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The Use of Preliminary Objections in ICSID Annulment Proceedings

Bernardo M. Cremades Román (B. Cremades y Asociados) · Wednesday, September 4th, 2013 · Institute for Transnational Arbitration (ITA), Academic Council

It is not uncommon to see the losing party of an ICSID arbitration filing a frivolous request for annulment merely to engage the opposing party in settlement negotiations. Another frequent abuse of ICSID's annulment mechanism is to attempt to re-litigate the merits at the annulment stage. An annulment proceeding under the ICSID Rules typically takes a couple of years and involves costs similar to those in a regular ICSID proceeding. For this reason, when an annulment request is filed, some opposing parties prefer to reach an early settlement for a discounted amount rather than waiting more time to receive full satisfaction.

In 2006, the ICSID Arbitration Rules were amended to include Rule 41(5). Under this Rule a party may, no later than 30 days after the constitution of the Tribunal but before the first session, "file an objection that a claim is manifestly without legal merit." The Rule requires the Tribunal to issue a decision on the objection at the "first session or promptly thereafter." Mr. Antonio Parra, one of the driving forces behind ICSID's 2006 amendments, described Rule 41(5) as having the purpose of allowing an "early dismissal by arbitral tribunals of patently unmeritorious claims." Antonio R. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 41 INT'L LAW. 47, 56 (2007).

Today, ICSID tribunals and scholars agree that Rule 41(5) may apply to matters regarding both merits and jurisdiction. In 2006, Ms. Aurélia Antonietti of ICSID wrote that this Rule "does include expedited objections to jurisdiction although it was primarily designed to dismiss frivolous claims on the merits." Aurélia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID REV. – FILJ 427, 439-440 (2006). More recently, other scholars have agreed with Ms. Antonietti. See e.g., Aren Goldsmith, *Trans-Global Petroleum: 'Rare Bird' or Significant Step in the Development of Early Merits-Based Claim-Vetting?*, 26(4) ASA BULLETIN 667, 668 (2008); Chester Brown and Sergio Puig, *The Power of ICSID Tribunals to Dismiss Proceedings Summarily: An Analysis of Rule 41(5) of The ICSID Arbitration Rules*, Sydney Law School Legal Studies Research Paper No. 11/33, June 2011, p. 25; Eric De Brabandere, *The ICSID Rule on Early Dismissal of Unmeritorious Investment Treaty Claims: Preserving the Integrity of ICSID Arbitration*, 9(1) MJIEL 23, 33 (2012); Michele Potestà and Marija Sobot, *Frivolous Claims in International Adjudication: a Study of ICSID Rule 41(5) and of Procedures of Other Courts and Tribunals to Dismiss Claims Summarily*, SELECTED WORKS OF MICHELE POTESÀ, January 2012, p. 21.

The ICSID Tribunal in *Brandes v. Venezuela* was the first to recognize the applicability of Rule 41(5) to jurisdictional issues. This Tribunal found that “[t]here exist no objective reasons why the intent not to burden the parties with a possibly long and costly proceeding when dealing with such unmeritorious claims should be limited to an evaluation of the merits of the case and should not also englobe an examination of the jurisdictional basis on which the tribunal’s powers to decide the case rest.” *Brandes Investment Partners, LP v. Venezuela*, ICSID Case No. ARB/08/03, Decision of February 2, 2009, ¶ 52. This same passage was quoted with approval in *Global Trading Resource Corp. et al. v. Ukraine*, ICSID Case No. ARB/09/11, Award of December 1, 2010, ¶ 30. A few days later, another Tribunal reached a similar conclusion and found that an “objection under Article 41(5) . . . may go either to jurisdiction or the merits.” *Rachel S. Grynberg et al. v. Grenada*, ICSID Case No. ARB/10/6, Award of September 1, 2010, ¶ 6.1.1. Moreover, in early 2013, two ICSID tribunals partially granted Rule 41(5) preliminary objections on jurisdiction issues in two different but related cases against Hungary. *Accession Mezzanine Capital L.P. et al. v. Hungary*, ICSID Case No. ARB/12/3, Decision of January 16, 2013, ¶¶ 65, 77-78; *Emmis International Holding, B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2, Decision of March 11, 2013, ¶¶ 70-72, 85.

In light of the foregoing, there is little doubt that the more accepted practice is to interpret Rule 41(5) of ICSID Arbitration Rules as to apply to both merits and jurisdiction.

Both the ICSID Convention and the ICSID Arbitration Rules permit the application of Rule 41(5) in the context of an annulment proceeding. Indeed, Rule 41(5) does not provide that it only applies to respondents, but instead says that “a party may . . . file an objection. . .” In the author’s opinion, it is abundantly clear that this Rule applies to both claimants and respondents. Other scholars agree with the author. See e.g., Michele Potestà and Marija Sobat, *Frivolous Claims in International Adjudication: a Study of ICSID Rule 41(5) and of Procedures of Other Courts and Tribunals to Dismiss Claims Summarily*, SELECTED WORKS OF MICHELE POTESTÀ, January 2012, p. 13.

Article 52(4) of the ICSID Convention expressly provides that “[t]he provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.” The author agrees with Professor Christoph Schreurer in the meaning of *mutatis mutandis* in Article 52(4), for whom it “means that any necessary adaptations must be made to the listed provisions in order to make them suitable” and, more precisely, that (i) “references to ‘the Tribunal’ must be read as ‘the *ad hoc* Committee’”; and (ii) “[r]eferences to ‘the award’ must be read as ‘the decision on annulment.’” Christoph Schreurer *et al.*, THE ICSID CONVENTION: A COMMENTARY 1057 (Cambridge University Press 2009).

As advanced, Article 52(4) of the ICSID Convention extends its application to Article 41(2) of the ICSID Convention without limitation whatsoever. The latter Article stipulates that “[a]ny objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, **or for other reasons is not within the competence of the Tribunal**, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.” (Emphasis added). The language in the emphasized portion is open and thus should be read as covering any preliminary objection, including under Rule 41(5).

The same is true under Rule 53 of the Arbitration Rules, which provides that “[t]he provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee.” This Rule expressly refers to “annulment” and contains no limitation whatsoever on the application of the Arbitration

Rules – including Rule 41(5) – to an annulment proceeding.

In light of the above and since there is no limitation as to the use of Rule 41(5), any party may file a preliminary objection in an annulment proceeding. But why would a party choose to file a preliminary objection in an annulment proceeding? The answer is fourfold:

1. Have a Second Bite of the Apple. The party opposing the annulment may have two chances of fighting the other party's arguments. However, the party considering filing an objection should be aware that the threshold "manifestly without legal merit" is very high. Therefore, if the annulment request is not patently unmeritorious, the preliminary objection will be rejected. In such case, since a preliminary objection proceeding can take anywhere from a few weeks to several months, the party filing such objection would have lost this time before the award becomes final. There is also the risk of facing an adverse award on costs for filing a weak preliminary objection.

2. Save Time. A preliminary objection may allow the arbitrators to dismiss an annulment request within a substantially shorter period than a full annulment procedure. Timing may sometimes be a key factor for a party.

3. Save Costs. An annulment proceeding is very expensive, especially when multiple grounds for annulment are being argued. A preliminary objection may be targeted to certain grounds but not to others. The ICSID Secretariat itself recognized that under Rule 41(5) "the tribunal may at an early stage of the proceeding be asked on an expedited basis to dismiss **all or part** of a claim on the merits." *Suggested Changes to the ICSID Rules and Regulations*, WORKING PAPER OF THE ICSID SECRETARIAT, May 12, 2005, p. 7 (emphasis added).

An early dismissal is particularly important when a party tries to re-litigate the merits of the case or bases the annulment on grounds clearly outside Article 52 of the ICSID Convention. By filing the preliminary objection, a party may clear *ab initio* the annulment proceeding of certain unmeritorious arguments and, consequently, avoid discussing them in detail (and, in turn, avoid reviewing and/or submitting larger amounts of documents). In other words, having the parties and the committee focus on the relevant issues exclusively may streamline the proceeding and thus reduce costs.

4. Financial Pressure. According to Regulation 14(3)(e) of ICSID's Administrative and Financial Regulations, "the [annulment] applicant shall be solely responsible for making the advance payments requested by the Secretary-General to cover expenses following the constitution of the Committee." Consequently, this may persuade less wealthy parties or parties unsure of the annulment prospects to discontinue the proceeding (as they may face higher advances due to the preliminary objection). In addition, an ongoing preliminary objection may encourage the opposing party to enter into a more beneficial settlement agreement.

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