

Rule 41(5) of the ICSID Arbitration Rules: The Sleeping Beauty of the ICSID system

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Foreword

The recent decision on preliminary objections, dated 17 January 2014, against the application for annulment in *Elsamex S.A. v. Honduras* (ARB/09/4) brought renewed interest in the procedure for summary dismissal of unmeritorious claims under Rule 41(5) of the ICSID Arbitration Rules.

The present post examines shortly this procedure as well as the implications of the above mentioned decision.

I. Characteristics

In response to criticism that no procedure exists for the expeditious dismissal of patently unmeritorious claims, in 2006, the ICSID adopted Arbitration Rule 41(5). This procedure is intended to strike a balance between the need to save time and costs and, on the other hand, not to wrongly drive the claimant from the judgment seat without due process guarantees. Consequently, the tribunal should uphold the respondent's Rule 41(5) objection only if the claim is obviously without legal merit and only if it is manifestly the case. The standard of manifestness is very high as will be detailed below.

II. Criticism

While Rule 41(5) was intended to serve the principles of timeliness and effectiveness, it may be questioned whether this is in fact so since, for example, in *Global Trading v. Ukraine* ten months passed from the filing of the objection until the date of the award. Tribunals thus seem to have taken literally the Latin maxim *festina lente* since such a timing hardly meets the requirement that the tribunal shall take its decision at the first session or promptly thereafter. Schreuer has therefore stated that this summary procedure may add an additional procedural level delaying proceedings and increasing costs. (Schreuer, C. et al., *The ICSID Convention: A Commentary* (Cambridge: 2009) at 544)

The Rule 41(5) procedure does not seem to be very broadly applied. Since the time of its inception it has been used in only eight cases.

III. Procedure

The respondent may file an objection under Rule 41(5) within 30 days of the constitution of the tribunal. The tribunal should give each party a proper opportunity to be heard. In principle, a tribunal can take a decision simply on the written submissions of the parties, but in most instances there are

two rounds of written arguments, followed by an oral phase to be held in conjunction with the first session.

If the tribunal decides that all claims are manifestly without legal merit, it will render an award, while in case it rejects some or all of the objections – the tribunal issues a decision. In such a decision, the tribunal disposes of the questions very briefly in order not to prejudge the merits.

There are a few consequences of the differentiation between a decision and an award. As it is well known, an award disposes finally of all questions, while a decision may be compared to a “partial award.” The difference between the two acts relates to their enforceability and the possibility for annulment. Thus, a decision is not subject to annulment or enforcement until the case is finally disposed of.

IV. Relation with other norms

“[I]f an objection is not upheld at the Rule 41(5) stage, the rights of the objecting party remain intact”, that is, a decision under Rule 41(5) is without prejudice to the respondent’s right to file preliminary objections. (*Global Trading v. Ukraine*, ARB/09/11, Award 1 December 2010, para. 33)

Consequently, after the 2006 amendment, there are now “three levels at which jurisdictional objections could be examined”, that is, the Secretary General’s gatekeeping role under Article 36(3) of the ICSID Convention; Rule 41(5) itself and preliminary objections under Rule 41(1). (*Brandes Investment Partners, LP v. Venezuela*, ARB/08/3, Decision on the Respondent’s objection, 2 February 2009, para. 53)

V. The standard of manifestly without legal merit

The requirement of manifestness has been understood as requiring the “respondent to establish its objection clearly and obviously, with relative ease and despatch. The standard is thus set high.” (*Trans-Global Petroleum, Inc. v. Jordan*, ARB/07/25, Decision on the Respondent’s objection, 12 May 2008, para. 88) “Manifest” implies that it is not necessary to engage in elaborate analysis which is why, as will be seen below, objections involving complex legal issues are outside the scope of Rule 41(5).

The objections under Rule 41(5) must relate to a legal impediment and not a factual one. This is so since at this early stage of the proceedings, without sufficient evidence, the Tribunal is in no position to decide disputed facts. The tribunal therefore has to decide on the dismissal based on the facts as alleged by the claimant. Only if on the best approach for the claimant its case is manifestly without legal merit, it should be summarily dismissed. (*Brandes v. Venezuela*, supra, para. 61)

An objection under Rule 41(5) may concern jurisdiction, the merits or the relief sought. (*Brandes v. Venezuela*, supra, para. 50; *Trans-Global v. Jordan*, supra, para. 121) Additionally, as shown by *Elsamex S.A. v. Honduras* the early dismissal procedure may be used against patently unmeritorious annulment applications. Examples will be examined below.

VI. Rule 41(5) objections against jurisdiction

In terms of jurisdiction, the tribunal may be required to decide whether on the basis of the facts as alleged by the claimant its claims “fall within or outside the scope of the consent to arbitrate.” (*Emmis International Holding, B.V. v. Hungary*, ARB/12/2, Decision on the Respondent’s objection 11 March 2013, para. 26) Thus, in *Emmis v. Hungary*, the relevant BIT was limited to disputes “concerning expropriation or nationalization of an investment”, consequently it was manifest that the non-expropriation claims presented by the claimant were not covered by the consent of the host State. (ibid., paras. 64, 70) In *Global Trading v. Ukraine*, the tribunal upheld Ukraine’s objection that the claimant does not have an investment on the territory of the State since its claims related to a

mere contract for the sale of goods. The tribunal held that the “term ‘investment’ excluded a simple sale and like transient commercial transactions’ from the jurisdiction of the Centre.” (ARB/09/11, Award 1 December 2010, para. 55; Cf. *Brandes v. Venezuela*, supra, para. 72)

VII. Rule 41(5) objections as to the merits of a claim

“With respect to the merits of the claim, an award denying such claims can only be made if the facts, as alleged by the Claimant and which prima facie seem plausible, are not manifestly of such a nature that the claim would have to be dismissed.” (*Brandes v. Venezuela*, supra, para. 73) For example, in *Trans-Global v. Jordan*, the tribunal dismissed one of the claims presented by the investor relating to the obligation of consultation. In view of the fact that the relevant BIT provision concerned an obligation of consultation between the two contracting States and not between the investor and the host State, the tribunal dismissed this claim as one manifestly without legal merit. (*Trans-Global v. Jordan*, supra, para. 118) Interestingly, in *RSM v. Grenada*, even though the issues raised were very complex, the tribunal upheld Grenada’s Rule 41(5) objection since RSM was in effect trying to re-package its contract claims – already dismissed in an earlier case – and to present them as treaty claims. (ARB/10/6, Award 10 December 2010, paras. 7.2.1, 7.3.6-7.3.7) The tribunal in that case recognized the applicability of the doctrine of collateral estoppel even as against third parties, finding that the ‘shareholders cannot use [their position] as both sword and shield.’ (ibid., paras. 7.1.5-7.1.7)

VII.A. Complexity of the issues involved

In *Brandes v. Venezuela*, the respondent claimed that the investor’s claims are without legal merit since it has previously made a waiver of its claims. The claimant countered that the waiver was made by coercion. In these circumstances, the tribunal decided that the claimant’s case is not susceptible to summary dismissal since it presents too complex legal and factual issues. This is explained by the caution of the tribunal not to dismiss a claim without all the information in its possession and thus to infringe the claimant’s right to be heard.

It follows that in case the Rule 41(5) objection raises too complex issues the tribunal will leave them for determination on a subsequent stage. Other objections which could be made under Rule 41(5) – relating either to jurisdiction or the merits – may concern the jurisdiction of the tribunal *ratione temporis*, a waiting period, nationality of the investor, etc. Potestà and Sobat note that another possible objection is one relating to the non-attribution to the State of a claimed breach (*Frivolous claims in international adjudication: a study of ICSID Rule 41(5) and of procedures of other courts and tribunals to dismiss claims summarily* at p. 21) However, in the opinion of the present authors, this is a question which raises too complex issues to be dismissible under Rule 41(5). For the same reason, we posit, that other objections which are not summarily dismissible relate to a plea of illegality (i.e. that the investment is established in breach of domestic law); treaty shopping; simple breach of contract; a forum selection clause contained in the underlying contract; that an indirect investment through a chain of intermediary companies is not protected under the BIT; etc.

VIII. Rule 41(5) objections against the relief sought

In *Emmis v. Hungary*, the respondent objected against one of the submissions of the claimant asking for a declaration of the tribunal that the respondent has breached customary international law. According to the respondent, customary law as an independent basis of a claim was outside the consent given in the treaty since the BIT provided for treaty claims only. The tribunal, however, in view of the fact that the applicable BIT referred to “any dispute”, decided that this claim is not manifestly without legal merit. (supra, paras. 78-79, 81-82, 84)

For comparison, in *Accession Mezzanine Capital L.P. v. Hungary*, which is based on similar facts, the tribunal decided that since the relevant BIT contains no definition of “expropriation” the applicable treaty standard must be interpreted and applied together with customary international law. (See

IX. Rule 41(5) objections in annulment proceedings

In *Elsamex S.A. v. Honduras*, Honduras sought an annulment of the award and relied on three of the grounds for annulment set out in Article 52 of the ICSID Convention. Elsamex filed an objection under Rule 41(5) claiming that the respondent's application clearly lacks legal merit and shall be dismissed *in limine litis*. This is the first annulment proceeding in which Rule 41(5) was utilized and, as a consequence, the Committee had to satisfy itself that the procedure for early dismissal is applicable, especially in view of the fact that Rule 41(5) was introduced in order to protect States from unmeritorious claims on the part of investors, not *vice versa*. (ARB/09/4, Decision on preliminary objections 17 January 2014, para. 98) The Committee found that Rule 41(5) applies based on Article 52 of the ICSID Convention which 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." (ibid., paras. 89, 100, 115)

The Committee then made the important observation that:

Various tribunals have expressed concern that a possible dismissal of a case in summary proceedings can have detrimental effects on the claimant, despite the fact that he may subsequently seek an annulment of the award. That concern is even greater in annulment proceedings since there is no further possibility for review. (ibid., para. 124)

This led the Committee to the conclusion that the high standard normally applied in considering objections under Rule 41(5) should be even higher in annulment proceedings. (ibid., para. 125) The Committee found that "Rule 41(5) can serve the purpose of avoiding an unmeritorious application for annulment, for example, when the Applicant for annulment raises a ground for annulment that simply does not exist under Article 52 of the Convention or tries to re-litigate the merits." (ibid., para. 130) As to the grounds for annulment raised by Honduras, however, the Committee rejected the objection presented by Elsamex since the latter had not met the above mentioned high threshold to show that the grounds are manifestly without legal merit. (ibid., paras. 135, 137, 141, 143, 144, 147) It follows that in annulment proceedings an objection under Rule 41(5) stands little chances of success.

X. Costs

When the tribunal dismisses in whole or in part an objection under Rule 41(5) and the case continues it does not make a decision as to the costs and this question is left for a subsequent stage. On the other hand, when a tribunal issues an award summarily dismissing all claims of the claimant it shall also decide on the allocation of costs.

In one case, because of the newness of the procedure, the tribunal did not award costs to the winning party. (*Global Trading v. Ukraine*, supra, para. 59) By contrast, in *Trans-Global v. Jordan*, the tribunal gave expression to its intent to apply the costs follow the event principle. (supra, para. 123) According to this principle, costs shall be shifted by "a weighing of relative success or failure, that is to say, the loser pays costs including reasonable legal and other costs of the prevailing party." (*Plama Consortium Limited v. Republic of Bulgaria*, ARB/03/24, Award 27 August 2008, para. 316) The costs follow the event principle becomes an established principle in the jurisprudence of ICSID tribunals. As stated by the tribunal in *Mr. Franck Charles Arif v. Republic of Moldova* this is the "more modern strand." (ARB/11/23, Award 8 April 2013, para 630) What is more, as explained by the tribunal in *Tza Yap Shum v. Peru*, the 'pay your own way' approach represents a remnant from general international law in that the Statute of the International Court of Justice does not in principle permit shifting of the costs to the unsuccessful State. (ARB/07/6, Award 7 July 2011, para. 296)

Notably, however, investment treaty arbitration is not containable on the State-to-State level and operates in a completely different setting. In any event, Rule 41(5) was introduced in order to address the concern of States that under the previously prevailing 'pay your own way' approach they could not expect to recover their costs. Consequently, in case the respondent is successful in its objections under Rule 41(5) the tribunal should shift the costs to the unsuccessful claimant.