From Iura Novit Curia to Zeno's Paradox of Motion

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The recent annulment decision in *Tza Yap Shum v. Peru* (ICSID Case No. ARB/07/6) has brought back the discussion regarding the 'pure' adversarial nature of investor-state arbitration system.

Mr. Shum, a Chinese investor claimed indirect expropriation under the Agreement on Promotion and Reciprocal Protection of Investments (APPRI) between the Governments of Peru and China arising out of several measures taken by Peru's tax authority SUNAT. Peru challenged the jurisdiction of the tribunal arguing that the claim regarding the unlawfulness of the expropriation was not within the scope of the offer to arbitrate. However, the tribunal upheld its jurisdiction, found a violation of the APPRI and ruled in favor of the investor. Subsequently, Peru requested the annulment of the award before ICSID.

One of the grounds for annulment raised by Peru was article 52(1)(d) of the ICSID Convention (serious departure from a fundamental rule of procedure) because the Tribunal had failed to (i) analyze the evidence presented by the parties, (ii) state reasons on which it based its decision and (iii) denied the State the opportunity to express its opinion about the interpretation adopted by the Tribunal of article 8(3) of the APPRI which contained a "fork in the road" provision. *See*, ¶114-121.

This post will address the later claim in the light of the Latin legal maxim *iura novit curia* (the court knows the law). Under this principle, a decision-maker (either a judge or arbitrator) is deemed to know the law beforehand and, therefore, can reach its legal reasoning on the outcome of the case, independently from the legal theories defended by the parties. Hence, if the claimant argued 'A' and the defendant argued 'B', under *iura novit curia* the tribunal can perfectly decide under legal reasoning 'C'.

The Supreme Court of Switzerland was the first body to uphold the application of *iura novit curia* in arbitration in 1994. The Court explained that by virtue of the principle *iura novit curia* if a conclusion reached by the tribunal is given sufficient reasoning, the arbitral tribunal can apply the law *ex-officio* without limiting itself to the arguments advanced by the parties. *See*, Westland Helicopters Ltd. v. The Arab British Helicopter Company (ABH) and the Arbitral Tribunal, point 3.-a).

In a similar way, the UK Arbitration Act allows arbitrators to decide a dispute in accordance with considerations 'determined by the tribunal'. *See*, article 46(1)(b). This view seems to have been adopted also by the arbitration rules of the LCIA, which grant power to the tribunal to take the initiative itself to identify the relevant issues of the case, ascertain relevant facts, the law applicable to the arbitration agreement, to the arbitration and to the merits of the dispute. Yet, the Rules

expressly limit this prerogative to “giving the parties a reasonable opportunity to state their views”. Article 22(1)(iii).

The reasoning behind the later approach is that an adjudicator of rights always has to permit the parties to point their views about new arguments that the tribunal might be considering to decide a case. An ‘interference’ by the arbitrator in the procedural debate of the case without counting with the parties participation may contravene the parties’ rights of contradiction and defense, and result in judgments that are not congruent with the arbitral proceeding.

In *Tza Yap Shum v. Peru* the tribunal took the opposite approach following the reasoning of the Annulment Committee in *Klockner v*. *Republic of Cameroon* (ICSID Case No. ARB/81/2). In this case, the arbitral tribunal decided the case undertaking an intermediate position (different from those advanced by the parties) on the interpretation of a provision of the Protocol of Agreement. On the annulment stage, the Annulment Committee held that arbitrators must be free to rely on arguments addressed and not addressed by the parties:

> Even if it is generally desirable for arbitrators to avoid basing their decision on an argument that has not been discussed by the parties, it obviously does not follow that they therefore commit a ‘serious departure from a fundamental rule of procedure’. Any other solution would expose arbitrators to having to do the work of the parties’ counsel for them and would risk slowing down or even paralyzing the arbitral solution to disputes. ¶91.

In *Tza Yap Shum v. Peru*, the legal discussion was focused on the interpretation of the phrase “*a controversy that involves the amount of compensation*” of Article 8(3) of the APPRI. The Peruvian State argued that the jurisdiction of the tribunal was limited to the amount of the compensation sought by the investor and not to the lawfulness or not of the expropriation. The arbitral tribunal disagreed opting for its own interpretation of the relevant provision.

In the annulment phase, Peru contended that the tribunal did not permit the parties to discuss on that specific issue. ¶ 52. The Committee first held that since the tribunal had to consider the relevant provisions of the APPRI to decide on its own competence, the Peruvian State should have reasonably anticipated that the interpretation of that phrase would be the key question for any decision relating to the scope of that rule. ¶ 129.

Furthermore, the Committee expressed a practical concern regarding the argument sustained by Peru which would create an extraordinary burden on the tribunal by having to submit their legal reasoning to a discussion between the parties which would result in that no award could ever be adopted before the parties had had the chance of submitting arguments about the relevancy of the tribunal’s legal reasoning. ¶ 130.

At this point, the Committee brought up ‘Zeno’s paradox of motion’ to illustrate its reasoning. The paradox proposes that time is comprised by a number of moments and that when someone throws an arrow; the arrow is seen as being motionless during each of its positions; leading to the conclusion that since the arrow is static in each moment of motion, it will never hit the target. The Committee compared each moment that the arrow is deemed to be static and impaired from advancing towards the target to every time an arbitrator would have to submit his legal reasoning to the parties in order to obtain their observations. Consequently, the arbitrator would never reach a final award. *See*, ¶131.

Finally, the Committee concluded that the tribunal did not have an obligation to get back to the parties to ask them about the last sentence of article 8(3) which the parties had not focused on. Even

if the parties did not specifically address the argument regarding the interpretation of article 8(3), the State did not prove that it could have not reasonably anticipated that the argument was going to be taken into consideration by the arbitrators. *See*, **¶141.**

In sum, in the annulment decision in *Tza Yap Shum v. Peru,* the *iura novit curia* principle was implicitly endorsed. The only issue the Committee addressed was whether the parties had the right to defend their views on the interpretation undertaken by the tribunal. Nevertheless, the Committee did not discuss whether the tribunal was entitled or not to adopt a legal reasoning other than the one presented by the parties in its pleadings.