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Original Article

The State Responsibility for Corruption in Investment Arbitration

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Abstract: In the investor-state dispute settlement context, it seems to be common for states to invoke corruption allegations as a defence against investors' claims in front of arbitral tribunals. And if a tribunal determines that the corruption occurred during investment making, it will certainly dismiss all claims based on jurisdictional or inadmissibility grounds. However, corruption involves both sides. Therefore, this study examines the possibility of addressing the state's role regarding corrupt acts in investor-state arbitration cases. In this paper, the author reviews five arbitration cases involving the tribunals' findings directly relevant to the state's acts in connection with corruption allegations. The results show that there is indeed an emerging principle for corruption control in investor-state dispute cases, which punishes both the investors and states for illicit acts. Even though this practice is not uniform in its application and scope, there is growing awareness that states could be held responsible for investments obtained through corruption under certain circumstances. The measures against states and their future implications are discussed.

Keywords: Corruption, international investment agreements, investor-state dispute settlement, arbitration, tribunal.

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1. Introduction

Investor-state dispute settlement (ISDS) is a procedure to resolve disputes between foreign investors and host governments [1]. The ISDS system allows foreign investors to seek redress in a neutral international arbitration forum [2]. The scheme functions as an enforcement mechanism for obligations under international investment agreements (IIAs), including classical bilateral investment treaties (BITs) or free trade agreements (FTAs), which intend to protect investors' rights and impose obligations upon host states [3-5]. In this sense, ISDS is generally regarded as pro-investors [6].

Additionally, the ability to claim against host country governments in front of tribunals is a significant departure from customary international law. It expands the rights of multinational corporations [2]. Gus Van Harten commented that modern FTAs would give foreign investors special rights to protect their assets by suing countries for compensation when they are affected by laws, regulations, and other decisions that they deem unfair [7]. During an investment arbitral tribunal hearing, the focus is usually on the request of the investor claimant for a monetary award [2]. In order to bring a case forward, the foreign investor must claim that the host country breached rules established in the agreement, such as uncompensated expropriation or breach of contract [2].

Nevertheless, corruption, the subject of this article, is one of the issues with which ISDS has been confronted in balancing interests between investors and states [3]. Corruption is likely to remain a focal point in investment treaty arbitration cases, as respondents, in particular, seek to have all the claims dismissed based on the investor's unlawful conduct [8, 9]. If a tribunal determines that the corruption occurred during investment making, it will certainly dismiss all of the claims on jurisdictional or admissibility grounds. No investor found to have made an investment through corruption will be accorded the protections of investment arbitration [8].

The potential for ISDS claims to be dismissed due to corruption defence is exemplified by the 2006 decision in World Duty Free v. Kenya. The International Centre for Settlement of Investment Dispute (ICSID) tribunal in World Duty Free stated that "bribery is contrary to the international public policy of most, if not all, states or, to use another formula, to transnational public policy", and that 'claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by an arbitral tribunal'. Since that decision, numerous claimants and respondents have alleged corruption as the basis for a claim or as a jurisdictional or admissibility defence in ICSID cases such as Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines, African Holding Company of Africa, Inc and Sciete Africaine de Construction au Congo SARL v. Democratic Republic of Congo, TSA Spectrum de Argentina SA v. Argentine Republic, Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, EDF (Services) Ltd v. Romania, RSM Production Corp v Grenada and Niko Resources (Bangladesh) Ltd v. People's Republic of Bangladesh, Metal-Tech Ltd v The Republic of Uzbekistan, Stentex Netherlands, BV v. The Republic of Uzbekistan, and Sanum Investments Limited v. Lao People's Democratic Republic [8].

As a result, there is an ongoing debate that findings on corruption often come down heavily on claimants while possibly exonerating defendants that may have been involved in the corrupt acts [10]. Miles stated that the 'essential asymmetry' exists in corruption cases, whereby an investor will always be responsible for a bribe, while the responsibility will only extend to the state under particular circumstances [11]. Therefore, we argue that there should be principles established for corruption control in international investment cases by addressing the state's responsibility for corrupt acts.

While these above-mentioned cases brought issues relating to corruption to the forefront of international arbitration, the tribunals in only

five cases directly addressed the question of states' responsibility regarding corrupt acts. Specifically, the EDF v. Romania [12] was a dispute where the investor alleged corruption as a claim against the state. In World Duty Free v. Kenya [13] and Sanum v. Laos [14], the tribunals expressed their criticisms against states for not prosecuting the corrupt officials, yet not taking any measures to punish the respondents. Whereas, in Metal-Tech v. Uzbekistan [10] and Spentex v. Uzbekistan [15], the tribunals decided to take specific measures against the state. Evidently, the cases where tribunals did take steps against a state are more recent than the others [16].

In this article, we investigate the extent to which arbitral tribunals are able to impose responsibilities on host states regarding their illicit acts in corruption issues. We begin in Section 2 by analysing two ISDS cases in which host states were only criticised for their conducts. We then examine in Section 3 the three cases in which arbitral tribunals agreed on taking measures against host states for their wrongdoings with regard to bribery and corruption. Section 4 explains the possibility of developing principles in ISDS to protect the whole system of investment arbitration against corruption.

2. Investor-state Dispute Settlement Corruption Cases Favouring States' Interests

Allegations of corruption in investor-state arbitrations can be raised as either "a sword or a shield" [17]. When used as a sword, alleged corruption on the part of the state forms the basis for the investor's claim. When used as a shield, corruption on the part of the investor becomes the linchpin of the state's defence. If proven, a state will likely be found to have breached its treaty obligations if it mistreated an investor's investment in retaliation for the investor's refusal to pay a bribe. On the other hand, where the claimant does engage in corrupt practices, the claim ought to be dismissed [18,19]. ICSID tribunals consistently have recognised that illegality in the making of the investment, including corruption, will lead to the dismissal of the claim [8].

Interestingly, the arguments of illegality are much more often invoked by host states as a "shield" from all possible liability-related arguments that foreign investors put forward. The average ratio between the instances where a state alleged corruption and a foreign investor alleged solicitation of bribes is 3 to 1 [19]. This ratio evidences the growing trend of using illegality arguments by states as a complete defence against practically everything, including jurisdiction, admissibility, liability, and quantum [16]. Consequently, the popularity of raising illegality arguments indicates that a "shield" can defeat all "swords", and if proven, corruption can make all investment claims go away, including those that have merit [9].

Take World Duty Free v. Kenya as an example. In this case, Kenya's defence turned on the admission of World Duty Free's CEO that he had handed over a briefcase of cash as a "personal donation" to the President of Kenya [8]. Both parties agreed that the payment took place, although Kenya asserted that the state was unaware of the payment at that time. The question was whether the payment to President Moi constituted a bribe and was, therefore, illegal. The following question was whether such a bribe is against international public policy and should be outcome-determinative for the arbitral proceedings [16]. In responding to these questions, the tribunal acknowledged that corruption and bribery may be typical for business operations in some states; such practices nevertheless should not enjoy international legal protection [16]. The tribunal ultimately stated that it "cannot uphold claims based on contracts of corruption or contracts obtained by corruption" and that the investor claimant "is not legally entitled to maintain any of its pleaded claims in these proceedings" [13].

In Sanum v. Laos, there were several arguments relating to the alleged bad-faith conducts of both parties. The claimants - Lao Holdings NV in the Netherlands and Sanum Investments (Sanum) in Macau, partnered with

a Laotian conglomerate in two casino projects and three slot machine clubs in Laos [14]. After several years, the claimant's partners initiated litigations against Sanum and excluded it from one of the most profitable casino projects. According to the claimants, the steps taken by their local partners were "orchestrated" and "designed" by the government of Laos, which had violated the China - Laos BIT [16]. The respondent argued that the tribunal should dismiss all claims because the claimants were engaged in several illicit schemes. The allegations are related to the bribery of former government officials extended in exchange for the termination of the audit of their business [16]. The tribunal found that on the balance of probabilities, there was enough evidence proving that investors were involved in "serious financial illegalities", fraud, and chicanery [16]. The tribunal ultimately decided in favour of the respondent state [14].

The tribunal decisions in World Duty Free and Sanum repeatedly receive criticism. In World Duty Free, critics pointed out that the combat against corruption had stopped short of penalising the investor and not taking any recourse against the state. Some authors have expressed concerns that, by simply scriticising Kenya's corruption involvement, the World Duty Free tribunal did not create any legal consequences for the state for not actively prosecuting or investigating the act of corruption. Some authors believe that prosecution or investigation should be required for a state to raise a corruption defence in arbitration [16].

Similarly, in Sanum, it was found that a state's failure to take reasonable investigatory steps would not cause estoppel regarding its defence against treaty violation claims [16]. The tribunal found it "disturbing" that Laos did not take any steps to prosecute or investigate any persons who had allegedly received bribes from the claimants. However, such failure only led the tribunal to make negative comments towards the state and several adverse findings to the respondent's position [16]. The outcome of this case is still that the investor claimant shall pay all the respondent's legal costs and all the arbitration costs of the Permanent Court Arbitration (PCA) proceedings [14].

The main objection to these two decisions is that corruption "takes two to tango". Bribery is a "bilateral" act involving both the investor and a state official. It would be unfair and even create "perverse incentives" to allow the state to raise corruption as a defence [18]. Additionally, where the state does not prosecute the alleged corruption, commentators have raised issues of attribution and estoppel to argue that a state should not be immunised from its wrongful conduct in corruption cases. The following part discusses several arbitral tribunals that define states" responsibilities relating to corruption issues.

3. Investor-state Dispute Settlement Corruption Cases Addressing States' Responsibility

Foreign investors can allege solicitation of bribes as part of their treaty violation case. Some commentators have created standards to use when assessing states' corrupt acts under international public policy [16]. Specifically, a state would violate its obligation to accord fair and equitable treatment by retaliating against and causing damages to an investor for failing to pay a bribe or for other corrupt reasons [18].

For example, in EDF v. Romania, the investor used the corruption allegation in EDF as a "sword", which is quite rare in ISDS cases. The claimant EDF Services Limited submitted that by soliciting bribes, the respondent state failed to accord fair and equitable treatment over its investment under the applicable UK Romania BIT [16]. The tribunal agreed that the nature of "a request for a bribe" would violate the fair and equitable treatment standard under the BIT and international public policy [16]. Although the allegation of the bribe demand had not been proven due to the lack of "clear and convincing evidence", the tribunal determined that corruption, if proven, would result in responsibilities for the respondent state.

The EDF tribunal's opinion on possible states' responsibility is similar to those of two arbitration cases against Uzbekistan. In Metal-Tech v. Uzbekistan, the arbitral tribunal found it appropriate to express its displease with the state's participation in corruption in the decision for the allocation of costs. In comparison, the Spentex v. Uzbekistan arbitral tribunal went several steps further with punitive measures against the state for tolerating corruption. Notably, in Metal-Tech and Spentex, the arguments of illegality are invoked as a "shield" by the host state.

Metal-Tech Ltd. was an Israeli company that had obtained the government of Uzbekistan's approval to establish a molybdenum processing joint venture with two state-owned entities [18]. It submitted a request for arbitration under the Israel-Uzbekistan BIT claiming on the initial criminal proceedings against its managers in Uzbekistan [16]. In its defence, the respondent alleged that the claimant's investment in Uzbekistan was procured by corruption and was, therefore, outside the scope of protection guaranteed under the BIT [16]. It was submitted that the claimant entered into several consulting contracts with three alleged consultants, including the brother of the Prime Minister of Uzbekistan and a former government official [18]. And those mentioned above consulting contracts were claimed to be nothing more than sham contracts designed to extend bribes to politically exposed people in Uzbekistan [16].

Therefore, the tribunal had the first task to evaluate whether the contracts in question were legitimate agreements or were products of corruption [16]. In assessing the investment acquisition, the arbitral tribunal went into the contracts' details, reasons for payments to the alleged consultants, and the evidence of services performed at the time the investment was established [16]. Additionally, the tribunal assessed the consultants' necessary qualifications to offer consulting services and their relationship with the Uzbek government officials in charge of the claimant's investment. In light of all the findings, the Metal-Tech tribunal did find that the consulting agreement was a sham contract designed to conceal the true nature and purpose. It is thus "determined that the tribunal lacked jurisdiction to adjudicate the matter due to corruption" [16].

Second, the most important question before the arbitral tribunal was the determination of legal consequences for both parties in case corruption findings were made [16]. The claimant asked the tribunal to decide that Uzbekistan should be paying the costs of arbitral proceedings, while the respondent requested the opposite [10]. When assessing this question, in light of its findings on corruption, the tribunal stated that there was a consensus on not protecting corrupt investment. However, the state also had a role in creating the environment for corruption as no charges seem to be brought against anyone involved, except for the joint venture officers. Therefore, it was found appropriate to order the parties to share the costs of arbitration [16].

The Metal-Tech award signaled the "perceived inequity result", which was attempted to be remedied by the distribution of costs. Therefore, the tribunal's quantum decision is a reflection of the "zero tolerance" approach towards corruption in international arbitration [16].

In the Spentex v. Uzbekistan dispute, the arbitral tribunal's analysis seems to reflect a creative and revolutionary approach to the issues of corruption and bribery of public officials in international investment arbitration. It reprimanded the respondent state for the first time by urging it to make a substantial payment to an international anti-corruption institution under threat of an adverse costs order [16].

Spentex is a company incorporated under the laws of the Netherlands, establishing an investment in Uzbekistan by purchasing three textile manufacturing plants. It is a subsidiary of an Indian company called Spentex Industries Limited. Notably, while having its Indian "origin", the claimant chose to take recourse under the Netherlands-Uzbekistan BIT by using

its corporate presence in the Netherlands [16]. Under the claimant's case, its operations faced a severe financial crisis, having been pushed into bankruptcy due to the actions of the Uzbek authorities [16].

The respondent raised the corruption defence, submitting that Spentex Industries Limited (a parent company of the claimant) had made corrupt payments to Uzbek public officials through two intermediate companies prior to its investment's acquisition via a public tender in 2006 [16]. The respondent asked the tribunal to decide that the investor could not benefit from the protection offered under the Netherlands-Uzbekistan BIT [15]. The reason was that the investor's allegedly corrupt conduct was against public policy and the principle of clean hands [16]. Spentex denied all allegations and explained that both consultants acted as legitimate advisors and provided services such as on-ground support, logistical management, local market study, and investment banking [16].

The tribunal award is unique in the sense that it decided to penalise both the investor and the state for engaging in corrupt practices [16]. On the one hand, the arbitral tribunal dismissed the claims entirely, based on one main circumstance that the $6 million fee had been paid to one of the consultants just a few days before the public tender took place, indicating a red flag for corruption [16]. In addition, it emphasised that the investment system's purpose is to promote the rule of law, and it cannot be used in cases where the investor itself had engaged in conduct that goes against this principle [16]. However, on the other hand, the tribunal noted that, where corruption is involved, any allegation of corruption necessarily implies that the respondent's officials were also implicated. Therefore, neither party shall benefit from the tribunal's award [16].

Regarding the state's responsibility, the Spentex tribunal reportedly found it inappropriate that Uzbekistan did not agree to cooperate with the tribunal in finding the person from the Uzbek Government's side whom the claimant may have bribed [15]. The tribunal also seemed displeased by the respondent's reluctance to investigate and prosecute the officials who "tangoed" with the investor in its corruption scheme. In the tribunal's view, if accepted without consequences, the respondent's conduct would "reinforce perverse incentives for respondent states in the context of corruption" [16]. It is stated that the tribunal urged Uzbekistan to make specific reforms in its anti-corruption policy and to make a monetary contribution to the Global Anti-corruption Initiative of the UNDP [16].

4. Results and Discussion

It has been argued that a "one-size-fits-all" approach is inflexible and inadequate for analysing the complex issues raised by allegations of corruption in investor-state cases [17]. When speaking of corruption and bribery of public officials, there is a growing concern that host states may further tolerate the solicitation of bribes by foreign investors so they may avoid any claims under IIAs. When we think of the current case law, this is indeed true that the current practice could lead to a one-sided approach in determining the "guilt" for corruption, which would usually lay on investors [16]. A possible way to address such a challenging one-sided approach could be to recognise the possibility of taking punitive measures against a "partner in crime" for acts of corruption in investment arbitration in certain situations [16].

The starting point for considering a host state's international responsibility for corruption is the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). The International Law Commission (ILC) adopted the ARSIWA in 2001 and, as Crawford explains, codifies and progressively develops the international law of state responsibility [20]. The ILC's work on the topic profoundly influences the discussion of a particular approach

to the issues of state responsibility. The top reference point concerning the default rules of customary international law is the ILC's Commentaries to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. As such, it is generally reflective of customary international law [21, 22].

Specifically, Article 1 of ARSIWA provides that a state shall take international responsibility for every of its internationally wrongful acts. Article 2 then goes on to provide that an internationally wrongful act is an act or omission which i) is attributable to the state under international law, AND ii) constitutes a breach of the state's international obligation [23].

In terms of attribution, Article 4 of ARSIWA provides that any state organ's conduct shall be considered an act of that state under international law, regardless of its character, functions, and positions within the state [23]. Article 4 also adds that "where a person acts in an apparently official capacity, or under colour of authority, that actions will be attributable to the state". This rule makes particular sense in the context of corruption, as it is the person's official position of authority or apparent authority that makes corruption possible [24].

Additionally, Article 7 of the ARSIWA explains that "the conduct of an organ of a state or a person or entity with the governmental authority shall be considered an act of the state under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions" [23].

Based on Articles 4 and 7, when a bribe is solicited and/or extorted by a foreign official from an investor belonging to another state, it is a classic case of ultra vires action for which a state may be held internationally responsible. The Commentary to Draft Article 7 explains that "one form of ultra vires conduct covered by Article 7 would be for a state official to accept a bribe to perform some act or conclude some transaction" [23]. Thus, for example, where a president, prime minister, mayor, legislator, or administrative official of a foreign state solicits or extorts a private payment in exchange for official action, her conduct is attributable to the state [23, 24].

Under international law, an act or omission that is attributable to the state will give rise to state responsibility when it is "not in conformity with what is required" of the state under its international legal obligations [21]. "International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order" [21]. One could envision a range of different legal theories that could be alleged against a state, including: i) liability for the solicitation and extortion of bribes, ii) liability for the receipt of bribes, iii) liability for the failure to prevent bribery, iv) liability for failing to provide redress to victims of solicitation and extortion [24].

The legal basis for arbitral tribunals' valuation of the host state's corruption liability can be derived from various international legal instruments dealing with corruption and bribery, such as the 1999 Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the 2003 United Nations Convention Against Corruption, or the 1996 Inter-American Convention against Corruption [16].

Therefore, it could be reasonable to argue that under ARSIWA and international anti-corruption treaties, host states should meet the legal consequences of corrupt acts. Case law in this specific sphere has reflected that there is an increasing practice of investment tribunals deciding on states being complicit in corruption [16]. For example, in World Duty Free and Sanum, even though the tribunal had ultimately found the investor at fault, it remarked that it found the whole situation "highly disturbing" because the government officials in both cases were not prosecuted for corruption by the respondent states. Perhaps, this can be especially "disturbing" or even cynical if a state

is raising allegations of corruption before an international tribunal and at the same time fails to take appropriate actions against responsible public officials at the domestic level [16].

Furthermore, the tribunal in Metal-Tech had a similar feeling: "While concluding that the claims are barred as a result of corruption, the tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts" [10]. As discussed above, the arbitral tribunal in the Metal-Tech case found it appropriate to express its displease with the state's participation in corruption in the decision to allocate costs [16].

In the Spentex case, while the tribunal decided that the investor's claims were inadmissible because of corruption, it reportedly noted that the respondent state was far from being cooperative in the proceedings, by refusing to provide information on the individuals responsible for receiving bribes and whether these individuals were subjected to criminal investigations. Furthermore, it was noted that Uzbekistan was rather unwilling than unable to investigate and prosecute corrupt activities in connection with this case [16]. The Spentex tribunal argued that the state's uncooperative approach could have harmed the entire arbitration system. Consequently, the majority of the tribunal upheld that it would be fair and just to urge Uzbekistan to make a donation of $8 million to the Global Anti-Corruption Initiative of the United Nations Development Programme (UNDP) under the risk of being obliged to bear all costs and fees of the proceedings plus 75 per cent of the investor's legal fees [16].

To summarise all the above, there are examples where arbitrators actually take punitive measures against states that allege and subsequently prevail with corruption arguments. Although this practice is not uniform in its application and scope, there is growing awareness that states could also be held responsible for investments obtained through corruption under certain circumstances [16]. It could be proposed that arbitral tribunals should be made aware of their ability to take punitive measures against a state for their own wrongdoing or reluctance to investigate the wrongdoing of their public officials under certain circumstances. Such measure, in exceptional cases, may be reflected in simply obliging a state to cover the costs of the proceedings or even the legal fees of another party [16].

5. Conclusion

In the international investment system context, there seems to be an emerging principle in ISDS towards balancing the investor's and state's interests when it comes to corruption issues. Specifically, allegations of corruption in ISDS can be raised either as a “sword” - the basis for the investor's claim, or as a “shield” - the state's defence. Interestingly, the arguments of illegality are much more often invoked by host states, evidenced by a growing trend for using illegality arguments by states as a complete defence against all investment claims, including those with merit. For example, in two cases World Duty Free v. Kenya and Sanum v. Laos, the tribunals decided to favour respondent states even though they found the state's conduct disturbing.

This method of favouring states received criticism due to the fact that corruption involves not only investors but also state officials, and allowing the state to raise corruption as a defence would be unfair. As a result, subsequent arbitration cases - EDF v. Romania, Metal-Tech v. Uzbekistan, and Spentex v. Uzbekistan - defied the state's responsibility for its official's corrupt act more clearly.

Therefore, it can be seen that there is indeed an emerging trend for corruption control in ISDS cases, which not only punishes the investors' wrongdoings but also addresses the states' responsibility for illicit acts. This principle is in line with the call for considering

holding states responsible for corruption practices in international arbitration previously voiced in legal literature. It is also in line with the 2001 Articles on Responsibility of States for Internationally Wrongful Acts and other international anti-corruption treaties.

In conclusion, corruption is not an issue in which one can decide to take sides between investors and states. It is not about punishing investors or rewarding states, or vice versa. On the contrary, every participant in the international economy benefits from the eradication of corruption [25], including the state itself. In this connection, there should be principles of corruption control in investment arbitration, which ensure the promotion of the rule of law and entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act. Accordingly, when the arbitral tribunal does not take any measures, it fails to take necessary steps for the benefit of the system at large [16].

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