

Kluwer Arbitration Blog

Metal-Tech Ltd. v. Republic of Uzbekistan - Is Really No One Getting Punished?

Tamar Meshel (University of Alberta Faculty of Law) · Friday, January 3rd, 2014

On 4 October 2013, an ICSID tribunal rendered its decision in the investment treaty dispute between the Israeli company Metal-Tech Ltd. and Uzbekistan. In the [award](#), the tribunal found that it lacked jurisdiction to hear the parties' claims and counterclaims brought under the Israel-Uzbekistan BIT and Uzbek law due to corruption related to Metal-Tech's investment in Uzbekistan. In particular, the tribunal found that payments of approximately USD 4 million made by Metal-Tech to several individuals, including an Uzbek government official and the brother of the then Prime Minister of Uzbekistan, while presented as remuneration for various consultancy services, in fact constituted corruption and were illegal under Uzbek law.

In 2000, Metal-Tech, an Israeli public company manufacturing molybdenum products, formed a joint venture with two state-owned companies in Uzbekistan to build and operate a plant for the production of molybdenum products. Metal-Tech was to contribute its technology, know-how, and access to international markets, as well as part of the financing needed for a new plant, while the Uzbek companies were to contribute buildings, constructions, machines, equipment, and raw molybdenum for the plant to process. In 2006, the Public Prosecutor's Office for the Tashkent Region initiated criminal proceedings on the ground that officials of the joint venture had abused their authority and caused harm to Uzbekistan. A month later, Uzbekistan's Cabinet of Ministers adopted a resolution that abrogated the joint venture's exclusive right to purchase raw materials required for the production of molybdenum products and to export such products. As a result, the Uzbek companies terminated their contracts with the joint venture and bankruptcy proceedings were initiated against it. Despite Metal-Tech's objections before the Uzbek courts, the joint venture was liquidated and delisted from the state registry of legal entities in 2009.

In its Request for Arbitration, Metal-Tech claimed that Uzbekistan had breached its obligations under its domestic laws and the Israel-Uzbekistan BIT by, *inter alia*, failing to accord Metal-Tech and its investment fair and equitable treatment and full and constant protection and security; breaching and repudiating the joint venture agreement; expropriating Metal-Tech's property without due process of law; and taking unreasonable and discriminatory measures that impair the management, use, enjoyment, and disposal of Claimant's investment. Uzbekistan denied Metal-Tech's allegations, argued that the tribunal lacked jurisdiction to hear the claims under the

BIT and Uzbek law, and submitted counterclaims to recover damages allegedly sustained as a result of Metal-Tech's unlawful conduct.

The tribunal based its decision to refuse jurisdiction over the parties' claims and counterclaims on Uzbekistan's lack of consent under the BIT and the ICSID Convention to refer the dispute to arbitration. Such consent, found in Article 8(1) of the BIT, was limited to disputes "concerning an investment", which Article 1(1) of the BIT defined as "...any kind of assets, implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made...". The tribunal interpreted this requirement to mean that the investment must be made "in compliance with the law at the time when it was established" (para. 193), as argued by Metal-Tech. However, since the tribunal proceeded to find on the facts that corruption took place to an extent sufficient to violate Uzbekistan law in connection with the establishment of Metal-Tech's investment in Uzbekistan, it held that the investment did not comply with Article 1(1) of the BIT. Therefore, the tribunal concluded that Metal-Tech's claims under the BIT did not fall within Article 8(1), were not covered by Uzbekistan's consent, and did not meet the consent requirement set out in Article 25(1) of the ICSID Convention (paras. 372-373). The tribunal also found that it had no jurisdiction over Metal-Tech's claims under Uzbek law, since Uzbekistan had not consented to arbitrate such claims independently of the BIT, and that "as a consequence of its having no jurisdiction over the claims, this Tribunal has no jurisdiction over the counterclaims" (para. 413).

There are several interesting aspects to the arbitral tribunal's decision.

First, as a result of Metal-Tech's claims being brought under a BIT that provided for an explicit legality requirement for investments, the tribunal's decision to dismiss Metal-Tech's claims on the ground of lack of jurisdiction was rather "technical", relying mainly on the interpretation of the BIT, Uzbek law, and the ICSID Convention. The tribunal only briefly referenced "international law and the laws of the vast majority of States" (para. 290), international instruments, and previous decisions and awards that condemn corruption and could render Metal-Tech's conduct illegal as a matter of domestic and transnational public policy. Indeed, having found that it lacked jurisdiction over the dispute as a result of its interpretation of the BIT and its analysis of the evidence, the tribunal could "dispense with the analysis of...[Metal-Tech's potential] violation of international public policy and transnational principles" (para. 374).

Second, while the parties disagreed on the issues of burden and standard of proof required to sustain an allegation of corruption, the tribunal found that the "factual matrix d[id] not require the Tribunal to resort to presumptions or rules of burden of proof" (para. 243). This was since the corruption "indicators" or "red flags" (para. 293) in this case arose from the evidence submitted by Metal-Tech itself, and the tribunal was therefore required to undertake a detailed and careful analysis of the facts and Uzbek law in order to find that corruption in fact took place. In concluding that some of the payments made by Metal-Tech were indeed illegal under Uzbek law, the tribunal considered their amounts, the fact that they were made irrespective of services provided, the lack of professional qualification of the consultants, the lack of transparency of the consultants' payment arrangements, the significant connections of

some of the consultants with Uzbek Government officials responsible for Metal-Tech's investment, and Metal-Tech's failure to substantiate through documentary or testimonial evidence the reality and legitimacy of the services for which payments were made.

Finally, although the tribunal dismissed Metal-Tech's case due to corruption, it acknowledged that Uzbekistan had also participated in the corrupt conduct through the allocation of costs. Rather than finding that "costs follow the event", the tribunal ordered each party to bear its own costs in part because Metal-Tech was deprived of protection under the BIT and, consequently, the host State avoided any potential liability. The tribunal noted that this "does not mean...that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs" (para. 422).

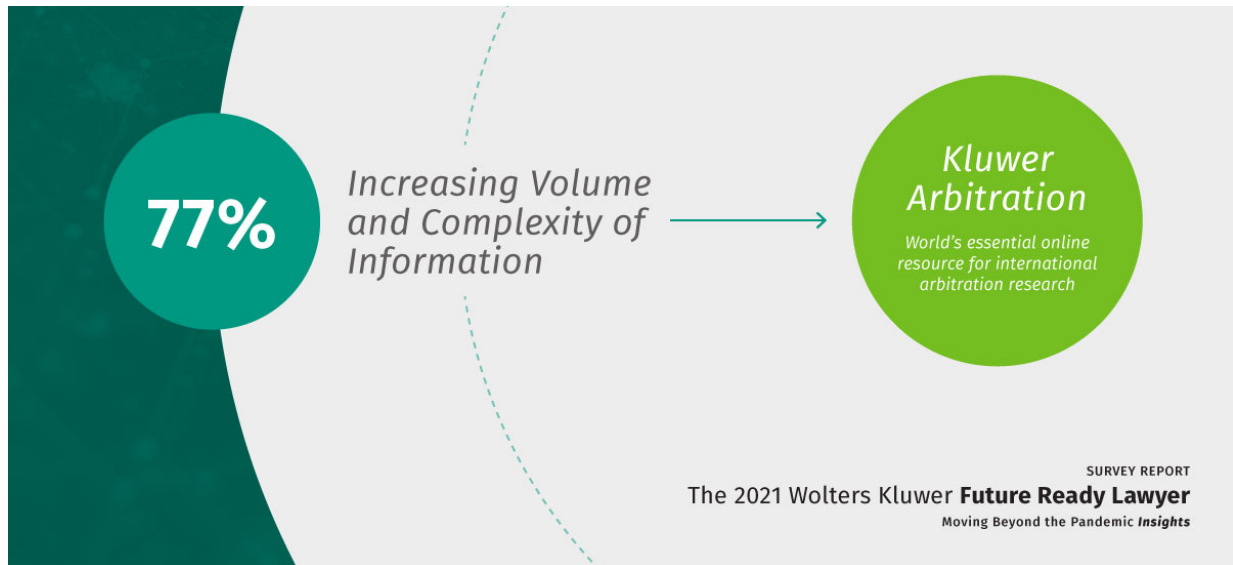
In the "ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts" (para. 389), the *Metal-Tech* decision certainly constitutes 'strike two' against investor claimants found to have engaged in corrupt activities ('strike one' being the decision in *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006). While the tribunal rightly noted that "the idea...is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law" (para. 389), one cannot but wonder whether decisions such as *Metal-Tech* in fact promote the rule of law in corruption-stricken countries such as Uzbekistan (which is ranked 168 out of 177 on [Transparency International's Corruption Perceptions Index](#)). Moreover, while both Metal-Tech and Uzbekistan have escaped direct sanctioning for their corrupt conduct (Metal-Tech may have lost its right to claim protection under the BIT, but its actual corrupt behavior was left unpunished), it may be the Uzbek people who are ultimately punished as their country loses much needed foreign investment (Uzbekistan is ranked 146 out of 189 by the [World Bank](#) for its "ease of doing business").

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