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Is an investment treaty tribunal entitled to dismiss a claim where it amounts to an 'abuse of process'?

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As previously reported, in a decision rendered on 15 April 2009, an ICSID Tribunal declined jurisdiction to hear claims submitted by Phoenix Action Ltd ("Phoenix") against the Czech Republic.

Phoenix, an Israeli company, purchased two Czech companies, Benet Praha and Benet Group, in 2002 while these two companies were involved in ongoing legal disputes. The Czech Republic challenged the jurisdiction of the Tribunal on the basis that Phoenix was a sham Israeli entity created by a Czech national in order to establish diversity of nationality and thereby invoke ICSID jurisdiction.

The Award is of particular interest for the way that the Tribunal approaches the Claimant's alleged lack of *bona fides*, the issue on which the case really turns. While the Tribunal concluded that "the claimant's initiation and pursuit of the arbitration [was] an abuse of the system of international ICSID investment arbitration", it did not do not go so far as to dismiss the Claimant's case as an 'abuse of process'. Instead, the Tribunal analyzed the procedural question of whether the Claimant's ICSID proceedings were brought in good faith, by analyzing the substantive issue of whether the Claimant's investment was made in good faith.

The question of whether the notion of 'abuse of process' has a place in international law, and indeed in international investment arbitration law, remains open. In the *Phosphate Lands* case, (ICJ Reports 1992, p.240) the International Court of Justice (ICJ) was urged to dismiss the claim in that case as an abuse of process, an objection it dealt with "rather summarily, although without denying that there might be some inherent power in the matter" (per Waste Management (ICSID Case No. ARB (AF)/00/3)).

More recently, in proceedings before the ICJ in June 2008 in the Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (*Mexico v. United States of America*), Prof. Vaughan Lowe QC submitted, *inter alia*, on behalf of the United States:

1. That the Court has an inherent power to regulate its own proceedings in the interests of justice and in order to safeguard the integrity of the Court.

2. That that power includes the power to dismiss applications where they amount to an abuse of

process.

…

15. It is almost tautological to say that a tribunal has the power to dismiss an application which is an abuse of its process.

…

Now the power to dismiss applications for abuse of process, even if it is not expressly conferred by the tribunal's constituent instrument, we believe exists as an inherent power. Professor Zimmerman's Commentary on the Statute of this Court says:

"Abuse of procedure is a special application of the prohibition of abuse of rights, which is a general principle of international law as well as in municipal law. It consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established."

The question of whether the notion of abuse of process exists in international investment treaty law has been considered by at least one tribunal. In *Waste Management*, a NAFTA Tribunal (composed of Crawford, Civiletti, Gómez) noted:

It is not necessary to decide whether NAFTA Chapter 11 tribunals possess any inherent power to dismiss a claim on grounds of abuse of process, or what circumstances might justify the exercise of any such power. No specific provision of Chapter 11, or of the ICSID Convention or Rules, confers such a power … It may be inferred that if such a power exists, it would only be for the purpose of protecting the integrity of the Tribunal's processes or dealing with genuinely vexatious claims. [Footnotes omitted]

In the author's view, 'abuse of process' is not an exclusively domestic or common law notion – as a facet of the abuse of rights doctrine in international law, there seems to be no reason why investment treaty tribunals should not affirm and exercise such a power albeit in exceptional circumstances.

Returning to the *Phoenix* case, with which this commentary began, it is notable that the Tribunal was satisfied that all other investment definition criteria, including compliance with the law of the host State were met. That was not the case in, for instance, *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), in which jurisdiction was also declined on the basis, *inter alia*, that the investment was not made in good faith. In that case, however, the Tribunal found a clear breach of the host State law and that factor appeared to have informed its determination of the good faith issue. In *Phoenix*, in contrast, there was no finding of any breach of host State law.

While one may not necessarily disagree with the outcome of the *Phoenix* case, it would have been better achieved through the exercise by the Tribunal of an inherent power to dismiss the proceedings for abuse of process, rather than on alleged failure to meet one of a number of investment criteria required to establish the Tribunal's jurisdiction. Indeed, such an approach would have been consistent with the decision of the Tribunal in that case to award *all* of the costs of the proceedings against the unsuccessful claimant.

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