Corruption as a ‘Sword’ in Investor State Arbitrations

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Edmund Bao (King & Wood Mallesons)

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That investor state tribunals may deal with allegations of corruption in ISDS disputes is well acknowledged. The seminal World Duty Free[fn] *World Duty Free Company Limited and The Republic of Kenya*, ICSID Case No. ARB/00/7 (Award dated 4 October 2006).[/fn] decision involved the payment (in a briefcase) of USD$2 million dollars cash to (the then) President of Kenya to secure a concession contract. The subsequent decision became (although it was by no means the first)[fn] See for example earlier decisions such as *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ISCID Case No. ARB/84/3 (Award on the Merits dated 20 May 1992); *Wena Hotels Ltd. v Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Award dated 8 December 2000). [/fn] the leading authority for the proposition that claims based on contracts tainted by corruption cannot be upheld on the basis of host state illegality and international public policy. In this respect, corruption has been primarily used as a ‘shield’ (i.e. a defence) by host states to challenge the enforcement of a contract, or as in *Metal Tech*, to challenge the Tribunal’s jurisdiction (see our previous discussion on *Metal Tech*).

On the other hand, there appears scant commentary on whether corruption may be used as a ‘sword’, such as the basis for a claim under an investment treaty or agreement. This usually involves corrupt solicitation of bribes that are unconsummated, as investors that have engaged in corrupt conduct do not themselves have clean hands. Predominantly, the avenues for a claim will be premised upon a violation of the fair and equitable principle, expropriation or a breach of the full security and protection provisions. Below we analyse two decisions (and their related tests) which demonstrate instances of corruption that have been relied upon by investors to bring a claim against the host state.

A. *EDF (Services) Limited v Romania* ICSID Case No. ARB/05/13 (Award dated 8 October 2009)

The case of *EDF (Services)* involved the alleged solicitation by (the then) prime minister of Romania for a US$2.5 million-dollar bribe. When EDF Services refused to pay the bribe, it was alleged that Romania (though various governmental departments and regulatory agencies) took retaliatory action by engaging in a concerted effort to destroy EDF’s business, resulting in a total loss of EDF’s operations. EDF claimed this was a breach of the FET principles (among other things). While EDF’s claim ultimately failed for other reasons as discussed below, the *EDF* Tribunal affirmed as uncontroversial that in the context of an investor claim, acts of corruption “is a violation of

international public policy, whereby 'exercising a State's discretion on the basis of corruption is a […] fundamental breach of transparency and legitimate expectations'".[fn] *EDF (Services) Limited v Romania* ICSID Case No. ARB/05/13 (Award dated 8 October 2009), [221].[/fn]

• *The requirement for "clear and convincing" evidence in substantiating allegations of corruption*

EDF (Services) demonstrates that tribunals will not entertain corruption allegations on the basis of a claim in the absence of clear and convincing evidence. The Tribunal held that "[t]he seriousness of a corruption charge also requires that the utmost care and sense of responsibility be taken to ascertain the truthfulness and genuine character of the evidence that the party intends to offer in support of its claim."[fn] E*DF (Services) Limited v Romania* ICSID Case No. ARB/05/13 (Procedural Order No. 3), [28].[/fn] This was highlighted by the Tribunal especially in the context that the bribe was allegedly facilitated at the highest levels of the Romanian government, including the Prime Minister.

In *EDF (Services)*, the oral testimony of EDF's witnesses in relation to the solicitation of payment was held to be inconsistent with respect to statements made concurrently to the NAD (the Romanian anti-corruption agency) during the course of its investigations. In particular, whereupon the statement made to the NAD expressly disavowed any knowledge of the identity of the bribe solicitants, the arbitration witness statement did name the individual who requested the bribe. This led the Tribunal to characterise the evidence as of doubtful value. In this respect, EDF was also unable to prove that the bribe was not made in the personal interest of the solicitant but rather on behalf of and for the benefit of the governmental authorities.

• *That evidence of corrupt conduct be authentic, reliable and obtained lawfully*

Another crucial piece of evidence sought to be admitted by EDF was an audio recording between one of EDF's agents and a staffer of (the then) Prime Minister of Romania. The recording was claimed by EDF as capturing a bribe being requested. The Tribunal however also rejected this piece of evidence. First, it was held that there was a lack of authenticity and reliability regarding the recording. The recording was subject to expert scrutiny as it had sections missing, including the beginning and end sections, various irregularities and instances of transient sounds indicative of possible manipulation. The Tribunal therefore ruled that the EDF had failed to discharge the burden of satisfying the court of the authenticity and reliability of the audio recording. A crucial factor in this finding was due to EDF not able to provide the original copy of the recording for analysis.

Second, the Tribunal held that the recording was not obtained lawfully under Romanian law. In particular, the recording was made clandestinely at the private home of a Romanian public servant without her knowledge. The Claimant's submission that Romanian privacy law did not apply to public servants was held not to be persuasive as the Romanian constitution guarantees all citizens (notwithstanding their public servant status) equal enjoyment of their rights and liberties (such as privacy).

B. *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada*, ICSID Case No. ARB/10/6 (Award dated 14 October 2010) and related proceedings

The proceeding history is complex. The original merits arbitration was brought under an investment agreement between RSM Production and Grenada. The crux of the dispute related to the cancellation

of RSM's exploration licence by Grenada for offshore hydrocarbon reserves. The merits Tribunal ruled in favour of Grenada and found that the cancellation had been in accordance with the agreement. RSM (the claimants in the first merits hearing) subsequently sought to annul the award (unsuccessfully) under the annulment committee's inherent powers. RSM then proceeded to bring fresh proceedings under FET, full protection and treatment and expropriation provisions (among others) under the Grenada-United States Bilateral Investment Treaty. RSM did this on the basis of new evidence relating to allegedly corrupt payments received by Grenada from certain Russian parties. RSM alleged that such payments were for the purpose of inducing Grenada to rely on a technicality with licence approval timeframes as a pretext to terminating its agreement (even if arguendo the terms of the Agreement permitted it to do so) and reissue the exploration licence to a Russian company. The following novel issues arose in the context of a claim based corruption argument:

• *Related corrupt conduct may lead to a breach of investment protections, notwithstanding that there were no breaches of the contractual agreement itself*

Despite the fact that a previous Tribunal had found Grenada's termination of the agreement valid, RSM invited the successor Tribunal to reopen the prior Tribunal's findings under Article 51 of the ICSID Convention in light of the new corruption evidence. The successor Tribunal declined to do so on the basis that the facts and circumstances which gave rise to the alleged conduct had in fact been available to RSM in the previous case but was not raised by RSM. The Tribunal characterised this as "no more than an attempt to re-litigate and overturn the findings of another ICSID Tribunal, based on allegations of corruption that were either known at the time or which ought to have been raised by way of a revised application and over which the Prior Tribunal had jurisdiction".[fn] *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Production Corporation v Grenada*, ICSID Case No. ARB/10/6 (Award dated 10 December 2010), [7.3.6].[/fn] As such, the successor Tribunal held that it was not open to them to revisit the facts and issues that had been distinctly determined by the merits Tribunal.

Distinguishing on the facts of this case, it seems that the Tribunal left open the possibility that fresh evidence in relation to corruption may be sufficient as a standalone basis for ISDS proceedings. This is assuming that the evidence that came to light is in fact new and rises issues not covered under collateral estoppel.

• *The alleged corrupt conduct must have a causative link with the alleged violation of the BIT*

The Tribunal ruled that even if it was established that the Grenadian officials were accepting bribes, the agreement (and exploration licence) was terminated by Grenada by relying on its contractual rights.[fn] *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Production Corporation v Grenada*, ICSID Case No. ARB/10/6 (Award dated 10 December 2010), [7.2.6].[/fn] As the merits Tribunal found, RSM was solely responsible for its application's timing which led to the loss of the exploration licence. As such, the causative link between the bribes and RSM losing the licence was broken.

Conclusion

The use of corruption as a sword presents many challenges to investors. There is a high evidentiary bar to successfully proving corrupt conduct. Absent clear and convincing proof and reliable evidence

of corrupt conduct directly linked to and attributable to the host state, a breach of investment protections is unlikely to be made out. Some of this is linked to practicalities surrounding the nature of corruption; the Tribunal in *EDF (Services)* acknowledged that "corruption is notoriously difficult to prove since, typically, there is little or no physical evidence".[fn] *EDF (Services) Limited v Romania* ICSID Case No. ARB/05/13 (Award dated 8 October 2009), [221].[/fn] This is not withstanding the accepted position in international investment law that allegations of corruption, if made out, is contrary to international public policy and is a breach of the fair and equitable policy. Therefore, despite the current lack of success by investors in using corruption as a sword, corruption as the basis for a claim in international investment arbitration appears nonetheless to be well-established.