

## TO WHOM IT MAY CONCERN

### High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (FACTI Panel)

#### Views of the AFRICAN LEGAL SUPPORT FACILITY

##### **I. BACK GROUND**

In the early 2000s, Regional Member Countries (RMCs) of the African Development Bank (AfDB) were faced with debt related lawsuits that threatened the objectives of the Highly Indebted Poor Countries (HIPC) Initiative. To respond to the challenges of high litigation costs coupled with inadequate legal capacities, corruption and lack of transparency, the African Legal Support Facility (ALSF) was established which entered into force by Agreement in December 2008.

The ALSF effectively started operations in March 2010, with operations initially being guided by AfDB procedures and funding originating from AfDB Group. The ALSF's mandate was to provide direct legal advice on vulture fund litigation, project investments and agreements, and to build sustainable legal capacity among RMCs in these areas. The vision of ALSF focuses on "Achieving sustainable legal capacity for Africa". The mission remains, "To provide legal advice and capacity building to African countries on vulture fund litigation, complex commercial negotiations and related sovereign transactions". ALSF interventions under three pillars:

- a) **Creditor Litigation Services** – under this pillar technical assistance is provided for African governments in litigation related to vulture funds;
- b) **Advisory Services** – under this pillar legal advisory services are provided to African Governments in the negotiation of complex commercial transactions and investment agreements;
- c) **Capacity Building** – Provision of capacity to national lawyers in African countries in recognition of a skills gap in areas relevant to ALSF, i.e. complex commercial transactions and vulture fund litigation.

The main features of the ALSF interventions are:

- **Pillar 1** – The successful litigation of cases and the reduction of debt service payments shall have as an immediate outcome a reduction in the number of vulture fund litigation cases and other claims and smaller pay-outs, which in turn will generate increased government savings (intermediate outcome). These increased government savings are expected to contribute to sustainable economic development and inclusive growth in Africa;
- **Pillar 2**– The mining, natural resource, or infrastructure PPP concessions negotiated or re-negotiated – should result in more equitable concessions / commercial contracts in targeted sectors (immediate outcome). This in turn is expected to lead to greater financial and non-financial benefits from concessions, which is expected to contribute to sustainable economic development and inclusive growth in Africa. Advisory services include cases of asset recovery;
- **Pillar 3a**– Strengthened capacity of African lawyers in government and private practice;

- **Pillar 3b**– Easy access across Africa to specialised legal knowledge on concessions and creditor litigation.

## II. RELEVANCE OF FACTI TO AFRICA

In our opinion the relevance of FACTI has already been underlined by the AU High-Level Panel on Illicit Financial Flows from Africa (2015) and its recommendations and subsequent implementation measures should be paramount when addressing the challenge for Africa. It should be noted that the Panel report was formally adopted by the African Union Summit of Heads of State and Government.

In a report on IFFs in Africa published in 2015,<sup>1</sup> the African Union High Level Panel on Illicit Financial Flows from Africa (the “HLP”) identified three major sources of IFFs on the Continent, namely:

- a. **Commercial Activities** – where IFFs derive from evading or aggressively avoiding taxes, custom duties, or levies, or the intent of hiding wealth, even though the business or activities engaged in may be legitimate.
- b. **Criminal Activities** – where IFFs are proceeds of criminal activities, and are kept from being detected by law enforcement agencies and revenue authorities.
- c. **Corruption and Abuse of State Authority** – where IFFs largely result from the abuse of state structures and institutions to facilitate IFFs as well as bribery.

Of concern is the impact of IFFs on governance, as successfully repatriating funds and other resources illegally requires corrupting and or suborning of state officials. From a development perspective, the consequences of IFFs are quite severe as the economies on the Continent do not benefit from the multiplier effect of the domestic use of such resources whether for consumption or investment, nor achieve maximum benefits from development projects, including those funded by the AfDB.

Whilst the Continent has affirmed the danger posed by IFFs and the need to tackle the same, the Continent continues to encounter challenges with respect to fighting IFFs, among them:

- i. Shortage of **technical and human capacity** to deal with crime perpetrated by sophisticated companies and individuals – this has resulted in a capacity imbalance between the prosecuting authority and multinational corporations.
- ii. Lack of **adequate funding** and reliance on unpredictable foreign assistance.

The African Union High Level Panel on Illicit Financial Flows from Africa (the “HLP”) is currently working with a Consortium *to stem Illicit Financial Flows from Africa* (“the Consortium”) established in 2016 to

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<sup>1</sup> AU High-Level Panel on Illicit Financial Flows from Africa (2015): Track it! Stop it! Get it: Illicit Financial Flows - Report of the High-Level Panel on Illicit Financial Flows from Africa at Page 14.

serve as a mechanism to support the HLP role to oversee the implementation of the recommendations of the Report.

### III. MEASURES NEEDED TO ADDRESS THE CHALLENGES FACED BY AFRICA

The ALSF has been involved in assisting several countries to recover sovereign assets (both stolen or otherwise belonging to the State but transferred outside the countries). Our experiences have shown that the following key issues need to be given paramount importance for Africa:

#### 1. Definition of sovereign assets

The definition of sovereign assets should not be limited to “stolen assets”. This excludes sovereign assets obtained through opaque methods such as litigation that arises from cases where there is collusion between state agents and foreign elements intended to create debt obligations on the African States.

#### 2. Addressing the Dispute Settlement Issues

One of the biggest challenges African Governments face is the settlement of investment disputes outside the continent. One Statistics shows that in one in one international arbitration centre 27 per cent of the cases relate to African States as one of the parties. However only one percent of the arbitrators are African. In addition the most of the cases take place outside the continent (International centre of Arbitration – ICA in Paris); London Centre of Arbitration in London and the International Centre for the Settlement of Investment Disputes (ICSID). Not only is the cost of travel to those arbitration centres expensive but the average cost of the arbitration is in excess of USD 5 million.

Some of the revelations to the ALSF in trying to assist African countries defend themselves in those cases are as follows:

- a) Quite often there is collusion between the foreign parties and some senior government officials to suppress vital evidence that could favour the cases of African governments;
- b) Because arbitration is not widespread in Africa (except for a few countries like Nigeria and South Africa) there is limited capacity in African countries to represent themselves arising in high litigation costs that add on to the externalisation of limited resources;
- c) The choice of law in most Contracts between African governments and foreign investors is the law of the foreign investors which means African governments have no alternative but to engage foreign litigators that are expensive.

There are several proposals being mooted to set up an Investor state **dispute settlement (ISDS)** is a mechanism contained in **investment** and trade agreements that allows an investor of a state party to bring a claim against another state party that is hosting the **investment**, if that state has allegedly breached a standard in the agreement.

This mechanism will only succeed in the case of Africa if African countries are involved and if the above challenges are addressed:

- a) The need to strengthen African Institutions responsible for International Arbitration;
- b) Increased capacity for African Arbitrators and litigants for representing African countries;
- c) Increased use of technology in dispute resolution to reduce the cost burden on African countries;
- d) Identifications of factors that lead to lack of transparency in international dispute resolution.

### **3. Addressing Tax avoidance**

There is a lot of emphasis placed on anti-money laundering which is good but transparency requires that the issue of tax avoidance be addressed in equal measure. It is therefore important to emphasise that opaque commercial practices lead to greater loss of revenue for African countries than money laundering. Money laundering takes place because international corporations are able to avoid paying taxes through such practices as:

- a) Double taxation agreements;
- b) False invoicing - The practice of falsely declaring the value of goods imported or exported to evade customs duties and taxes, circumvent quotas or launder money. The value of goods exported is often understated, or the value of goods imported is often overstated, and the proceeds are shifted illicitly overseas. Most estimates of trade-based illicit financial flows focus on this mechanism.
- c) Lack of transparency in beneficial ownership taking advantage of secrecy jurisdictions.
- d) Use of tax havens.
- e) Trade mis-invoicing.
- f) Transfer pricing.

In order for African countries to be effective in enhancing International Financial Accountability, Transparency and Integrity it is absolutely important that there is full cooperation from developed countries as well as reform of some laws in developed countries to address tax avoidance.

At the Lough Erne summit in 2013 in Northern Ireland, the G7 addressed tax avoidance activities by multinational corporations. That summit communiqué lent support to two policy tools: automatic information exchange, and country by country reporting. Both became part of the OECD's Base Erosion and Profit Shifting Initiative (BEPS).<sup>2</sup>

These initiatives were intended to increase information on the movement of income into tax havens, and on where multinational companies truly conduct their business. However, multinational companies paying less tax than they should by shifting profits is only part of the equation of fixing flawed tax systems that contribute to inequality.

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<sup>2</sup> See <https://theconversation.com/if-g7-are-serious-about-tackling-inequality-they-should-implement-our-global-tax-framework-122332>

The other side of this equation is how governments are caught in this race to the bottom, competing to offer more generous tax rates to businesses. This process and its harmful impact on tax revenues and inequality has been neglected by the G7 to date.

In 2014, research by the IMF found that these processes were particularly harming developing countries by depleting them of tax revenues. For example, a 1% reduction in corporation tax in all countries was found to reduce a typical country's corporate tax base by 3.7%, but this was two to three times higher for developing countries.

## **CONCLUSION**

Unless these additional issues are addressed, the environment for enhancing transparency will not be improved as it remains lop sided placing emphasis on anti-money laundering only. The additional issues have been well highlighted in the African Union High Level Panel on Illicit Financial Flows from Africa.

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