INTRODUCTORY NOTE TO WORLD DUTY FREE COMPANY LTD. V. THE REPUBLIC OF KENYA
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The award in World Duty Free Company Ltd. v The Republic of Kenya, ICSID Case No. ARB/00/7, 6 October 2006, dismissed a contractual claim tainted by corruption. Its ramifications for international commercial transactions are far-reaching. The award suggests that foreign investors need to come with "clean hands" before ICSID tribunals. Bribes to obtain investment contracts violate international public policy and leave foreign investors without remedy. This decision comes in the wake of efforts to combat corruption at the international level to counter its detrimental effect on sustainable economic development and poverty reduction.1

The Republic of Kenya and the company House of Perfume entered into a contract to operate duty free shops and upgrade passenger facilities at Nairobi and Mombassa airports. That contract was governed by both English and Kenyan law. To secure the licenses required for operating the shops, Mr. Ali, manager and majority shareholder, paid a "personal donation" of US$ 2 million apparently solicited by President Moi. The latter was presented with a suitcase full of cash, and returned it filled with fresh corn. The occurrence of this payment was uncontested. In 1990, the agreement substituted World Duty Free Company ("WDF"), incorporated on the Isle of Man, for the House of Perfume. The tribunal imputed Mr. Ali's actions as alter ego of both companies to WDF.

An ICSID tribunal composed of Judge Gilbert Guillaume, Andrew Rogers, and V.V. Veeder applied international, English, and Kenyan law. WDF alleged that Kenya breached the contract and took its property without compensation. The award has two principal elements. First, the tribunal held that the 1989 contract was obtained by a bribe, independent of eventual conformity with local practice (para. 172). It thereby dismissed WDF’s argument that the payment was simply "part of the consideration paid by the House of Perfume to obtain the contract" as well as local custom ("Harambee"), essentially a part of the cost of doing business which "was not only acceptable, but fashionable" in Kenya (para. 120). Noting frequent abuse of Harambee, the tribunal found that that concept was unlikely to include bribery under Kenyan law and custom (para. 134).

Second, after thoroughly reviewing various judicial decisions and international conventions on corruption and an expert opinion by Lord Mustill, the tribunal concluded that bribery breached international, English and probably Kenyan public policy. The tribunal found that Kenyan and English law both abhor corruption: "Corruption of a state officer by bribery is synonymous with the most heinous crimes because it can cause huge economic damage; and its long-term victims can be legion" (para 173). It also extensively quoted a 1963 ICC award by Judge Lagergren, which called corruption "an international evil" contrary to "good morals and international public policy common to the community of nations" and consequently concluded that claims tainted by corruption forfeit "any right to ask for assistance of the machinery of justice" (para. 148).2 In adopting a transnational conception of public policy, the tribunal stressed however that arbitral tribunals need to carefully verify "the objective existence of a particular transnational public policy rule" (para. 141).

Applying the doctrines of ex turpi causa non oritur actio and ex dolo malo non oritur actio, the tribunal refused to uphold "claims based on contracts of corruption or on contracts obtained by corruption" (para. 157). Doing so would encourage others to bribe public officials. Bribes thus taint investment contracts with illegality and make them voidable. In reaching this conclusion, the tribunal pointed out that Mr. Ali was "steeped in illegal conduct", and that prior to giving the bribe, had the free choice whether or not to invest in Kenya (para 178). If future ICSID tribunals follow this award, claimants who excuse side payments on the grounds that doing business in a particular country might be very difficult without them, are left without remedy.

Two additional points of general interest appear in the award. First, the tribunal drew a clear distinction between the nation of Kenya and its head of state. At the outset, the tribunal noted that it lacked jurisdiction over the former Kenyan president, who was also not represented in these proceedings. The recipient of the bribe, the tribunal held, was clearly Kenya's President acting as agent against the interests of his principal. Therefore, the bribe could not legally be imputed to Kenya. The tribunal observed that "if it were otherwise, it would not be a bribe." (para. 169). The tribunal thereby rejected WDF's contention that Kenya negotiated the contract with full

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knowledge of payment it now relies on for invalidating the same contract. The extraordinarily important point is that acts of personal enrichment may bind only the agent, not the principal.

Second, the tribunal rejected the notion that the corruption payment was detached from the investment contract. Rather, the bribe was causal for that contract, "an intrinsic part of the overall transaction, without which no contract would have been concluded between the parties" (para. 167). The tribunal thus cast a wide net over attempts at inducing public officials to grant special favors in exchange for monetary gain. Investment contracts as a whole are voidable whenever government agents impose obligations on its principal procured by a bribe.

In the final part of the award, the tribunal showed concern that Kenya employed the bribing of its own head of state as a complete defense to WHD's claims, given that Kenya had neither tried to prosecute the former President for corruption nor to recover the bribe. After expressing some sympathy to the unfair outcome for the claimant, the tribunal noted that claims tainted by corruption must be dismissed in order to protect "the mass of tax-payers and other citizens making up one of the poorest countries in the world" (para 180). The fight against corruption overrides resulting shortfalls in justice for individual claimants. This clear affirmation underscores the overriding rationale behind the tribunal's decision. Corruption is an international evil to which no ICSID tribunal ought not to lend any assistance. This statement of principle is of great relevance for future foreign investment disputes.

ENDNOTES

1 The most recent example is the New Governance and Anticorruption Strategy for the World Bank Group, March 21, 2007. For instance, in November 2006, the World Bank had banned Lahmeyer International GmbH from Bank-financed projects for a period of seven years on the grounds that the company had bribed the Chief of the Highlands Development of Lesotho; cf. also, United Nations Convention Against Corruption, 41 ILM 31 (2004); African Union Convention on Preventing and Combating Corruption, 41 ILM 1 (2004); OECD Convention on Combating Bribery of Foreign Public Officials, 37 ILM 1 (1998).