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Worley International Services v. Ecuador: The What, When and How in Corruption Allegations

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On 22 December 2023, a Tribunal composed of Prof. Bernard Hanotiau, Prof. Brigitte Stern and Dr. Andrés Rigo Sureda (President) issued a final award (“Award”) in an investment treaty case PCA 2019-15 (“Dispute”), between Worley International Inc. (“Worley” or “Claimant”) and The Republic of Ecuador (“Ecuador” or “Respondent”).

The [dispute](#) arose in connection with agreements for the development of four oil and gas infrastructure projects in Ecuador in which Worley served as project manager. The Claimant argued that the Respondent violated its obligations under the ‘[Treaty between the United States of America and Ecuador concerning the Encouragement and Reciprocal Protection of Investment](#)’ (the “Treaty”) through the non-payment of several services, an alleged pursue of unfounded proceedings against Worley which Claimant categorized as a harassment campaign, and, due to certain tax liabilities.

On its part, the Respondent raised several objections to the jurisdiction of the Tribunal, specifically pointing to several instances of corrupt and illegal acts allegedly committed by Worley *at the making* and *during the operation* of the investment.

In this post, we describe the factual background of the dispute and examine the jurisdictional and admissibility issues regarding allegations of corrupt and illegal acts.

Background

The facts underlying Respondent’s jurisdictional objections and corruption and illegality allegations were as follows:

At the making of the investment, (i) Worley allegedly won the bid for the Pacific Refinery Project because it received outside help –trafficking of confidential information— of Mr. Plummer from Shaw, a consulting firm advising on the bidding process. In possible exchange, Worley may have awarded Shaw a US\$ 1.2 million contract.

Also, (ii) Worley allegedly violated the Ecuadorian law by misrepresenting its intention to comply with the 30% subcontracting limit mandated by Article 87 of the Public Procurement Law and

subsequently breached this limit. According to this legal prohibition, a company that has entered into a contract with the Ecuadorian State is restricted from subcontracting other providers to perform more than 30% of the total obligations outlined in the main contract. The purpose of this regulation is to guarantee that the contracted work is genuinely carried out by the companies that successfully secured the bid and have been verified by the public procurement authorities.

During the operation of the investment, (i) Claimant allegedly bribed officials of Petroecuador –oil owned State company— to secure six complementary agreements related to one of the projects, the ‘Esmeraldas Refinery’. The bribes purportedly took the form of illegitimate business trips to Miami Beach, NBA games in San Antonio, Formula 1 Grand Prix in Austin, among others; and gifts such as local art or dinner parties. Likewise, (ii) Tecnazul, a subcontractor of Worley under its surveillance, paid more than US\$ 1.2 million in bribes to Petroecuador’s employees. Worley may have willfully failed to monitor and investigate Tecnazul’s corrupt activities.

For its part, the facts underlying Claimant’s non-payment, harassment campaign, and tax liabilities allegations were as follows:

- On October 27, 2016, Petroecuador halted negotiations and payments to Worley allegedly due to a Presidential Communication and a decision of the Superintendent of the Esmeraldas Refinery, which categorized Claimant as a company “related to” Tecnazul;
- The Claimant contends that the Respondent conducted a “harassment campaign” against it through investigations initiated by the Comptroller General, the Prosecutor General, and the Internal Revenue Service. According to the Claimant, these actions constituted violations of multiple standards outlined in the Treaty;
- The Internal Revenue Service audited Worley’s tax returns for 2012, 2014, 2015, and 2016. For the last three years, the Claimant was found liable for unpaid taxes and fines were imposed. Worley claims the audits were “suspicious” since they occurred after the Presidential Communication. It argues the Internal Revenue Service unjustly disregarded its evidence.

Decision

As a *preliminary matter*, the Tribunal determined that the Treaty’s absence of an explicit legality clause does not prevent an examination of whether the Claimant’s purported investment comply with the law, because “*the condition that the investor must not commit a serious violation of the legal order is inherent to any investment treaty*” (Award, §202). In this context, illegalities may affect the dispute’s adjudication by potentially stripping the investment of protections or barring the Tribunal’s jurisdiction or the admissibility of the Claimant’s claims. For this purpose, the Tribunal examined the consequences to the Tribunal’s jurisdiction of unlawful activities at different investment stages. While illegalities at the investment’s inception deprive an investment tribunal of jurisdiction, the Tribunal considered that illegalities during its lifespan can also impact claim adjudication. According to the majority, illegalities may be addressed as merits of the claim, while serious illegalities concerning violations of international public policy may result in barring the admissibility of the claim. Prof. Stern suggests addressing illegalities during the investment’s lifespan as part of the claim’s merits.

On the *jurisdiction and admissibility*, the Tribunal dismissed Worley’s claims entirely on three independent grounds: *Firstly*, it deemed the existence of a widespread pattern of illegality and bad

faith, affecting the core aspect of Claimant's investment from its *inception*, which deprives the Tribunal of jurisdiction. *Secondly*, concerning the Claimant's corruption *during* the operation of its investment, the majority of the Tribunal considered such acts as rendering the claims inadmissible, while Prof. Stern advocated for their dismissal. *Thirdly*, akin to the last ground, the majority of the Tribunal found the Claimant's willful blindness towards Tecnazul's corruption *during* the operation of its investment as rendering the claims inadmissible, while according to Prof. Stern they should be dismissed. Finally, concerning costs, the Tribunal ordered the Claimant to reimburse the costs of arbitration to the Respondent.

Analysis

Widespread corruption in Latin America has become a pervasive issue that now has permeated investment arbitration. Investment activities typically involve significant sums of money, interaction with public officials and, several other risks, creating an environment conducive to the spread of corruption. However, investment arbitration is rapidly evolving to counteract this phenomenon. Indeed, corruption-related allegations play an important role in resolving the parties' dispute.

In the Dispute, the parties disagreed on whether an investment Treaty must include express language requiring compliance of the investment with the law of the host country for such requirement to apply or, whether such requirement applies even without an express legality clause. The Tribunal, in this preliminary matter, leaned towards the latter interpretation and invoked the precedents of *Plama v. Bulgaria* (ICSID Case No. ARB/03/24, Award of 27 August 2008) and *Inceysa v. El Salvador* (ICSID Case No. ARB/03/26, Award of 2 August 2006) cases. The rationale behind this conclusion is that a State would not have consented to arbitration to protect investments that violate its own law, thus the absence of an express legality clause in a treaty does not prevent an enquiry into whether the claimant's investment complied with the law.

Also, as a preliminary matter, the Tribunal analyzed the timing of the corruption acts and their implications. Specifically, unlawful activities display different consequences depending on the stage when they occur. The Tribunal identified two different stages: (i) corruption committed at the inception of the investment, and (ii) corruption during its operation.

For the first stage, the Tribunal recognized that illegalities *ab initio* deprives the Tribunal of jurisdiction, position that is widely accepted. In this instance, the Tribunal considered Worley's illegal acts sufficiently serious to deprive the Tribunal of jurisdiction.

Regarding the second stage, the Tribunal explained that such illegalities may be addressed as part of the merits of a claim. However, particularly serious illegalities concerning violations of international public policy may have the effect of barring the admissibility of claims. Therefore, illegal behavior during the operation of the investment may have two different consequences: (i) barring admissibility or (ii) dismissal of claims during the merits phase due to the investment not being protected.

As previously mentioned, the majority of the Tribunal opted to address the allegations as a question of admissibility through the prism of the *Bank Melli v. Bahrain* standard (PCA Case No. 2017-25, Award of 9 November 2022, para. 365). Consequently, the Tribunal analyzed whether the unlawful activity of Worley was (i) serious and widespread, and (ii) bear close relationship to the

claims. The Tribunal reached the conclusion that Worley’s conduct was grave, reprehensible and breached international public policy. Therefore, such serious violations bar the admissibility of claims since:

“international adjudicatory bodies have a duty not to entertain claims tainted by violations of certain universally accepted norms pursuant to general principles of good faith and nemo auditur propiam turpitudinem allegans.”

On the contrary, Prof. Stern adhered to the theory that illegalities occurring during the life of the Claimant’s investment should rather be addressed as part of the merits of a claim. Although this theory would yield the same outcome in this case, it is interesting to note Prof. Stern’s reasoning for not aligning with the majority of the Tribunal. Her rationale is that admissibility should be a concept restricted to procedural defects of a claim that can potentially be rectified, while a claim based on an investment tainted by corruption can never be remedied.

Finally, another intriguing discussion was the standard of proof for corruption allegations. Here, the Tribunal adopted a balanced standard as developed in *Sanum v. Laos* (PCA Case No. 2013-13, Award of 12 September 2012, para. 108), which rejects the need for a “*clear and convincing evidence*” standard and instead prefers to adopt a “*standard higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt*”.

Conclusion

Corruption poses a significant threat to arbitration. However, it is certain that arbitral tribunals will meticulously scrutinize allegations of corruption or bribery to prevent the use of the arbitral system for the defense of unlawful activities. It is evident that this remains a developing area, but with the *Worley International Services v. Ecuador* case, several matters are starting to be generally accepted—such as the dispensation of a legality clause to examine the compliance of the investment with the law—, while others remain subject to ongoing discussion—such as the consequences of corrupt actions during the operation of an investment—.

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