

Daniel Arap Moi / World Duty Free Company Limited

Case ID:

ARW-47

Jurisdiction of Origin of Public Official or Entity Allegedly Involved:

Kenya

Position of Public Official(s) (yrs in office):

President (1978-2002)

Jurisdiction of Asset Recovery:

International Centre for Settlement of Investment Disputes, Washington, D.C.

Jurisdiction of Asset Recovery ? Description:

Location of Recovery Effort

Asset Recovery Start:

1998

Asset Recovery End:

2006

UNCAC Offenses Implicated:

Art.16

Money laundering Implicated:

No

Legal Basis for Asset Recovery:

Other

Intl.Cooperation: MLAT/Letter of Request?:

No

Basis for Intl Cooperation:

NA

Contributing Factors in Asset Recovery:

The Article 9(2)(c) of the Agreement of 27th April 1989 provided that any arbitration shall apply English law while Article 10(A) provided that the Agreement shall be governed by Kenyan law. The Tribunal noted that the provisions were "perhaps awkwardly worded. for present purposes, however, no practical difficulty arises from their apparent inconsistency," in voiding the contract under both English and Kenyan laws and public policy. (Award of September 25, 2006, at 49). The Tribunal also held that "Mr. Ali's payment was received corruptly by the Kenyan head of state; it was a covert bribe; and accordingly its receipt is not legally to be imputed to Kenya itself." (Award of September 25, 2006, at 54).

Status of Asset Recovery :

Completed

Stage in Asset Recovery Chain:

Final Judgment (No Appeal)

Agreement for Returned Assets:

No

Agreement for Returned Assets - Description:

NA

Case Summary:

According to the December 2010 Asset Recovery Handbook by the Stolen Asset Recovery Initiative, "In 1989, Kenya initially entered into an agreement with World Duty Free Company

(WDF) for construction, maintenance, and operation of duty-free complexes at Nairobi and Mombasa international airports. In obtaining the contract, WDF paid bribes to the former Kenyan president, Daniel arap Moi. Subsequently, in 1998, WDF was placed under receivership by the High Court in Kenya; and a formal judgment and decree was made in 2001, transferring beneficial ownership to the receiver. In disputing the order before the ICSID, WDF claimed that Kenya had unlawfully destroyed its contractual rights through the receivership order. The government of Kenya argued that WDF's procurement of the agreement through bribes was a breach of English and Kenyan laws applicable to the contract, as well as breach of international public policy, and that the government was lawfully entitled to avoid contract obligations." (Source: Asset Recovery Handbook (Stolen Asset Recovery Initiative, December 2010) at 167). The Arbitration Tribunal noted that "former President of Kenya, Mr. Daniel arap Moi, was not a party to these arbitration proceedings and was not legally represented in these proceedings. He was not heard as a witness... The Tribunal decided on the dispute submitted to it on the evidence adduced and the submissions made by the parties to the case." (Source: In the Proceeding Between World Duty Free Company Limited and The Republic of Kenya, ICSID Case No. ARB/00/7, Award of September 25, 2006.) World Duty Free Company Limited, a company incorporated in the Isle of Man, had requested the arbitration on June 16, 2000. The request was registered by the ICSID pursuant to Article 36(3) of the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States. World Duty Free was managed by Mr. Nasir Ibrahim Ali; in 1991, the Al-Ghurair family which had owned WDF sold its shares and as a result, Mr. Ali held in his own name 10% of the World Duty Free shares and 90% of the stock was registered in the name of Dinky International SA, whose shareholders were Mr. Ali at 90% and rest owned by his wife. Mr. Ali's \$2 million payment to then President Moi is described in his written statement to the Tribunal (Award of September 25, 2006, at 37-38.) The Tribunal wrote, "It remains nonetheless a highly disturbing feature in this case that the corrupt recipient of the Claimant's bribe was more than an officer of the State but its most senior officer, the Kenyan President; and that it is Kenya which is here advancing as a complete defence to the Claimant's [World Duty Free's] claims the illegalities of its own former President. Moreover, on the evidence before this Tribunal, the bribe was apparently solicited by the Kenyan President and not wholly initiated by the Claimant. Although the Kenyan President has now left office and is no longer immune from suit under the Kenyan Constitution, it appears that no attempt has been made by Kenya to prosecute him for corruption or to recover the bribe in civil proceedings." (Award of September 25, 2006, at 59.)

Disposition of Criminal Case(s):

None

Jurisdiction of Origin: Investigative Agency:

Kenyan Anti-Corruption Commission

Jurisdiction of Origin: Prosecuting Authority/Civil Attorney(s):

NA

Jurisdiction of Origin: Courts Involved:

NA

Jurisdiction of Asset Recovery: Investigative Agency:

Kenyan Anti-Corruption Commission

Jurisdiction of Asset Recovery: Prosecuting Authority/Civil Attorney(s):

Government of Kenya represented at proceedings by: Attorney General of Kenya, Counsel from law firm of Freshfields Bruckhaus Deringer, Director of Public Prosecutions, Senior Assistant Commissioner Police of Kenya

Jurisdiction of Asset Recovery: Courts Involved:

International Centre for Settlement of Investment Disputes (Washington, D.C.)

Documents:

Moi_StAR_Handbook_World_Duty_Free.pdf

Moi_World_Duty_Free_ICSID_Sept_2006.pdf

Moi_Profile_Statehousekenya_Gov_Apr_29_2011.pdf

Moi_World_Duty_Free_Chatham_House_Mar_28_2007.pdf

Documents Links:

http://www1.worldbank.org/finance/star_site/documents/arw/Moi_StAR_Handb...

http://www1.worldbank.org/finance/star_site/documents/arw/Moi_World_Duty...

http://www1.worldbank.org/finance/star_site/documents/arw/Moi_Profile_St...

http://www1.worldbank.org/finance/star_site/documents/arw/Moi_World_Duty...

Other Sources:

World Duty-Free Company Limited v. The Republic of Kenya, ICSID Case No. ARB/00/7, Award of September 25, 2006, accessed at

<http://ita.law.uvic.ca/documents/WDFv.KenyaAward.pdf>;

Jean-Pierre Brun, Larissa Gray, Clive Scott and Kevin M. Stephenson, Asset Recovery Handbook: A Guide for Practitioners (Stolen Asset Recovery Initiative, December 2010), "Box 8.5: World Duty Free Company Limited v. The Republic of Kenya," at 167.

See also, "World Duty Free v The Republic of Kenya: a Unique Precedent?," Summary of Chatham House International Law Discussion Group meeting, March 28, 2007, with main speaker Constantine Partasides, Partner, International Arbitration Group, Freshfields Bruckhaus Deringer who represented Government of Kenya in the arbitration proceedings, accessed at http://www.chathamhouse.org.uk/files/9129_il280307.pdf;

Profile of Daniel Toroitich arap Moi from the Official Website of State House, Kenya, accessed at <http://www.statehousekenya.go.ke/presidents/moi/profile.htm>.