

Evidence of Corruption before Investor-State Arbitration

A case study of Metalclad v. the United Mexican States

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Introduction

Confluence

- Growth of the number of, and recourse to, mechanisms for the settlement of international economic disputes
- Developments in the understanding and combat of corruption internationally

The Dispute

How was it raised to an international arbitration?

- Brief overview of the dispute
- The facts, highly disputed

Conflict General Timetable

94-00

- new federal environmental authorities

1991

- 1st investments

December 1991

- La Pedrera is shut down

February 1993 – La Pedrera Investment

1996

– reserve zone decree

May 1993-September 1996: Governor Sanchez-Unzueta term

The Forum and the Law

Forum where it was brought: Section B of NAFTA Chapter Eleven

- Investment protections under NAFTA
 - National treatment
 - Most favorable national treatment
 - Treatment in accordance with international law
 - Expropriation or measure tantamount to expropriation

Metalclad's Claim

In Memorial

- Invitation
- + federal assurances no municipal permit (detrimental reliance)
- + corruption and collusion of state and municipal officials (among others)
- + federal government's failure
- = NAFTA violations and taking of Metalclad's investment

Corruption Allegations

- Attempt of bribery by municipal officials
- Collusion and corruption of state officials with competitor
- Collusion and corruption of municipal officials
- Collusion and corruption by private individuals

Payroll payments to the wife of Dr. Pedro Medellin

- Evidence: company official saw evidence

Collusion between State Governor and competitor

- Evidence: newspaper articles
- Bribery suggestion by local counsel?

- State reliance on study prepared by Mr. Aleman

If Corruption, What Is The Consequence?

Overview of NAFTA obligations

- National treatment, MFN, international law, expropriation
- Treatment in accordance with international law, including fair and equitable treatment and full protection and security

Corruption & collusion = bad faith = antithesis of fairness equity & below minimum standard of treatment

International Law, Investment Treatment, and Corruption

Requirements for the finding of international responsibility

- Conduct in breach of international law
- Conduct attributable to the State
- Injury to foreign investor or its investment

Conduct attributable to the state

- Not the conduct of private individuals, unless failure to protect
- Effect of knowledge of corruption and failure to take steps to prevent injury

Injury

Standard of proof

- The allegation must be directly advanced
- More than circumstantial evidence

Mexico Investigates Corruption Allegations

Dr. Pedro Medellin's wife in RIMSA's payroll

- Dr. Pedro Medellin was a widower at the time

Governor denies allegations and offers counter-evidence

- Metalclad attempted to bribe him

- The affidavit by local counsel

Municipal presidents deny allegations

Mexico Finds Additional Evidence

Metalclad's pre-La Pedra investments

- Allegation of detrimental reliance
- Incorporation documents: Lucia Ratner
- Mr. Rodarte's role
 - The contamination of La Pedra
 - Rodarte's conflict on interest issue
- Metalclad's omission of Rodarte relation pre-La Pedra

Mr. Rodarte is Ms. Ratner's husband

Contractual Agreements

- Three subsidiaries: A, B, and C
 - Ms. Ratner a shareholder in A

Metalclad take-over of Mexican shareholders

Stock exchange agreements with Ms. Ratner and an unknown individual

- Graduated formula for the payment of stocks and cash conditioned upon occurrence of certain events

Graduated Formula

Metalclad shares and cash conditioned upon

- Permits and financing for construction of facilities if companies A, B and C

Realization of payment and advance: Bona fide reasons for conditions?

Appropriateness of shareholder in A (Ms. Ratner) receiving consideration for developments in companies B and C?

If Corruption, What Is the Consequence?

Analogy between nullity of contract in private international arbitration

Good faith in international adjudication

- States are obligated to bring claims in good-faith
- Investor-State Arbitration give direct access to investors
- Requirement applicability of investors?

Principle of law: no one to take advantage of his/her own wrong-doing

If good faith requirement, required State conduct:

- Corruption evidence not circumstantial
- Allegation must be directly made
- Should the State take congruent steps domestically?

E.g., investigate and prosecute corruption

What is the Duty of the Arbitral Tribunal?

- The process is not about corruption
- Need to assess and resolve relevance and consequence
- Proactive arbitration?
- Need to resolve all issues put before the Tribunal
- International developments against corruption

Conclusion: Lessons and Possibilities

- The role of discussion and academic work in the development of law
- Professionalization of local governments and information gathering: public records
- Ethical challenges for counsel
- Legal Education