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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 investment treaty arbitration.

Although 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on investment treaty arbitration have been written, the relentless rate of change in the field rapidly leaves them out of date.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 eighth 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
Honlet Legum Arbitration
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Chapter 6

OBJECTION OF MANIFEST LACK OF LEGAL MERIT OF CLAIMS UNDER THE ICSID ARBITRATION RULES

Koh Swee Yen SC and Monica W Y Chong[1]

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 (the 2006 version)) on 10 April 2006 (the previous Rule 41(5)) was a bold and innovative step in international arbitration,[2] and remained a unique feature of the ICSID Arbitration Rules for the first 10 years of their promulgation.[3] The previous 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.*[4]

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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 the previous 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 (2006 version), which was promulgated in the same year as the previous Rule 41(5). 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 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

Although there has been an increasing number of institutional rules that also expressly provide for powers of summary dismissal of claims,[5] the landscape was markedly different at the time of the promulgation of the previous Rule 41(5); until fairly recently, 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 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'.[6] Although some commentators have suggested that it is possible for such authority to be read into the general provision,[7] tribunals no doubt take different views on this[8] and 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.[9] The previous Rule 41(5) was thus a true frontrunner.

The new stand-alone Rule 41 in the most recent version of the ICSID Arbitration Rules, effective 1 July 2022 (Rule 41),[10] retains and significantly enhances the summary dismissal mechanism under the previous Rule 41(5).[11] Among other things, Rule 41 makes it explicitly clear that the mechanism can be deployed for jurisdictional objections and objections regarding the merits of claims, and also sets out more detailed procedures and timelines for each stage of a challenge.

Despite these changes, past decisions rendered under the previous Rule 41(5) should remain largely instructive for parties considering or faced with a challenge under the current Rule 41 as the changes generally do not seek to reverse any trend in the decision-making of ICSID tribunals under the previous Rule 41(5).

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jurisprudence developed in the interpretation of [Rule 41(5)]]'. In this chapter, references to the previous Rule 41(5) procedure refer also to the procedure under Rule 45(6), ICSID Arbitration (Additional Facility) Rules (2006 version).

5 SIAC Rules 2016, Rule 29.1; SCC Rules 2017, Article 39(1); HKIAC Administered Arbitration Rules 2018, Article 43(1). 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 International Chamber of Commerce (ICC) Rules of Arbitration (as amended in 2017): ICC, 'ICC Court revises note to include expedited determination of unmeritorious claims or defences', 30 October 2017, www.iccwbo.org/media-wall/news-speeches/icc-court-revises-note-to-include-expedited-determination-of-unmeritorious-claims-or-defences (accessed 18 May 2023).

6 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (2013), Article 17(1); International Chamber of Commerce (ICC) Arbitration Rules (2017), Article 22(1; London Court of International Arbitration Rules (2014), Article 14.4.

7 Goldsmith-2008, op. cit. note 2, pp. 681–82; Michele Potestà and Marija Sobat, 'Frivolous 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.

10 Rule 41 can be found in Chapter VI of the 2022 ICSID Arbitration Rules on Special Procedures.

11 The changes are discussed in detail in Alvin Yeo and Koh Swee Yen, 'Rule 41: Manifest Lack of Legal Merit' in Richard Happ and Stephan Wilske (eds.), *ICSID Rules and Regulations 2022: Article-by-Article Commentary*, Beck/Hart/Nomos (17 Nov. 2022) (Yeo and Koh).

II GENESIS OF THE PREVIOUS 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,[12] 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'.[13]

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.[14] 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.*[15]

Following consultations with various stakeholders and interest groups, the first draft of what would become the previous Rule 41(5) was published in an ICSID Secretariat Working Paper

12 ICSID Secretariat, Discussion Paper on 'Possible Improvements of the Framework for ICSID Arbitration' (22 Oct. 2004) (ICSID Discussion Paper-2004).

13 ibid., at [10].

14 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 12, 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; Sergio Puig and Chester 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 Giorgetti (ed.), *Litigating International Investment Disputes: A Practitioner's Guide* (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.

15 United Nations Conference on Trade and Development (UNCTAD), 'Investor–State Dispute Settlement and Impact on Investment Rulemaking' (UNCTAD/ITE/IIA/2007/3), p. 82.

dated 12 May 2005.[16] The main differences between the draft and final versions of the text of that provision 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'. The first of these points has been retained in Rule 41, whereas the latter two have been modified in Rule 41 (see Section IV, below).

III THE EARLY CASES ON THE PREVIOUS RULE 41(5)

The previous 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[17] (in *Trans-Global Petroleum Inc v. Jordan*[18] (*Trans-Global*) in February 2008 and *Brandes Investment v. Venezuela*[19] (*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]'.[20] 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'.[21]

16 ICSID Secretariat, Working Paper on 'Suggested Changes to the ICSID Rules and Regulations' (12 May 2005), p. 7.

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

18 *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*).

19 *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*).

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

21 ibid., at [118]–[119].

It was not until December 2010 that the provision came to life.[22] Within a span of 10 days, two separate tribunals in *Global Trading Resource Corp and anor v. Ukraine*[23] (*Global Trading*) and *RSM Production Corp v. Grenada*[24] (*RSM Production*) issued orders dismissing claims pursuant to the previous 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'),[25] while the tribunal in *RSM Production* dismissed all claims by the claimant[26] on preclusion grounds (as they were 'no more than an attempt to relitigate and overturn the findings of another ICSID tribunal').[27]

Since then, decisions on the previous Rule 41(5) have been rendered (albeit mostly finding against the applicant)[28] a known further 44 times (five in annulment proceedings[29]

22 See, also, Lars 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; Eric De 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.

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

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

25 *Global Trading* at [57].

26 *RSM Production* at [9.1].

27 ibid., at [7.3.6].

28 See the previous edition of this chapter for information regarding *Ansung Housing Co Ltd v. People's Republic of China* (*Ansung Housing*) and *AFC Investment Solutions v. Colombia*: Alvin Yeo, Koh Swee Yen and Monica W Y Chong, 'Objection of manifest lack of legal merit of claims: ICSID Arbitration Rule 41(5)' in Barton Legum (ed.), *The Investment Treaty Arbitration Review*, 7th edn., Law Business Research Ltd, 2022, note 26 (Yeo, Koh and Chong).

29 For information regarding *Elsamex SA v. Honduras* (*Elsamex*) and *Ioan Micula and ors v. Romania*, see Yeo, Koh and Chong, op. cit. note 28, note 27. See also *Venoklim Holding BV v. Venezuela*, ICSID Case No. ARB/12/22; *Dominion Minerals Corp. v. Republic of Panama*, ICSID Case No. ARB/16/13 (Decision on Stay and Rule 41(5) Objection, 21 Jul. 2022) (*Dominion Minerals*), at [157]–[158] (where the ad hoc committee held that, while the nature of the 'manifestly without legal merit' test 'remains the same' when applied in the context of annulment proceedings, 'its application at the annulment stage requires even more care and scrutiny, or as put in earlier decisions a "higher standard of conviction"' given that (1) the ICSID Rules do not require petitioners to set out their case on annulment in any detail and it is expected that the parties will have a later opportunity to submit written arguments in support of their request after the ad hoc committee has been constituted, (2) a summary dismissal of an annulment petition is final and not subject to any recourse under the ICSID rules and procedures (unlike the original award), and (3) the words '*mutatis mutandis*' in ICSID Arbitration Rule 53); *EcoDevelopment in Europe AB and EcoEnergy Africa AB v. United Republic of Tanzania*, ICSID Case No. ARB/17/33 (Decision on Ecodevelopment in Europe AB and EcoEnergy Africa AB's Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 1 Nov. 2022); Potestà-2017, op. cit. note 14, pp. 267–271 for a discussion of the use of Rule 41(5) in annulment proceedings.

and three in proceedings for the revision of an award[30]), bringing the total known number of previous Rule 41(5) applications filed to 48 as at April 2023[31] (as at the time of writing, no reported challenges have been brought under Rule 41).

A review of the available decisions rendered to date reveals a fairly consistent application and interpretation of the previous Rule 41(5) by ICSID tribunals (see Section IV, below).

IV THE PREVIOUS RULE 41(5) IN PRACTICE

i A residual rule (cf. the new Rule 41)

The previous Rule 41(5) begins with 'Unless the parties have agreed to another expedited procedure for making preliminary objections'. This accords 'proper prominence'[32] to agreements on other forms of expedited procedures that may already be contained in some investment treaties and agreements.[33] Where that is the case, the procedure proposed in the previous Rule 41(5) would apply only to the extent not otherwise agreed by the parties

30 The first of these three cases was *Edenred SA v. Hungary*, ICSID Case No. ARB/13/21 and the second was *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12 (*InfraRed Environmental*). See Yeo, Koh and Chong, op. cit. note 28, note 28 for more information. The final case was *Hydro Srl and others v. Republic of Albania*, ICSID Case No. ARB/15/28 (Decision on Claimants' Application to Dismiss the Revision Application Under ICSID Arbitration Rule 41(5), Claimants' Request for Allocation of Advance Payments, Claimants' Requests for Security, and Respondent's Proposal for the Establishment of an Escrow Mechanism) (*Hydro*), where the tribunal summarily dismissed Albania's request for revision of the arbitral award on the basis that Albania's request was not based on a 'fact' known to the tribunal as required by Article 51 of the ICSID Convention. The tribunal rejected Albania's contention that the award should be revised to take into account the claimants' criminal activities addressed in a subsequent local judgment, finding at [115]-[134] that the contention was based on the same factual background that underpinned the original arbitration.

31 Based on information obtained from the ICSID website, 'Decisions on Manifest Lack of Legal Merit', https://icsid.worldbank.org/cases/content/tables-of-decisions/manifest-lack-of-legal-merit (accessed 18 May2023), there were 46 such applications as at 9 April 2023, not counting *Hydro* and *Optima Ventures LLC, Optima 7171 LLC and others v. United States of America*, ICSID Case No. ARB/21/11 (where the USA's 2006 Rule 41(5) application appears to be pending: www.iareporter.com/articles/usa-seeks-dismissal-of-icsid-case-brought-by-companies-belonging-to-ukrainian-oligarchs-arguing-that-the-claims-manifestly-lack-legal-merit (accessed 18 May 2023)). Two of these cases were filed under Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules (2006 version): *Mobile TéleSystems OJSC v. Republic of Uzbekistan*, ICSID Case No. ARB(AF)/12/7 (Procedural Order Taking Note of the Discontinuance of the Processing pursuant to Article 49(1) of the Arbitration (Additional Facility) Rules, 14 Nov. 2013); and *Lion Mexico*.

32 Chester Brown and Sergio 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* (Brown and Puig-2011), p. 24.

33 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.

under the relevant treaties.[34] See, for example, *Pac Rim Cayman LLC v. El Salvador*,[35] where El Salvador submitted that, given the opening line in the previous 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 the previous Rule 41(5), that was applicable.[36] That submission was not materially disputed by the claimant and was accepted by the ICSID tribunal as correct.[37]

Rule 41 does not, by contrast, contain the aforementioned proviso, suggesting that Rule 41 may operate in tandem with other forms of expedited procedure for dealing with preliminary objections that may exist in the relevant treaty or instrument. It remains to be seen whether, in cases of conflict, the expedited procedure provided for in the relevant treaty or instrument will prevail over the procedure in Rule 41 or vice versa.

ii Scope – merits, jurisdiction and procedure

In terms of the scope of objections that can be raised by respondent states,[38] it accepted that the previous Rule 41(5) permits not just objections as to merits but also jurisdictional objections.[39] 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 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.*[40]

This position accords with the drafting history of the previous Rule 41(5) and discussions at the ICSID Secretariat during the 2006 amendment process,[41] and has been consistently

34 Aurélia 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 14, p. 253.

35 *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*).

36 *Pac Rim* at [81].

37 ibid., at [85].

38 Though 'a party may' in the previous Rule 41(5) (and now Rule 41) 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 14, p. 254.

39 Antonietti-2007, op. cit. note 34, pp. 439–40; Potestà-2017, op. cit. note 14, pp. 256–57.

40 *Brandes* at [50], [52], [55]. See, further, Diop-2010, op. cit. note 17, pp. 322–23.

41 Diop-2010, op. cit. note 17, p. 322.

endorsed by subsequent ICSID tribunals confronted with applications under the previous Rule 41(5) raising objections based on jurisdiction.[42] Rule 41 now makes it explicitly clear that jurisdictional objections are included within its scope.

In *RSM Production*, the previous Rule 41(5) was further extended to cover objections premised on 'equitable considerations and procedural impediments'.[43] 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.[44] In the circumstances, the tribunal in the second arbitration dismissed all the claims pursuant to the previous 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.*[45]

The 'abuse of process' overtones in *RSM Production* highlight an additional functionality of the previous Rule 41(5) (and likely Rule 41, even though its text was not expanded to explicitly cover 'abuse of process') in preventing abuse of international arbitral procedures.[46] 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*

42 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]; *AHG Industry GmbH & Co. KG v. Republic of Iraq*, ICSID Case No. ARB/20/21 (Award on the Respondent's Application Under ICSID Rule 41(5), 30 Sep. 2022) (*AHG Industry*) at [55].

43 Diop-2010, op. cit. note 17, p. 324.

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

45 ibid., at [7.3.6]–[7.3.7].

46 Brabandere-2012, op. cit. note 22, pp. 30 and 44.

> *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.*[47]

Tribunals have also had occasion, in some instances, to consider the previous Rule 41(5) preliminary objections[48] premised on the Achmea decision by the Court of Justice of the European Union (CJEU),[49] finding that arbitration clauses contained in intra-EU BITs are incompatible with EU law.

iii Procedure (cf. the new Rule 41)

Under the previous Rule 41(5), the respondent had just 30 days after the constitution of the tribunal, and 'in any event before the first session of the Tribunal', to raise any objection thereunder.[50] This 30-day period was designed to fit within the default 60-day period following constitution of the tribunal (stipulated in the 2006 ICSID Arbitration Rule 13(1)) within which the tribunal must hold its first session,[51] and after which the tribunal must decide 'promptly'.[52] The norm appears to be 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. With the exception of a handful of cases,[53] this has been the typical manner in which proceedings under the previous Rule 41(5) have been conducted.[54]

Rule 41 preserves this three-stage process but implements certain modifications:

a Subsection 41(2)(a) increased the time limit for a party to file an objection to 45 days after the constitution of the tribunal, following concerns expressed by states that the previous 30-day time limit did not give a party raising an objection sufficient time to prepare its submissions;[55]

b Subsection (2)(b) makes it clear that the written submissions filed in support of an objection should specify the basis of the objection and a statement of the relevant facts, law and arguments;

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47 ibid., p. 44.

48 Yeo, Koh and Chong, op. cit. note 28, note 47 for information on *Alverley Investments Limited and Germen Properties Ltd v. Romania*; *Strabag SE, Erste Nordsee-Offshore Holding GmbH and Zweite Nordsee-Offshore Holding GmbH v. Germany*; and *Mainstream Renewable Power*.

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

50 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.

51 Antonietti-2007, op. cit. note 34, p. 441.

52 In *Trans-Global*, the tribunal confirmed that the two temporal conditions in the previous 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 (*Trans-Global*, at [24]–[29]). In *Almasryia for Operating & Maintaining Touristic Construction Co LLC 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, submitted on Monday 3 September 2018, was, therefore, found to be within time as the tribunal's constitution was only notified to parties on 2 August 2018.

53 Yeo, Koh and Chong, op. cit. note28, note 57.

54 ibid., note 58.

55 Yeo and Koh at [19]

c Subsection (2)(d) permits a party to file an objection before the constitution of the tribunal; and

d Subsection (2)(3) imposes a 60-day time limit for the tribunal to render its decision on an objection, providing greater certainty with regard to when the parties may expect a decision.

The last sentence of the previous Rule 41(5) makes clear that the dismissal of an objection thereunder will not affect a party's right to thereafter file jurisdictional objections according to the normal procedure under Rule 41(1) of the ICSID Arbitration Rules (2006 version). In this manner, the previous Rule 41(5) forms part of a 'harmonious continuum'[56] 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 Rule 41(1) of the ICSID Arbitration Rules (2006 version).[57]

The same approach is preserved under the ICSID Arbitration Rules (2022 version); Rule 41(4) makes it explicitly clear that '[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 or to argue subsequently in the proceeding that a claim is without legal merit'.

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, which standard is retained in Rule 41. 'Manifest' in this regard has consistently been equated with 'evident', 'obvious' or 'clearly revealed to the eye, mind or judgement'.[58] The threshold is very high, and a respondent must establish its objection 'clearly and obviously, with relative ease and dispatch'.[59] Put another way, it must be shown that the claim is 'clearly and unequivocally unmeritorious'[60] and, therefore, 'untenable in a way that is evident and easily proved'.[61]

In *Lotus Holding Anonim Sirketi v. Republic of Turkmenistan*,[62] 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'.[63] As expressed in even starker terms in *Mainstream Renewable Power*, the

56 Diop-2010, op. cit. note 17, 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)'.

57 Diop-2010, op. cit. note 17, p. 319–21; *Mainstream Renewable Power*, at [94]–[95].

58 *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]; *Dominion Minerals* at [151] (in the context of a 2006 Rule 41(5) application brought in annulment proceedings)

59 *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].

60 *Lion Mexico*, at [66].

61 Diop-2010, op. cit. note 17, p. 336.

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

63 ibid., at [158]. The tribunal allowed the respondent's application under the previous Rule 41(5) 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.

respondent must demonstrate that 'the claim was lost before it left the start line'.[64] This will not be the case when the claimant has 'a tenable arguable case',[65] or when the objections throw up novel, difficult or disputed legal issues (as the procedure was intended 'only to apply undisputed or genuinely indisputable rules of law to uncontested facts').[66]

Not surprisingly, this high threshold has rarely been crossed, as exemplified in:

a *Trans-Global*, where it was 'obvious'[67] 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]'[68] (a conclusion that the tribunal was able to reach with 'little difficulty of interpretation');[69]

b *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';[70]

c *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;[71]

d *Ansung Housing*, where there were 'multiple and clear pleadings'[72] 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 under Article 9(7) of the 2007 China–Korea BIT)[73] 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);[74]

e *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[75], 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;[76]

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

65 *PNGSDP*, at [88].

66 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 application under the previous Rule 41(5).

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

68 ibid., at [95].

69 id.

70 *Global Trading*, at [56].

71 *Emmis International*, at [70].

72 *Ansung Housing*, at [107]–[108].

73 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'.

74 *Ansung Housing*, at [136]–[141].

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

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

f *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;[77] and

g *AHG Industry*, where none of the instruments relied on by the claimant (including a non-ratified Iraq–Germany BIT, the 2012 EU–Iraq Partnership and Cooperation Agreement, Iraq's Investment Law and an April 2008 contract concluded with the state-owned Iraqi Cement State Company), taken individually or as a whole, incorporated Iraq's consent to ICSID arbitration.[78]

More often than not, cases fall short of the required threshold. In *PNGSDP*, the state raised objections under the previous Rule 41(5) 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)[79] – 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.[80] The state also argued that the claims that were based on the alleged MFN clause in Section 37(1) of the IPA[81] 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.[82]

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

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

78 *AHG Industry*, at [222]–[223], [234(1)].

79 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).

80 *PNGSDP*, at [35].

81 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.'

82 *PNGSDP*, at [52].

> *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 effet 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.*[83]

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 (2006 version)) 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.*
>
> *. . . [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.*[84]

In *Eskosol SpA in liquidazione v. Italian Republic* (*Eskosol*), the tribunal rejected the respondent's application under the previous Rule 41(5). Italy presented four separate grounds for its application[85] and the claimant argued that none of Italy's objections satisfied the requirements of the previous Rule 41(5), as they demanded 'a significant factual enquiry'

83 ibid., at [94]–[98].

84 *Lion Mexico*, at [79]–[81].

85 *Eskosol* at [43]: '(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.'

and raised 'novel and complex legal issues'.[86] 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'.[87] 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'.[88] The tribunal concluded that as the issues involved were not 'manifest', but 'novel and complex',[89] they were unsuitable for resolution in a summary dismissal application.[90]

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, 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.*[91]

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.[92] 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'.*[93]

The word 'legal' in 'without legal merit' (which is retained in Rule 41) was specifically introduced into the final text of the previous Rule 41(5) to avoid improper discussions on the

86 *Eskosol*, at [42].

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

88 *Eskosol*, at [37].

89 ibid., at [98].

90 ibid., at [120]; [169]; [171].

91 Markert-2011, op. cit. note 22, p. 148.

92 Brown and Puig-2011, op. cit. note 32, p. 28.

93 ibid., pp. 28–29.

facts of the case at the summary dismissal stage,[94] 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).[95] Tribunals would refuse, therefore, to entertain factual evidence[96] or weigh the credibility or plausibility of a disputed factual allegation at the summary dismissal stage;[97] '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.'[98] In *Mainstream Renewable Power*, the tribunal dismissed Germany's application under the previous Rule 41(5) 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)'.[99]

Notwithstanding this, some tribunals (e.g., those in *Trans-Global* and *RSM Production*) seem prepared to make a 'plausibility exception'[100] 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.[101]

V CONCLUSION

After nearly 20 years of the summary dismissal mechanism first implemented under the previous Rule 41(5), one looks back and notes with some relief that initial concerns that the mechanism would be prone to abuse by respondent states – who can delay proceedings and increase costs by invoking without basis an 'additional procedural layer'[102] – have not manifested.

To date, 48 known applications have been filed under the previous Rule 41(5), representing a fraction of ICSID's caseload.[103] The high threshold set and consistent approach to these applications, as well as potential costs consequences for unmeritorious invocations of the procedure[104] have likely served as important deterrents against trigger-happy behaviour

94 Antonietti-2007, op. cit. note 34, p. 440; Diop-2010, op. cit. note 17, pp. 325–326; *Lion Mexico*, at [68]–[70].

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

96 Christoph H Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press, 2009 (Schreuer-2009), p. 543; *Trans-Global*, at [91].

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

98 *Brandes*, at [61].

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

100 Markert-2011, op. cit. note 22, p. 147.

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

102 Schreuer-2009, op. cit. note 97, p. 544.

103 See ICSID', 'In Focus: Objections that a Claim Manifestly Lacks Legal Merit (ICSID Convention Arbitration Rule 41(5))' noting that, as at March 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 ICSID, 'In Focus: Objections that a Claim Manifestly Lacks Legal Merit (ICSID Convention Arbitration Rule 41(5))', https://icsid.worldbank.org/es/recursos/publicaciones/focus-objections-claim-manifestly-lacks-legal-merit-icsid-convention (accessed 18 May 2023).

104 Although tribunals in the earlier cases had exercised caution in the allocation of costs (given the newness of the previous 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 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

in this respect. The built-in short timelines in the previous 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 that Rule 41 retains the high threshold of 'manifestly without legal merit' and provides further meat to a procedure with efficiency as its core aim, these trends are unlikely to be reversed in the near future.

limitations arguments were not reasonable' and awarded the successful 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 summary dismissal 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 application under the previous Rule 41(5). 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)]).