Corruption and standards of proof in investment arbitration

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__Ashique Rahman__ and __Miglena Angelova__ of Fietta in London ask whether investor-state tribunals have dispensed with "abstract" standards of proof when it comes to assessing corruption allegations.

A debate has raged for years about how investor-state tribunals should assess evidence of corruption. The debate has focused, for the most part, on the applicable "standard of proof" required to sustain an allegation of corruption. Parties denying the existence of corruption argue invariably that the bar should be set high and that corruption only may be established through "clear and convincing" evidence. Conversely, parties seeking to use evidence of corruption as a defence in the arbitration (or to further their claims) argue that corruption, like any other fact, need only be established according to the ordinary standard of proof (ie, proof on a "preponderance of evidence" or on the "balance of probabilities").

The past year has seen several decisions in which investor-state tribunals have grappled with corruption allegations. They include the decision rendered in February 2019 by two (identical) tribunals in *Niko Resources v Bapex and Petrobangla*, the two awards rendered in August 2019 in *Sanum v Laos* and *Lao Holdings v Laos*, and the award rendered in August 2019 in *Glencore v Colombia*.

A close review of these decisions demonstrates that the debate about what should be the applicable standard of proof is largely academic and often does not assist tribunals. All of these recent decisions have one thing in common. They indicate that investor-state tribunals do not find it useful to define and apply a single, "abstract" standard of proof. Rather, when it comes to assessing corruption allegations, tribunals tend to have a "less formalistic sensibility […] towards the evidentiary rules".

The decisions in *Niko* and *Glencore* are recent examples where tribunals have declined to adopt a separate, heightened standard of proof for corruption.

Niko Resources v Bapex and Petrobangla

In *Niko*, the respondents alleged that the claimant had obtained two contracts with state entities through corruption. They argued that, as a result, Niko's claims should be dismissed in their entirety. The tribunal addressed a series of questions to the parties, one of which concerned the "standard of proof in case of corruption allegations". Niko

argued that, "because corruption is a serious allegation which can attract drastic legal consequences", the tribunal should adopt a "heightened" standard of proof. For their part, the respondents claimed that "the consequences of a finding of corruption are no greater than the consequences of many other findings in international arbitration" and, therefore, the standard of proof should be no different to the ordinary standard (ie, proof on a preponderance of the evidence).

The tribunal adopted a flexible approach to the evidentiary rules. It observed that there was no "invariable rule on the standard of proof" and that it was not required to apply the "exacting standards of proof that justify criminal sanction". The tribunal refused to endorse a "heightened standard of proof" for corruption. It would adopt a holistic approach and would assess corruption allegations based not only on direct evidence, but also on "indicators of possible corruption", "red flags", "circumstantial evidence" and "inferences".

The tribunal also observed in passing that, if it had sustained the respondents' corruption allegations, the tribunal would have given the respondents the "unjust advantage" of obtaining gas delivered by their joint venture with Niko "without having to pay anything for it". The tribunal concluded that "granting such advantages to the alleged victims or corruption cannot be the purpose of the fight against corruption". These final words, in particular, suggest that the tribunal's decision may have been influenced, at least in part, by equitable considerations and the justice of the case.

Glencore v Colombia

The tribunal in *Glencore* rendered its award six months after the decision on corruption in *Niko* and adopted a similar approach to assessing allegations and evidence of corruption.

Colombia alleged in the arbitration that the claimants had procured an amendment to a mining contract that was the subject of the dispute by corrupting a senior Colombian civil servant who was in charge of supervising the mining sector in Colombia.

With respect to the standard of proof, the *Glencore* tribunal confirmed explicitly that there was "no reason to depart from the traditional standard of preponderance of the evidence". The tribunal explained that, when it came to assessing allegations and evidence of corruption, its task would be no different to what it would do with respect to any other allegation or piece of evidence produced in the arbitration. The tribunal would follow:

the time-honoured methodology followed by tribunals in all jurisdictions to establish truth based on indicia or circumstantial evidence: if a party marshals evidence that proves the existence of certain indicia, and it is possible to infer from these indicia (using experience and reason) that a certain fact has occurred, the tribunal may take such fact as established.

The tribunal proceeded to analyse the evidence and "red flags" that Colombia had identified as allegedly pointing to corruption. It found that, in the circumstances, the respondent had failed to substantiate its allegations of corruption.

Sanum* and *Lao Holdings v Laos

The *Sanum* and *Lao Holdings* cases concerned investments made by two US entrepreneurs in casino projects and slot machine clubs in Laos. The investors made their investments through companies incorporated in the Netherlands Antilles (Lao Holdings) and Macau (Sanum).

The claimants alleged in the parallel arbitrations that their local partner in Laos (a company called ST Holdings) had stopped cooperating with the claimants, commenced litigation and, ultimately, fulfilled a plan "designed" by the state to drive the claimants out of Laos and appropriate for the government the wealth created by the investment. For its part, Laos argued that the claims (in both arbitrations) should be dismissed because the claimants had procured and operated their investments through corruption.

Once again, the parties proposed contrasting standards of proof for corruption (ie, "balance of probabilities" versus proof based on "clear and convincing evidence"). In separate awards, the *Sanum* and *Lao Holdings* tribunals (consisting of the same two co-arbitrators and different chairs) decided that corruption must be proved through "clear and convincing" evidence. After assessing the evidence, the tribunals concluded that the respondent's case on corruption was "speculative rather than substantial" and that the evidence of corruption was "neither clear nor convincing".

Although it may appear that the *Sanum and Lao Holdings* tribunals adopted a different approach to the applicable "standard of proof" than the approach adopted by the tribunals in *Niko* and *Glencore*, a closer analysis shows an underlying consistency in all of these decisions.

The *Sanum* and *Lao Holdings* tribunals' decision to adopt the "clear and convincing" standard meant that they were faced with a dilemma in the specific circumstances of the cases. On the one hand, the respondent had failed to produce "clear and convincing" evidence of corruption. On the other hand, in the *Sanum* tribunal's words, the claimants' conduct was "deeply suspicious" and "bristle[d] with 'red flags'".

The tribunals therefore decided to go one step further. They determined that, although the respondent had not satisfied the "heightened", "clear and convincing" standard, the tribunals would also assess the claimants' misconduct against the (lower) "balance of probabilities" standard. The tribunals' decision to assess the claimants' conduct against both the "clear and convincing" and the "balance of probabilities" standard accords with the more flexible approach adopted in *Niko Resources* and *Glencore* towards evidentiary standards. It shows that, time and again, investor-state tribunals adopt flexible evidentiary rules when dealing with allegations of corruption and other malfeasance.

The *Sanum* and *Lao Holdings* tribunals decided ultimately that, although it was "unable to find 'clear and convincing evidence', […] it is more likely than not that a bribe was paid […] to advance the Claimants' agenda". The tribunals were satisfied that the claimants' representatives "were involved in channelling funds illicitly to Lao Government officials". The respondent had therefore produced sufficient evidence to establish "serious financial misconduct" and "corruption of Government officials […] to the lower standard of 'balance of probabilities'". This finding, in turn, allowed the

tribunals to determine that the claimants had "dealt in bad faith with the Government", which was "not without Treaty consequences, both in relation to their attempt to rely on the guarantee of fair and equitable treatment, as well as their entitlement to relief of any kind from an international tribunal".

Although the tribunals went on to dismiss both cases on the merits, "bad faith" on the claimants' part provided "added reasons to deny" them treaty protection.

Corruption comes to the fore

The issue of corruption came to the fore in 2019. The recent decisions highlight that the debate on the applicable "standard of proof" for corruption is, in the words of the *Niko* tribunal, of not "much assistance" to tribunals. It is therefore not surprising that these recent decisions show that tribunals adopt varying standards of proof. Whereas the *Niko* and *Glencore* tribunals preferred the "preponderance of evidence" standard over the "clear and convincing" standard, the *Sanum* and *Lao Holdings* tribunals used both standards to assess the claims to their satisfaction. These decisions show a continuous and largely consistent move toward a flexible approach to the evidentiary rules when it comes to assessing allegations of corruption.

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