On Corruption in Investor-State Arbitration: the Case of Odebrecht Against the Peruvian State

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On February 4, 2020, ICSID registered a request for arbitration submitted by the company Odebrecth Latinvest Sarl, a Luxembourg-based subsidiary of the Brazilian company Odebrecht SA, against the Republic of Peru (ICSID Case No. ARB/20/04). This post analyzes the background to this dispute, as well as the possible strategies that the parties could use during the arbitration process to raise and respond to the issues of corruption that have been put into issue by Peru.

Background to the Dispute

Odebrecht states – through a letter addressed to the special team of prosecutors – that it demands compensation of more than US $ 1200 million from Peru, arguing that Peru violated its obligations under the Agreement between the Government of the Republic of Peru and the Belgian-Luxembourg Economic Union for the Reciprocal Promotion and Protection of Investments (BIT), in relation to the Concession Contract for the Project 'Improvement of the Country`s Energy Security and Development of the South Peruvian Pipeline' (Concession Contract). It also states that it was obliged to submit this request for arbitration since the BIT establishes in article 11(4) a limitation period of three years to file a request for

arbitration, which expired in January 2020.

Odebrecht argues, amongst other things, that on January 24, 2017, the state arbitrarily canceled the Concession Contract and adopted other measures related to the project that violate the rights of the Odebrecht subsidiary, such as the enforcement of the corresponding bond letter. It alleges that this occurred without the State indemnifying the company for the investments made, which would amount to more than US$ 1 billion. It also states that its admitted acts of corruption do not relate to the Concession Contract.

Peru has indicated through a press release that the contract was terminated because the consortium failed to obtain the financing and certify the financial closure within the terms established in the Concession Contract, even after two extensions were granted. Likewise, the Lava Jato Case Special Prosecution Group, in its response letter to Odebrecht, has stated that Odebrecht, under the effective collaboration agreement, has accepted that it committed acts of corruption regarding the Concession Contract (as occurred in the cases of the Costa Verde Highway Construction Project, Callao Section; and Lima-Callao Electric Mass Transportation System Project, Line 1, Sections 1 and 2), therefore the arbitration request should not have been filed.

It should be noted that this arbitration is linked to a previous arbitration also related to the Concession Contract and currently in process, raised by the Spanish companies Enagas S.A. and Enagas Internacional S.L.U. against the Peruvian State (ICSID Case No. ARB/18/26), in which compensation of US$ 1980 million is being claimed.

Next Steps in the Proceedings and Key Sticking Points

Under Rule 1 of the ICSID Arbitration Rules, the next step is to proceed with the constitution of the Arbitral Tribunal. However, it is likely that the Peruvian State will use the “clean hands doctrine” to allege a lack of jurisdiction (as happened in the case of African Holding Company of America, Inc. and Société Africaine de Construction au Congo SARL v. Democratic Republic of Congo), or the inadmissibility of the claim (as occurred in the case of Azpetrol International Holdings BV, Azpetrol Group BV and Azpetrol Oil Services Group BV v. Republic of Azerbaijan). If this occurs, the Arbitral Tribunal will need to decide whether to

consider the jurisdictional/admissibility issues together with the merits, or choose to bifurcate, that is, to consider the jurisdictional issues and the merits separately.

Should Peru make such a submission, it will have to prove that the acts of corruption that it alleges actually took place, which in turn will depend on the standard of proof used by the Arbitral Tribunal. The ICSID Convention and the Arbitration Rules are silent on this matter, on which there is no consensus in Investor-State jurisprudence. Although the standard of proof is commonly high, an Arbitral Tribunal (in Spentex Netherlands, B.V. with the Republic of Uzbekistan) has already adopted a more flexible and holistic approach, coupled with the use of the "connecting the dots" method (as indicated in the case Methanex Corporation with the United States of America):

> *"Connecting the dots is hardly a unique methodology; but when it is applied, it is critical, first, that all the relevant dots be assembled; and, second, that each be examined, in its own context, for its own significance, before a possible pattern is essayed. Plainly, a self-serving selection of events and a self-serving interpretation of each of those selected, may produce an account approximating verisimilitude, but it will not reflect what actually happened."*

In this way, proof by the Peruvian State of the acts of corruption carried out by Odebrecht in relation to the Concession Contract will be crucial. Proving corruption may therefore not be as easy as the Special Prosecution Group appears to assume it will be, especially as it appears that in the effective collaboration agreement, Odebrecht did not recognize any payment of bribes to public officials regarding said Concession Contract. For this reason, everything will depend upon the standard of proof that the Arbitral Tribunal uses. If it uses a high standard of proof, the proof of alleged corruption in the Concession Contract will be complicated; but if it adopts a more flexible and holistic standard, together with the "connecting the dots" method, it will be easier for Peru to prove the alleged corruption regarding the Concession Contract.

To my knowledge, this will be the first ICSID arbitration in which a State is prosecuting public officials involved in acts of corruption at the same time as the arbitration proceedings in which corruption is alleged. It could also provide an opportunity for the Arbitral Tribunal to address the issue of the responsibility of the Peruvian State for such acts (as happened in the case Spentex Netherlands, B.V.

with the Republic of Uzbekistan.[fn]See Betz, Kathrin “Proving Bribery, Fraud and Money Laundering in International Arbitration. On Applicable Criminal Law and Evidence”, Cambridge University Press, United Kingdom, 2017, pp. 128-136.[/fn] Therefore, even if Peru is successful in resisting the claim on the grounds of corruption, it may face the consequences of its public officials having also participated in those acts. In that event, the Arbitral Tribunal may condemn Peru to bear its own legal expenses, as well as half of the arbitration costs (as happened in the case Metal-Tech Ltd. case with the Republic of Uzbekistan). Further, in the event that it files a counterclaim against Odebrecht, the Arbitral Tribunal may also dismiss that counterclaim for lack of jurisdiction.

This case is therefore worth watching as it develops, to see what path it takes according to the various scenarios. It provides an opportune moment for an Arbitral Tribunal to rule on these issues that are frequently connected to allegations of corruption in investor-state arbitration.