusing to endorse illegal conduct. It stated that 'not only is the integrity of the arbitration system threatened, but that of the court as well, since to enforce an award in such circumstances would implicate it in the fraudulent scheme.'⁴⁰ The Court therefore granted Nigeria's application for extension of time.

5. 'Match fixing by Nigerian counsel?

Nigeria's defence has placed particular blame on the former Attorney General of Lagos State, Olasupo Shasore. In 2014, Mr Shasore was appointed as counsel for Nigeria in the arbitration leading to the legal tussle considering his expertise in the legal profession and his position as a former president of the Lagos Court of Arbitration. Mr Shasore was paid \$2 million to assist in the first and second stages of the arbitration.⁴¹ The Nigerian government has presented evidence that suggests that he failed to act dutifully to defend Nigeria's interests but rather kept pushing for settlement, thus suggesting that he was compromised.⁴²

Nigeria has alluded that right from when Mr Shasore's service was engaged in 2014, he alongside members of the settlement team, discouraged

³⁸ See *Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi* (Judgment of the High Court of Justice of England and Wales) EWHC 3283 (2012), [2013] 1 Lloyd's Rep 86 para 27 (per Popplewell, J.) (Eng.) (Popplewell (at para 27), commenting on the 28-day period given under the English Arbitration Act, argued that 'This relatively short period of time reflects the principle of speedy finality which underpins the Act').

³⁹ *Nigeria v P&ID* 2020, para 261-63.

⁴⁰ *Nigeria v P&ID* 2020, para 273.

⁴¹ *Nigeria v P&ID* 2020.

⁴² *Nigeria v P&ID* 2020.

the Nigerian government from strongly contesting claims of the British firm. Rather, they encouraged the then Minister of Petroleum, Diezani Alison-Madueke, to pursue settlement discussions. The team consisted of Mr Shasore, the legal representative of the Ministry of Petroleum Resources, Folakemi Adelere, Legal Adviser of the Ministry of Petroleum Resources, and Ikechukwu Oguine, who was the Coordinator, Legal Services at the Nigerian National Petroleum Corporation (NNPC).⁴³

On 11 November 2014 the Attorney-General wrote to Mrs Alison-Madueke, on the advice of Mr Shasore, urging her ‘to pursue settlement discussions’.⁴⁴ Thereafter, Ms Adelere, Legal Adviser to the Ministry from 2013 to 2017, sent a memorandum to the Permanent Secretary of the Ministry recommending a settlement with P&ID.⁴⁵ In December 2014, Mr Shasore, Ms Adelere and Mr Oguine travelled to London for settlement negotiations with P&ID.⁴⁶

The allegations go further in showing how Mr Shasore conducted a shoddy job in defending Nigeria. During the liability hearing, which began on 1 June 2015 and ended early in the afternoon the same day, Mr Shasore stated that he hoped to cross-examine Michael Quinn, the founder of the company, on the matter.⁴⁷ The chairman of the Tribunal responded that there had been no application to cross-examine Mr Quinn, a procedural mistake on the part of Mr Shasore, a senior arbitrator. What is even more worrying is that Mr Quinn was already dead at the time Mr Shasore wanted to cross-examine him, an attempt believed to aid the argument of P&ID.⁴⁸

Mr Shasore allegedly made a questionable payment of \$100,000 each to Ms Adelere and Mr Oguine.⁴⁹ Mr Shasore argues that he gave them as a gift. The close following of the gift with their recommendations for a settlement remains questionable.

⁴³ *Nigeria v P&ID* 2020.

⁴⁴ *Nigeria v P&ID* 2020.

⁴⁵ *Nigeria v P&ID* 2020.

⁴⁶ *Nigeria v P&ID* 2020.

⁴⁷ *Nigeria v P&ID* 2020.

⁴⁸ *Nigeria v P&ID* 2020.

⁴⁹ *Nigeria v P&ID* 2020.

6. The hearing

In his opening statement for Nigeria, Mark Howard KC said he only needed to prove that only one person who touched the contract was bribed. 'There are many documents that are as close to a smoking gun as one will ever see in a fraud case,' he said. 'There are so many incriminating documents in this case, there is a risk of being desensitised. If only one document was found in another case, it would be extraordinary. What we have uncovered is a whole cascade'.⁵⁰

Howard told the Court that P&ID paid bribes prior to the awarded contract and after in a bid to conceal evidence of earlier corruption. P&ID's documents used codewords for bribes such as 'PR' and 'Dublin Expenses'. Spreadsheets were highlighted during the claimant's opening which, Howard said, listed PR, marketing, and Dublin Expenses payments made to ministers. The Court heard many bribes were made in cash.⁵¹

Howard said: 'What do P&ID say about this? Very little indeed, as you will see in cross examination, witnesses have given explanations that are contradictory and nothing short of ridiculous. As I say it is difficult to keep the smile of one's face – but payments to ministers, "PR", brown envelopes, are you serious?'⁵²

WhatsApp messages were also read out in court which, Howard argued, showed obvious corruption and bribery including messages talking of the need to be 'discreet' between the legal director and Cahill. '\$10m was being spent on bribes, [you've] got to remember this is not over the entire life of P&ID and these other companies. We do not have any record after 2012,' Howard said.⁵³

P&ID denied it paid any bribes and denies any wrongdoing. The company claimed it was entitled to the tribunal's arbitration award as Nigeria breached the contract.

⁵⁰ Bianca Castro, 'Bid to overturn \$11.1 bn arbitration opens in High Court' *The Law Society Gazette* [England & Wales] 23 January 2023.

⁵¹ Castro. 'Bid to overturn \$11.1 bn arbitration opens in High Court'.

⁵² Castro. 'Bid to overturn \$11.1 bn arbitration opens in High Court'.

⁵³ Castro. 'Bid to overturn \$11.1 bn arbitration opens in High Court'.

7. Lessons for African states?

Ohio Omiunu argues and in my view correctly so, that the uncertainty about how foreign courts will decide sensitive disputes involving sovereign states (including Nigeria's main challenge against the P&ID arbitral award) raises more fundamental issues about the dependence of African countries on foreign courts and arbitration tribunals as fora for settling their disputes with foreign investors.⁵⁴ The reputation and track record of the well-known global arbitration centres remains an attraction to arbitration users from Africa.⁵⁵

However, recent cases like *Nigeria v P&ID* and *Mozambique v Credit Suisse International*,⁵⁶ which present high economic stakes and public policy considerations, underscore the need to develop the capacity of arbitration centres across Africa to provide viable fora for settling arbitration disputes. Similar to the Nigeria GSPA scandal, Mozambique alleged in its case that the commercial loan contracts between Proindicus, MAM and two foreign creditors – Credit Suisse and VBT Bank – were procured in breach of Mozambican law. Mozambique also alleged fraud, with Mozambique arguing that ‘. . . bribes had been paid to government officials and to Credit Suisse employees and that the supply contracts were shams and instruments of fraud.’⁵⁷

8. Conclusion

Be as it may, it is high time that we reexamine at the conduct of counsel in arbitration. Thus far, tribunals have been blamed, and rightly so, for

⁵⁴ See Akanmidu, ‘Explainer: How Nigeria got hit with a \$9.6 billion judgment debt in London’.

⁵⁵ See Robert Wheal, Elizabeth Oger-Gross, Tolu Obamuroh and Opeyemi Longe, ‘Institutional arbitration in Africa: Opportunities and challenges: Africa’s arbitration options and case-loads continue to rise’, *White & Case LLP*, 17 September 2020, (‘In a 2018 survey of almost 800 arbitration practitioners and users by White & Case and Queen Mary University, African respondents chose the ICC and LCIA as the top two institutions.’).

⁵⁶ See *Mozambique v Credit Suisse International*, (Judgment of the High Court of Justice of England and Wales) EWHC 1709 (2020).

⁵⁷ *Mozambique v Credit Suisse International*, (Judgment of the High Court of Justice of England and Wales) EWHC 1709.

questionable awards against global South states. However, it seems a 'match fixing' of investment arbitration proceedings, which in many instances are confidential, is creeping in, and it is most likely that *P&ID v Nigeria* is not the only case. Inevitably, many more will be unearthed in due time. The courts where these awards are to be enforced must take a more purposive approach into looking at these allegations. While we do not know the outcome of Nigeria's challenge of the award when the case commences in 2023, we all hope that good precedence would be set in combatting corruption in ISDS. Just like 'match fixing' corrupts the authenticity of competitive sports, so does it corrupt the ISDS system and must be dealt with firmly.

Equally eagerly awaited are possible disciplinary proceedings by the Nigerian bar association against the counsels if the allegations against them are proven. Take a look at it, the current outstanding amount, including interest, is some US\$11.1 billion, this is equivalent to almost one third of the budget of Nigeria in 2023 and is about 4 times more the allocation for the health budget and about 6 times the education budget. The amount in the ward could change the fortunes of the health sector of Nigeria as well as assure a bright future through education for the Nigerian kids for at least 5 years. The children of Nigeria and the people seeking health services should not pay this high price at the altar of corruption in ISDS and especially one from corrupt practices by investors and government officials as well as 'match fixing' by counsels.