

THE INVESTMENT  
TREATY  
ARBITRATION  
REVIEW

SEVENTH EDITION

Editor  
Barton Legum

THE LAWREVIEWS

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TREATY  
ARBITRATION  
REVIEW

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# PREFACE

This year's edition of *The Investment Treaty Arbitration Review* boasts a number of new chapters. The result is greater coverage and a resource that is even more useful to practitioners.

As before, this new edition provides an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments in the field of investment treaty arbitration.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to those developments and the context behind them.

This seventh edition represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

**Barton Legum**

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Part II

ADMISSIBILITY AND  
PROCEDURAL ISSUES

# OBJECTION OF MANIFEST LACK OF LEGAL MERIT OF CLAIMS: ICSID ARBITRATION RULE 41(5)

*Alvin Yeo, Koh Swee Yen and Monica W Y Chong*<sup>1</sup>

## I INTRODUCTION

The promulgation of Rule 41(5) in the Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes (the ICSID Arbitration Rules) on 10 April 2006 was a bold and innovative step in international arbitration,<sup>2</sup> and remained a unique feature of the ICSID Arbitration Rules for the first 10 years of their promulgation.<sup>3</sup> Rule 41(5) reads:

*Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to [Rule 41(1)] or to object, in the course of the proceeding, that a claim lacks legal merit.*<sup>4</sup>

The governing rules of most arbitral institutions did not stipulate in express terms the arbitral tribunal's authority to dismiss claims in an expedited fashion, other than to make a general

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1 Alvin Yeo and Koh Swee Yen are senior counsel and Monica W Y Chong is a partner at WongPartnership LLP. The authors are grateful to their colleague Donny Trinh Ba Duong for the considerable assistance given in respect of the research and preparation of this chapter.

2 Aren Goldsmith, "Trans-Global Petroleum: "Rare Bird" or Significant Step in the Development of Early Merits-Based Claim-Vetting?" (2008) 26(4) *ASA Bulletin* (Swiss Arbitration Association) 667 (Goldsmith-2008), pp. 680–82.

3 Similar provisions have since been introduced in the 2016 Singapore International Arbitration Centre (SIAC) Rules (effective from 1 Aug. 2016) and the 2017 SIAC Investment Arbitration Rules (effective from 1 Jan. 2017), modelled on Rule 41(5). Other arbitral institutional rules that have since expressly empowered arbitrators to decide on an early summary dismissal of claims include the 2017 Stockholm Chamber of Commerce (SCC) Rules and the Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018.

4 An identical provision is found in Rule 45(6) of the International Centre for Settlement of Investment Disputes (ICSID) Arbitration (Additional Facility) Rules, which was promulgated in the same year as Rule 41(5) of the ICSID Arbitration Rules. In *Lion Mexico Consolidated LP v. United Mexican States*, ICSID Case No. ARB(AF)/15/2 (Decision on the Respondent's Preliminary Objection under Article 45(6) of the ICSID Arbitration (AF) Rules, 12 Dec. 2016) (*Lion Mexico*), the first publicised decision concerning an

provision for the tribunal to ‘conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ disputes’.<sup>5</sup> During the past few years, major arbitral institutions have departed from this trend, and there is an increasing number of institutional rules that now expressly provide for powers of summary dismissal of claims.<sup>6</sup> Although some commentators have suggested that it is possible for such authority to be read into the general provision,<sup>7</sup> tribunals no doubt take different views on this.<sup>8</sup> It is reasonable to imagine that an arbitral tribunal would be slow to terminate the proceedings at the outset, without an explicit power to do so, for fear of (unwittingly) affecting the claimant’s right to be heard.<sup>9</sup>

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application pursuant to Rule 45(6), ICSID Arbitration (Additional Facility) Rules, the tribunal noted (at [56]) that the two Rules contain ‘effectively the same language’, and ‘[t]hus . . . draws guidance, as to the applicable standard [under Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules, from the jurisprudence developed in the interpretation of [Rule 41(5)]]’. In this chapter, references to the Rule 41(5) procedure refer also to the procedure under Rule 45(6), ICSID Arbitration (Additional Facility) Rules.

- 5 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (2013), Article 17(1) (‘The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute’); International Chamber of Commerce (ICC) Arbitration Rules (2017), Article 22(1) (‘The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute’); London Court of International Arbitration Arbitration Rules (2014), Article 14.4 (‘Under the Arbitration Agreement, the Arbitral Tribunal’s general duties at all times during the arbitration shall include . . . (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties’ dispute’).
- 6 SIAC Rules 2016, Rule 29.1 (‘A party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that: (a) a claim or defence is manifestly without legal merit; or (b) a claim or defence is manifestly outside the jurisdiction of the Tribunal’) and SIAC Investment Arbitration Rules 2017, Rule 26.1 (‘A Party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that: (a) a claim or defence is manifestly without legal merit; (b) a claim or defence is manifestly outside the jurisdiction of the Tribunal; or (c) a claim or defence is manifestly inadmissible’); SCC Rules 2017, Article 39(1) (‘A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration’); HKIAC Administered Arbitration Rules 2018, Article 43(1) of the (‘The arbitral tribunal shall have the power, at the request of any party and after consulting with all other parties, to decide one or more points of law or fact by way of early determination procedure, on the basis that: (a) such points of law or fact are manifestly without merit; or (b) such points of law or fact are manifestly outside the arbitral tribunal’s jurisdiction; or (c) even if such points of law or fact are submitted by another party and are assumed to be correct, no award could be rendered in favour of that party’). In the ICC’s ‘Note to the Parties and Arbitral Tribunals on the Conduct of Arbitration’ (first published Oct. 2017), it was clarified that the power to expeditiously determine manifestly unmeritorious claims or defences comes within the broad scope of the ICC Rules of Arbitration (as amended in 2017): see <https://iccwbo.org/media-wall/news-speeches/icc-court-revises-note-to-include-expedited-determination-of-unmeritorious-claims-or-defences> (last accessed 16 Jun. 2022).
- 7 Goldsmith-2008, op. cit. note 2, pp. 681–82; Potestà and Sobat, ‘Fivolous claims in international adjudication: a study of ICSID Rule 41(5) and of procedures of other courts and tribunals to dismiss claims summarily’ (2012) *Journal of International Dispute Settlement* 1 (Potestà and Sobat-2012), pp. 26–27.
- 8 Goldsmith-2008, op. cit. note 2, p. 682; J Coe Jr, ‘The State of Investor–State Arbitration – Some Reflections on Professor Brower’s Plea for Sensible Principles’ (2004–2005) 20 *American University International Law Review* 929, pp. 934–35.
- 9 Goldsmith-2008, op. cit. note 2, pp. 683–86.

## II GENESIS OF RULE 41(5)

The inclusion of such a summary dismissal mechanism in the ICSID Arbitration Rules was first raised in an ICSID Secretariat Discussion Paper circulated to the members of the ICSID Administrative Council on 22 October 2004,<sup>10</sup> some 36 years after the ICSID Arbitration Rules came into force on 1 January 1968. It proposed the creation of ‘a special procedure’, pursuant to which ‘the tribunal may at an early stage of the case be asked on an expedited basis to dismiss all or part of the claim . . . without prejudice to the further objections a party might make, if the request were denied’.<sup>11</sup> This was intended to address calls for greater efficiency in ICSID proceedings, as well as recurring complaints by state parties that the ICSID Secretariat’s limited screening power under Article 36(3) of the ICSID Convention was inadequate to weed out claims that were manifestly unmeritorious.<sup>12</sup> These complaints grew louder with the increase in the number of investment claims lodged, and were fuelled by concerns that state parties were being exposed to the abusive tactics of investors seeking to play the system:

*The significant increase in investment disputes over the last decade has given rise to the concern that investors may abuse the system. Investors may be eager to claim as many violations of the applicable [international investment agreement] as possible in order to increase their chances of success. This may take a heavy toll in terms of time, effort, fees and other costs, not only for the parties to the dispute, but also for the arbitral tribunal. It is within this context that several countries have advocated a procedure to avoid ‘frivolous claims’ in investment-related disputes, namely claims that evidently lack a sound legal basis.<sup>13</sup>*

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10 ICSID Secretariat, Discussion Paper on ‘Possible Improvements of the Framework for ICSID Arbitration’ (22 Oct. 2004), available at <https://icsid.worldbank.org/sites/default/files/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> (last accessed 16 Jun. 2022) (ICSID Discussion Paper-2004).

11 ICSID Discussion Paper-2004, op. cit. note 10, at [10].

12 The exercise of the Article 36(3) screening power is confined to cases where the request discloses a manifest lack of jurisdiction of the Centre, and does not extend to the merits of the dispute or to cases where jurisdiction is merely doubtful but not manifestly lacking. In the words of Antonio Parra, former Deputy Secretary General of ICSID and main drafter of the 2006 amendments, ‘[t]he Secretariat is powerless to prevent the initiation of proceedings that clear this jurisdictional threshold, but are frivolous as to the merits’. A decision by the ICSID Secretariat pursuant to Article 36(3) is, furthermore, given only on the basis of information supplied by the requesting party and therefore does not typically follow an adversarial process. See ICSID Discussion Paper-2004, op. cit. note 10, at [6], [9], [10]; Antonio Parra, ‘The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes’ (2007) 22(1) *ICSID Review* 55, p. 65; Puig and Brown, ‘The Secretary-General’s Power To Refuse To Register a Request for Arbitration under the ICSID Convention’ (2012) 27(1) *ICSID Review* 172, p. 190; Carlevaris, ‘Preliminary Matters: Objections, Bi-furcation, Request for Provisional Measures’ in *Litigating International Investment Disputes: A Practitioner’s Guide* (Giorgetti ed., Brill, 2014) p. 173, pp. 175–80; Michele Potestà, ‘Preliminary Objections to Dismiss Claims that are Manifestly Without Legal Merit under Rule 41(5) of the ICSID Arbitration Rules’ in Crina Baltag (ed.), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International, 2017) (Potestà-2017), p. 252.

13 United Nations Conference on Trade and Development (UNCTAD), ‘Investor–State Dispute Settlement and Impact on Investment Rulemaking’ (UNCTAD/ITE/IIA/2007/3), p. 82, available at [https://unctad.org/en/Docs/iteiia20073\\_en.pdf](https://unctad.org/en/Docs/iteiia20073_en.pdf) (last accessed 16 Jun. 2022).

Following consultations with various stakeholders and interest groups, the first draft of what would become the current Rule 41(5) was published in an ICSID Secretariat Working Paper dated 12 May 2005.<sup>14</sup> The main differences between the draft and final versions of the text of Rule 41(5) were (1) the addition in the final version of the word ‘legal’ in the phrase ‘manifestly without legal merit’; (2) the inclusion in the final version that parties can agree ‘to another expedited procedure for making preliminary objections’; and (3) the addition of the rule that the objection needs to be filed ‘in any event before the first session of the Tribunal’ (these aspects of the Rule are discussed further in Section IV, below).

### III THE EARLY CASES

Rule 41(5) got off to a relatively muted start. In the first three years of its existence, it was invoked only twice in the 72 cases registered under the ICSID Convention<sup>15</sup> (in *Trans-Global Petroleum Inc v. Jordan*<sup>16</sup> (*Trans-Global*) in February 2008 and *Brandes Investment v. Venezuela*<sup>17</sup> (*Brandes*) in December 2008), and with only partial success in *Trans-Global*.

*Trans-Global* concerned allegations that Jordan had engaged in a systematic campaign to destroy the claimant’s investments in a petroleum exploration venture after the claimant confirmed its discovery of oil pay zones in the designated area of exploration. Specifically, Jordan was alleged to have breached (1) the fair and equitable treatment standard in Article II(3)(a) of the US–Jordan bilateral investment treaty (BIT), (2) the non-discrimination provision in Article II(3)(b) of the US–Jordan BIT, and (3) an obligation to consult the claimant in Article VIII of the US–Jordan BIT. Jordan filed Rule 41(5) objections, asserting that the claims were manifestly without legal merit as they alleged ‘infringements of non-existent legal rights of the Claimant or non-existent legal obligations of [Jordan]’.<sup>18</sup> The application failed in relation to the claims under Articles II(3)(a) and II(3)(b), but succeeded in relation to the third claim as Article VIII was found to contain only an obligation of consultation between the two contracting states and not between the investor and the host state; ‘the essential legal basis’ in respect of the third claim was therefore ‘entirely missing under the BIT’.<sup>19</sup>

It was not until December 2010 that Rule 41(5) came to life.<sup>20</sup> Within a span of 10 days, two separate tribunals in *Global Trading Resource Corp and anor v. Ukraine*<sup>21</sup> (*Global*

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14 ICSID Secretariat, Working Paper on ‘Suggested Changes to the ICSID Rules and Regulations’ (12 May 2005), available at <https://icsid.worldbank.org/sites/default/files/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf> (last accessed 16 Jun. 2022), p. 7.

15 Diop, ‘Objection under Rule 41(5) of the ICSID Arbitration Rules’ (2010) 25 *ICSID Review* 312 (Diop-2010).

16 *Trans-Global Petroleum Inc v. Jordan*, ICSID Case No. ARB/07/25 (Tribunal’s Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008) (*Trans-Global*).

17 *Brandes Investment v. Venezuela*, ICSID Case No. ARB/08/3 (Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, 2 Feb. 2009) (*Brandes*).

18 *Trans-Global*, at [95].

19 *ibid.*, at [118]–[119].

20 See, also, Markert, ‘Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5) – Soon to Become the Preliminary Objection of Choice?’ (2011) 2(2) *Kölner Schrift zum Wirtschaftsrecht* 142 (Markert-2011), p. 144. See, also, Brabandere, ‘The ICSID Rule on Early Dismissal of Unmeritorious Investment Treaty Claims: Preserving the Integrity of ICSID Arbitration’ (2012) 9(1) *Manchester Journal of International Economic Law* 23 (Brabandere-2012), p. 42.

21 *Global Trading Resource Corp and Globex International Inc v. Ukraine*, ICSID Case No. ARB/09/11 (Award, 1 Dec. 2010) (*Global Trading*).



*Trading*) and *RSM Production Corp v. Grenada*<sup>22</sup> (*RSM Production*) issued orders dismissing claims pursuant to Rule 41(5). The tribunal in *Global Trading* did so on jurisdictional grounds (holding that the sale and purchase contracts on which the claims were based were ‘pure commercial transactions that cannot on any interpretation be considered to constitute “investments” within the meaning of Article 25 of the ICSID Convention’),<sup>23</sup> while the tribunal in *RSM Production* dismissed all claims by the claimant<sup>24</sup> on preclusion grounds (as they were ‘no more than an attempt to relitigate and overturn the findings of another ICSID tribunal’).<sup>25</sup>

Since then, decisions on Rule 41(5) have been rendered (albeit mostly finding against the applicant)<sup>26</sup> a known further 38 times (three in annulment proceedings<sup>27</sup> and two in

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22 *RSM Production Corporation and ors v. Grenada*, ICSID Case No. ARB/10/6 (Award, 10 Dec. 2010) (*RSM Production*).

23 *Global Trading* at [57].

24 *RSM Production* at [9.1].

25 *ibid.*, at [7.3.6].

26 Although China in *Ansung Housing Co Ltd v. People’s Republic of China*, ICSID Case No. ARB/14/25 (Award, 9 Mar. 2017) (*Ansung Housing*) (only the second ICSID claim to be brought against China, and the first such claim to proceed past the stage of tribunal constitution) succeeded in its Rule 41(5) application (filed 15 Sep. 2016), on the grounds that the claim was time-barred under Article 9(7) of the 2007 China–Korea BIT and thus ‘manifestly without legal merit’ (see *Ansung Housing* at [105]–[122]), and that the most-favoured nation clause in Article 3(3) of the 2007 PRC–Korea BIT could not be invoked to sidestep the temporal limitation prescribed in Article 9(7) (see *Ansung Housing* at [136]–[141]). The tribunal issued an oral ruling in China’s favour at the close of the Rule 41(5) hearing (conducted during the first session in Singapore) on 14 Dec. 2016 and declared the proceedings closed on 15 Feb. 2017 (following the submission of costs statements and observations on costs) (see *Ansung Housing* at [4], [24]–[27]), before issuing its Award on 9 Mar. 2017. In *AFC Investment Solutions v. Colombia* (Award, 24 Feb. 2022), the tribunal similarly granted Colombia’s Rule 41(5) application and dismissed the claims on the ground that they were manifestly time-barred under the 2006 Colombia–Spain BIT: Lisa Bohmer, ‘Analysis: In the context of Rule 41(5) proceedings, an ICSID tribunal decides that notice of dispute did not interrupt limitation period, and concludes that banking claim against Colombia manifestly falls outside of its temporal jurisdiction’ (<https://www.iareporter.com/articles/analysis-in-the-context-of-rule-415-proceedings-an-icsid-tribunal-decides-that-notice-of-dispute-did-not-interrupt-limitation-period-and-concludes-that-banking-claim-against-colombia-manifestly-f/>) (last accessed 16 Jun. 2022)). See, also, *Fengzhen Min v. Korea*, ICSID Case No. ARB/20/26 (Decision on the Respondent’s Preliminary Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules, 18 Jun. 2021), where part of the claims was found to have been time-barred under the China–Korea BIT and thus manifestly without legal merit.

27 *Elsamex SA v. Honduras*, ICSID Case No. ARB/09/4 (Decision on Elsamex SA’s Preliminary Objections, 7 Jan. 2014) (*Elsamex*); *Ioan Micula and ors v. Romania*, ICSID Case No. ARB/05/20 (Decision on the applicable arbitration rules and on the preliminary objections filed by the Respondents on Annulment, 25 Jun. 2014) (where the tribunal dismissed the application following Romania’s successful argument that the 2003 ICSID Arbitration Rules (which did not contain Rule 41(5)), rather than the 2006 ICSID Arbitration Rules (containing Rule 41(5)), applied to the annulment proceedings): see Decision on Annulment (26 Feb. 2016) at [7]–[20]); *Venoklim Holding BV v. Venezuela*, ICSID Case No. ARB/12/22. See Potestà-2017, *op. cit.* note 12, pp. 267–271 for a discussion of the use of Rule 41(5) in annulment proceedings.

proceedings for the revision of an award)<sup>28</sup> bringing the total known number of Rule 41(5) applications filed to 42 (as at March 2022).<sup>29</sup> A review of the available decisions rendered to date reveals a fairly consistent application and interpretation of Rule 41(5) by ICSID tribunals (see Section IV).

- 28 The first of these two cases was *Edenred SA v. Hungary*, ICSID Case No. ARB/13/21 (Decision on Revision, 7 Feb. 2019), where the tribunal summarily dismissed Hungary's request to revise a Dec. 2016 award. Hungary had asked the ICSID tribunal to decline jurisdiction over claims brought under the France–Hungary BIT on the basis of the March 2018 ruling of the Court of Justice of the European Union (CJEU) in a separate case (post-dating the ICSID tribunal's award) that investor-state arbitration provisions in a BIT between EU Member States were incompatible with EU law. The ICSID tribunal reportedly concluded, inter alia, that, as the application of the CJEU's decision to the arbitration was a question of law (not fact), the ICSID revision procedure (applicable where a new fact is discovered) was inapplicable (see Tom Jones, 'ICSID panel declines to revisit intra-EU award' (13 Feb. 2019), <https://globalarbitrationreview.com/article/1180228/icsid-panel-declines-to-revisit-intra-eu-award> (last accessed 16 Jun. 2022)). In the second case, *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12 (Decision on Claimants' Objection under ICSID Rule 41(5) to Respondent's Application for Revision, 8 Mar. 2021) (*InfraRed Environmental*), the tribunal summarily dismissed the respondent's application for revision of the underlying award, judging the request to be manifestly without legal merit. Spain had sought a revision of the underlying award on the ground that the tribunal had relied on a since-annulled award made in a separate arbitration (*Eiser Award*) when deciding a threshold issue concerning the 'installed capacity' of certain plants. The tribunal disagreed, holding (at [62]–[64]) with reference to the wording of Article 51(1) ('Either party may request revision of the award . . . on the ground of discovery of some fact of such nature as decisively to affect the award . . .'), that (1) it was manifest that its earlier determination of the 'installed capacity' issue was not exclusively or mainly based on the *Eiser Award*, and (2) it was also manifest that, in the absence of the *Eiser Award*, it would have reached the same conclusion on that issue. Spain's revision application was in the circumstances dismissed, notably, with Spain being ordered to pay the entirety of the costs, fees and expenses of ICSID and of the members of the tribunal in relation to the revision proceedings (at [81(2)]).
- 29 Based on information obtained from ICSID website, <https://icsid.worldbank.org/cases/content/tables-of-decisions/manifest-lack-of-legal-merit> (last accessed 28 Mar. 2022), there were 39 such applications as at 16 Jun. 2022, not counting *Mainstream Renewable Power Ltd and others v. Germany*, ICSID Case No. ARB/21/26 (Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 18 Jan. 2022) (*Mainstream Renewable Power*) and *AFC Investment Solutions S.L. v. Colombia*, ICSID Case No. ARB/20/16 (Award, 24 Feb. 2022) (*AFC Investment Solutions*) and *Alpene Ltd v. Republic of Malta*, ICSID Case No. ARB/21/36 (Decision on the Respondent's Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 23 May 2022) (where the Tribunal dismissed Malta's objection under Rule 41(5) based on the claimant's alleged failure to comply with the China-Malta BIT's exhaustion of local remedies requirement: <https://www.iareporter.com/articles/kaufmann-kohler-chaired-tribunal-dismisses-rule-415-objection-in-dispute-under-china-malta-bit/> (last accessed 16 Jun. 2022)). Two of these cases were filed under Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules: *Mobile TeleSystems OJSC v. Republic of Uzbekistan*, ICSID Case No. ARB(AF)/12/7 (Decision on the Respondent's Objection pursuant to the ICSID AF Rules, 14 Nov. 2013); and *Lion Mexico*.

## IV RULE 41(5) IN PRACTICE

### i A residual rule

Rule 41(5) begins with ‘Unless the parties have agreed to another expedited procedure for making preliminary objections’. This accords ‘proper prominence’<sup>30</sup> to agreements on other forms of expedited procedures that may already be contained in some investment treaties and agreements.<sup>31</sup> Where that is the case, the procedure proposed in Rule 41(5) would apply only to the extent not otherwise agreed by the parties under the relevant treaties.<sup>32</sup> See, for example, *Pac Rim Cayman LLC v. El Salvador*<sup>33</sup> (*Pac Rim*), where El Salvador submitted that, given the opening line in Rule 41(5), it was the expedited procedure under Articles 10.20.4 and 10.20.5 of the Central America Free Trade Agreement, and not that under Rule 41(5), that was applicable.<sup>34</sup> That submission was not materially disputed by the claimant and was accepted by the ICSID tribunal as correct.<sup>35</sup>

### ii Scope – merits, jurisdiction and procedure

In terms of the scope of objections that can be raised by respondent states,<sup>36</sup> it is by now accepted that Rule 41(5) permits not just objections as to merits but also jurisdictional objections.<sup>37</sup> As was first noted in *Brandes*:

*Rule 41(5) does not mention “jurisdiction”. The terms employed are “legal merit”. This wording, by itself, does not provide a reason why the question whether or not a tribunal has jurisdiction and is competent to hear and decide a claim could not be included in the very general notion that the claim filed is “without legal merit” . . . [But] [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*

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30 Brown and Puig, ‘The Power of ICSID Tribunals to Dismiss Proceedings Summarily: An Analysis of Rule 41(5) of the ICSID Arbitration Rules’ (2011) 10 *The Law & Practice of International Courts and Tribunals*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1859446](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1859446) (last accessed 16 Jun. 2022) (Brown and Puig-2011), p. 24.

31 For example, Article 1(1) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (read with Article 9.22(4) of the Trans-Pacific Partnership Agreement), which permits the raising of preliminary objections on the ground ‘that a claim is manifestly without legal merit’; 2012 US Model BIT, Articles 28(4) and 28(5) provide that ‘a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made’; 2003 Chile–US Free Trade Agreement, Articles 10.19(4) and 10.19(5); 2008 Rwanda–US BIT, Articles 28(4) and 28(5); Central America Free Trade Agreement (CAFTA), Articles 10.20.4 and 10.20.5.

32 Antonietti, ‘The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules’ (2007) 41 *International Lawyer* 427 (Antonietti-2007), p. 441. In the absence of such a treaty provision, disputing parties may also mutually agree on the use of an alternative procedure (e.g., in an investment contract), though one would expect such a scenario to be uncommon: Potestà and Sobat-2012, op. cit. note 7, p. 12; Potestà-2017, op. cit. note 12, p. 253.

33 *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12 (Decision on the Respondent’s Preliminary Objections under CAFTA, Articles 10.20.4 and 10.20.5, 2 Aug. 2010) (*Pac Rim*).

34 *Pac Rim* at [81].

35 *ibid.*, at [85].

36 Though ‘a party may’ in Rule 41(5) would seem to encompass both the claimant and respondent, the procedure is hardly likely to hold much interest for a claimant (except if a claimant were seeking the dismissal of a respondent’s unmeritorious counterclaim): Potestà-2017, op. cit. note 12, p. 254.

37 Antonietti-2007, op. cit. note 32, pp. 439–40; Potestà-2017, op. cit. note 12, pp. 256–57.

*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 . . . The Arbitral Tribunal therefore interprets Rule 41(5) in the sense that the term "legal merit" covers all objections to the effect that the proceedings should be discontinued at an early stage because, for whatever reason, the claim can manifestly not be granted by the Tribunal.*<sup>38</sup>

This position accords with the drafting history of Rule 41(5) and discussions at the ICSID Secretariat during the 2006 amendment process,<sup>39</sup> and has been consistently endorsed by subsequent ICSID tribunals confronted with Rule 41(5) applications raising objections based on jurisdiction.<sup>40</sup>

In *RSM Production*, Rule 41(5) was further extended to cover objections premised on 'equitable considerations and procedural impediments'.<sup>41</sup> The dispute concerned an agreement between the claimant and Grenada, under which the claimant was to be granted a licence for petroleum exploration if this was requested within a certain period. After Grenada denied the claimant's untimely licence request, the claimant initiated ICSID arbitration proceedings, which were disposed of in Grenada's favour. The claimant was dissatisfied and commenced a second ICSID arbitration on the basis of the United States–Grenada BIT, although all the legal and factual predicates of the claims were the same as those that arose in the first arbitration and had been determined conclusively against the claimants.<sup>42</sup> In the circumstances, the tribunal in the second arbitration dismissed all the claims pursuant to Rule 41(5), reasoning that:

*as pleaded and argued, the present case is no more than an attempt to relitigate and overturn the findings of another ICSID tribunal, based on allegations of corruption that were either known at the time or which ought to have been raised by way of a revision application and over which the Prior Tribunal had jurisdiction. Claimant's present case is thus no more than a contractual claim (previously decided by an ICSID tribunal which had the jurisdiction to deal with Treaty and contractual issues), dressed up as a Treaty case . . . [T]he Tribunal finds that the initiation of the present arbitration is thus an improper attempt to circumvent the basic principles set out in Convention Article 53 [finality of awards] and the procedures available for revision and rectification of awards provided for in Article 51.*<sup>43</sup>

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38 *Brandes* at [50], [52], [55]. See, further, *Diop-2010*, op. cit. note 15, pp. 322–23.

39 *Diop-2010*, op. cit. note 15, p. 322.

40 See *Global Trading*, at [30]; *PNG Sustainable Development Program Ltd v. Papua New Guinea*, ICSID Case No. ARB/13/33 (Decision on the Respondent's Objections under Rule 41(5) of the ICSID Arbitration Rules, 28 Oct. 2015) at [91]; *Emmis International Holdings BV and ors v. Hungary*, ICSID Case No. ARB/12/2 (Decision on Respondent's Objection under ICSID Arbitration Rule 41(5), 11 Mar. 2013) (*Emmis International*) at [64]–[72]; *Lion Mexico* at [71]–[75] (in the context of an application brought pursuant to Rule 45(6) of the ICSID Arbitration (Additional Facility) Rule); *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50 (Decision on Respondent's Application under Rule 41(5), 20 Mar. 2017) (*Eskosol*) at [35].

41 *Diop-2010*, op. cit. note 15, p. 324.

42 *RSM Production* at [4.1.1]–[4.1.2].

43 *ibid.*, at [7.3.6]–[7.3.7].

The ‘abuse of process’ overtones in *RSM Production* highlight an additional functionality of Rule 41(5) in preventing abuse of international arbitral procedures.<sup>44</sup> As Brabandere suggests:

*Although the objective of Rule 41(5) is not explicitly aimed at targeting claims that constitute an “abuse of process”, it is likely that the rule will prevent, or at least offer an adequate procedure to assess the submission of such claims, since it provides arbitral tribunals operating under the ICSID Convention with a procedure to assess the claims, inter alia, on these grounds in an early stage in the proceedings.*<sup>45</sup>

It remains to be seen whether Rule 41(5) will be more often utilised in this capacity.<sup>46</sup>

Tribunals have also had occasion, in some instances, to consider Rule 41(5) preliminary objections<sup>47</sup> premised on the *Achmea* decision by the Court of Justice of the European Union (CJEU)<sup>48</sup>, finding that arbitration clauses contained in intra-EU BITs are incompatible with EU law.

### iii Procedure

The procedure under Rule 41(5) is significantly expedited. The respondent has just 30 days after the constitution of the tribunal, and ‘in any event before the first session of the Tribunal’, to raise any objection under Rule 41(5).<sup>49</sup> This 30-day period was designed to fit within the default 60-day period following constitution of the tribunal (stipulated in ICSID Arbitration Rule 13(1)) within which the tribunal must hold its first session,<sup>50</sup> and after

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44 Brabandere-2012, op. cit. note 20, pp. 30 and 44.

45 *ibid.*, p. 44.

46 In *Red Eagle Exploration Ltd. v. Colombia* (ICSID Case No. ARB/18/12) and *Galway Gold v. Colombia* (Case No. ARB/18/13), Colombia reportedly sought, unsuccessfully, the dismissal of proceedings under Rule 41(5) on the ground that the claimants had been incommunicado for a prolonged period, such that proceedings should be deemed discontinued under ICSID Arbitration Rule 45 (see, e.g., Lisa Bohmer, ‘Arbitrator Decline Colombia’s Request to Dismiss ICSID Mining Case’, [www.iareporter.com/articles/arbitrators-decline-colombias-request-to-dismiss-icsid-mining-case](http://www.iareporter.com/articles/arbitrators-decline-colombias-request-to-dismiss-icsid-mining-case) (last accessed 16 Jun. 2022)).

47 See *Alverley Investments Limited and Germen Properties Ltd v. Romania*, ICSID Case No. ARB/18/30 (Decision on the Respondent’s Preliminary Objections pursuant to ICSID Arbitration Rule 41(5), 1 Aug. 2019), where Romania’s Rule 41(5) objection based on the intra-EU nature of the dispute failed (although the tribunal subsequently decided to bifurcate the proceedings with jurisdictional issues to be dealt with separately and heard Romania’s intra-EU objection as part of the next phase); *Sinabag SE, Erste Nordsee-Offshore Holding GmbH and Zweite Nordsee-Offshore Holding GmbH v. Germany*, ICSID Case No. ARB/19/29 (Decision on the Respondent’s Preliminary Objections pursuant to ICSID Arbitration Rule 41(5), 24 Jul. 2020), where Germany’s Rule 41(5) objection based on the *Achmea* decision was also dismissed; and *Mainstream Renewable Power*, in which Germany sought unsuccessfully to argue that arbitration under the Energy Charter Treaty was incompatible with EU law in light of certain CJEU judgments (the ICSID tribunal held, *inter alia*, that those CJEU judgments engaged relatively novel issues that should not be examined in an expedited fashion in the context of Rule 41(5) proceedings: see [120]).

48 CJEU, C-284/16, *Slovakia v. Achmea BV* (6 Mar. 2018).

49 The 2016 SIAC Rules and 2017 SIAC Investment Arbitration Rules do not specify any time limit to raise an objection that the claim is manifestly without legal merit.

50 Antonietti-2007, op. cit. note 32, p. 441.

which the tribunal must decide ‘promptly’. In *Trans-Global*, the tribunal confirmed that the two temporal conditions in Rule 41(5) are cumulative, meaning that a preliminary objection must be filed within 30 days of the constitution of the tribunal and before the first session.<sup>51</sup>

Though it was suggested that ‘promptly’ should be understood in terms of ‘days or weeks, [and] not months’,<sup>52</sup> the concept has generally been applied in terms of weeks and, at times, months; for example, the tribunals in *Trans-Global*, *Brandes*, *PNG Sustainable Development Program Ltd v. Papua New Guinea (PNGSDP)*<sup>53</sup> and *Fengzhen Min* took roughly three weeks following oral arguments to issue their decisions, whereas the process took more than three months in *Lion Mexico* and almost five months in *Global Trading*.<sup>54</sup>

In any case, the Rule specifically requires parties to be given ‘the opportunity to present their observations on the objections’ before the tribunal ‘promptly’ decides, and failure to accord parties with a full opportunity to be heard could potentially lead to a charge of serious departure from a fundamental rule of procedure, with the consequence of a possible annulment under Article 52(1)(d) of the ICSID Convention.<sup>55</sup> How the balance between the desire for an expedited decision and the requirements of a properly reasoned determination is to be struck would depend on the requirements of each individual case. As noted in *Global Trading*:

*Rule 41(5) is sparse in its indications to a tribunal as to the procedure to be followed when an objection is lodged. It says no more than that “the parties” (in the plural) must have “the opportunity to present their observations on the objection”, and that the Tribunal is required to notify the parties of its decision “at its first session or shortly thereafter”. To the extent that the Rule leaves the question of procedure there, it is no doubt for each individual Tribunal to fill in the gaps by exercising the general procedural powers given to it by Rule 19. On the other hand, it should be noted that – if a Tribunal does in the event decide that all claims are manifestly without legal merit – it is then required by Rule 41(6) to render “an award” to that effect, thus attracting those elements of the Rules and the ICSID Convention that relate to the rendering of an award . . . There may be cases*

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51 *Trans-Global*, at [24]–[29]. In *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2 (Award on the Respondent’s Application under Rule 41(5) of the ICSID Arbitration Rules, 1 Nov. 2019 (*Almasryia*) at [25]–[26]), the tribunal confirmed that the 30-day time limit starts to run from the date on which the tribunal’s constitution was announced, excluding the day of dispatch for computation. The deadline also falls on the next business day after the 30-day period. Kuwait’s Rule 41(5) application in *Almasryia*, submitted on Monday 3 September 2018, was thus found to be within time as the tribunal’s constitution was only notified to parties on 2 August 2018.

52 Markert-2011, op. cit. note 20, p. 145.

53 ICSID Case No. ARB/13/33 (Decision on the Respondent’s Objections under Rule 41(5) of the ICSID Arbitration Rules, 28 Oct. 2014) (*PNGSDP*).

54 There must be some limit to this – if it is too difficult to decide, the case is probably not one that is suitable for summary dismissal under Rule 41(5). The drafters of Rule 41(5) ‘can only have had in mind an objection that was so clear-cut that it could be decided virtually on the papers or with a minimum of supplementary argument’ (*MOL Hungarian Oil and Gas Company plc v. Croatia*, ICSID Case No. ARB/13/32 (Decision on Respondent’s Application under ICSID Arbitration Rule 41(5), 2 Dec. 2014) (*MOL*) at [44]).

55 Schreuer, et al, *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press, 2009 (Schreuer-2009), p. 543.

*in which a tribunal can come to a clear conclusion on a Rule 41(5) objection, simply on the written submissions, but they will be rare, and the assumption must be that, even then, the decision will be one not to uphold the objection, rather than the converse. That is because, if an objection is not upheld at the Rule 41(5) stage, the rights of the objecting party remain intact, as the last sentence of the Rule makes plain.<sup>56</sup>*

It appears to be the norm for parties to be permitted one to two rounds of written submissions, followed by a round of oral arguments, before the tribunal issues a decision or award under Rule 41(5). With the exception of a handful of cases,<sup>57</sup> this has been the typical manner in which Rule 41(5) proceedings have been conducted to date.<sup>58</sup>

Finally, the last sentence of Rule 41(5) makes clear that the dismissal of a Rule 41(5) objection will not affect a party's right to thereafter file jurisdictional objections according to the normal procedure under Rule 41(1). In this manner, Rule 41(5) forms part of a 'harmonious continuum'<sup>59</sup> of jurisdictional review of claims with a progressively higher standard of review at each stage, beginning from the Secretary General's screening power under Article 36(3) of the ICSID Convention, and ending with the tribunal's determination of objections raised under the Rule 41(1) procedure.<sup>60</sup>

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56 *Global Trading*, at [32]–[33].

57 *Emmis International; Accession Mezzanine Capital LP and anor v. Hungary*, ICSID Case No. ARB/12/3 (Decision on Respondent's Objection under Arbitration Rule 41(5), 16 Jan. 2013); *Edenred SA v. Hungary*, ICSID Case No. ARB/13/21 (Decision on Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 6 Jun. 2014); *Transglobal Green Energy LLC and Transglobal Green Panama SA v. Republic of Panama*, ICSID Case No. ARB/13/28 (Decision on the Admissibility of Respondent's Preliminary Objection to Jurisdiction of the Tribunal under Rule 41(5) of the Arbitration Rules, 17 Mar. 2015); *Álvarez y Marín Corporación SA and others v. Republic of Panama (Álvarez)*, ICSID Case No. ARB/15/14 (Decision on Respondent's Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 27 Jan. 2016); *Mathias Kruck and others v. Spain*, ICSID Case No. ARB/15/23 (Decision on the Respondent's Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 14 Mar. 2016); *Lion Mexico* (in which the tribunals appeared to have dispensed with oral arguments on the Rule 41(5) applications).

58 *Trans-Global; Brandes; Global Trading; RSM Production; Rafat Ali Rizvi v. Indonesia*, ICSID Case No. ARB/11/13 (Award on Jurisdiction, 16 Jul. 2013); *PNGSDP; MOL; Pan American Energy LLC v. Plurinational State of Bolivia*, ICSID Case No. ARB/10/8 (Decision on the Respondent's Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules, 26 Apr. 2013); *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8 (Decision on the Respondent's Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 27 Jan. 2015); *Elektrogospodarstvo Slovenije – razvoj in inženiring d.o.o. v. Bosnia and Herzegovina*, ICSID Case No. ARB/14/13 (Decision on the Respondent's Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 3 Nov. 2015); *Elsamex; Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 (Decision on the Respondent's Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules, 2 Jul. 2013); *Lundin Tunisia BV v. Tunisia*, ICSID Case No. ARB/12/30 (Decision on the Respondent's Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules, 6 Jan. 2014); *Ansung Housing*. Similarly for *Mobile TeleSystems*, in respect of proceedings under Arbitration (Additional Facility) Rule 45(6).

59 Diop-2010, op. cit. note 15, p. 318. See, also, *Brandes*, at [53], where the tribunal noted that 'there are actually three levels at which jurisdictional objections could be examined. First by the Secretariat, and if the case passes that level, it would then be under Rule 41(5), and if it passes that level, it might still be under Rule 41(1)'.

60 Diop-2010, op. cit. note 15, p. 319–21; *Mainstream Renewable Power*, at [94]–[95].

**iv Test for ‘manifest lack of legal merits’**

There is a high level of uniformity in the manner in which ICSID tribunals have applied the test of ‘manifest’ lack of merit. ‘Manifest’ in this regard has consistently been equated with ‘evident’, ‘obvious’ or ‘clearly revealed to the eye, mind or judgement’.<sup>61</sup> The threshold is very high, and a respondent must establish its Rule 41(5) objection ‘clearly and obviously, with relative ease and dispatch’.<sup>62</sup> Put another way, it must be shown that the claim is ‘clearly and unequivocally unmeritorious’<sup>63</sup> and, thus, ‘untenable in a way that is evident and easily proved’.<sup>64</sup> In *Lotus Holding Anonim Sirketi v. Republic of Turkmenistan*,<sup>65</sup> the tribunal described this high threshold as one that demanded that ‘no matter what evidence is adduced, there is a fundamental flaw in the way that the claim is formulated that must inevitably lead to its dismissal’.<sup>66</sup> As expressed in even starker terms in *Mainstream Renewable Power*, the respondent must demonstrate that ‘the claim was lost before it left the start line’.<sup>67</sup> This will not be the case when the claimant has ‘a tenable arguable case’,<sup>68</sup> or when the objections throw up novel, difficult or disputed legal issues (as Rule 41(5) was intended ‘only to apply undisputed or genuinely indisputable rules of law to uncontested facts’).<sup>69</sup>

Not surprisingly, the high threshold under Rule 41(5) has rarely been crossed: for example, in *Trans-Global*, where it was ‘obvious’<sup>70</sup> that the claims under Article VIII of the US–Jordan BIT were based on ‘non-existent legal rights of the Claimant’ and ‘non-existent legal obligations of [Jordan]’<sup>71</sup> (a conclusion that the tribunal was able to reach with ‘little difficulty of interpretation’);<sup>72</sup> in *Global Trading*, where neither of the relevant contracts could ‘by any reasonable process of interpretation be construed to be “investments” for the purposes of the ICSID Convention’;<sup>73</sup> in *Emmis International*, where it was ‘manifest’ from the ‘plain text of the Treaties’ that the claimants were not covered by the consent of the host state;<sup>74</sup> in *Ansung Housing*, where there were ‘multiple and clear pleadings’<sup>75</sup> by the claimants confirming that they ‘first knew’ that they incurred loss and damage ‘more than three years before the commencement of proceedings (thus offending the three-year limitation period

61 *Trans-Global*, at [83]; *PNGSDP*, at [88]; *Lion Mexico*, at [62]–[67] (in the content of an application brought pursuant to Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules); *Almasryia*, at [28]; *Mainstream Renewable Power*, at [80]–[86].

62 *Trans-Global*, at [88]; *Global Trading*, at [35]; *Brandes*, at [63]; *PNGSDP*, at [88]; *MOL*, at [25], [45]; *Ansung Housing*, at [70], [142]; *Almasryia*, at [29].

63 *Lion Mexico*, at [66].

64 Diop-2010, op. cit. note 15, p. 336.

65 ICSID Case No. ARB/17/30, Award (6 Apr. 2020)

66 *ibid.*, at [158]. The tribunal allowed the respondent’s Rule 41(5) application after concluding, inter alia, that the claimant lacked *locus standi* to commence the claims that were in connection with contracts to which its subsidiary, but not itself, was a party.

67 *Mainstream Renewable Power*, at [96].

68 *PNGSDP*, at [88].

69 *ibid.*, [89]. In *Ansung Housing* (see [32], [71]), the tribunal ‘assume[d] the truth of the facts alleged by Claimant’ for purposes of ruling on China’s Rule 41(5) application.

70 *Trans-Global*, at [118].

71 *ibid.*, at [95].

72 *id.*

73 *Global Trading*, at [56].

74 *Emmis International*, at [70].

75 *Ansung Housing*, at [107]–[108].



under Article 9(7) of the 2007 China–Korea BIT<sup>76</sup> and where it was ‘clear’ from a ‘plain reading’ of the most-favoured nation (MFN) clause in Article 3(3) of the 2007 China–Korea BIT that MFN treatment did not extend to the temporal limitation period for investor-state arbitration in Article 9(7);<sup>77</sup> in *Almasryia*, where the tribunal found that it was ‘manifest, clear and obvious just from simply looking at the text of the letters’ that the claimant’s sending of the letters did not comply with a six-month waiting period and notification requirement prescribed by Article 10(2) of the Egypt–Kuwait BIT<sup>78</sup>, and where it was ‘obvious’ that the claimant did not even have an existent property right under the laws of Kuwait to ground an expropriation claim;<sup>79</sup> and in *InfraRed Environmental*, where it was clear on the face of the underlying award (of which Spain sought a revision) that it was made without reliance on the since-annulled *Eiser* award.<sup>80</sup>

More often than not, cases fall short of the required threshold. In *PNGSDP*, the state raised Rule 41(5) objections in relation to both the tribunal’s jurisdiction and the substantive merits of the claimant’s claims. On jurisdiction, the state argued that the mandatory jurisdictional requirements under Article 25(1) of the ICSID Convention were not satisfied as the state did not provide a standing offer to arbitrate investment disputes by its domestic legislation – Section 39 of the Papua New Guinea (PNG) Investment Protection Act 1992 (IPA)<sup>81</sup> – and the claimant was not a ‘foreign investor’ with a ‘private foreign investment’, because it existed to fulfil the sole public purpose of promoting sustainable development and advancing the general welfare of the people of PNG.<sup>82</sup> The state also argued that the claims that were based on the alleged MFN clause in Section 37(1) of the IPA<sup>83</sup> were manifestly without legal merit, as Section 37(1) was not an MFN clause but simply a clause that entitled a foreign investor to the protections under the IPA, unless the investor is entitled to more favourable treatment under any other treaty to which PNG is also a party.<sup>84</sup>

Although the MFN clause argument essentially required the tribunal to construe Section 37(1) of the IPA – which could arguably be carried out under a summary Rule 41(5)

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76 2007 China–Korea BIT, Article 9(7) provides: ‘an investor may not make a claim pursuant to paragraph 3 of this Article if more than 3 years have elapsed from the date on which the investor first acquired, or should have first acquired, the knowledge that the investor had incurred loss or damage’.

77 *Ansung Housing*, at [136]–[141].

78 *Almasryia*, at [34]–[48]. This Rule 41(5) ruling is currently the subject of annulment proceedings commenced on 12 Mar. 2020.

79 *ibid.*, at [49]–[58]. This Rule 41(5) ruling is currently the subject of annulment proceedings commenced on 12 Mar. 2020.

80 *InfraRed Environmental*, at [69]–[73].

81 Papua New Guinea (PNG) Investment Protection Act 1992 (IPA), in Section 39, provides: ‘The Investment Disputes Convention Act 1978, implementing the [ICSID Convention], applies, according to its terms, to disputes arising out of foreign investment.’ The Investment Disputes Convention Act 1978 in turn provided, in Section 2: ‘A dispute shall not be referred to [ICSID] unless the dispute is fundamental to the investment itself.’ PNG eventually succeeded on this ground in the subsequent Rule 41(1) proceedings (*PNG Sustainable Development Program Ltd v. Papua New Guinea*, ICSID Case No. ARB/13/33, Award, 5 May 2015).

82 *PNGSDP*, at [35].

83 IPA, in Section 37(1), provides: ‘The provisions of this section shall apply to a foreign investor except where treatment more favourable to the foreign investor is accorded under any bilateral or multilateral agreement to which the State is a party.’

84 *PNGSDP*, at [52].

procedure – after three rounds of written submissions (two by the state and one by the claimant) and an oral hearing, the tribunal found that all of the state’s objections gave rise to novel and complex issues of laws that also required analysis of ‘relatively unusual’ facts:

*[T]he interpretation of the IPA and IDCA [Investment Disputes Convention Act] is central to the Respondent’s objections with respect to written consent and the alleged MFN clause in the IPA. The Tribunal considers that these interpretations cannot be satisfactorily made in the context of a Rule 41(5) application, which necessarily involves an expedited and summary procedure. The Tribunal notes that there are disputed questions regarding which system (or systems) of law should apply to the interpretation of the IPA and IDCA (in particular, international or domestic rules of interpretation), and in addition, which specific interpretive principles should apply (e.g., the effect utile principle and the rule of contra proferentem). Further, the Tribunal notes that the IPA and the IDCA have not yet been the subject of interpretation by an ICSID tribunal, and it will therefore be required to decide issues of first impressions. Doing so in a summary Rule 41(5) procedure would be inappropriate.*

...

*[T]he Respondent’s objection with respect to “private foreign investment” cannot be satisfactorily dealt with at this stage of the proceeding. The Respondent’s objection does not appear to be based upon an explicit jurisdictional criterion set out in either the ICSID Convention or the relevant PNG legislation. Rather, the Respondent’s objection appears to be based on the Respondent’s interpretation of the ICSID Convention’s jurisdictional requirements in light of materials extraneous to the terms of Article 25(1) (in particular, the Convention Preamble and the Report of the Executive Directors on the [ICSID Convention]) and a distinction drawn by the Respondent between the Claimant and what the Respondent refers to as “typical foreign investors” considered in other ICSID Convention cases.*

*As such, the Respondent’s objection is unsuited for a Rule 41(5) application. It does not involve application of undisputed or indisputable legal rules, but rather involves novel issues of interpretation and analysis.<sup>85</sup>*

The tribunal in *Lion Mexico* (the first publicised decision concerning an application brought pursuant to Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules) also dismissed the respondent state’s preliminary objections in very similar terms:

*The amount of evidence and the length and detail of the arguments show the complexity of the underlying legal question.*

*The Tribunal further notes that the issue of whether pagares [i.e., promissory notes] and hipotecas [i.e., mortgages] that formalize and secure loans with a maturity of less than three years can be considered as investments under Art. 1139(g) and (h) NAFTA – separately from contemporaneous loan transactions – seems to be a novel issue, which has never been addressed in previous decisions.*

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85 *ibid.*, at [94]–[98].

. . . [T]he question whether the pagares and hipotecas constitute an investment pursuant to Art. 1139(g) and (h) NAFTA, or whether their status must be considered exclusively pursuant to Art. 1139(d) NAFTA, raises complex interpretative issues and requires a greater degree of consideration and a more thorough analysis of Mexican law and international legal principles. The Tribunal requires further legal argument on these issues within the context of the full development of the Parties' cases.<sup>86</sup>

In *Eskosol SpA in liquidazione v. Italian Republic*<sup>87</sup> (*Eskosol*), the tribunal rejected the respondent's application under Rule 41(5). Italy presented four separate grounds for its application<sup>88</sup> and the claimant argued that none of Italy's objections satisfied the requirements of Rule 41(5), as they demanded 'a significant factual enquiry' and raised 'novel and complex legal issues'.<sup>89</sup> Although the parties agreed that 'in order to be manifestly without legal merit, the claims must be plainly without merit as a matter of law', Italy used the additional formulation of 'clearly and obviously' to construe the word 'manifest', and *Eskosol SpA* referred to tribunal decisions to contend that the defect must be 'obvious and plain'.<sup>90</sup> The tribunal opined that 'for the purposes of this case, there was no need to distinguish among the formulations of plain, clear and obvious, which all recognise that the manifest standard requires a very high degree of clarity, [such that], in the view of the tribunal, the claims presented cannot succeed as a matter of law'.<sup>91</sup> The tribunal concluded that as the issues involved were not 'manifest', but 'novel and complex',<sup>92</sup> they were unsuitable for resolution in a Rule 41(5) application.<sup>93</sup>

These explications of the test of manifest lack of legal merit should not be confused with the *prima facie* test that is used for preliminary objections to jurisdiction under Rule 41(1), which is less strict:

*The prima facie test . . . requires the arbitral tribunal to undertake a full evidentiary inquiry into genuine jurisdictional matters but allows a prima facie assessment not only of the alleged facts but also of the legal standards applicable to determine a violation of the BIT on the merits. Contrary to this, a preliminary objection under Arbitration Rule 41(5) must be directed either at jurisdiction or at the merits and allows neither for an evidentiary inquiry nor for the arbitral tribunal to undertake a prima facie assessment of legal standards. Instead, the arbitral tribunal has to be absolutely certain about the applicable legal standard in order to find that a claim is manifestly without legal merit. If the tribunal is in doubt, the preliminary objection will be rejected and the proceeding will continue.*<sup>94</sup>

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86 *Lion Mexico*, at [79]–[81].

87 *Eskosol*, op. cit. note 40, above.

88 '(i) *Eskosol* cannot be considered a "national of another Contracting State" under Article 25(2)(b) of the ICSID Convention . . . (ii) *Eskosol* does not qualify as an "investor" either under the Energy Charter Treaty or the ICSID Convention . . . (iii) Under Article 26(3)(b)(i) of Annex 1D of the Energy Charter Treaty, Italy declined to consent to arbitration of a dispute previously submitted to another forum; (iv) The claim is barred by the principles of *lis pendens* and *res judicata* or collateral estoppel.' *Eskosol* at [43].

89 *Eskosol*, at [42].

90 The claimant, inter alia, relied on *Trans-Global, Global Trading, Brandes, Elsamex, RSM Production, Álvarez* and *PNGSDP; Eskosol*, at [37].

91 *Eskosol*, at [37].

92 *ibid.*, at [98].

93 *ibid.*, at [120]; [169]; [171].

94 Markert-2011, op. cit. note 20, p. 148.

**v Addressing disputed facts**

The applicable standard of review for making a finding that a claim is ‘manifestly without legal merit’ must also be distinguished from the question of what standard an ICSID tribunal should apply in addressing facts asserted by a claimant.<sup>95</sup> As seen above, the threshold for the former inquiry is necessarily very high (manifest). Conversely, a very low bar is set for the latter inquiry:

*At the first level of inquiry, the Tribunal should accept pro tem the facts as alleged by the claimant, to assess whether, on the basis of the claimed set of facts . . . there might be a violation of the relevant obligation. At the second level of inquiry, the Tribunal must make a definitive finding that the claims are “manifestly without legal merit”. It is on this second question that the four Tribunals are in complete agreement that the bar is “high”.<sup>96</sup>*

The word ‘legal’ (in ‘without legal merit’) was specifically introduced into the final text of Rule 41(5) to avoid improper discussions on the facts of the case at the Rule 41(5) stage,<sup>97</sup> and ICSID tribunals have therefore been careful to emphasise that objections should be based on legal impediments to claims (and not factual ones, which a tribunal may not be in a position to decide in a preliminary manner).<sup>98</sup> Tribunals would refuse, therefore, to entertain factual evidence<sup>99</sup> or weigh the credibility or plausibility of a disputed factual allegation at the Rule 41(5) stage;<sup>100</sup> ‘basically the factual premise has to be taken 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.’<sup>101</sup> Most recently in *Mainstream Renewable Power*, the tribunal dismissed Germany’s Rule 41(5) application as, inter alia, it was ‘not satisfied that [Germany] has established a foundation of “unavoidable and indisputable fact” from which to proceed to determination pursuant to Rule 41(5)’.<sup>102</sup>

Notwithstanding this, some tribunals (e.g., those in *Trans-Global* and *RSM Production*) seem prepared to make a ‘plausibility exception’<sup>103</sup> to the rule that the facts alleged by the claimant should be taken at face value if disputed facts that are relevant to the legal merits of the claim are regarded as manifestly incredible, frivolous, vexatious or inaccurate, or made in bad faith.<sup>104</sup>

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95 Brown and Puig-2011, op. cit. note 30, p. 28.

96 *ibid.*, pp. 28–29.

97 Antonietti-2007, op. cit. note 32, p. 440; Diop-2010, op. cit. note 15, pp. 325–326; *Lion Mexico*, at [68]–[70].

98 *Trans-Global*, at [97]; *Brandes*, at [59]; *PNGSDP*, at [90]; *Almasryia*, at [30]–[33], [47], [58].

99 Schreuer-2009, op. cit. note 55, p. 543; *Trans-Global*, at [91].

100 *Trans-Global*, at [105].

101 *Brandes*, at [61].

102 *Mainstream Renewable Power*, at [102].

103 Markert-2011, op. cit. note 20, p. 147.

104 *Trans-Global*, at [105]; *RSM Production*, at [6.1.2]; *Emmis International*, at [26].

## V CONCLUSION

After more than 15 years of Rule 41(5), one looks back and notes with some relief that initial concerns that the Rule would be prone to abuse by respondent states – who can delay proceedings and increase costs by invoking without basis an ‘additional procedural layer’<sup>105</sup> – have not eventuated. To date, 42 Rule 41(5) applications have been filed, representing a fraction of ICSID’s caseload.<sup>106</sup> The high threshold set and consistent approach to these applications, as well as potential costs consequences for unmeritorious invocations of Rule 41(5)<sup>107</sup> have likely served as important deterrents against trigger-happy behaviour in this respect. The built-in short timelines in Rule 41(5) have also ensured that applications have generally been swiftly disposed of, and guard against any abuse of the process as a delay tactic.

Given the positive experience with Rule 41(5) thus far, this is certainly a feature of the ICSID Arbitration Rules that is worth retaining. Not surprisingly, during the most recent ICSID Rules amendment exercise (launched in October 2016), all indications pointed towards retention of the Rule; the aim of all the proposed amendments as detailed in the Working Papers published by ICSID<sup>108</sup> was to enhance the utility of the Rule rather than

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105 Schreuer-2009, op. cit. note 55, p. 544.

106 See ICSID’s publication titled ‘In Focus: Objections that a Claim Manifestly Lacks Legal Merit (ICSID Convention Arbitration Rule 41(5))’ noting that, as at Mar. 2021, Rule 41(5) requests correspond to only ‘approximately 5% of the 754 arbitration and post-award remedy proceedings registered during the same period’ – see <https://icsid.worldbank.org/es/recursos/publicaciones/focus-objections-claim-manifestly-lacks-legal-merit-icsid-convention> (last accessed 16 Jun. 2022).

107 Although tribunals in the earlier cases had exercised caution in the allocation of costs (given the newness of Rule 41(5)), a more robust approach to costs may be expected by tribunals moving forward as parties gain familiarity with the scope and aims of the Rule 41(5) procedure. This was so in *Ansung Housing*, where the tribunal noted (at [162]) that ‘the Rule 41(5) procedure is no longer new and . . . the Claimant’s limitations arguments were not reasonable’ and awarded the successful Rule 41(5) applicant (China), inter alia, 75 per cent of its legal fees and expenses. Going forward, one can also expect the same robust approach to be adopted against parties mounting unmeritorious Rule 41(5) applications. In *Eskosol*, the tribunal, vide Procedural Order No. 3, Decision on Respondent’s Request for Provisional Measures (dated 12 Apr. 2017), denied Italy’s request for provisional measures, which included an order for security for costs for the Rule 41(5) application. Noting that requests for measures regarding security for costs are not *ipso facto* beyond the scope of a tribunal’s powers at [31], the tribunal undertook a proportionality analysis, and held that ‘Italy had not demonstrated that it was either necessary or urgent that Eskosol S.p.A. post security of \$250,000 for a potential costs award in Italy’s favour’ at [36]–[39]. In summarily dismissing Spain’s revision application, the tribunal in *InfraRed Environment* also ordered Spain to pay the entirety of the costs, fees and expenses of ICSID and of the members of the tribunal in relation to the revision proceedings (at [81(2)]).

108 ICSID Secretariat: Working Paper #1 on ‘Proposals for Amendment of the ICSID Rules’ (Aug. 2018) (ICSID Working Paper 1); Working Paper #2 on ‘Proposals for Amendment of the ICSID Rules’ (Mar. 2019); Working Paper #3 on ‘Proposals for Amendment of the ICSID Rules’ (Aug. 2019); Working Paper #4 on ‘Proposals for Amendment of the ICSID Rules’ (Feb. 2020); Working Paper #5 on ‘Proposals for Amendment of the ICSID Rules’ (Jun. 2021) (ICSID Working Paper 5); Working Paper #6 on ‘Proposals for Amendment of the ICSID Rules’ (Nov. 2021), which contained no further change to the proposed amendments to Rule 41(5) in ICSID Working Paper 5. The Working Papers are collectively available at <https://ink.org/resources/rules-amendments> (last visited 28 Mar. 2022).

replace it.<sup>109</sup> On 21 March 2022, the ICSID Member States approved the amended ICSID Arbitration Rules (including an enhanced Rule 41(5) procedure, which will take the form of a self-contained provision titled Rule 41: Manifest Lack of Legal Merit, under a new chapter on special procedures), which will come into effect on 1 July 2022.<sup>110</sup>

The success of Rule 41(5) has meanwhile led to moves by the Singapore International Arbitration Centre and a number of other major arbitral institutions to include similar explicit provisions in their rules with their own unique input,<sup>111</sup> and it will be interesting to see whether more arbitral institutions will follow suit with similar innovations.

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109 For example, a proposed change is to make it explicitly clear that the scope of Rule 41(5) encompasses jurisdictional objections in addition to objections as to the merits of the claim, following the line of cases discussed in Section IV.ii herein (see ICSID Working Paper 1 at p. 175 and [372]–[373]). Other proposals aimed at further expediting the process include (1) allowing the filing of Rule 41(5) applications even before the tribunal is constituted (pending which the ICSID Secretary General will fix time limits for parties' observations so that the tribunal may deal with the objections as soon as possible after it is constituted) (see ICSID Working Paper 1 at p. 175 and [376]), and (2) requiring the tribunal to rule on the objection within 60 days of either the constitution of the tribunal or the last written or oral submission on the objection, whichever is the later (see ICSID Working Paper 1 at p. 175 and [378]).

110 The new Rule 41 adopts the wording as proposed in ICSID Working Paper 5:

- (1) *A party may object that a claim is manifestly without legal merit. The objection may relate to the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal.*
- (2) *The following procedure shall apply:*
  - (a) *a party shall file a written submission no later than 45 days after the constitution of the Tribunal;*
  - (b) *the written submission shall specify the grounds on which the objection is based and contain a statement of the relevant facts, law and arguments;*
  - (c) *the Tribunal shall fix time limits for submissions on the objection;*
  - (d) *if a party files the objection before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the objection, so that the Tribunal may consider the objection promptly upon its constitution; and*
  - (e) *the Tribunal shall render its decision or Award on the objection within 60 days after the later of the constitution of the Tribunal or the last submission on the objection.*
- (3) *If the Tribunal decides that all claims are manifestly without legal merit, it shall render an Award to that effect. Otherwise, the Tribunal shall issue a decision on the objection and fix any time limit necessary for the further conduct of the proceeding.*
- (4) *A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 43 [the proposed revised rule for the making of preliminary objections] or to argue subsequently in the proceeding that a claim is without legal merit.*

111 See footnote 6, above; e.g., the SIAC provisions provide for the summary dismissal of both claims as well as defences.

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