

THE INVESTMENT
TREATY
ARBITRATION
REVIEW

SECOND EDITION

Editor
Barton Legum

THE LAWREVIEWS

THE INVESTMENT TREATY ARBITRATION REVIEW

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PREFACE

Barton Legum

The past year confirmed the usefulness of *The Investment Treaty Arbitration Review's* contribution to its field. The biggest challenge for practitioners and clients over the past year has been to keep up with the flow of new developments and jurisprudence in the field. There was a significant increase in the number of investment treaty arbitrations registered in the first years of this decade. These cases have come or are now coming to conclusion. The result today is more and more awards and decisions being published, making it hard for practitioners to keep up.

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 The relentless rate of change in the field rapidly leaves them out of date.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, therefore, *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, and the context for, those developments.

This second edition adds new topics to the Review, increasing its scope and utility to practitioners. It 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

Dentons

Paris

April 2017

OBJECTIONS OF MANIFEST LACK OF LEGAL MERIT OF CLAIMS: THE SUCCESS OF ARBITRATION RULE 41(5)

*Alvin Yeo and Koh Swee Yen*¹

I INTRODUCTION

The promulgation of Rule 41(5) in the ICSID Rules of Procedure for Arbitration Proceedings (the ICSID Arbitration Rules) on 10 April 2006 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 its promulgation.³ 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 objections, 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

1 Alvin Yeo is a senior counsel and Koh Swee Yen is a partner at WongPartnership LLP. The authors are grateful to their colleague Monica WY Chong 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* 667 (Goldsmith-2008) pages 680–682.

3 Similar provisions have since been introduced in the 2016 SIAC Rules (effective from 1 August 2016) and the 2017 SIAC Investment Arbitration Rules (effective from 1 January 2017), modelled upon Rule 41(5).

4 An identical provision is found in Rule 45(6) of the 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 December 2016) (*Lion Mexico*), the first publicised decision concerning an application pursuant to Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules, the tribunal noted (at [56]) that the two Rules contain 'effectively the same language', and '[t]hus . . . dr[e]w 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 Article, references to the 'Rule 41(5)' procedure refers also to the procedure under Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules.

By contrast, the governing rules of most arbitral institutions do not stipulate in express terms the arbitral tribunal's authority to dismiss claims in an expedited fashion,⁵ 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 One would 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

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 2004,¹⁰ 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

-
- 5 Although the ICC Rules for a Pre-Arbitral Referee Procedure provide for expedited procedures, they are directed towards a temporary solution prior to formation of the arbitral tribunal, and do not affect the merits of an arbitration, which, if initiated in a case, will be a separate proceeding with arbitrators different from the referee who decided the claim: Mishra and Kapoor, 'ICSID – Numero Uno, Not Anymore?' (2014) *SPII International Law Journal* 45, page 56.
- 6 Article 17(1) of the 2013 UNCITRAL Arbitration Rules ('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'); Article 22(1) of the 2012 ICC Arbitration Rules ('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'); Article 14.4 of the 2014 LCIA Arbitration Rules ('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'). Cf Rule 29.1 of the 2016 SIAC Rules ('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 Rule 26.1 of the 2017 SIAC Investment Arbitration Rules ('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').
- 7 Goldsmith-2008, pages 681–682; Potestà and 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), pages 26–27.
- 8 Goldsmith-2008, page 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, pages 934–935.
- 9 Goldsmith-2008, pages 683–686.
- 10 ICSID Secretariat, Discussion Paper on 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004), available at <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> (last visited on 19 February 2017) (ICSID Discussion Paper-2004).

party might make, if the request were denied'.¹¹ 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.¹² These complaints grew louder with the increase in number of investment claims lodged, and were fuelled by concerns that state parties were being exposed to abusive tactics of investors seeking to game 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 IIA 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.¹³

Following consultations with various stakeholders and interest groups, the first draft of what would become the current Rule 41(5) was published in a 12 May 2005 ICSID Secretariat Working Paper.¹⁴ The main differences between the draft and final versions of the text of Rule 41(5) were the addition in the final version of 'legal' in the phrase 'manifestly without legal merit', the inclusion in the final version that parties can agree 'to another expedited procedure for making preliminary objections', and 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, *infra*).

11 ICSID Discussion Paper-2004 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, and does not extend to the merits of the dispute or to cases where jurisdiction is merely doubtful but not manifestly lacking. 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 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, page 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, page 190; Carlevaris, 'Preliminary Matters: Objections, Bi-furcation, Request for Provisional Measures' in *Litigating International Investment Disputes: A Practitioner's Guide* (Giorgetti ed., Brill, 2014) page 173 (Carlevaris-2014), pages 175–180; 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), page 252.

13 UNCTAD, Investor-State Dispute Settlement and Impact on Investment Rulemaking (UNCTAD/ITE/IIA/2007/3), page 82, available at <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=421> (last visited on 19 February 2017).

14 ICSID Secretariat, Working Paper on 'Suggested Changes to the ICSID Rules and Regulations' (12 May 2005), available at <https://icsid.worldbank.org/en/Documents/resources/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf> (last visited on 19 February 2017), page 7.

III THE EARLY CASES

Rule 41(5) got off to a relatively muted beginning. In the first three years of its existence, it was invoked only twice in the 72 cases registered under the ICSID Convention¹⁵ (in *Trans-Global Petroleum Inc v. Jordan*¹⁶ (*Trans-Global*) in February 2008, and *Brandes Investment v. Venezuela*¹⁷ (*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]'.¹⁸ The application failed in relation to the first two 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'.¹⁹

It was not until December 2010 that Rule 41(5) came to life.²⁰ Within a span of 10 days, two separate tribunals in *Global Trading Resource Corp and anor v. Ukraine*²¹ (*Global Trading*) and *RSM Production Corp v. Grenada*²² (*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'),²³ while the

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).

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 February 2009).

18 *Trans-Global* at [95].

19 *Trans-Global* 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), page 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), page 42.

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

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

23 *Global Trading* at [57].

tribunal in *RSM Production* dismissed all of the claimant's claims²⁴ on preclusion grounds (as the claims were 'no more than an attempt to relitigate and overturn the findings of another ICSID tribunal').²⁵

Since then, Rule 41(5) has been invoked (albeit mostly unsuccessfully²⁶) a further 20 times (thrice in annulment proceedings),²⁷ bringing the total number of Rule 41(5) applications filed to date to 24.²⁸ 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, *infra*).

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'²⁹ to agreements on other forms of expedited procedures that may already be contained in some investment treaties

24 *RSM Production* at [9.1].

25 *RSM Production* at [7.3.6].

26 Although, most recently, the PRC in *Ansung Housing Co Ltd v. People's Republic of China*, ICSID Case No. ARB/14/25 (Award, 9 March 2017) (*Ansung Housing*) (the second-ever ICSID claim to be brought against the PRC, and the first such claim to proceed past the stage of tribunal constitution) succeeded in its Rule 41(5) application (filed on 15 September 2016), on the grounds that the claim was time-barred under Article 9(7) of the 2007 PRC–Korea BIT and thus 'manifestly without legal merit' (see *Ansung Housing* at [105]–[122]), and that the MFN 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 the PRC's favour at the close of the Rule 41(5) hearing (conducted during the First Session in Singapore) on 14 December 2016, declared the proceedings closed on 15 February 2017 (following the submission of costs statements and observations on costs) (see *Ansung Housing* at [4], [24]–[27]), before issuing its Award on 9 March 2017.

27 *Elsamex SA v. Honduras*, ICSID Case No. ARB/09/4 (Decision on Elsamex SA's Preliminary Objections, 7 January 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 June 2014) (*Ioan Micula*) (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 the Decision on Annulment (26 February 2016) at [7]–[20]); *Venoklim Holding BV v. Venezuela*, ICSID Case No. ARB/12/22. See Potestà-2017, pages 267–271 for a discussion of the use of Rule 41(5) in annulment proceedings.

28 Based on information obtained from ICSID website <https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Manifest-Lack-of-Legal-Merit.aspx> (last visited on 19 February 2017) and the recent decision of *Ansung Housing*. 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 November 2013) (*Mobile TeleSystems*); *Lion Mexico*.

29 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 (last visited on 19 February 2017) (Brown and Puig-2011), page 24.

and agreements.³⁰ Where that is the case, the procedure proposed in Rule 41(5) would only apply to the extent not otherwise agreed by the parties under the relevant treaties.³¹ See, for example, *Pac Rim Cayman LLC v. El Salvador*³² (*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 CAFTA, and not that under Rule 41(5), that was applicable.³³ That submission was not materially disputed by the claimant and was accepted by the ICSID tribunal as correct.³⁴

ii Scope – merits, jurisdiction and procedure

In terms of the scope of objections that can be raised by respondent states,³⁵ it is by now accepted that Rule 41(5) permits not just objections as to merits, but also jurisdictional objections.³⁶ As was first noted in *Brandes*:³⁷

*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.*³⁸

30 E.g., Article 9.23(4) of the TPP, which permits the raising of preliminary objections on the ground 'that a claim is manifestly without legal merit'; Articles 28(4) and 28(5) of the 2012 US Model BIT, which provides 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'; Articles 10.19(4) and 10.19(5) of the 2003 Chile–US FTA; Articles 28(4) and 28(5) of the 2008 Rwanda–US BIT; Articles 10.20.4 and 10.20.5 of the Central America Free Trade Agreement (CAFTA).

31 Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2007) 41 *International Lawyer* 427 (Antonietti-2007), page 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, page 12; Potestà-2017, page 253.

32 *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 August 2010).

33 *Pac Rim* at [81].

34 *Pac Rim* at [85].

35 While '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 (save for the case where a claimant is seeking the dismissal of a respondent's unmeritorious counterclaim): Potestà-2017, page 254.

36 Antonietti-2007, pages 439–440; Potestà-2017, pages 256–257.

37 *Brandes* at [50], [52], [55].

38 See, further, Diop-2010, pages 322–323.

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

In *RSM Production*, Rule 41(5) was further extended to cover objections premised on ‘equitable considerations and procedural impediments’.⁴¹ 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 US–Grenada BIT, although all of 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.⁴² In the circumstances, the tribunal in the second arbitration dismissed all of the claims pursuant to Rule 41(5), reasoning that:⁴³

[A]s 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. . . . the 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.

The ‘abuse of process’ overtones in *RSM Production* highlight an additional functionality of Rule 41(5) in preventing abuse of international arbitral procedures.⁴⁴ As Brabandere suggests, ‘[a]lthough 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.’⁴⁵ It remains to be seen whether Rule 41(5) will be more often utilised in this capacity.

39 Diop-2010, page 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 October 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 March 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).

41 Diop-2010, page 324.

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

43 *RSM Production* at [7.3.6]–[7.3.7].

44 Brabandere-2012, pages 30 and 44.

45 Brabandere-2012, page 44.

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). This 30-day period was designed to fit within the default 60-day period post the constitution of the tribunal (stipulated in Arbitration Rule 13(1)) within which the tribunal has to hold its first session,⁴⁶ and after which the tribunal must decide ‘promptly’.

While it was suggested that ‘promptly’ should be understood in terms of ‘days or weeks, [and] not months’⁴⁷ the concept has generally been applied in terms of weeks and, at times, months; for example, the tribunals in *Trans-Global*, *Brandes* and *PNGSDP* took roughly three weeks following oral arguments to issue their decisions, while the process took more than three months in *Lion Mexico* and almost five months in *Global Trading*.⁴⁸

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.⁴⁹ 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*:⁵⁰

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. While the full rigour of the rules in question would be difficult to apply to a decision upholding an objection under Rule 41(5), it must be the case that, if the circumstances were to arise, a Tribunal ought to draw inspiration from the general sense of those rules so far as they can be applied to the situation in hand . . . On that question, the Tribunal has come to the clear view that, in principle, it would not be right to non-suit a claimant under the ICSID system without having allowed the claimant (and therefore the respondent as well) a proper opportunity to be heard, both in writing and orally. That may raise organizational problems,

46 Antonietti-2007, page 441.

47 Markert-2011, page 145.

48 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 December 2014) (*MOL*) at [44].

49 Schreuer et al, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009) (Schreuer-2009), page 543.

50 *Global Trading* at [32]–[33].

in the face of the requirement that the Tribunal is to rule on the objection 'at its first session or shortly thereafter' . . . but the Tribunal was able to resolve them in the present case, given the delays that had been introduced into the proceedings for extraneous reasons, by allowing two rounds of short and focused written argument, complemented by two rounds of well-focused oral argument completed within one single day at the end of the first formal session . . . The cost has been a slight delay (which the parties accepted was reasonable) between the hearing and the rendering of this Award. But the Tribunal views that as both inevitable and still within the spirit of the Rules. There may be cases 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.

It appears, indeed, 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,⁵¹ this has been the typical manner in which Rule 41(5) proceedings have been conducted to date.⁵²

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'⁵³ of jurisdictional review of claims with a progressively higher

51 *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 January 2013), *Edenred SA v. Hungary*, ICSID Case No. ARB/13/21 (Decision on Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 6 June 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 March 2015), *Álvarez y Marín Corporación SA and others v. Republic of Panama*, ICSID Case No. ARB/15/14 (Decision on Respondent's Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 27 January 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 March 2016); *Lion Mexico* (where the tribunals appeared to have dispensed with oral arguments on the Rule 41(5) applications).

52 *Trans-Global, Brandes; Global Trading; RSM Production; Rafat Ali Rizvi v. Indonesia*, ICSID Case No. ARB/11/13 (Award on Jurisdiction, 16 July 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 April 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 January 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 November 2015); *Elsamex SA v. Honduras*, ICSID Case No. ARB/09/4 (Decision on 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 July 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 January 2014); *Ansung Housing*. Similarly for *Mobile TeleSystems*, in respect of proceedings under Arbitration (Additional Facility) Rule 45(6).

53 *Diop-2010*, page 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).'

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.⁵⁴

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'.⁵⁵ The threshold is very high, and a respondent must establish its Rule 41(5) objection 'clearly and obviously, with relative ease and dispatch'.⁵⁶ Put another way, it must be shown that the claim is 'clearly and unequivocally unmeritorious'⁵⁷ and thus 'untenable in a way that is evident and easily proved'.⁵⁸ This will not be the case where the claimant has 'a tenable arguable case' (since Rule 41(5) was intended to capture cases that are 'clearly and unequivocally unmeritorious'),⁵⁹ nor where the objections throw up novel, difficult or disputed legal issues (since Rule 41(5) was intended 'only to apply undisputed or genuinely indisputable rules of law to uncontested facts').⁶⁰

Unsurprisingly, the high threshold under Rule 41(5) has rarely been crossed; for example, in *Trans-Global*, where it was 'obvious'⁶¹ 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]'⁶² (a conclusion that the tribunal was able to reach with 'little difficulty of interpretation'),⁶³ 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',⁶⁴ 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,⁶⁵ and most recently in *Ansung Housing*, where there were 'multiple and clear pleadings'⁶⁶ by the claimants confirming that they 'first knew' that they incurred loss and damages more than three years before the commencement of proceedings (thus offending the three-year limitation period under Article 9(7) of the 2007 PRC-Korea BIT⁶⁷), and where it was

54 Diop-2010, page 319-321.

55 *Trans-Global* at [83]; *PNGSDP* at [88]; *Lion Mexico* [62]-[67] (in the content of an application brought pursuant to Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules).

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

57 *Lion Mexico* at [66].

58 Diop-2010, page 336.

59 *PNGSDP* at [88].

60 *PNGSDP* at [89]. In *Ansung Housing* (see [32], [71]), the tribunal 'assume[d] the truth of the facts alleged by Claimant' for purposes of ruling on the PRC's Rule 41(5) application.

61 *Trans-Global* at [118].

62 *Trans-Global* at [95].

63 *Trans-Global* at [95].

64 *Global Trading* at [56].

65 *Emmis International* at [70].

66 *Ansung Housing* at [107]-[108].

67 Article 9(7) of the 2007 PRC-Korea BIT provided: '... 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'.

‘clear’ from a ‘plain reading’ of the MFN clause in Article 3(3) of the 2007 PRC–Korea BIT that MFN treatment did not extend to the temporal limitation period for investor–state arbitration in Article 9(7).⁶⁸

More often than not, the threshold is fallen short of. In a relatively recent decision in *PNG Sustainable Development Program Ltd v. Papua New Guinea*⁶⁹ (*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 Investment Protection Act 1992 (IPA),⁷⁰ and the claimant was not a ‘foreign investor’ with a ‘private foreign investment’, because it existed to fulfil the sole public purposes of promoting sustainable development and advancing the general welfare of the people of Papua New Guinea (PNG).

The state also argued that the claims that were based upon the alleged most favoured nation clause (the MFN clause) in Section 37(1) of the IPA⁷¹ 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.

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) 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’⁷² facts:⁷³

[T]he interpretation of the IPA and IDCA 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 effet utile principle and the rule of contra

68 *Ansung Housing* at [136]–[141].

69 ICSID Case No. ARB/13/33 (Decision on the Respondent’s Objections under Rule 41(5) of the ICSID Arbitration Rules, 28 October 2015).

70 Section 39 of the IPA provided: ‘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.’ Papua New Guinea (PNG) eventually succeeded on this ground in the subsequent Rule 41(1) proceedings, in light of which the proceedings were closed (*PNG Sustainable Development Program Ltd v. Papua New Guinea*, ICSID Case No. ARB/13/33 (Award, 5 May 2015)).

71 Section 37(1) of the IPA provided: ‘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.’

72 *PNGSDP* at [94].

73 *PNGSDP* at [95]–[98].

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.

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:⁷⁴

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 constitutes 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.

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 Arbitration Rule 41(1), which is less strict:⁷⁵

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

74 *Lion Mexico* at [79]-[81].

75 Markert-2011, page 148.

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.

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.⁷⁶ 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.⁷⁷

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’.

Indeed, 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,⁷⁸ 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).⁷⁹ Tribunals would therefore refuse to entertain factual evidence⁸⁰ or weigh the credibility or plausibility of a disputed factual allegation at the Rule 41(5) stage;⁸¹ ‘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.’⁸²

Notwithstanding this, tribunals (e.g., those in *Trans-Global* and *RSM Production*) seem prepared to make a ‘plausibility exception’⁸³ 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.⁸⁴

V CONCLUSION

After more than 10 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

76 Brown and Puig-2011, page 28.

77 Brown and Puig-2011, pages 28–29.

78 Antonietti-2007, page 440; Diop-2010, pages 325–326; *Lion Mexico* at [68]-[70].

79 *Trans-Global* at [97]; *Brandes* at [59]; *PNGSDP* at [90].

80 Schreuer, page 543; *Trans-Global* at [91].

81 *Trans-Global* at [105].

82 *Brandes* at [61].

83 Markert-2011, page 147.

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

proceedings and increase costs by invoking without basis an ‘additional procedural layer’,⁸⁵ have not eventuated. To date, only 24 Rule 41(5) applications have been filed, representing a fraction of ICSID’s caseload.⁸⁶ The high threshold set and consistent approach to such applications, as well as potential costs consequences for unmeritorious invocations of Rule 41(5)⁸⁷ has likely served as an important deterrent 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. Indeed, the success of Rule 41(5) is evident from the move by the SIAC to include a similar explicit provision in their rules,⁸⁸ and it will be interesting to see whether other arbitral institutions follow suit.

85 Schreuer, page 544.

86 Based on information obtained from the ICSID website <https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Manifest-Lack-of-Legal-Merit.aspx> (last visited on 19 February 2017).

87 The authors noted in a previous edition of this chapter that, while 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 forwards 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 (the PRC), *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.

88 Rule 29.1 of the 2016 SIAC Rules and Rule 26.1 of the 2017 SIAC Investment Arbitration Rules: see footnote 6, *supra*.

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