Bribery and the Defence of Illegality in Investment-Treaty Arbitration with Special Emphasis on the Energy Charter Treaty

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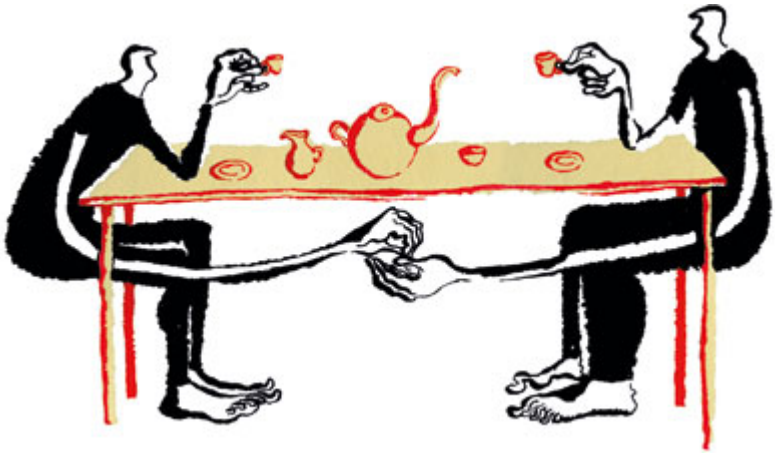

Investment-treaty arbitration is a Dispute Resolution process between a host state and a foreign investor, usually governed by International Investment Agreements ("**IIA**") such as Bilateral Investment Treaties ("**BIT**") or Multilateral Investment Treaties ("**MIT**"). When an investor seeks to bring a claim against host states before an Investment Arbitral Tribunal, the host states often take the defence of 'investor illegality', to protect themselves from liability towards the investors. Here, the host states argue that since the foreign investor obtained the investment within the host state through illegal means, such as bribery of the host state's officials, such investments should not be protected by the governing IIA. This would relieve the host states of any potential liability. Although the very definition of acts such as bribery is also debated, the focus of this piece is only on the effects of a finding of such illegalities over the dispute settlement process.

The Energy Charter Treaty ("**ECT**"), which came into effect in April 1998, is a multilateral investment treaty designed to promote energy security and extends primarily to European states. Having over 52 signatories, the ECT is considered to be one of the most expansive and comprehensive MITs. Thus, especially in the context of the ECT, being one of the most prevalent and wide MIT, it becomes important to assess whether there is a defence of 'investor illegality', that would bar a foreign investor from exercising their right to submit disputes to an Arbitral Tribunal established under Part III of the ECT. Exploring relevant case-law, this article establishes the existence of a defence of investor illegality. However, it also clarifies that such a defence may attack either jurisdiction or admissibility, depending on the treaty provision concerned. The article also looks at the doctrines of good faith and *Nemo Auditur Propriam Turpitudinem Allegans* to test the defence.

Does Bribery Impact Jurisdiction of the Tribunal or Admissibility of the Claim?

Jurisdiction is a tribunal's competence to hear a particular dispute (for example, whether the tribunal has the competence to address the subject matter of the dispute). As for admissibility, even if a tribunal has jurisdiction over a dispute, it could refuse to admit a claim for special reasons – this piece shall consider, for example, a situation where the investor has obtained the investment in violation of domestic laws. Furthermore, a failure to exhaust local remedies is generally considered to be an issue of admissibility. Although the ICSID Convention does not distinguish between jurisdiction and admissibility (*Enron v Argentina*2007), it is understood through judicial decisions that jurisdictional objections preclude tribunals from giving rulings concerning the admissibility *and* the substance of claims, whereas admissibility objections do not undermine the jurisdiction of the tribunal.

The question of whether bribery could affect the jurisdiction or admissibility has been discussed in the existing literature on investment arbitration. As Miles' research has shown (page 351), there exists a presumption that bribery by investors would affect the admissibility of the investor's claim, and not the jurisdiction of the tribunal. However, such a presumption is incorrect as the determination must instead depend on the syntax of the IIA and the timing of the instance of bribery. As regards syntax, there are certain IIAs that contain express legality requirements, in view of which the bribery of the investors affects the jurisdiction of the tribunal. In contrast, the absence of such legality requirements in IIAs would mean that bribery could impact the admissibility of the claim.

A typical express legality requirement could look like the one provided within Article 1(1) of the Germany – Philippines BIT (1997), as interpreted by the tribunal in *Fraport v Philippines* (2007) ("**Fraport**"), which reads that an "investment" shall mean any kind of asset accepted "*in accordance with the respective laws and regulations*". Furthermore, with respect to this BIT, the tribunal held that jurisdiction would not be affected if the investor indulges in bribery of public officials *after* obtaining the investment (p. 300).

Unlike the aforementioned BIT, as per its definition of 'investment', the ECT does not contain an express requirement of the investments to be obtained through legal means. Article 1(6) of the ECT defines "Investment" to mean every kind of asset, owned or controlled directly or indirectly by an Investor. Although the tribunal in *Plama v Bulgaria* (2008) ("**Plama**")recognised the absence of an express legality requirement within the ECT, it nevertheless read in Article 26(6) of the ECT at the admissibility stage, as per which principles of international law must be applied by the tribunal, granting jurisdiction to the tribunal. The tribunal reasoned that since the acts of the investors in *Plama* were contrary to the applicable rules and principles of international law, this could be a basis for them to preclude the claims of the investors. In *Plama*, the tribunal ruled that there was a principle prohibiting 'fraud' under international law, and since the investors had obtained the investment through fraud, this prohibition would fall within the ambit of Article 26(6). *Plama* would be more appropriate with respect to the ECT than *Frapport* because *Plama* is an ECT-governed dispute, whereas *Frapport* is based on the Germany-Philippines BIT; and secondly, the *Plama* award was rendered more recently than *Frapport*. Thus, relying on the *Plama* jurisprudence, it can be held that the ECT has provisions to preclude claims of foreign investors if they have obtained the investments through bribery.

The Good Faith Principle

With respect to the ECT, the tribunal in *Plama v Bulgaria* ruled that a tribunal established under the ECT would only extend protection to investments obtained under the international and domestic principle of good faith. In a similar vein to *Plama*, the tribunal in *Phoenix Action v Czech Republic* (2009) held that for investments to be protected by the arbitral tribunal, they must not be obtained in violation of the good faith principle. As per Hamester v Ghana (2010), investments obtained through bribery and corruption are violative of the good faith principle, as per the ICSID Convention, even if the investment treaty is silent on the matter, and the claims on these investments become inadmissible. Therefore, the good faith principle can be a valid ground to preclude the admission of claims before a tribunal. It is important to note here that *Plama* recognised the existence of the good faith principle in the context of both domestic and international law. Thus, states which are signatories to the ECT can invoke violations of both the regimes of law to prove that the respective investors obtained investments in their states in violation of the good faith principle. As most states would have laws prohibiting bribery in their statutes, ECT cases could be a good example for precluding investors' claims under the good-faith principle.

Nemo Auditur Propriam Turpitudinem Allegans

Nemo Auditur Propriam Turpitudinem Allegans is a civil law maxim, which literally means "no one can be heard to invoke their own turpitude". The maxim stems from the broader umbrella of the good faith doctrine, and could be interpreted to explain that when a party to an investment agreement is aware that its actions are prohibited by law, while performing those actions, the party would not be entitled to later claim restitution with respect to those illegal actions. In simpler terms, if the investor is aware of the fact that their acts, while obtaining investments, can be regarded as bribery, they would not later be allowed to seek protection of those investments, which they initially obtained through illegal means. From the perspective of the host state,. if the public official of the host state is directly involved in accepting bribery, along with *mala fide intention* on the officials' part, the same doctrine can arguably be used against them. This is to say that if an agent of the host state has engaged in an illegal act like bribery, the host state should not be allowed to benefit from the preclusion of the investor's claim before an arbitral tribunal, relying on the doctrine of *Nemo Auditur Propriam Turpitudinem Allegans*.

The tribunal in *Inceysa Vallisoletana v El Salvador*(2006) relied on this doctrine to rule that the investors who engaged in bribery and fraud would not be entitled to seek protection of the arbitral tribunal. This doctrine should not necessarily be a part of the investment treaty governing the states, and can be treated as a general principle of law, as understood under Article 38(1)(c) of the ICJ Statute. To reiterate, with respect to the ECT, as per Article 26(6), tribunals established under the ECT should decide on disputes in accordance with principles of international law. Thus, as the doctrine would be a principle of international law, it would govern ECT disputes as well.

Conclusion

This article has discussed various aspects of international investment law, such as the impact of bribery on the jurisdiction of the tribunal or admissibility of the claim. The article also looks into the good faith principle and the doctrine of *nemo auditur propriam turpitudinem allegans* which can be used to preclude the investor's claims. All these concepts of the defence of illegality have also been applied in the case of ECT disputes. In the context of the above analysis, it is important to understand that investor bribery as a defence not only promotes the purpose of MITs such as ECT by furthering their goal of discouraging illegal conduct, but it also acts as an anti-bribery mechanism in the larger public international law context, which has campaigned against bribery and corruption through tools such as the OECD Convention on Combating Bribery of Foreign Public Officials (1997) and the UN Convention against Corruption (2003).

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