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Arbitral, Not Arbitrary – Part II: Special Case of Application of Arbitral Discretion. Functions Exercisable Proprio Motu in ICSID Arbitration

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An earlier post examined the general limitations on arbitral discretion. This part will look into the question of actions taken *proprio motu* and the limits thereto.

Functions exercisable *proprio motu* are perceived as a special case of application of the discretionary powers enjoyed by a tribunal. Actions taken *proprio motu* must be distinguished from functions exercised *ex officio*. The latter imply obligation, duty to act, while the former – a margin of appreciation. (See *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, Separate Opinion of Judge Kre?a at p. 401)

To understand the importance of this issue consider the following example. In the controversial *Patrick Mitchell v. Democratic Republic of the Congo* annulment decision the following passage appears:

> "[T]he Arbitral Tribunal would have been welcome to address ex proprio motu the other provisions of the Treaty, which might potentially excuse taking such measures against the Claimant. A comparable approach would have been along the lines of the adage jura novit curia – on which the DRC leaned heavily during the Annulment Proceeding – but this could not truly be required of the Arbitral Tribunal, as it is not, strictly speaking, subject to any obligation to apply a rule of law that has not been adduced; **this is but an option** – and the parties should have been given the opportunity to be heard in this respect – for which reason it is not possible to draw any conclusions from the fact that the Arbitral Tribunal did not exercise it." (ICSID Case no. ARB/99/7, Decision on the application for annulment of the award of November 6, 2006, para. 57; emphasis added)

One could well read into this passage an option for the tribunal to substitute itself for one of the parties and deal with circumstances precluding wrongfulness which have not been raised by the party concerned. This would seriously impede the equality of the parties. A tribunal may not supplement *sua sponte* the parties' claims and defences as little would be left of the adversarial nature of the proceedings. (Newcombe & Paradell, *Law and Practice of Investment Treaties:*

Standards of Treatment (Kluwer Law International: 2009) at p. 90)

Which actions may be taken *proprio motu*?

According to Rule 41(2) of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules") "The Tribunal *may on its own initiative* consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence." This right of initiative on the part of the tribunal is explained by the cardinal importance of the **question of jurisdiction** and the principle of *compétence de la compétence*. By the same token, in the salient *Mihaly International Corp. v. Sri Lanka* award the tribunal found that:

> "[T]he question of jurisdiction of an international instance involving consent of a sovereign State deserves a special attention at the outset of any proceeding against a State Party to an international convention creating the jurisdiction. As a preliminary matter, the question of the existence of jurisdiction based on consent must be examined proprio motu, i.e., without objection being raised by the Party." (ICSID Case no. ARB/00/2, Award of March 15, 2002, para. 56)

Since Arbitration Rule 41 mentions "at any stage of the proceeding" it may be questioned whether and which objections to jurisdiction may be deemed precluded by virtue of Arbitration Rule 27. As pointed out by Prof. Schreuer a party may not be permitted to "keep it in store as ammunition against a possible unfavourable award in annulment proceedings." (Schreuer, *Commentary*, supra at p. 995) Prof. Schreuer explains that the jurisdiction of an ICSID tribunal depends on a number of requirements enumerated in Article 25 of the Convention some of which are objective and some – depend on the disposition of the parties. Similarly, the existence of an investment (which is an objective fact) cannot be subject to waiver, while the consent of the respondent can. In the latter case, this would amount to a prorogation of the tribunal's jurisdiction (*forum prorogatum*). (See Schreuer, C., *Belated Jurisdictional Objections in ICSID Arbitration* in *Liber Amicorum Bernardo Cremades* (W. Á. Fernández-Ballesteros, D. Arias eds.) 1081 (2010) at p. 1095)

Questions of admissibility, on the other hand, cannot be examined by the tribunal *motu proprio* for the same reasons as those expressed above in relation to the *Patrick Mitchell v. Democratic Republic of the Congo* annulment decision. The tribunal in *Hochtief AG v. Argentina* usefully stated that:

> "In the ICJ, for example, rules on admissibility include such matters as the rules on the nationality of claims and the exhaustion of local remedies. The ICJ may have jurisdiction to decide whether State A had injured corporation B in violation of international law; but it may be that the claim actually filed is inadmissible because it has been brought by the wrong State, or because local remedies have not yet been exhausted. But if no objection is raised on such grounds, the Court will not raise the matter proprio motu." (ICSID Case no. ARB/07/31, Decision on Jurisdiction of October 24, 2011, para. 5)

Before reaching any conclusion, consider also the power of an *ad hoc* committee to stay the

enforcement of the award pending disposition of the application for annulment. This power is found in Article 52(5) of the ICSID Convention. The word "*may*" as used in the text implies discretion, but the annulment committee cannot stay enforcement of the challenged award *ex proprio vigore* without a request by the applicant for annulment. To hold otherwise would threaten the balance of rights under the Convention.

From the above it may be concluded that there are two groups of actions which the tribunal may take on its own motion:
– actions which may be taken despite any objections of the parties – such as the question of jurisdiction;
– actions which depend on the objection/agreement of the parties – such as the question whether a hearing would be public. (See Arbitration Rule 32(2) which mentions "*The Tribunal shall decide, with the consent of the parties…*")

Limitations on functions exercisable *proprio motu*

The conclusion that results from the above discussion is that the ICSID Convention and Rules are those which authorize actions to be taken *proprio motu*. In other words, there must be a permissive (enabling) norm, otherwise the adversarial character of the procedure would be impeded. The parties may not be 'surprised' by the tribunal. Any action taken *proprio motu* which is not based on such an enabling norm would be arbitrary in that it will be destructive of the equality of the parties.

Other instances in which the tribunal may act *sua sponte* are:
– it has broad discretion to order the production of evidence (See Article 43 of the ICSID Convention; *Aguas del Tunari S.A. v. Bolivia*, ICSID Case no. ARB/02/3, Decision on Jurisdiction of October 21, 2005, para. 25). Here it may be added that in order to safeguard itself from charges of bias, a tribunal shall exercise self-restraint in summoning evidence on its own motion independently of a request from one of the parties;
– indication of provisional measures. (See Article 47 of the ICSID Convention)

In case of default of appearance of the respondent the tribunal is rather obliged to satisfy itself that the submissions of the active party are well-founded in fact and in law. (See Article 42(4) of the Convention which uses the word "shall" rather than "may". See also *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, ICSID Case no. ARB/83/2, Award of March 31, 1986, paras. 356-357)

In place of conclusion

When it comes to that thin red line separating the arbitral from the arbitrary, one may recall a quote from Samuel Gompers:

> "Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion. I believe in arbitration between two lions or two lambs… There can be arbitration only between equals…" (February 10, 1888)

Before finding the proper limits of arbitral discretion – at which this post attempts by setting a first step – there is the risk that arbitration be one "between the lion and the lamb."

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