

Allegations of Government Corruption in ICSID Arbitration Involving Latin America

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Metrics of Government Corruption in Latin America

- **Corruption Perceptions Index (2007)**
 - **Published by Transparency International**
 - **Input from World Bank, NGOs, etc.**
 - **Chile and Uruguay as less corrupt**
 - **Argentina and Bolivia as very corrupt**
 - **Haiti as most corrupt in region**
- **Global Corruption Report (2007)**
- **Private Sector Perceptions**
 - **2008 Survey: 72% of executives responded that, of all regions, their companies are most vulnerable to corruption in Latin America**

International Public Policy Against Corruption

- United Nations Convention Against Corruption (2003)
 - Article 5: National anti-corruption polices and international cooperation
 - Article 4: Protection of state sovereignty (non-intervention)
- Inter-American Convention Against Corruption (1996)
 - Article 1: State signatories to “eradicate corruption”
 - Article 2: “Cooperation” among states for the “effectiveness of measures” to “eradicate corruption” in “public functions”
 - March 2007 MOU of Organization of American States and Inter-American Development Bank

International Public Policy Against Corruption (cont.)

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)
 - Article 1: State signatories to make corruption a “criminal offense under [national] law”
 - April 2007 MOU of OECD and Organization of American States
- 12th International Anti-Corruption Conference (Guatemala, 2006)
 - Pledge to eliminate corruption in Central America by 2010
- **BUT: Bilateral Investment Treaties (“BITs”) and international commercial contracts normally lack provisions against government corruption.**

Allege government corruption? The Claimant's Perspective

- Want fair, transparent and predictable environment for international commercial transactions
 - 2007 Study by Dal Bo and Rossi: Where CPI higher, companies need more employees
- Interest in expedited arbitration
 - **BUT: Risk of stay of arbitration per national criminal process**
 - **Reemerging Calvo Doctrine?**
- Pressure point (for the government to settle)
- Risk damaging relationship with government (future administrations)
- Risk of corruption counterclaim
 - National criminal process against claimant
 - Duty to report corruption allegations against the company (SEC)

Allege government corruption?

The Government's Perspective

- **Interest of Eradicating Corruption to Maintain Institutional Legitimacy**
 - US denial of travel visas to public officials accused of corruption
- **Risk of Arbitration Finding of Government Corruption**
 - Mere allegation creates skepticism as to compliance with international commitments
 - May affect credit rating and position vis-à-vis WB, IMF, etc.
 - Chilling of foreign investment
- **Political Considerations**

Allege government corruption? The Tribunal's Perspective?

- **Competence Regarding Government Corruption Allegations?**
 - **Presumption that government corruption should be processed by national courts in criminal proceedings**
 - **Inability to develop evidence of government corruption**
 - **Concern that overextension of the tribunal's jurisdiction could render arbitration award vulnerable to due process attacks**
 - **BUT SEE: *Westacre Inv. vs. Jugoinport SDRP Holdings* (ICC Award 6497 (1994)) – Arbitration tribunal did not assess allegations that government officials accepted bribes to grant the contract because such allegations were not made with specificity. British court denied enforcement of arbitration award as contrary to international public policy against corruption.**
 - **Cremades and Cairns, "Corruption, International Public Policy and the Duties of Arbitrators," *Dispute Resolution Journal* (November 2003)**
 - **Argue that jurisdiction derived from BIT requires tribunals to assess allegations of government corruption**

Survey of cases involving allegations of government corruption:

- **RSM Production Corporation (USA) v. Government of Granada (ICSID Case No. ARB/05/14)**
- **Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (ICSID Case No. ARB/03/25)**
- **Lucchetti Enterprises, S.A. (Chile) and Lucchetti Peru, S.A. (Peru) v. Republic of Peru (ICSID Case No. ARB/03/4)**
- **SGS Société Générale de Surveillance S.A. (Switzerland) v. Republic of the Philippines (ICSID Case No. ARB/02/6)**
- **F-W Oil Interests, Inc. (USA) v. Republic of Trinidad and Tobago (ICSID Case No. ARB/01/14)**
- **World Duty Free Company Ltd. v. Republic of Kenya (ICSID Case No. ARB/00/7)**

F-W Oil Interests, Inc. (USA) v. Republic of Trinidad and Tobago (ICSID Case No. ARB/01/14)

- **US company commenced ICSID arbitration against the Government of Trinidad y Tobago for contract revocation.**
- **Claimant alleged that corruption of government minister led to revocation of contract and its award to a competitor.**
- **Government corruption allegation withdrawn prior to the hearing.**
- **Arbitration Award (2006) for the Government**

World Duty Free Company Ltd. v. Republic of Kenya (ICSID Case No. ARB/00/7)

- Swiss company commenced ICSID arbitration against Kenyan Government for revocation of contract and its award to a competitor.
- Government counterclaimed that company was awarded the contract because it bribed the previous President of Kenya, which illegal act nullified the contract.
- Company argued that USD\$500,000 were not given to the President as a bribe, but as a “personal donation... necessary to engage in business in Kenya”
- Tribunal determined that monies given to President nullified the contract.
- 2004 - Claimant company admitted noncompliance with its anti-corruption regulations, having paid USD\$2,000,000 in “donations”

Lucchetti Enterprises, S.A. (Chile) and Lucchetti Peru, S.A. (Peru) v. Republic of Peru (ICSID Case No. ARB/03/4)

- **Company commenced ICSID arbitration against Peruvian Government, alleging that permits for the construction of manufacturing plant were revoked illegally.**
- **Government counterclaimed that the judicial orders that resulted in the issuance of the construction permits were obtained by corruption of public officials of the previous administration, and thus no jurisdiction for the arbitration pursuant to BIT.**
- **Arbitration Award (2005) – Determined lack of jurisdiction as facts at issue predated the BIT.**
- **Tribunal also held that, were there proof of the alleged corruption, such would have been additional basis for the determination of lack of jurisdiction.**

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COMMENTS AND Q&A