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Bribery, Corruption, and Fraud in Investor-State Disputes: How Should Tribunals Approach Economic Crimes?

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Investor-state tribunals frequently face allegations of economic crimes, especially in jurisdictions with a weak rule of law.

For instance, the largest ever investor–State award of $50 billion in Yukos v Russian Federation, primarily concerned a criminal investigation of alleged tax evasion, fraud and embezzlement by what was then the largest Russian oil company. The tribunal ruled that instead of collecting taxes, Russia's main objective was to bankrupt the investor and expropriate its assets.

Economic crimes which arise in investor-State disputes include bribery, tax evasion, bank, accounting and securities fraud, and other forms of malpractice. Allegations of money laundering may arise in the context of claims related to fake asset sales, intentional selling of overpriced goods, and in reimbursement scams.

Investor-State tribunals are not normally expected to deal with criminal liability because they normally do not have the necessary expertise, powers and resources to conduct independent criminal investigations. The ICSID Convention and investment treaties also do not regulate these matters. Nonetheless, allegations of economic crime may have a profound impact on the disputes before them.

Jurisdiction or Admissibility?

At the very beginning, tribunals may decide to decline jurisdiction over claims tainted by economic crimes or rule that such claims are inadmissible.

The practice of tribunals remains largely inconsistent, as it ranges from exonerating the State from its responsibility for involvement in an economic crime (e.g., World Duty Free v Kenya) to awarding investors significant amounts of compensation (e.g. Yukos v Russian Federation). In this context, the language of the treaty, or other instrument, in which the parties consent to arbitration, helps to distinguish jurisdiction from admissibility.

In case the treaty or the arbitration agreement requires the investment to be made in accordance with law, tribunals usually consider economic crimes at the jurisdictional stage of arbitration (See, e.g. Methanex v United States of America, Inceysa v El Salvador). Otherwise, committing an economic crime when acquiring an investment may result in the claim being ruled inadmissible at

the merits phase (See, e.g. Churchill Mining v Indonesia).

At the same time, it appears that the autonomous nature of the arbitration agreement presumes that tribunals should assert their jurisdiction, even if the investor breached its obligations when securing the investment. With occasional exceptions, such as that of Plama v Bulgaria, which relied on the separability concept to explain the nonapplication of most-favoured-nation clauses to dispute settlement provisions of a treaty, it is difficult to find cases when tribunals rely on this essential principle of arbitration law.

It Takes Two to Bribe?

In cases where economic crimes have allegedly occurred in an investor–State dispute, the State is more than just a party to the arbitration. The State also remains the entity which regulates, investigates, adjudicates and enforces in relation to such crimes within its territory. Prosecuting economic crimes might itself breach a State's international obligations, leading to an investor-State claim against it. On the other hand, the State can assert a counterclaim for the investor's misconduct.

When State representatives commit economic crimes themselves, investment tribunals should pay more attention to the principle of contributory fault. For instance, bribery typically presumes misconduct of two parties — the one making an illicit payment and the other accepting it. Penalizing only the investor by rejecting its claims or only the State would seem unfair and contradict generally accepted principles of international law, such as those reflected in the ILC Articles on State Responsibility.

Tribunals should also take into account the failure of a State to comply with its international obligations, including the obligation to effectively combat bribery and corruption. Furthermore, the commission of an economic crime by an investor should be reflected in damages awards, as the Yukos tribunal did by reducing the amount due to be paid to the investor.

Towards Greater Certainty on the Effect of Economic Crimes

The system of investor-State dispute settlement has been recently criticized for a lack of predictability, legitimacy and for excessive intervention with the exercise of the sovereign powers of States.

As States rely on criminal law to deal with economic crimes, they expect predictability from international tribunals reviewing their conduct. Investors too would benefit from greater consistency exercised by tribunals on issues related to economic crimes.

The silence of investment treaties on the consequences of economic crimes combined with the inconsistent application of internal law results in increased uncertainty, expensive proceedings and controversial decisions. In deciding on the admissibility of claims related to economic crimes, tribunals could draw inspiration from national best practices, such as the UK Bribery Act.

Instead of introducing strict liability on businesses for bribery, this Act reverses the burden of proof and introduces an offence of failing to prevent bribery for all companies, including parent companies. The Bribery Act also establishes an 'adequate procedures' defence to avoid liability for bribery.

The Act's official guidance on the defence of adequate procedures lists risk assessment procedures, due diligence, engagement by senior management, communication and training, as well as monitoring and review of existing procedures. Hence, organizations would not be liable for bribes paid on their behalf under the Act if they could prove, on the balance of probabilities, that they had 'adequate procedures' in place to prevent them.

The Act's logic could help tribunals in approaching issues not properly regulated in other domestic legal systems and help to build consensus on the 'adequate procedures' expected of States and investors when it comes to bribery, corruption and other economic crimes.

To ensure legal certainty concerning the effect of bribery, money laundering and other economic crimes in international investment law, treaties must include provisions on the effect of economic crimes. States should facilitate the consolidation of international investment agreements by adopting joint interpretative statements on previously concluded treaties, or by replacing old treaties with modern bilateral treaties, either one at a time or through regional agreements.

A new generation of investment treaties should take into account both applicable domestic law and the existing sources of international law concerning economic crimes together with national best practice. The same holds true for the practice of investment tribunals.

More legal certainty within the investor-State dispute resolution system will facilitate international efforts to reform investment agreements. It would also improve the legitimacy and predictability of the system of investor-State disputes and reconcile the combating of economic crime with the protection of foreign investors.

A longer article on this topic appeared in the International and Comparative Law Quarterly in July 2018. It is available here.

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