Economic Crime and International Investment Law: Current Issues

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The Twenty-eighth ITF Public Conference on Economic Crime and International Investment Law, hosted by the British Institute of International and Comparative Law (BIICL) on 22 May 2017, attracted 13 distinguished speakers and more than 100 participants for a day discussion on the issues of economic crime in investor-state arbitration. The conference provided a forum for legal scholars, practitioners, and students to reflect on the controversial issues arising out of allegations of economic crime in investor-state arbitration.

The conference commenced with a welcoming address by Professor Yarik Kryvoi, Director of Investment Treaty Forum, followed by keynote address by Lucinda Low, President of the American Society of International Law. In her opening address, Lucinda Low pointed out that the issues of corruption and bribery allegations are increasingly growing both in commercial and investment arbitration. Notable cases dealing with allegations of economic crimes included *Fraport Airport v. The Republic of the Philippines*, *World Duty Free v. The Republic of Kenya*, *Metal Tech v. The Republic of Uzbekistan*, and the most recent case, *Vladislav Kim and others v. The Republic of Uzbekistan*.

Though issues of economic crimes in investment arbitration are far from novel, there remains a lack of uniformity among arbitral tribunals on how tackle economic crimes. The core issues causing divergence include (i) breach of investors' obligations as a bar to jurisdiction; (ii) attribution of a state officials' wrongful acts to the state; (iii) interaction between State criminal proceedings and arbitration; (iv) provisional measures to stop State proceedings; (v) the burden and the standard of proof; (vi) *sua sponte* investigation and inquiry into corruption. All these controversial concerns were discussed during the conference.

Breach of Substantive National and International Law Obligations as a Bar to Jurisdiction

The first panel discussed the types of investors' obligations, the breach of which leads to denial of jurisdiction.

Since investment treaties are concluded to encourage and protect foreign investors, they do not represent an adequate source of investors' obligations *vis-à-vis* States. Nevertheless, several investment treaty cases have ruled that if a foreign national has acquired foreign investment in violation of the host State's laws, then such investment should not be protected before investment arbitration tribunal. However, not every single infraction of the host State's law should lead to denial of protection. To decide whether the tribunal shall upheld the jurisdiction, it should analyse the type of law that was violated, the importance of that law, and the seriousness of the breach. This

statement is supported by several cases. In *Metalpar v. Argentina*, the tribunal upheld the jurisdiction pointing that Argentinian law already prescribed sanction for such violations, and therefore, denial of investment protection would be disproportionate. In *Peter Allard v. Barbados*, the tribunal upholding the jurisdiction stated that the investor acted in a good faith. Similarly, in *Mamadoil v. Albania*, the tribunal did not find sufficient seriousness of the breach to deny the jurisdiction.

One of the speakers argued that illegality, even if proven, does not necessarily deprive the tribunal of jurisdiction, unless it is expressly stated in the relevant treaty, or the illegality causes a nullification of property rights under relevant domestic law, such that there is no longer an "investment" for purposes of subject matter jurisdiction.

Discussion also arose over whether the illegality considerations are related to the issues of jurisdiction or admissibility. It was noted that the timing of the investor's unlawful conduct is critical: it is only unlawful conduct pertaining to the acquisition of the investment that is relevant to the jurisdiction of the tribunal; unlawful conduct *ex post* the establishment of investment is instead a question for the admissibility. However, no uniformity with respect to the issue exists in the tribunals' practice. While some tribunals deny jurisdiction after finding establishment illegality (*Fraport I, II*, *Metal-Tech Ltd. v. Republic of Uzbekistan*), other tribunals find such claims inadmissible (*Plama v. Bulgaria*, *World Duty Free v. The Republic of Kenya*, *SGS v. Republic of the Philippines*).

Economic Crimes and the Merits of Investor-State Disputes

Panel Two addressed the issues of provisional measures, state attribution, and relationship with national proceedings.

With respect to provisional measures in investor-state arbitration, the proposition was made that though provisional measures can be resorted to in investor-state arbitration according to Article 47 of ICSID Convention, such measures are relatively useless when dealing with criminal proceedings brought by a State against claimants. First, the provisional measures cannot be granted before the tribunal is constituted. Second, it takes a long time to acquire such measures after the tribunal is constituted. Generally, states are not willing to allow the interference of the tribunal in the criminal sphere, as opposed to civil and administrative spheres. When it comes to the exclusivity of arbitration proceedings under Article 26 of the ICSID Convention, the states usually make an argument that this provision only applies to domestic proceedings in civil or administrative matters, but never in criminal.

Regarding the attribution of economic crimes committed by the State's official to the State, it was stated that we are currently at the situation of attribution asymmetry. International investment tribunals surprisingly resist to apply these principles in scenarios of corruption performed by state officials (i.e., *World Duty Free v. The Republic of Kenya* and *EDF v. Romania*). *Metal Tech v. The Republic of Uzbekistan* it is the only case where the "responsibility" of State is found in the award with respect to the allocation of costs between the parties

In order to rebalance this asymmetry, three fundamental interrelated objectives were suggested: (i) to level playing field between investors and states; (ii) to define and apply the principles and rules pursuant to which foreign investments are promoted and protected or not entitled to protection; (iii) to determine the list of principles and rules according to which State's conduct is in accordance with international law.

No agreement between the panellists was achieved on whether investor-state tribunals may raise and investigate allegations of corruption *sua sponte.* On one hand, the arbitrators having a duty to render an enforceable award may overlook the possibility of corruption and face allegations based on public

policy violations. On the other hand, conducting an investigation of corruption may invite challenges based upon *ultra petita* and/or *ultra vires*.

Evidentiary Challenges of Allegations of Economic Crimes in Investor-State Disputes

Panel Three discussed the evidentiary challenges of allegations of economic crimes in investor-state disputes.

Allegations of economic crimes, such as corruption or bribery are easy to make, but notoriously difficult to prove. In domestic criminal law, the burden of proof is not disputed – the prosecutor has to prove the guilt of the suspect. This issue in investment arbitration is unclear because both the investor and the state representative may be involved in an alleged economic crime such as bribery.

Since ultimately allegations of economic crimes are dealt in accordance with national criminal laws, the burden of proof is also determined with these laws. However, some tribunals addressed the issue of the standard of proof, suggesting that a "reasonable certainty" standard applies to situations of suspected corruption (*Metal Tech v. The Republic of Uzbekistan*); that "clear and convincing evidence" was needed (*EDF v. Romania*); or that both standards were equivalent (*Getma International and others v. Republic of Guinea*).