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Corruption Under Scrutiny: The Ratione Materiae Objection in Panamericana Televisión v. Peru

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On 1 December 2022, the Tribunal in *the Panamericana Television S.A* (hereafter, "Pantel" or "Claimant") v. *The Republic of Peru* (hereafter, "Peru" or "Respondent") *case* issued its Final Award, in which not only did it reject the merits of Pantel's claims, but it also dismissed, among others, the objection *ratione materiae* formulated by Peru, based on Articles 2, 3, 6, and 9(7) of the Agreement Between The Swiss Confederation And The Republic Of Peru On The Promotion And Reciprocal Protection Of Investments (hereafter, "Treaty"). The present article briefly introduces the case's background and the objection surrounding the illegality of the investment.

Background

Panamericana Televisión was founded in 1958 by the Lindley and Delgado families, becoming one of the most successful Peruvian television channels and amassing some of the highest audience ratings between the 1990s and early 2000s. The founding families' administration ceased when Mr. Genaro Delgado Parker resigned from the position of Executive Chairman of Grupo Pantel, leading to the appointment of Mr. Ernesto Schütz Landázuri ("Mr. Schütz"). After acquiring an indirect majority control over the company, Mr. Schütz appeared in a video leak of bribery acts (known as the "Vladivideos" leak, one of the most infamous corruption scandals of Peruvian history). In sum, Mr. Schütz received numerous wads of cash from Vladimiro Montesinos – head of Peru's Intelligence Service and Presidential Advisor of Alberto Fujimori – in a clandestine meeting, asking him for support in litigations initiated by Mr. Delgado Parker.

Such events motivated the opening of criminal proceedings against Mr. Schütz in Peru for the crimes of illicit association to commit a crime and peculation in detriment of the State. Accordingly, he managed to transfer control over Pantel to his children, Mr. Ernest Schu?tz Freundt, Ms. Lorena Schu?tz Freundt, and Ms. Katerine Schu?tz Dalmau (the "Schütz Siblings"). Immediately after doing so, Mr. Schütz escaped from Peruvian justice by flying, via Chile, to Argentina, and then to Switzerland. Peru then delegated the prosecution of Mr. Schütz's criminal charges to the Swiss courts, who ultimately declared such charges as non-punishable under Swiss legislation.

Simultaneously to the events described above, Mr. Delgado Parker filed a lawsuit in Peru against,

among others, Grupo Pantel, Pantel, Mr. Schu?tz Landázuri and the Schu?tz Siblings requesting interim measures regarding the channel administration. The requested interim measures included being appointed as administrator and the nullity of some bribery-related acts of Pantel's shareholders. Because part of the interim measures was granted, Mr. Parker became Pantel's administrator, but his management worsened Pantel's financial stability, resulting in the company's inability to pay taxes and other obligations.

As a result, many debt lawsuits followed, including one filed by the Ministry of Economy and Finances ("MEF") which required the channel to pay considerable loan installments (which is still unable to pay up to this date). It created a detrimental domino effect which led Pantel to file a Precautionary Bankruptcy Proceedings before the National Institute for the Defense of Competition and for the Protection of Intellectual Property ("INDECOPI"), and whose responsibility was attributed to the Peruvian State by the Constitutional Tribunal of Peru.

In 2019, Pantel and the Schu?tz Siblings ("Claimants") began an arbitration proceeding against Peru alleging moral, extra-patrimonial and patrimonial damages, in breach of Articles 2, 3(1), 3(2), and 4 of the Treaty, which included the violation of:

- international law through expropriation (which was "perfected" with the granting of the interim measures);
- fair and equitable treatment to investments and investors, in accordance with customary international law (because of the "abuse of authority" committed by Peruvian officials, threats and unlawful seizing of control suffered by Pantel);
- Peru's duty of protecting Pantel's investment (since the granted interim measures impaired Pantel to manage, maintain, use, enjoy, extend or sell an investment on Peruvian territory, specifically denying Pantel the right to be governed by its board of directors and management in accordance with Peru's laws and regulations); and
- Pantel's right to free transfer payments (because the State dispossessed Pantel of the guarantee of free transfer of dividends and other payments, suspending its board of directors and management, and transferring control of its investment to a judicial administration lacking lawful authority).

Peru's Jurisdictional Objections

Since the beginning of the arbitration, Peru anticipated that it would raise four jurisdictional objections against the Claimants: (i) a *ratione voluntatis* objection, regarding both Claimants' –alleged– non-compliance of certain admissibility or jurisdiction requirements; (ii) a *ratione personae* objection, related to the nationality of the Claimants; and (iii) a *ratione materiae* objection, derived from the alleged existence of acts of corruption.

In this context, the Tribunal decided to bifurcate the arbitration, addressing first the *ratione voluntatis* and *ratione personae* objections and further joining the *ratione materiae* objection to the merits of the controversy, if the case survived the initial jurisdictional phase.

Thus, on 11 September 2020, the Arbitral Tribunal first issued its Award on Jurisdiction, through which it rejected the *ratione personae* objection submitted by Peru. However, the Arbitral Tribunal partially upheld the Respondent's *ratione voluntatis* objection regarding the Schütz Siblings, concluding that they did not comply with pre-arbitration requirements, such as: (i) holding consultations with Peru; and (ii) previously submitting their claims to Peru's national courts

–contrary to what was concluded for Pantel. Therefore, the arbitration proceeded to the next stage with only Pantel as the Claimant, where the *ratione materiae* objection would be discussed and decided.

Peru's *Ratione Materiae* Objection Concerning the Illegality of the Investment

As a *ratione materiae* objection, Peru stated that: (i) Mr. Schütz had been regularly receiving illegal payments from Vladimiro Montesinos to alter Pantel's editorial line in favor of the Fujimori regime; (ii) Mr. Schütz used this money to inject capital into the Pantel Group and Pantel and, hence, Pantel's investment would be "*tainted by those acts of corruption*"; and (iii) consequently, the Tribunal lacked jurisdiction, according to Articles 2, 3, 6, and 9(7) of the Treaty.

Pantel, on the other hand, contended that: (i) the alleged corruption had not been proved; (ii) Mr. Schütz was declared innocent by Peruvian courts and should benefit from *res judicata;* and (iii) in any event, the international relevant standard of corruption could only be satisfied if findings evidenced the arbitration agreement in the Treaty was affected by corruption, meaning the arbitral relationship between Peru and Switzerland was a result and consequence of corruption.

The Tribunal, quoting the World Duty Free v. Kenya case, recognized that corruption violated international public order and that if an investment that could qualify for protection under a BIT was made due to corruption, it could not expect the protection of such treaty. Notwithstanding, following the decision of the Tethyan Copper Company Pty Ltd v. Pakistan tribunal, the Tribunal clarified that not any proven corruption act would suffice to exclude an investment from benefiting from the protection of a BIT since the relevant corruption act must relate to the investment decision-making itself.

In that sense, the Tribunal based its decision on two main pillars:

First, the Tribunal considered that the cash payments made by Mr. Montesinos to Mr. Schütz had, *prima facie*, the appearance of illegality, since:

- Mr. Schütz received the money without signing a single document;
- The money payments were transported, hidden in wine bottles; and
- Mr. Schütz requested Vladimiro Montesinos' interference in the legal proceedings against Mr. Delgado.

Even considering the cash payments as "fruit of the poisonous tree" (due to its alleged illegal origins), the Tribunal concluded that, based on the evidence on the record, it was not possible to determine that such payments"*should be considered a direct act of corruption or that the crimes attributed to Mr. Schütz Landázuri do not strictly speaking concern corruption of public officials*."

Second, the Tribunal concluded that, given the evidence provided, it was impossible to determine if Mr. Schütz used Montesinos' money to acquire control over Pantel or for his own benefit.

That being the case, even considering that payments made to Mr. Schütz were acts of corruption, it was still impossible to link them directly to the investment made, so the Tribunal rejected the *ratione materiae* objection raised by Peru.

Further Peruvian Arbitration Corruption Cases

The Pantel v. Peru corruption allegations case linked to Peruvian public officials was not the first one heard by an international arbitral tribunal.

For instance, in Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Peru case, while the claimants did not raise a formal jurisdictional objection concerning the illegality of the investment, Peru did suggest the existence of corruption as part of the disputed facts (that Lucchetti would have obtained court rulings in its favor through corruption). In this case, the Tribunal did not analyze whether the alleged acts of corruption occurred, as it ended up declining jurisdiction based on a *ratione temporis* objection.

Another more recent case is Bacilio Amorrortu v. Peru. In this arbitration, Mr. Amorrortu alleged the existence of corruption as a component of his fair and equitable treatment claim. According to Mr. Amorrortu, this protection was breached by a rigged public tender previously schemed between the ruling government and one of the bidders, Graña & Montero. Nevertheless, as in the case of Lucchetti, the Tribunal did not analyze the existence of corruption and declined jurisdiction for other reasons (as further detailed here).

Another recent case in which the tribunal did analyze the existence of corruption was the case of Rutas de Lima v. la Municipalidad Metropolitana de Lima, in which the Lima Metropolitan Municipality claimed that some acts, and contracts were a direct reflection and consequence of corrupt payments made to Peruvian officials. Following a lengthy debate, the tribunal concluded that there were:

> *" not enough elements to declare the total or partial nullity of the Contract or the June 2016 Act on the grounds that they could be affected by corruption*".

Conclusion

The Pantel v. Peru case, along with the examples mentioned above, allows one to observe that corruption continues to be one of the main issues Peru faces as a developing country. Although there is a clear international policy for combating corruption, this does not mean that arbitral tribunals tend to accept related objections to restrict an investor's rights to the protections of a BIT or to render ineffective contracts entered into with public entities. On the contrary, the Pantel and Rutas de Lima cases exemplify that arbitral tribunals are extremely careful when analyzing these objections.

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