

INTRODUCTORY NOTE TO METAL-TECH LTD. V.
REPUBLIC OF UZBEKISTAN (ICSID)
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Introduction

In *Metal-Tech Ltd. v. Republic of Uzbekistan*,¹ an International Centre for Settlement of Investment Disputes (ICSID) panel unanimously dismissed an investment claim by an Israeli investor filed pursuant to the Israel-Uzbekistan Bilateral Investment Treaty (BIT)² against Uzbekistan. The tribunal concluded that it lacked jurisdiction to hear the dispute because the investment was not “implemented,” i.e., “established” in accordance with the laws and regulations of Uzbekistan as it was the result of corrupt practices by the investor. To reach this conclusion, the tribunal relied, *inter alia*, on the requirement of consent as set forth in Article 46 of the ICSID Convention. Ultimately, the tribunal decided that a consequence of having no jurisdiction over the claims, it had no jurisdiction over Uzbekistan’s counterclaims.³

Although the tribunal’s discussion on the scope of legitimate investment under the BIT is significant, the case will likely be remembered for the tribunal’s *sua sponte* inquiry into apparent corruption uncovered during the formal proceedings. The decision demonstrates the tribunal’s zealous inquiry into excessive and unjustified payments to government officials and individuals with close ties to government leadership. The tribunal reviewed and evaluated a range of circumstantial evidence that drew adverse inferences on Metal-Tech, shifting the evidentiary burden on the claimant, and dismissed the case accordingly as the corruption was established “to an extent sufficient to violate Uzbekistan law”⁴ and within “reasonable certainty”⁵ in connection to its investment.

Under most arbitration rules, arbitrators have the power to request *sua sponte* the production of evidence. Under Article 43(a) of the ICSID Convention, the tribunal may “call upon the parties to produce documents or other evidence.” Similarly, under Article 43(2)(a) of ICSID Arbitration Rules, the tribunal may “call upon the parties to produce documents, witnesses and experts.” Similar provisions are found under Article 25(5) of

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¹ *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013), available at <http://italaw.com/sites/default/files/case-documents/italaw3012.pdf>.

² Agreement between the Government of the State of Israel and the Government of the Republic of Uzbekistan for the Promotion and Reciprocal Protection of Investments, Isr.-Uzb., July 4, 1994, WIP Lex No. TRT/IL-UZ/001, [hereinafter BIT], available at http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=309386.

³ *Metal-Tech*, *supra* note 1, ¶¶ 412 & 413.

⁴ *Id.* ¶¶ 412, 372.

⁵ *Id.* ¶ 243

the 2012 International Chamber of Commerce (ICC) Rules; Article 22.1(v) of the new 2014 London Court of Arbitration Rules; Article 20 (4) of the International Centre for Dispute Resolution Rules; Article 43(1) of the new 2015 China International Economic and Trade Arbitration Commission Rules; and Article 24(g) of the Singapore International Arbitration Centre Rules. These inherent powers of the tribunal are also adopted in Article 3(10) of the International Bar Association Rules on Taking of Evidence in International Commercial Arbitration.

Although the arbitrators' *sua sponte* power to request the production of evidence was widely accepted in the *Metal-Tech* case (the issue of corruption was raised by the Respondent), such proactive efforts by the tribunal have received mixed reviews from the arbitration community in cases where issues of corruption were not raised by either party to the arbitration proceeding. Some scholars and practitioners argue that "arbitrators should act with great caution when introducing in the arbitral debate elements which were not included in the parties' submissions."⁶ In other words, "although arbitrators should be sensitive to states' legitimate interests, they should not turn themselves into investigators, policemen or prosecutors."⁷ Thus, while some scholars and practitioners found the tribunal's *sua sponte* considerations of corruption troubling,⁸ others have argued that such unilateral approach by tribunals is necessary to preserve the legitimacy of the process.⁹ That would be the case in situations "where the arbitral proceedings are a sham, e.g., where a bogus consent award is sought."¹⁰

Facts

The dispute between the parties arose after a joint venture to operate a mineral plant in Uzbekistan went sour. Failing to reach an amicable resolution to their dispute, Metal-Tech commenced arbitration against Uzbekistan in January 2010 before ICSID under the

⁶ Alexis Moure, *Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal*, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 229 (Loukas, A. Mistelis & Stavros L. Brekoulakis eds., 2009); see also Paul Friedland, *Fact-Finding by International Arbitrators - The Issue of Sua Sponte Calls for Evidence*, at 3 (ASA Conference, Feb. 2015), available at <http://www.arbitration-ch.org/dl/2f9f8cbc536af2ec4743743cc25256cf/050%20Panel%203%20Friedland%20-%20Sua%20Sponte%20Calls%20for%20Evidence.pdf>.

⁷ Moure, *supra* note 6; see also Gary B. Born, *Rights and Duties of International Arbitrators*, in *INTERNATIONAL COMMERCIAL ARBITRATION* 1998 (2d ed. 2014).

⁸ See, e.g., Anna Jouravleva, *Sua Sponte Corruption Inquiries by Arbitral Tribunals: Causing More Harm Than Good*, *GLOBAL ARB. BLOG* (Dec. 19, 2014), <http://globalanticorruptionblog.com/2014/12/19/sua-sponte-corruption-inquiries-by-arbitral-tribunals-causing-more-harm-than-good/> (arguing that "the approach adopted by the tribunal in *Metal-Tech* might do more harm than good" and listing a number of possible "scenarios" where *sua sponte* considerations of corruption may "unwittingly perpetuate corruption").

⁹ See, e.g., Michael Hwang S.C. & Kevin Lim, *Corruption in Arbitration—Law and Reality*, 8 *ASIAN INT'L ARB. J* 1, 13 (2012) ("A tribunal is not 'solely a manifestation and instrumentalization of party autonomy' which can ignore 'international goals of sanctioning illegality.' Tribunals must remain vigilant and alert to the possibility of corrupt dealings being hidden by one or both parties, otherwise they may become unwitting accessories to heinous acts 'more odious than theft.'" (emphasis in original)).

¹⁰ See Friedland, *supra* note 6, at 4.

Israel-Uzbekistan BIT, claiming, *inter alia*, that numerous measures by the Uzbek government effectively expropriated its investment.¹¹

Uzbekistan rejected all of Metal-Tech's assertions and asked the tribunal to dismiss the claim on the basis that it lacked jurisdiction as the "investment was 'implemented', i.e. made *and* operated, in violation of Uzbek law."¹² Specifically, Uzbekistan argued that Metal-Tech "engaged in corruption and made fraudulent and material misrepresentations to gain approval for its investment,"¹³ and since Article 1(1) of the BIT requires that an investment be "implemented *in accordance with the laws and regulations of the Contracting Party* in whose territory the investment is made,"¹⁴ the present claim was outside of the tribunal's jurisdiction.

Jurisdiction

The tribunal started its discussion by referring to Article 25(1) of the ICSID Convention,¹⁵ which governs the tribunal's jurisdiction. The tribunal summarized Article 25(1) as requiring four conditions to be met in order for jurisdiction to lie:

- (i) the arbitration must be between a Contracting State and a national of another Contracting State, (ii) there must be a legal dispute arising directly out of (iii) an investment, and (iv) the Contracting State and the investor must have consented in writing to ICSID arbitration.¹⁶

Applying the four prongs to the case, the tribunal had no trouble concluding that the nationality requirement was met, as both Uzbekistan and Israel are parties to the ICSID Convention. A little more noteworthy was the tribunal's discussion with respect to definition of investment; but ultimately the tribunal concluded that the joint venture between Metal-Tech and Uzbekistan "meets the objective definition of investment as understood to be contained in Article 25(1) of the ICSID Convention."¹⁷

¹¹ In particular, Metal-Tech argued that Uzbekistan breached its obligations under the BIT and Uzbekistan law by unlawfully expropriating its investment, by failing to accord it fair and equitable treatment, as well as full protection and security, and by subjecting the investment to unreasonable and discriminatory measures. *See Metal-Tech, supra* note 1, at 29–33.

¹² *Id.* at 33–34, ¶ 110 (emphasis in original).

¹³ *Id.*

¹⁴ *Id.* (emphasis added). Uzbekistan read the word "implemented" broadly, arguing that "an investor forfeits any right under the BIT in respect of investment that are 'made, carried out, or operated in an unlawful manner.'" *See id.* at 55–56, ¶ 167. Metal-Tech, on the other hand, disputed this expansive interpretation of the temporal scope of Article 1(1) of the BIT, arguing that the provision "refers only to the establishment of an investment (not its operation) and that there is no evidence that the establishment of [the joint venture] was illegal." *See id.* at 58, ¶ 176.

¹⁵ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25(1), Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

¹⁶ *Metal-Tech, supra* note 1, at 40, ¶ 123.

¹⁷ *Id.* at 41, ¶ 128. The tribunal explicitly disagreed with the ruling in *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Decision on Jurisdiction (Apr. 15, 2009), which took a broader approach and ruled that "compliance with the laws of the host State and respect of good faith are elements

Another noteworthy part of the decision was the discussion about Article 25(1) requirement that both parties consent to arbitration. According to Uzbekistan, the investment “was made and implemented contrary to the laws and regulations of the Republic of Uzbekistan, [and therefore] Respondent has not granted its consent to arbitrate before ICSID a dispute concerning that investment.”¹⁸ Metal-Tech countered this argument by suggesting that under the BIT, the tribunal must “incorporate a more favorable definition of ‘investment,’” i.e., the definition found in the Greece-Uzbekistan BIT, which does not include a legality requirement.

MFN Clause

Metal-Tech’s case depended on whether the Israel-Uzbekistan BIT requires the existence of a legitimate investment for the tribunal to exercise its jurisdiction. To this end, Metal-Tech asked the tribunal to apply the most favored nation (MFN) clause to incorporate a broader definition of investment contained in other Uzbekistan BITs, namely the Greece-Uzbekistan BIT, which does not have a legality requirement. It based its argument on Article 7(c) of the BIT, which it read to encompass MFN treatment to the definition of investment under Article 1(1).¹⁹

Uzbekistan strongly contested this interpretation of the MFN clause, submitting instead that such expansive application of MFN “would improperly circumvent the basic prerequisite that an investment first be covered under one treaty before receiving the benefits of a second treaty.”²⁰ Furthermore, Uzbekistan reminded the tribunal that other “[t]ribunals have consistently rejected attempts to use the MFN clause to circumvent the scope of treaty coverage, including the definition of a qualifying investment.”²¹

The tribunal agreed with Uzbekistan and rejected Metal-Tech’s invitation to read the MFN obligation as “extend[ing] to the definition of investment of Article 1(1) of the BIT.” In particular, the tribunal concluded that “one must be *under* the treaty to claim *through* the treaty.”²²

The tribunal also rejected Metal-Tech’s argument that Article 7(c) of the BIT “shows the Parties’ intention to extend the MFN clause to the definition of investment.”²³

After dispensing with the MFN argument, the tribunal turned to the scope of the legality requirement.

Legality of Investment

of the objective definition of investment under Article 25(1) of the ICSID Convention.” See *Metal-Tech*, supra note 1, at 41, ¶ 127.

¹⁸ *Metal-Tech*, supra note 1, at 42, ¶ 129.

¹⁹ See *id.* at 50, ¶ 149.

²⁰ *Id.* at 46, ¶ 139.

²¹ *Id.* (referring to *Société Générale v. Dominican Republic*, UNCITRAL, Award on Preliminary Objections to Jurisdiction (Sept. 19, 2008)).

²² *Id.* at 48–49, ¶ 145.

²³ *Id.* at 49, ¶ 147.

On the issue of the scope of the legality requirement of Article 1(1) of the BIT, the tribunal first noted that the scope of the provision is “circumcised in terms of subject matter (laws and regulations) and time (time of implementation).”²⁴ As only the second prong was contested, the tribunal briefly affirmed that the subject-matter scope of the legality requirement was met.²⁵

As to the question of the scope of the investment’s time of implementation, the tribunal agreed that the case hinged on the definition of the term “implemented” and whether the term meant “established” or “established and operated.” Applying the BIT’s relevant provisions, as well as the textual and contextual approaches prescribed by the Vienna Convention on the Law of Treaties, the tribunal concluded that the term “‘assets implemented’ refers to the time when the investment was made,” meaning that the “investment must be legal when it is initially established.”²⁶ To reach its conclusion, the tribunal referred to other instances in the BIT where the term “implemented” was used.²⁷

Finding that the investment had to be legal at its inception, the tribunal went on to determine whether Metal-Tech’s investment was made in accordance with Uzbek law at the time it was established.

Sua Sponte Corruption Inquiry

During a hearing at ICSID, the tribunal became aware of facts that prompted its further inquiry. The tribunal discovered that: 1) a 2005 consulting agreement between Metal-Tech and the three consultants replaced or amended an earlier consulting agreement in place since 1998 (the timing of the consulting agreement would prove crucial to the discussion on the legitimacy of the investment); 2) the work performed by the consultants was not in accordance with the said agreements but rather consisted of “lobbyist activities;” and 3) the three consultants had been paid approximately four million U.S. dollars²⁸ for their services.²⁹ These discoveries motivated the tribunal to exercise its *ex officio* powers and request additional information and documents “to inquire about the reasons”³⁰ for such substantial sums being paid. The tribunal decided

²⁴ *Id.* at 54, ¶ 164.

²⁵ As to the subject-matter scope of the legality argument, the tribunal stated: “In general, on the basis of existing case law, it considers that the subject-matter scope of the legality requirement covers: (i) non-trivial violations of the host State’s legal order (*Tokios Tokelés*, *LESI*, and *Desert Line*), (ii) violations of the host State’s foreign investment regime (*Saba Fakes*), and (iii) fraud – for instance, to secure the investment (*Inceysa*, *Plama*, *Hamster*) or to secure profits. There is no doubt that corruption falls within one or more of these categories.” *Id.* at 55, ¶ 165.

²⁶ *Id.* at 62, ¶ 193.

²⁷ *Id.* at 61, ¶ 189.

²⁸ The tribunal noted that the total payments paid by Metal-Tech to the consultants “exceeded its initial cash contribution to the venture and amounted to nearly 20% of the entire cost of the project.” *Id.* at 64, ¶ 199.

²⁹ *Id.* at 24, ¶ 86.

³⁰ *Id.* ¶ 241.

that its decision to order the production of additional information and documents *ex officio*, pursuant to its powers under Article 43 of the ICSID Convention, should stand. Given that the decision was founded on the Tribunal's *ex officio* procedural powers, any debate about whether the Respondent's request was made belatedly, whether the documents might fall within an earlier document request, and/or whether any such earlier document request had been complied with, had become moot.³¹

Metal-Tech was, however, unable to produce documents explaining the consultants' questionable employment or their excessive fees, and could not prove that the services rendered by the consultants existed or that the consultants possessed the needed qualifications to perform the duties for which they were hired. In addition, the tribunal found that there was a lack of transparency with respect to how the consultants were paid, and that two of the three consultants had "significant connections" with the Uzbek government.³²

These factors led the tribunal to conclude that the payments were not for services but bribes paid to assist in the implementation and continuing operation of the investment. Hence, the tribunal concluded that the payments constituted corruption. Importantly, the tribunal established that the bribes occurred "when the Claimant's investment was established,"³³ and that they were in violation of Uzbekistan's anti-bribery laws.³⁴

The tribunal then ruled that since the investment was not implemented in accordance with Uzbekistan's laws and regulations, and since Uzbekistan's consent to ICSID arbitration is limited to disputes concerning investments implemented in compliance with its local law, the dispute was not covered by Uzbekistan's consent. Thus, the tribunal lacked jurisdiction over the dispute.³⁵

Conclusion

The tribunal's *sua sponte* approach has been greatly debated since its issuance in 2013. But even before *Metal-Tech* was published, the arbitration community was divided as to arbitral tribunals' appropriate role in dealing with corruption.

This not the first instance where an arbitral tribunal, upon discovering corrupt practices, requests *sua sponte* further information and documentation. As recently as 2006, the

³¹ See Friedland, *supra* note 6, at 3.

³² *Id.* at 74, ¶ 225.

³³ *Id.* at 92, ¶ 273.

³⁴ *Id.* at 128, ¶ 372. Applying Uzbekistan's relevant criminal provisions to the facts discovered during the proceedings, the tribunal concluded that corruption was "established to an extent sufficient to violate Uzbekistan law in connection with the establishment of the Claimant's investment in Uzbekistan."

³⁵ *Id.* at 128, ¶¶ 372–73.

ICSID tribunal in *World Duty Free Co. Ltd. v. Republic of Kenya*³⁶ was faced with a similar situation where the corruption was not alleged by the parties but rather discovered during the proceedings. In *World Duty Free*, however, the tribunal retained jurisdiction but decided to dismiss the case because the contract between the parties was void as it was tainted by bribery, which the tribunal concluded was “contrary to the international public policy of most, if not all, States, . . . and thus against transnational public policy.”³⁷

As Gary Born acknowledges in his brief overview on bribery in arbitration cases, “adjudicating contract disputes where it is alleged that the contract has been tainted by bribery, either in its procurement or in its performance, presents difficult issues for arbitrators, as well as for counsel.”³⁸ Born states that although in the past arbitration tribunals dismissed disputes involving allegations of bribery for lack of jurisdiction, in recent years, such disputes “began to gain acceptance,” and now arbitrators are faced with a new challenge—“address[ing] the complex questions of proof where the allegations are in dispute, and determin[ing] how to approach situations where no allegation has been raised, but the facts and circumstances suggest the underlying contract may have been contaminated by bribery, and should therefore be void.”³⁹ Indeed, this is precisely the scenario that the tribunal in *Metal-Tech* had to face as it discovered suspicious consulting agreements and exorbitantly high payments to “lobbyists.”

Where do we go from here? One possibility would be to “treat investor corruption not as a jurisdictional or preliminary issue . . . , but rather as an issue that should be ‘balanced’ at the merits stage.”⁴⁰ In other words, the investor’s suspected corruption of state officials would be balanced against the state’s participation in the illegal scheme.⁴¹ Aware of the current views on the issue of *sua sponte* considerations, the tribunal in *Metal-Tech* had this to add:

[T]he Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the

³⁶ *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

³⁷ *Id.*

³⁸ Gary Born, *Bribery and an Arbitrator’s Task*, KLUWER ARB. BLOG (Oct. 11, 2011), <http://kluwerarbitrationblog.com/blog/2011/10/11/bribery-and-an-arbitrator%E2%80%99s-task/>.

³⁹ *Id.*

⁴⁰ Jason Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States?*, INVESTMENT TREATY NEWS (Oct. 19, 2012), <https://www.iisd.org/itn/2012/10/19/investment-treaties-and-investor-corruption-an-emerging-defense-for-host-states/> (referring to *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, ICSID Case No. ARB/03/25, Award (Aug. 16, 2007) (Cremades, dissenting) (providing an argument to balance the investor and state participation in illegal acts)).

⁴¹ *Id.*

other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.⁴²

Also noteworthy is that despite finding corruption on the part of the investor, the tribunal ordered that each party pay its own expenses and legal fees and share the ICSID costs. Ultimately, this meant that Uzbekistan had to pay almost eight million dollars in legal fees and expenses, as compared to the claimant's U.S. \$1.7 million.⁴³

⁴² *Metal-Tech*, *supra* note 1, at 133, ¶ 329.

⁴³ *Id.* at 140, ¶ 414.