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Navigating the Intersection of Sovereign Acts and Commercial Activities: Insights from *Omega v. Panama*

Rebeca Mosquera, Isabella Lorduy (Reed Smith) · Thursday, June 20th, 2024

In the 2022 case of *Omega Engineering LLC and Oscar Rivera v. Republic of Panama* (ICSID Case No. ARB/16/42), the Tribunal faced the challenge of distinguishing between a state's sovereign acts and its commercial activities. This case raised the critical question of when a state's conduct shifts from exercising sovereign authority to acting as a purely commercial entity. Ultimately, the Tribunal rejected the Claimants' claim and awarded part of the costs to Panama as the prevailing party, highlighting the complexity of the issue.

Background of the Dispute

Omega Engineering (the "Omega Consortium" or "Consortium") and Oscar Rivera ("Mr. Rivera") (collectively, the "Claimants") sought over USD 100 million from the Republic of Panama ("Panama" or the "Government"). They alleged that Panama had violated the [Panama-US Trade Promotion Agreement](#) ("TPA") and the [Panama-US Bilateral Investment Treaty](#) ("BIT"). The Claimants pointed to a series of measures taken by Panama, including terminating project contracts, failing to pay invoices, withholding permits, and initiating criminal investigations against Mr. Rivera. The Claimants argued that these actions were retaliatory and stemmed from Mr. Rivera's refusal to contribute to a campaign for Panama's then Vice-President.

The project contracts in question were related to the construction of medical facilities, higher education centers, and a courthouse, among others. The Claimants contended that the contract terminations were unjustified and violated the protections afforded to foreign investors under the relevant investment treaties. Additionally, the Claimants claimed that Panama's actions included a smear campaign, which involved a criminal investigation into corruption allegations against Mr. Rivera, damaging his global reputation.

Jurisdictional Objections Raised by Panama

Panama's response raised several jurisdictional objections, citing a lack of jurisdiction due to alleged corruption in the La Chorrera Project, a contract awarded to the Omega Consortium. Panama argued that the Claimants had bribed a former judge of the Supreme Court of Panama to secure the contract and contended that breaches of ordinary commercial contracts did not fall under

BIT protections, citing cases like the *Vivendi Annulment* and *El Paso v. Argentina*. Panama also contended that the Claimants failed to provide sufficient evidence of the Vice-President's alleged motives and that the solicitation meeting in 2012 was unproven.

Panama stated that its actions were commercial in nature, and therefore, no expropriation had taken place. Additionally, Panama argued that the criminal investigations were conducted reasonably under justifiable police powers regarding the full protection and security claim. The Tribunal considered the jurisdictional and substantive issues interrelated and did not bifurcate the case.

Assessing Commercial Legitimacy

The central question was whether Panama acted reasonably in a commercial capacity or engaged in illegitimate sovereign conduct. The Claimants suggested a test requiring proof of government misconduct contributing to contract terminations. In contrast, Panama's standard required proving that arbitrary or illegitimate actions were the "sole and proximate cause" of the project contract failures. The Tribunal rejected both approaches and meticulously examined each project to distinguish legitimate commercial measures from unreasonable exercises of sovereign power.

For each project contract, the Tribunal concluded that the weight of the evidence indicated that the relevant governmental entity had a legitimate contractual basis for its actions. To do this, the Tribunal assessed whether the actions of the Government entities in their dealings with the Consortium in the projects constituted a misuse of public power or were intended to harm the Consortium.

The Tribunal concluded that Panama's actions were consistent with legitimate commercial measures, citing the following examples:

- The decision to terminate a contract was based on the Omega Consortium's failure to meet the project requirements. The Tribunal considered various factors, particularly the Consortium's actions during the project. These included reducing the on-site workforce until payment and time extension issues were resolved, requesting additional payment, and eventually suspending all work. These actions were deemed significant, considering that Panama had granted multiple time extensions to complete the project.
- Panama's decision to terminate a contract was influenced by the Claimants' failure to provide the necessary operational expenses to support their change order requests.
- The Claimants were found to have not allocated the required resources to complete the projects.

In addition, the Tribunal considered the usual delay associated with a change in government administration, as well as the Government's reluctance to allocate additional budgeted funds. The Tribunal also determined that the Government did not treat other contractors differently.

The Role of Witnesses Testimonies

During the hearing, the Tribunal heavily relied on the testimonies of the witnesses to determine whether the Government was acting within its commercial capacity. Specific testimonies had a significant impact on the Claimants' case, revealing that contract termination was based on

commercial considerations rather than any illegitimate or arbitrary actions by Panama.

The Tribunal emphasized the importance of cross-examination in its findings, highlighting the potential harm associated with a failure to cross-examine in such cases. It pointed out that the Claimants' decision not to cross-examine a witness directly involved with the contracts limited the Tribunal's ability to evaluate whether there was an intent to harm by Panama. Notably, the Tribunal clarified that it did not critique the strategic decisions made by either party in their presentations but observed that the evidence and testimony provided by witnesses involved in the project could assist the Tribunal in understanding why a particular contract failed.

The Corruption Investigation

The Claimants contended that Panama's criminal investigation was not genuine. They claimed that Panama's actions violated the principles of fair and equitable treatment, full protection and security, and amounted to an indirect expropriation of their investments. On the other hand, Panama alleged that the Claimants secured the La Chorrera project contract through bribery. Panama also claimed that the Tonosí land deal was a fraudulent transaction aimed at concealing the Claimants' bribery. Furthermore, Panama argued that its actions constituted a legitimate exercise of police power.

The Tribunal conducted a thorough analysis to determine the authenticity of the Tonosí land deal. The Claimants asserted the legitimacy of the transaction, while Panama argued that it could be a fraudulent scheme. After careful consideration, the Tribunal found that there was a significant likelihood that the Tonosí land deal was not a legitimate transaction. Consequently, the Tribunal concluded that the Claimants could not prove any wrongdoing by Panama's police during their investigations.

In the context of the jurisdictional analysis, Panama contended that the claims concerning Mr. Rivera's criminal investigation did not directly stem from an investment as required by the BIT, the TPA, and Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), as the original target was the former judge of the Supreme Court of Panama. Nevertheless, the Tribunal determined that the claims of criminal investigation were directly linked to the Claimants' investments.

As no evidence was presented under Panamanian law to establish corruption in making the investment, the Tribunal abstained from deciding on the applicable standard of proof for corruption. The United States and the Claimants posited that the standard should be "clear and convincing evidence", while Panama maintained that it should be a "balance of probabilities."

Concluding Observations

The Tribunal's decision in *Omega v. Panama* holds great significance as it underscores the intricate balance between safeguarding foreign investments and a state's prerogative to partake in commercial undertakings. However, ascertaining whether a state has operated within its commercial sphere without exercising its sovereign authority is not a matter of first impression and remains highly dependent on the specific circumstances of each case. As demonstrated in *Omega*,

tribunals are advised to examine and assess the evidence meticulously.

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