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World Duty Free v. Kenya

World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7

(Originally published in 2011 in *International Investment Law and Sustainable Development: Key cases from 2000–2010*

(<https://www.iisd.org/library/international-investment-law-and-sustainable-development-key-cases-2000-2010>); republished on this website on October 18, 2018. Read more here. (<https://www.iisd.org/itn/isds-investment-arbitration-sustainable-development/>))

Award available at <https://www.italaw.com/cases/3280>
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Keywords

Corruption, interpretation, investor obligations, transparency

Key dates

Request for Arbitration: 7 July 2000

Constitution of Tribunal: 29 November 2000

Award: 4 October 2006

Arbitrators

Judge Gilbert Guillaume (president)

Hon. Andrew Rogers (claimant appointee)

Mr. V. V. Veeder (respondent appointee)

Forum and applicable procedural rules

International Centre for Settlement of Investment Disputes (ICSID)

ICSID Rules of Procedure for Arbitration Proceedings

Applicable treaty

None—the case concerns a contract-based investment arbitration. (The present (April 2010) compilation of cases in this e-book covers primarily treaty-based arbitration. This case is an exception in that the dispute arose under a contract between the government and the investor, not a treaty between two states.)

Alleged violation

- Claimant alleged Kenya violated various contractual obligations and international law by illegally taking and destroying Claimant's property

Other legal issues raised

- Interpretation—reference to other bodies/principles of law
- Investor obligations—obligations to comply with domestic/international law
- Procedure—transparency

1.0 Case Summary

In June 2000, World Duty Free Company Limited, a company incorporated in the United Kingdom (“World Duty Free” or “the Claimant”[1]), initiated ICSID proceedings against the Republic of Kenya (“Kenya” or “the Respondent”). It alleged that Kenya had breached contractual obligations it owed the Claimant and had illegally taken the Claimant's property when, in relevant part, Kenyan officials ordered in 1989 that a court-appointed official take over management and control of World Duty Free. As a remedy, the Claimant sought restitution and damages, including lost profits and exemplary damages.

At issue was a 1989 contract (the “1989 Agreement”) between the Claimant and Kenya, pursuant to which the Claimant would construct, maintain and operate duty-free complexes at two airports in Kenya. The 1989 Agreement also contained an arbitration clause providing that, if there were a dispute between the parties,

the parties would submit it to ICSID for resolution by an arbitral tribunal pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).

In December 2002, the Claimant filed a document in the arbitral proceedings that revealed the Claimant previously had made a covert payment to the former President of Kenya, Daniel arap Moi, in order to conclude the 1989 Agreement. Upon discovery of that information, Kenya sought to dismiss the Claimant's case on the grounds that, because the relevant contract had been procured through payment of a bribe, the contract was void and unenforceable as a matter of public policy. Based on those developments, in December 2004 the Tribunal declared that the parties had to address, and it had to decide, certain fundamental issues—namely, (1) whether a bribe was paid by the Claimant to the former president, (2) if so, whether the 1989 Agreement was procured as a result of the bribe and (3) if the Agreement had been obtained by the bribe, whether it was valid and enforceable under applicable domestic laws and public international law (para. 129).

Based on its assessment of the facts and relevant principles of domestic and international law, the Tribunal held the Claimant had in fact procured the 1989 Agreement through a bribe to the former Kenyan President and that, consequently, the Claimant had no right to pursue or recover under any of its pleaded claims, all of which arose from that 1989 Agreement (para. 179).

2.0 Select Legal Issues

This case is important in that it is an example of how a tribunal can refer to and rely upon general principles of international law, and private parties' obligations thereunder, in order to inform its evaluation of claims. It also supports the principle that investors have obligations to comply with domestic and international law in the host states in which they invest, and shows how investor misconduct in certain circumstances can affect an investor's legal rights vis-à-vis host states. The fact that *World Duty Free* was based on a contract between the Claimant and Kenya—as opposed to a bilateral investment treaty or other international investment agreement (IIA)—may, however, limit these principles' applicability in other investor–state disputes. The discussion below addresses each of these issues in more detail. It then also briefly relays some of the Tribunal's statements regarding transparency in investor–state dispute settlement and notes problems with its approach to this topic.

2.1 Applying general principles of international law and public policy on corruption

The 1989 Agreement on which the Claimant based its claims (and ICSID jurisdiction) stated that disputes arising out of the contract should be resolved in accordance with English and/or Kenyan law[2] (paras. 158–59). Nevertheless, the Tribunal held that principles of international law also applied, noting that other arbitral tribunals had likewise “based their decisions on universal values” (paras. 137, 141). The Tribunal explained that before applying such “universal values” to the case before it, however, it must ensure there was “objective existence of a particular transnational public policy rule” on the subject (para. 141). To determine whether there was a relevant “transnational public policy” rule or “accepted norms of conduct that must be applied in all fora” (para. 139), the Tribunal looked to international conventions, declarations, national court decisions and arbitral awards condemning bribery and corruption (paras. 141–157). Based on those sources, it declared it was “convinced that bribery is contrary to...transnational public policy” and, as a result, it had to reject “claims based on contracts of corruption or contracts obtained by corruption” (para. 157).

Significantly, the Tribunal also noted that investors’ duties to comply with these international law principles remain in force even when corruption is a “widespread” and “common practice” in the relevant host state (para. 156). This suggests investors must comply with what can be characterized as an “objective minimum standard of conduct”—i.e., a standard from which investors cannot deviate even if there is evidence that the particular host state in which they are investing does not adhere to or enforce the standard (paras. 156, 172).[3]

The Tribunal acknowledged it had concerns that its decision would unfairly leave the Claimant without a remedy for wrongful acts by Kenya; yet it reasoned that the “answer” to those concerns was that public policy principles, such as the ones guiding its case, protect “not the litigating parties but the public” (para. 181).

2.2 Investors’ legal obligations

World Duty Free is further notable in that it signals that foreign investors not only have *rights* in the countries where they invest, but also *obligations*; it similarly illustrates that foreign investors’ enjoyment of their rights may be contingent on the investors’ compliance with their obligations. There is, however, an arguable limit to *World Duty Free*’s implications for the scope and significance of investor obligations: because the Tribunal explicitly stated that the decision involved analysis of whether the Claimant could enforce illegally obtained *contractual rights*, the Tribunal left unclear whether and how its holding would have differed if the Claimant had grounded its claims on *rights under a governing IIA* (paras. 129, 137, 157).

The decision in a more recent case, *Inceysa v. El Salvador*,^[4] however, helps address that issue. There, a tribunal held that because the investor obtained its investment through fraud, the investor could not seek relief for alleged harm to that investment under *either the governing IIA or the contract*.^[5] Together, *World Duty Free* and *Inceysa* may therefore support a growing recognition and significance of foreign investors' duties to comply with national and/or international law relating to their investments. One caveat to that conclusion is that each case relates to improper conduct by the investor in connection with securing the investment. The decisions do not deal with the important issue of wrongful conduct by investors in connection with maintaining or operating their investments.

2.3 Confidentiality

In recounting the procedural aspects of the case, the Tribunal described its response to Kenya's request for an order regarding the confidentiality of the proceedings (paras. 12, 16). The Tribunal began by stating that, "[e]specially in an arbitration to which a Government is a Party, it cannot be assumed that the [ICSID] Convention and the [Arbitration] Rules incorporate a general obligation of confidentiality which would require the Parties to refrain from discussing the case in public" (para. 17). Nevertheless, with respect to confidentiality of hearings, the Tribunal decided to apply the following rule, which it derived from its reading of the ICSID Arbitration Rules and other ICSID regulations: "[W]hen no decision has been taken [by the Tribunal with the Parties' consent] to open the hearings to the public, the records of such hearings should not be disseminated unilaterally by one of the Parties" (para. 17). Pursuant to this approach, one disputing party can prevent the other from disclosing minutes, audio recordings and other records of hearings (para. 17). There does not appear to be any showing a party must meet before it can successfully compel or maintain confidentiality of the proceedings, nor any mechanism for public policy concerns to override a party's decision on the hearings' confidentiality (cf. para. 181). Following this approach, legitimate public interests in obtaining information relevant to government or investor misconduct or liability can apparently be thwarted by either disputing party's desire to conceal its own wrongful actions (para. 17).

Notes

[1] The term "Claimant" also refers in this summary to World Duty Free Company Limited's corporate predecessor, House of Perfume of Al-Ghurair Enterprises (of Dubai), as well as Mr. Nasir Ibrahim Ali, the "alter ego of both companies."

[2] There was ambiguity in the 1989 Agreement regarding which country's law should apply, but the Tribunal found that the situation presented “no practical difficulty” because application of “the two legal systems [had] the same material effect” in resolving this case (para. 159).

[3] After interpreting and applying principles of international law, the Tribunal examined the relevant domestic laws of Kenya and England. It concluded that each country's legal framework likewise prevented the Claimant from claiming any rights under its illegally procured contract. It also found that when Kenya learned of the bribe during the arbitration proceedings it could and legitimately did avoid the contract. There was no evidence or reason that supported attributing to Kenya the illegal acts of its former president (paras. 182–185).

[4] *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 (2 August 2006).

[5] The tribunal in *Inceysa* analyzed the issue of whether the investor's wrongful conduct precluded the investor's claims as a jurisdictional issue. The tribunal held that it did not have authority to hear the investor's claims because El Salvador had only consented to ICSID jurisdiction over claims arising out of investments made in accordance with El Salvador's laws; the investor's illegally made investment did not meet that requirement.

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