

ICSID Convention after 50 Years
Unsettled Issues

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CHAPTER 9

Preliminary Objections to Dismiss Claims that are Manifestly Without Legal Merit under Rule 41(5) of the ICSID Arbitration Rules

Michele Potestà

§9.01 INTRODUCTION

Pursuant to Rule 41(5) of the ICSID Arbitration Rules and Article 45(6) of the ICSID Additional Facility Rules, a party may request that the tribunal decide on an expedited basis that a claim is ‘manifestly without legal merit’.¹ The possibility to raise this type of preliminary objection was introduced with the 2006 amendments to the Rules with a view to allowing tribunals to dismiss patently unworthy claims *in limine*.²

According to ICSID, as of 1 July 2016, twenty-one decisions or awards have been issued under Rule 41(5) of the ICSID Arbitration Rules (by arbitral tribunals in eighteen cases and by ad hoc committees in three cases).³ As of the same date, Article 45(6) of

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1. See ICSID Rules of Procedure for Arbitration Proceedings (‘Arbitration Rules’), as amended in 2006, Rule 41(5); ICSID Arbitration (Additional Facility) Rules, Art. 45(6), as amended in 2006. For purposes of simplicity, this chapter refers to Rule 41(5) of the ICSID Arbitration Rules, being understood that similar considerations will generally apply, *mutatis mutandis*, to Art. 45(6) of the ICSID Additional Facility Rules. This is of course not the case for the observations made in respect of the applicability of Rule 41(5) in ICSID annulment proceedings (see *infra* §9.04), as awards rendered under the ICSID Additional Facility Rules are subject to annulment at the seat of arbitration.
 2. See generally Aurélia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Review – Foreign Investment Law Journal 427, esp. 438–442 (2006).
 3. See, in chronological order of the decision or award (source: ICSID, *Decisions on Manifest Lack of Legal Merit*, <https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Decisions-on-Manifest-Lack-of-Legal-Merit.aspx> (accessed 1 July 2016)): *Trans-Global Petroleum, Inc. v. Hashemite*

the ICSID Additional Facility Rules has been used in only one instance.⁴ Examining the issues which arise in the application of Rule 41(5) is timely as the Rule has now been

Kingdom of Jordan, (ICSID Case No. ARB/07/25), Decision on the Respondent's Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules of 12 May 2008; *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, (ICSID Case No. ARB/08/3), Decision on the Respondent's Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules of 2 February 2009; *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, (ICSID Case No. ARB/09/11), Award of 1 December 2010; *RSM Production Corporation and others v. Grenada*, (ICSID Case No. ARB/10/6), Award of 10 December 2010; *Rafat Ali Rizvi v. Republic of Indonesia*, (ICSID Case No. ARB/11/13), Decision on the Respondent's Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules of 4 April 2012 (not publicly available); *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary*, (ICSID Case No. ARB/12/3), Decision on the Respondent's Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules of 16 January 2013; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, (ICSID Case No. ARB/12/2), Decision on the Respondent's Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules of 11 March 2013; *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 of 26 April 2013 (not publicly available); *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 of 2 July 2013 (not publicly available); *Lundin Tunisia B.V. v. Republic of Tunisia*, (ICSID Case No. ARB/12/30), Decision on the Respondent's Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules of 6 January 2014 (not publicly available); *Elsamex, S.A. v. Republic of Honduras*, (ICSID Case No. ARB/09/4), Annulment Proceeding, Decision on Elsamex S.A.'s Preliminary Objections of 7 January 2014; *Edenred SA v. Hungary*, (ICSID Case No. ARB/13/21), Decision on Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5) of 6 June 2014 (not publicly available); *Ioan Micula, Viorel Micula and others v. Romania*, (ICSID Case No. ARB/05/20), Annulment Proceeding, Decision on the applicable arbitration rules and on the preliminary objections filed by the Respondents on Annulment of 25 June 2014 (not publicly available); *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, (ICSID Case No. ARB/13/33), Decision on the Respondent's preliminary objections pursuant to ICSID Arbitration Rule 41(5) of 28 October 2014; *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*, (ICSID Case No. ARB/13/32), Decision on the Respondent's Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules of 2 December 2014; *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) of 27 January 2015 (not publicly available); *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. 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 of 17 March 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) of 3 November 2015 (not publicly available); *Álvarez y Marín Corporación S.A. 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) of 27 January 2016 (not publicly available), and Reasoning of the Decision on Respondent's Preliminary Objections pursuant to ICSID Arbitration Rule 41(5) of 4 April 2016; *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, (ICSID Case No. ARB/12/22), Annulment Proceeding, Decision on Respondent's Preliminary Objections pursuant to ICSID Arbitration Rule 41(5) of 8 March 2016; *Mathias Kruck and others v. Kingdom of Spain*, (ICSID Case No. ARB/15/23), Decision on the Respondent's Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5) of 14 March 2016 (not publicly available).

Parties have on occasion filed Rule 41(5) objections and subsequently withdrawn them. See, e.g., *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, (ICSID Case No. ARB/07/3), Award on Jurisdiction of 28 December 2009, paras 74–75.

4. *Mobile TeleSystems OJSC v. Republic of Uzbekistan*, (ICSID Case No. ARB(AF)/12/7), Decision on the Respondent's Objection Pursuant to Art. 45(6) Arbitration (Additional Facility) Rules of 14 November 2013 (not publicly available).

in force for ten years and a significant number of cases have considered the scope of this procedure.

This chapter is structured in three parts. First, it briefly discusses the origins of Rule 41(5) within the ICSID Convention framework (*infra* at §9.02). Second, it examines the application of Rule 41(5) by arbitral tribunals. In this context, it deals with the main issues with which tribunals have grappled, including the scope of 41(5) preliminary objections (*infra* at §9.03[C]) and the standard of review which a tribunal must adopt when considering such objections (*infra* at §9.03[D]). Third, the chapter considers the application of the rule in annulment proceedings under the ICSID Convention, which presents certain peculiarities as compared to proceedings before arbitral tribunals (*infra* at §9.04).

§9.02 THE ORIGINS OF RULE 41(5) AND ITS POSITION WITHIN THE ICSID FRAMEWORK

A ‘frivolous’ claim is, according to Black’s Law Dictionary, a claim which is ‘lacking a legal basis or legal merit’, ‘not serious’ or ‘not reasonably purposeful’.⁵ Domestic legal systems have developed mechanisms to allow courts to dismiss or strike out, on an expedited basis, frivolous claims,⁶ and similar rules are not unknown in the procedures of international courts and tribunals.⁷ In the ICSID arbitration framework, a rule establishing a procedure for the early dismissal of claims that are ‘manifestly without legal merit’ was introduced with the 2006 amendments of the Rules. Rule 41(5) provides as follows:

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 paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

The genesis of the Rule may be summarized as follows. In 2004, as a result of the increase in ICSID cases in the early 2000s and the ensuing need to devise more efficient procedures, the ICSID Secretariat released a Discussion Paper proposing a number of changes to the ICSID Regulations and Rules.⁸ The 2004 Discussion Paper suggested,

5. Black’s Law Dictionary 739 (9th edition, West 2009).

6. For example, in the US see Fed. R. Civ. P. 12(b)(6) (providing that a motion to dismiss may be made for ‘failure to state a claim upon which relief can be granted’).

7. See 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*, 3(1) Journal of International Dispute Settlement 137, 139–145 (2012).

8. ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, Discussion Paper of 22 October 2004 (‘2004 Discussion Paper’), <https://icsid.worldbank.org/apps/>

inter alia, to consider the situation where a party could seek from the tribunal the summary dismissal of an unmeritorious claim.⁹ The Discussion Paper suggested that the introduction of an express rule to this effect would ‘make clear ... that the tribunal may at an early stage of the case be asked on an expedited basis to dismiss all or part of the claim’.¹⁰ It was in fact unclear whether an arbitral tribunal – in the absence of an explicit provision in the Convention or the Rules – was in the position to grant such type of request by a party. In *Metalpar v. Argentina*, for example, Argentina had filed, at the outset of the proceedings, a motion which was in essence a request for summary dismissal of the claimants’ claim.¹¹ At its first session, the tribunal had denied such request as ‘not procedurally possible’.¹²

The new procedure which the 2004 Discussion Paper envisaged was put in relation with (and distinguished from) the screening mechanism provided under Article 36(3) of the ICSID Convention.¹³ Under this provision, each request for arbitration is subjected to a first screening by the ICSID Secretary General, who may refuse to register a request where ‘the dispute is manifestly outside the jurisdiction of the Centre’.¹⁴ Such filtering mechanism does, however, not extend to the merits of the dispute (or to cases where jurisdiction is merely doubtful).¹⁵ 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’.¹⁶ It also bears noting that a decision by the Secretary General pursuant to Article 36(3) ICSID Convention is given only on the basis of the information supplied by the requesting party and therefore does normally not follow an adversarial process.¹⁷

ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf (accessed 30 July 2016), 3, para. 5.

9. 2004 Discussion Paper, 3–4, para. 6.
10. 2004 Discussion Paper, 3–4, para. 6, emphasis added.
11. Argentina requested that ‘the Tribunal decide briefly and immediately on the validity of the registration of Claimants’ request for arbitration’. See *Metalpar S.A. and Buen Aire S.A. v. Argentina*, (ICSID Case No. ARB/03/05), Award on the Merits of 6 June 2008, para. 11.
12. The 2003 ruling by the arbitral tribunal – denying Argentina’s request – is referred to in *Metalpar v. Argentina*, para. 11. See also Potestà and Sobat, *supra* n. 7, 147; Antonio R. Parra, *Chapter 42: ICSID Arbitration Rule 41(5) Objections. MOL v. Croatia*, in *Building International Investment Law, The First 50 Years of ICSID* 593, fn. 7 (Meg N. Kinnear et al. eds., Kluwer Law International 2015); Antonio R. Parra, *The History of ICSID* 262 (Oxford University Press 2012).
13. See 2004 Discussion Paper, 6–7, para. 9. See also *Elsamex v. Honduras*, para. 92 (describing the genesis of Rule 41(5) as a ‘supplement’ to the ICSID Secretary General’s power to refuse to register a request pursuant to Art. 36(3) of the Convention).
14. See ICSID Convention, Art. 36(3). A similar screening power by the ICSID Secretary General exists under the ICSID Additional Facility Rules. See Art. 4 of the ICSID Additional Facility Rules.
15. 2004 Discussion Paper, 3–4, 6–7, paras 6, 9–10.
16. Antonio R. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 41 *International Lawyer* 47, 56 (2007).
17. See ICSID Convention, Art. 36(3) (‘on the basis of the information contained in the request’); Rule 6 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) (same). However, because the Centre is required to transmit the request to the respondent, it may receive spontaneous comments challenging the registrability of the request. See Christoph Schreuer et al., *The ICSID Convention: A Commentary* 460–461, 469–470

In the subsequent 2005 Working Paper, the ICSID Secretariat proposed a text amending Rule 41 so as to allow a tribunal at an early stage of the proceedings to dismiss on an expedited basis all or part of a claim on the merits.¹⁸ On the basis of this text (with a few modifications),¹⁹ the ICSID Rules and Regulations were finally amended in 2006, and Rule 41(5) became effective as of 10 April 2006. The ICSID Additional Facility Rules were also amended in the same year so as to include a new provision, Article 45(6), which is identical to Rule 41(5) of the ICSID Arbitration Rules.

§9.03 THE APPLICATION OF RULE 41(5) IN ARBITRATION PROCEEDINGS

This section reviews how Rule 41(5) has been applied in arbitration proceedings. It first describes the main procedural features of this expedited process (at §9.03[A]). It next discusses whether Rule 41(5) only covers merits-based objections or also jurisdictional objections (at §9.03[B]). Section §9.03[C] deals then with the standard of review that a tribunal must adopt in considering a Rule 41(5) objection. Finally, the section discusses how tribunals have dealt with issues of costs in the framework of Rule 41(5) objections (at §9.03[D]) and whether good faith objections, even if rejected, may have positive effects on the overall efficiency of the process (at §9.03[E]).

[A] The Procedure under Rule 41(5)

As a preliminary matter, it should be noted that Rule 41(5) is residual in nature, i.e., it applies only ‘[u]nless the parties have agreed to another expedited procedure for making preliminary objections’. A number of investment treaties (BITs or multilateral investment agreements) provide for alternative procedures for making preliminary objections on an expedited basis, which thus shall have precedence over ICSID Rule 41(5).²⁰ In particular, recent investment treaties have included similar procedures for the early dismissal of unmeritorious claims directly modelled on Rule 41(5).²¹

(2d ed., Cambridge University Press 2009); Martina Polasek, *The Threshold for Registration of a Request for Arbitration under the ICSID Convention*, 5 *Dispute Resolution International* 177, 180–181 (2011).

18. ICSID, *Suggested Changes to the ICSID Rules and Regulations*, Working Paper of the ICSID Secretariat, 12 May 2005, 2005 Working Paper, <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf> (accessed 30 July 2016), 7.

19. Two notable changes from the 2005 Working Paper text to the finally adopted language are the insertion of the first sentence on the residual nature of the Rule (‘unless the parties have agreed etc.’) and the addition of the word ‘legal’ within the formulation ‘manifestly without merit’.

20. See Antonietti, *supra* n. 2, 441–442. The residual role for Rule 41(5) would also come into play where the disputing parties (as opposed to the State parties to a treaty) were to agree on the use of an alternative expedited procedure for making preliminary objections, for instance in an investment contract containing an ICSID clause, although this would be rare in practice.

21. See, e.g., TPP, Art. 9(23); Indian Model BIT (2015), http://finmin.nic.in/reports/ModelTextIndia_BIT.pdf (accessed 30 July 2016), Art. 21; EU-Vietnam FTA, Chapter 8.II, section 3, Art. 18; EU-Canada CETA, Art. 8.32.

The use of the Rule is open to ‘a party’ which, read literally, would seem to encompass both the claimant and the respondent. The *Global Trading v. Ukraine* tribunal’s observation that ‘the drafters might equally well have said “the respondent”, since the procedure is hardly likely to hold much interest for a claimant’,²² is certainly to be shared in principle, although it may not be ruled out that there may be instances where a claimant may seek the dismissal of a respondent’s unmeritorious counterclaim.²³

The procedure envisaged under Rule 41(5) is considerably accelerated compared to the one triggered by an objection to jurisdiction under Rule 41(1) of the ICSID Arbitration Rules.²⁴ A party is required to file an objection that a claim is manifestly without legal merit within thirty days from the constitution of the tribunal, and in any event before the tribunal’s first session.²⁵ The tribunal should issue a decision at the first session or ‘promptly thereafter’.²⁶ The practice of the tribunals which dealt with the objection under Rule 41(5) shows that a decision on the expedited objection was issued *after* the first session rather than strictly *at* the first session. Tribunals have rendered their decisions as early as four days or as late as several months after the first session of the tribunal.²⁷ In one case, the tribunal communicated its decision shortly after the last memorial on the 41(5) objection, and delivered the reasoning in a subsequent decision.²⁸

The nature of an expedited procedure necessarily entails that the examination of the facts and legal issues of the case will be made summarily, i.e., without a full airing of all the evidence which a party would otherwise present under ordinary proceedings. But ‘how far can a tribunal go down the path of curtailing the process or the evidence’²⁹ without infringing due process rights and thus committing a ‘serious departure from a fundamental rule of procedure’ (within the meaning of one of the annulment grounds in Article 52 of ICSID Convention)?

22. *Global Trading v. Ukraine*, para. 29.

23. However, the counterclaim would have to be raised very early in the proceedings so as to allow the other party to raise its 41(5) objection within the very short time-frame provided by the Rule, which is not very likely. Thus, in practice, Rule 41(5) provides a tool available solely to the respondent, rather than to either party. See Potestà and Sobat, *supra* n. 7, 150. See also Ina C. Popova and Fiona Poon, *From Perpetual Respondent to Aspiring Counterclaimant? State Counterclaims in the New Wave of Investment Treaties*, 2(2) BCDR International Arbitration Review 223, 245 (2015) (noting that ‘because counterclaims are typically asserted in responsive briefs, ICSID tribunals may find that counterclaims are not subject to an objection under ICSID Rule 41(5) on the grounds that they are ‘manifestly without legal merit’).

24. Schreuer et al., *supra* n. 17, 543.

25. The two temporal conditions specified in Rule 41(5) are cumulative. See *Transglobal v. Panama*, paras 24–29.

26. According to ICSID Arbitration Rule 13(1), the first session of the tribunal should take place within sixty days of the constitution of the tribunal.

27. See Aïssatou Diop, *Objection under Rule 41(5) of the ICSID Arbitration Rules*, 25 ICSID Review – Foreign Investment Law Journal 312, 333 (2010) (discussing the first four cases applying Rule 41(5)).

28. See *Álvarez v. Panama*, paras 19–20.

29. Judith Gill, *Application for the Early Disposition of Claims in Arbitration Proceedings*, in *50 Years of the New York Convention* 513, 520 (Albert Jan van den Berg, ed., ICCA Congress Series no. 14 (Dublin 2009), Kluwer Law International 2009).

Rule 41(5) only indicates that the tribunal must ‘giv[e] the parties the opportunity to present their observations on the objection’. In the words of the *Global Trading v. Ukraine* tribunal, ‘a balance evidently has to be struck between the right ... given to the objecting party under Rule 41(5) to have a patently unmeritorious claim disposed of before unnecessary trouble and expense is incurred in defending it, and the duty of the tribunal to meet the requirements of due process’.³⁰ The *Trans-Global v. Jordan* tribunal, the first to apply Rule 41(5), highlighted the ‘basic principle of procedural fairness’, and stated that:

It would ... be a grave injustice if a claimant was wrongly driven from the judgment seat by a final award under [Rule] 41(5), with no opportunity to develop and present its case under the written and oral procedures prescribed by [the ICSID Arbitration Rules].³¹

Rule 41(5) is silent as to whether the expedited procedure shall be conducted orally or only through written submissions. The existing practice shows that many tribunals allowed for an opportunity for oral argument.³² Oral submissions were heard at the first session or at a separate hearing, and after one or two rounds of written arguments.³³ The tribunal in *Global Trading v. Ukraine* observed in this regard 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. ... The cost has been a slight delay ... 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.³⁴

On the other hand, the taking of oral testimony would hardly fit into the strict timetable imposed by Rule 41(5).³⁵

Lastly, a successful objection as to the manifest lack of legal merit of a claim will trigger the issuance of an award³⁶ ‘finally disposing of the Claimant’s claim with all its attendant legal effects under the ICSID Convention’.³⁷ Thus, the award will have res

30. *Global Trading v. Ukraine*, para. 34.

31. *Trans-Global v. Jordan*, para. 92.

32. *Global Trading v. Ukraine*, para. 33; *Trans-Global v. Jordan*, paras 19–22; *Brandes v. Venezuela*, para. 6; *RSM Production v. Grenada*, para. 1.3.4, *PNG v. Papua New Guinea*, para. 14; *MOL v. Croatia*, para. 12. In other cases, the tribunal considered that a hearing was unnecessary. See *Álvarez v. Panama*, para. 18.

33. See, e.g., *Trans-Global v. Jordan*, paras 19–22; *Brandes v. Venezuela*, para. 6; *RSM Production v. Grenada*, para. 1.3.6; *Global Trading v. Ukraine*, para. 33. See also Diop, *supra* n. 27, 333.

34. *Global Trading v. Ukraine*, para. 33, emphasis original.

35. As the *Trans-Global* tribunal remarked:

if the claimant’s factual allegation required any rebuttal, it would tend to show that the allegation would survive an objection under Rule 41(5); and, conversely, the reverse if the allegation needed testimony to supplement or support it. (*Trans-Global v. Jordan*, para. 91)

36. See ICSID Arbitration Rules, Rule 41(6).

37. *Trans-Global v. Jordan*, para. 92.

judicata effect, it will be subject to the remedies envisaged by the ICSID Convention (*in primis*, application for annulment) and may be subject to enforcement. If the objection pursuant to Rule 41(5) fails, the ruling will likely be in the form of a decision (although it could even be made orally).³⁸ As the last sentence of Rule 41(5) clarifies, the dismissal of an objection that a claim manifestly lacks legal merit will not affect the party's right to subsequently file jurisdictional objections pursuant to Rule 41(1) or to object that a claim lacks legal merit in the course of the proceeding.

[B] Jurisdiction or Merits?

One question that a number of tribunals have considered is whether Rule 41(5) only covers claims that are unmeritorious as to the merits or also claims for which there is manifestly no jurisdiction. A review of the ICSID Secretariat background papers would suggest that the primary intention behind the introduction of the new procedure was to cover claims that were unmeritorious on the merits, rather than (also) on jurisdiction.³⁹ The 2004 Discussion Paper noted that the introduction of what would become Rule 41(5) 'would be helpful in reassuring parties that consider the screening power of the Secretary-General to be too limited, *especially insofar as it does not extend to the merits of the dispute*'.⁴⁰ The 2005 Working Paper, in perhaps even clearer terms, recorded the drafters' intention 'to make it clear, by the introduction of a new paragraph (5) [in Rule 41], that the tribunal may at an early stage of the proceeding be asked on an expedited basis to dismiss all or part of a claim *on the merits*. The change would be helpful in addressing any concerns about the limited screening power of the Secretary-General'⁴¹ (which, as already seen, extends only to a review whether the dispute is 'manifestly outside of the jurisdiction of the Centre').⁴²

The tribunal in *Brandes v. Venezuela*, the first to consider this issue, relied essentially on a purposive interpretation of the Rule to find that 41(5) objections covered both jurisdiction and merits. The tribunal observed that:

There 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

38. See 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*, 10 *The Law and Practice of International Courts and Tribunals* 227, 256–257 (2011). In *Álvarez v. Panama*, the tribunal first communicated its decision, and subsequently communicated the reasoning. See *Álvarez v. Panama*, paras 19–20.

39. The *Elsamex v. Honduras* committee noted that 'in the preparatory works [of Rule 41(5)] there is no express mention of jurisdictional objections'. *Elsamex v. Honduras*, para. 92.

40. 2004 Discussion Paper, 7, para. 10, emphasis added.

41. 2005 Working Paper, 7, emphasis added.

42. See also Parra, *MOL v. Croatia*, *supra* n. 12, 594–595. But see Antonietti, *supra* n. 2, 440 (noting that 'in light of the discussions which followed the Working Paper and given the comments received, it has appeared that expedited objections on jurisdiction could not be ruled out of the scope of Rule 41(5)', and concluding that 'Rule 41(5) does include expedited objections to jurisdiction although it was primarily designed to dismiss frivolous claims on the merit').

englobe an examination of the jurisdictional basis on which the tribunal's powers to decide the case rest.⁴³

Subsequent tribunals have professed their agreement with this holding, without exceptions.⁴⁴

As acknowledged by the *Brandes v. Venezuela* tribunal,⁴⁵ this solution, however, creates three opportunities to assess the Centre's jurisdiction: first, by the Secretary General under Article 36(3) of the ICSID Convention; second in the context of a Rule 41(5) objection; and third through the 'ordinary' jurisdictional objections route pursuant to Rule 41(1) of the Arbitration Rules.⁴⁶ This may cause concerns for the overall efficiency and length of the process. In fact, the wording of Rule 41(5) might suggest that jurisdictional objections are not comprised within the scope of the expedited procedure. The last sentence of Rule 41(5) refers to 'an objection pursuant to paragraph (1)' of Rule 41, i.e., jurisdictional objections, in apparent juxtaposition to an objection 'that a claim lacks legal merit' (which would clearly seem to refer to a defence on substance). It would seem reasonable that the objection referred to in the first sentence of Rule 41(5) ('that a claim is manifestly without legal merit') be given the same scope as the objection referred to in the last sentence of the same provision ('that a claim lacks legal merit') which is clearly distinguished from jurisdictional objections. Also Rule 41(6) appears to juxtapose a tribunal's decision 'that the dispute is not within the jurisdiction of the Centre or not within its own competence' to decisions 'that all claims are manifestly without merit', further suggesting that the scope of 'ordinary' 41(1) objections and expedited 41(5) objections should not overlap.

That being said, it is undeniable that jurisdictional objections lend themselves well to an examination under Rule 41(5) as they are in many cases essentially of legal nature and do often not require complex factual inquiries.⁴⁷ The unanimity of case law on the question of the inclusion of jurisdictional objections within the scope of the Rule appears to have in any event settled the issue.

43. *Brandes v. Venezuela*, para. 52. See also *id.*, para. 54, noting that 'this proceeding is not overly burdensome and if it can avoid cases to go ahead if there is a manifest absence of jurisdiction, it can clearly fulfil the basic objectives of this Rule which is to prevent the continuation of a procedure when the claim is without legal merit'.

44. See *Global Trading v. Ukraine*, para. 30; *RSM Production v. Grenada*, para. 6.1.1; *PNG v. Papua New Guinea*, para. 91 (where the issue was not disputed by the claimant); *Emmis v. Hungary*, para. 45 (where the issue was not disputed by the claimants). In *Álvarez v. Panama*, despite the claimant's argument that Rule 41(5) does not cover jurisdictional objections (see *Álvarez v. Panama*, para. 60), the tribunal left the issue open, rejecting the respondent's application on different grounds (*id.*, paras 98–99).

45. *Brandes v. Venezuela*, para. 53.

46. See also *Global Trading v. Ukraine*, para. 33 (noting that 'the rejection of an objection under Rule 41(5) at the pre-preliminary stage does not stand in the way of its resurrection later in the normal way as if Rule 41(5) did not exist'); *Emmis v. Hungary*, para. 84 (rejecting a 41(5) objection and noting that the tribunal's 'finding does not preclude Respondent from maintaining, should it be so advised, an objection to jurisdiction in relation to this claim').

47. See, e.g., the objections raised in *Emmis v. Hungary* and *Accession Mezzanine v. Hungary* (concerning the limitations *ratione materiae* in the BITs' dispute settlement clauses) or in *Global Trading v. Ukraine* (concerning the question whether a sale contract fell within the definitions of 'investment' of Art. 25 of the ICSID Convention and the applicable BIT).

[C] The Standard of Review: When Is a Claim ‘Manifestly Without Legal Merit’?

The most problematic issue in the interpretation of Rule 41(5) is the exact meaning of ‘manifestly without legal merit’, a ‘succinct phrase susceptible to different meanings’.⁴⁸

[1] The Standard of Review

The lack of legal merit must be ‘manifest’. As noted by the *Trans-Global v. Jordan* tribunal, the word ‘manifest’ is also used in certain provisions of the ICSID Convention⁴⁹ and it may be assumed that ‘the meaning of the new rule was intended to reflect the well-established meaning of these older provisions’.⁵⁰ The tribunal observed that:

the ordinary meaning of the word requires the respondent to establish its objection clearly and obviously, with relative ease and despatch. The standard is thus set high. Given the nature of investment disputes generally, the Tribunal nonetheless recognises that this exercise may not always be simple ... The exercise may thus be complicated; but it should never be difficult.⁵¹

Thus, the standard to be applied under Rule 41(5) is ‘very demanding and rigorous’.⁵² In the words of the *PNG v. Papua New Guinea* tribunal, the Rule ‘is intended to capture cases which are clearly and unequivocally unmeritorious’.⁵³ In that sense, ‘a case is not clearly and unequivocally unmeritorious if the Claimant has a tenable arguable case’.⁵⁴

In *MOL v. Croatia*, the tribunal scrupulously discussed the standard to be applied under Rule 41(5).⁵⁵ The tribunal started by noting that the Rule ‘plainly envisages a claim that is so obviously defective from a legal point of view that it can properly be

48. *Trans-Global v. Jordan*, para. 75.

49. See ICSID Convention, Art. 36(3) (providing that the Secretary General will not register the request if ‘the dispute is manifestly outside the jurisdiction of the Centre’); Art. 52(1)(b) (one of the grounds for annulment being that the ‘Tribunal has manifestly exceeded its powers’); Art. 57 (disqualification of an arbitrator for ‘any fact indicating a manifest lack of the qualities’ required by the Convention). With regard to the use of the word ‘manifest’ in Art. 52(1)(b) of the ICSID Convention, Christoph Schreuer explains that ‘[i]n accordance with its dictionary meaning, “manifest” may mean “plain”, “clear”, “obvious”, “evident” and easily understood or recognized by the mind. Therefore, the manifest nature of an excess of powers is not necessarily an indication of its gravity. Rather, it relates to the ease with which it is perceived’. See Schreuer et al., *supra* n. 17, 938.

50. *Trans-Global v. Jordan*, para. 83.

51. *Id.*, para. 88. A number of subsequent tribunals have cited this passage with approval. See *Brandes v. Venezuela*, para. 63; *Global Trading v. Ukraine*, para. 35; *RSM Production v. Grenada*, paras 4.2.1 and 6.1.1; *Álvarez v. Panama*, para. 80.

52. *PNG v. Papua New Guinea*, para. 88. Further, according to the *PNG* tribunal, this very demanding standard ‘applies no less to jurisdictional than other matters’. *Id.*, para. 91.

53. *Id.*, para. 88.

54. *Id.*, para. 88.

55. For a comment on the standard of review adopted in *MOL v. Croatia*, see in particular Parra, *MOL v. Croatia*, *supra* n. 12, esp. at 596 (noting that this decision ‘most cogently states the level of review expected of tribunals by the rule’).

dismissed outright'.⁵⁶ The tribunal contrasted this type of objection to 'an objection to the jurisdiction or substantive defence (in terms, that a claim "lacks legal merit"), which requires for its disposition more elaborate argument or factual enquiry' and 'must be made the subject of a regular preliminary objection under Rule 41(1) or a regular defence on the merits'.⁵⁷ This distinction, according to the tribunal, derives 'from the very nature of the new avenue of recourse opened by Rule 41(5)' as well as from the time limits laid down in it, which imply that an objection must be 'so clear-cut that it could be decided virtually on the papers or with a minimum of supplementary argument'.⁵⁸ While expressing agreement with the 'clear and obvious' standard advanced in *Trans-Global v. Jordan* (quoted above), the *MOL v. Croatia* tribunal disagreed with the *Trans-Global* tribunal's observation that the exercise envisaged in Rule 41(5) 'may not always be simple, requiring (as in this case) successive rounds of written and oral submissions by the Parties, together with questions addressed by the tribunal to those Parties. The exercise may thus be complicated; but it should never be difficult'. For the *MOL v. Croatia* tribunal, this approach 'seems to be carrying a tribunal into hybrid territory somewhere between Rule 41(5) and Rule 41(1)'.⁵⁹ By contrast, the 'right test' is to maintain a distinction 'between a claim by an investor that can properly be rejected out of hand, and one which requires more elaborate argument for its eventual disposition'.⁶⁰ In other words, Rule 41(5) would apply to matters that are 'clear' and 'certain' (which would be 'manifest' in the meaning of Rule 41(5)), and not to those which are 'susceptible to argument one way or the other' or for which it is 'necessary to engage in elaborate analyses' (which would not be manifest).⁶¹ This distinction would be respectful of 'the evident intention behind Rule 41(5), to the benefit of the health of the ICSID system'.⁶²

The approach to the standard of review under Rule 41(5) advanced by the *MOL v. Croatia* tribunal has the advantage of clarity and simplicity, as tribunals will consider that a party has not met its burden where issues are complex⁶³ and subject to tenable arguments and counter-arguments, or involve interpretation of 'novel legal issues' or 'issues of first impression'.⁶⁴ To conclude with the wording of the *PNG v. Papua New Guinea* tribunal, 'Rule 41(5) is not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts'.⁶⁵

56. *MOL v. Croatia*, para. 44.

57. *Id.*, para. 44.

58. *Id.*, para. 44.

59. *Id.*, para. 45.

60. *Id.*, para. 45.

61. *Trans-Global v. Jordan*, para. 84, cited with approval in *MOL v. Croatia*, para. 45.

62. *MOL v. Croatia*, para. 45.

63. See also *Álvarez v. Panama*, para. 102 (issue is complex and it is appropriate to defer examination to ordinary phase); *Brandes v. Venezuela*, para. 75 (the answers to the questions 'necessitate the examination of complex legal and factual issues which cannot be resolved in these summary proceedings') and para. 76 ('these difficult legal questions cannot be resolved in these summary proceedings').

64. *PNG v. Papua New Guinea*, paras 89, 94–95, 98.

65. *Id.*, para. 89.

[2] ***‘Legal’ Versus ‘Factual’: How to Consider Disputed Facts***

Rule 41(5) concerns claims that are manifestly without ‘legal’ merit. In the text proposed by the ICSID Secretariat in the 2005 Working Paper, the new procedure was to concern claims which were ‘manifestly without merit’.⁶⁶ The final text of the 2006 amendments inserted the adjective ‘legal’. This change is said to have been introduced to avoid inappropriate discussions on the facts of the case at this stage of the proceedings.⁶⁷ After reviewing the ICSID preparatory papers and other background documents, the *Trans-Global v. Jordan* tribunal noted that ‘the adjective “legal” ... is clearly used in contradistinction to “factual”’.⁶⁸ In *Brandes v. Venezuela*, the tribunal noted that the objection ‘should concern a legal impediment to a claim and not a factual one’.⁶⁹ Similarly, the *PNG v. Papua New Guinea* tribunal noted that where a party’s objection also calls for a factual analysis, it will be inappropriate for resolution under Rule 41(5).⁷⁰ In *Álvarez v. Panama*, the respondent filed a 41(5) objection that the investment was illegally made and the tribunal thus lacked jurisdiction. The tribunal held that this type of objection could not be examined in a 41(5) context, because it would have required it to examine the underlying disputed facts to determine whether the investment was made illegally.⁷¹

That said, even if the objection goes to the ‘legal merit’ of a claim, ‘it is rarely possible to assess the legal merits of any claim without also examining the factual premise upon which that claim is advanced’.⁷² This may be true for both substantive defences and jurisdictional objections. If this is so, the question arises as to how a tribunal should, for the purpose of the exercise of Rule 41(5), consider the disputed facts relevant to the legal merit of a claim. Rule 41(5) provides no guidance in this respect.⁷³ In some of the cases addressing this question, parties and tribunals have referred to the so-called *prima facie* test, adopted by investment treaty tribunals in the examination of their *ratione materiae* jurisdiction. The *prima facie* test is resorted to where a tribunal must assess whether the claims and counterclaims submitted by the

66. 2005 Working Paper, at 7.

67. Antonietti, *supra* n. 2, 440.

68. *Trans-Global v. Jordan*, para. 97. See also *PNG v. Papua New Guinea*, para. 90.

69. *Brandes v. Venezuela*, para. 59. See also *PNG v. Papua New Guinea*, para. 90.

70. *PNG v. Papua New Guinea*, para. 93.

71. *Álvarez v. Panama*, paras 95–96.

72. *Trans-Global v. Jordan*, para. 97. See also *Elsamex v. Honduras*, para. 106 (noting the ‘difficulty to completely separate legal arguments from their factual premises’, author’s translation). See also Andrea Carlevaris, *Preliminary Matters: Objections, Bi-furcation, Request for Provisional Measures*, in *Litigating International Investment Disputes, A Practitioner’s Guide* 173, 194 (Chiara Giorgetti ed., Brill Nijoff 2014) (‘the first decisions applying the rule seem to support the view that a limited analysis of factual elements may be required to assess the legal merit of the claims, and that ruling on the objection necessarily entails an assessment of the facts alleged in support of such claims’).

73. The most recent treaties which incorporate provisions similar to Rules 41(5) set forth that the tribunal shall assume the facts pleaded by the claimant to be true. See, e.g., EU-Vietnam FTA, Art. 18(3); CETA, Art. 8.32(5); Indian Model BIT (2015), Art. 21(3).

parties to the dispute fall within the description of the types of claims and counter-claims over which the tribunal has jurisdiction.⁷⁴

To summarize the principles on the *prima facie* test developed by tribunals in the context of assessing that specific aspect of their *ratione materiae* jurisdiction mentioned above, the first element of the test is for tribunals to accept as true *pro tempore* the facts alleged by a claimant.⁷⁵ There are nuances in the approaches taken by tribunals in this respect. Some tribunals, for example, have accepted a claimant's characterization of facts as *pro tempore* controlling, except where they are 'frivolous or abusive',⁷⁶ 'incredible, frivolous or vexatious',⁷⁷ 'improbable, frivolous or reckless',⁷⁸ 'plainly without any foundation',⁷⁹ or 'entirely baseless at first sight'.⁸⁰ Other tribunals have conducted a further examination beyond the claimant's own characterization, especially where parties had opposing views on the facts.⁸¹ In those instances, tribunals have looked at contrary evidence supplied by the respondent,⁸² so as to put the claimant's contentions 'in a broader perspective'.⁸³ The second step is for tribunals to inquire whether the 'facts alleged may be capable, if proved, of constituting breaches of the BIT'.⁸⁴

Within the context of Rule 41(5), some of the tribunals have examined the disputed facts by reference to the *prima facie* tests outlined above. It should be noted that the *prima facie* approach may serve as a useful analogy for these purposes,

74. See in particular Zachary Douglas, *The International Law of Investment Claims* 273–277 (Cambridge University Press 2009); Audley Sheppard, *The Jurisdictional Threshold of a Prima-Facie Case*, in *The Oxford Handbook of International Investment Law* 932 (Peter Muchlinski, Federico Ortino and Christoph Schreuer eds., Oxford University Press 2008).

75. See, e.g., *Chevron Corp and Texaco Petroleum Corp. v. Ecuador*, (UNCITRAL), Interim Award of 1 December 2008, para. 105; *Canfor Corporation v. United States*, (NAFTA/UNCITRAL), Decision on Preliminary Question of 6 June 2006, para. 171; *Mytilineos Holdings SA v. Serbia and Montenegro and Serbia*, (UNCITRAL), Partial Award on Jurisdiction and Dissenting Opinion of 8 September 2006, para. 187; *Telenor Mobile Communications AS v. Hungary*, (ICSID Case No. ARB/04/15), Award of 22 June 2006, para. 21; *SGS Société Générale de Surveillance SA v. Pakistan*, (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction of 6 August 2003, para. 145.

76. *El Paso Energy International Co. v. Argentina*, (ICSID Case No. ARB/03/15), Decision on Jurisdiction of 27 April 2006, para. 45.

77. *Methanex Corporation v. United States*, (NAFTA/UNCITRAL), Partial award of 7 August 2002, para. 112.

78. *Murphy Exploration and Production Company International v. Ecuador*, (ICSID Case No. ARB/08/4), Award on Jurisdiction and Dissenting Opinion of 15 December 2010, para. 10.

79. *Duke Energy International Peru Investments No 1, Ltd v. Peru*, (ICSID Case No. ARB/03/28), Decision of the Ad hoc Committee of 28 February 2011, para. 118.

80. *Société Générale v. Dominican Republic*, (LCIA Case No. UN 7927), Award on Preliminary Objections to Jurisdiction of 19 September 2008, para. 61.

81. *PSEG Global Inc. et al. v. Turkey*, (ICSID Case No. ARB/02/5), Decision on Jurisdiction of 4 June 2004, para. 64.

82. See *Continental Casualty Company v. Argentina*, (ICSID Case No. ARB/03/9), Decision on Jurisdiction of 22 February 2006, para. 61; *Total SA v. Argentina*, (ICSID Case No. ARB/04/01), Decision on Objections to Jurisdiction of 25 August 2004, para. 53.

83. *Joy Mining Machinery Ltd. v. Egypt*, (ICSID Case No. ARB/03/11), Award on Jurisdiction of 30 July 2004, para. 30.

84. See among many, *Noble Energy Inc. and MachalaPower Cia Ltd. v. Ecuador and Consejo Nacional de Electricidad*, (ICSID Case No. ARB/05/12), Decision on Jurisdiction of 5 March 2008, para. 153. See also Douglas, *supra* n. 74, 274–275.

provided, however, one keeps in mind that it was developed in a specific and different context (that of the assessment of one aspect of the tribunal's jurisdiction *ratione materiae*). Thus, as rightly noted in *Trans-Global v. Jordan*, a tribunal applying Rule 41(5) must work 'within the particular concept required by Article 41(5) with its own terminology'.⁸⁵

In *Trans-Global v. Jordan*, the respondent proposed that the tribunal adopt a twofold approach: (i) to accept the facts alleged by the claimant insofar as they were of 'sufficiently plausible character', and then (ii) to determine whether such alleged facts were capable of constituting a violation of the BIT.⁸⁶ The tribunal refused to adopt this approach and stated that:

In applying Rule 41(5), the Tribunal accepts that, as regards disputed facts relevant to the legal merits of a claimant's claim, the tribunal need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith; nor need a tribunal accept a legal submission dressed up as a factual allegation. The Tribunal does not accept, however, that a tribunal should otherwise weigh the credibility or plausibility of a disputed factual allegation.⁸⁷

Thus, while the tribunal stressed that it was not helped by the prima facie investment case law,⁸⁸ it ultimately adopted a test which resembles the prima facie test applied by certain tribunals in the context of assessing their jurisdiction *ratione materiae*. The *RSM Production v. Grenada* tribunal professed its agreement with the *Trans-Global* approach⁸⁹ and added that in considering a Rule 41(5) objection:

it is appropriate that a claimants' Request for Arbitration be construed liberally and that, in cases of doubt or uncertainty as to the scope of a claimant's allegation(s), any such doubt or uncertainty should be resolved in favour of the claimant.⁹⁰

This observation is probably to be interpreted in connection with the fact that pursuant to the ICSID Convention and Rules the request for arbitration – the only written submission required to a claimant before the filing by a respondent of a 41(5) objection – need not contain particular factual allegations beyond what is necessary to pass the Secretary General's review pursuant to Article 36(3) ICSID Convention.⁹¹

The *Emmis v. Hungary* echoed the test proposed in *Trans-Global v. Jordan* and noted that:

For the purpose of [a Rule 41(5)] determination, the arbitral tribunal ... must ordinarily presume the facts which found the claim on the merits as alleged by the claimant to be true (unless they are plainly without any foundation). In the application of those presumed facts to the legal question of its jurisdiction, the tribunal

85. *Trans-Global v. Jordan*, para. 104.

86. *Id.*, para. 81.

87. *Id.*, para. 105.

88. *Id.*, para. 103.

89. *RSM Production v. Grenada*, para. 6.1.2.

90. *Trans-Global v. Jordan*, para. 6.1.3.

91. See the requirements pursuant to Art. 36(2) of the ICSID Convention and Rule 2 of the Institution Rules. On this, see the discussion in *Trans-Global v. Jordan*, paras 98–102.

must then decide whether, as matter of law, those facts fall within or outside the scope of the consent to arbitrate.⁹²

In *Brandes v. Venezuela*, the tribunal first endorsed the view that ‘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’.⁹³ Subsequently, the tribunal refined this idea, by noting that:

The level of scrutiny of ‘*manifestly*’ obviously provides a far higher threshold than the *prima facie* standard normally applied for jurisdiction under Rule 41(1) where the factual premise for the decision on jurisdiction is normally taken as alleged by the Claimant.⁹⁴

The tribunal then introduced a threshold of ‘plausibility’ which has to be met by the claimant in the allegation of the relevant facts.⁹⁵ In formulating what it considered the correct test to be applied within the framework of Rule 41(5), the tribunal concluded that:

With respect to the merits of the claim, an award denying such claims can only be made if the facts, as alleged by the Claimant and which *prima facie* seem plausible, are not manifestly of such a nature that the claim would have to be dismissed.⁹⁶

One may wonder whether the approach requiring that the facts be ‘*prima facie* plausible’ (*Brandes v. Venezuela*) as opposed to assuming them to be true (unless manifestly incredible, frivolous, vexatious, inaccurate, plainly without any foundation, or made in bad faith) (*Trans-Global v. Jordan*, *RSM Production v. Grenada*, *Emmis v. Hungary*), may entail a higher threshold to be met for a claimant when presenting its case. A less demanding standard would, however, seem to be more appropriate in the context of a 41(5) objection, given that the very nature of a summary procedure appears less suited to an in-depth scrutiny as to the plausibility of the facts. At most, at that stage a tribunal may review whether the facts are plainly without any foundation. If a tribunal were to be of the opinion that it would not be able to decide the questions presented to it without an in-depth scrutiny of the factual allegations and evidence, it would be appropriate for it to reject the 41(5) objection and to address all questions in the subsequent, non-summary, phase of the procedure. One could thus conclude that a claim will be considered as manifestly without legal merit if the facts – as alleged by the claimant and taken as true by the tribunal, provided they are not patently unfounded – are clearly incapable of sustaining a finding of liability (if the objection goes to issues of substance) or clearly fall outside the scope of the tribunal’s jurisdiction (if the objection goes to jurisdiction).

92. *Emmis v. Hungary*, para. 26. See also *Álvarez v. Panama*, para. 82.

93. *Brandes v. Venezuela*, para. 61.

94. *Id.*, para. 62, emphasis original.

95. *Id.*, para. 69, where the tribunal held that ‘at this preliminary stage, it is sufficient, in the Tribunal’s view, to accept *prima facie* the plausible facts as presented by the Claimant’.

96. *Id.*, para. 73.

[D] Unmeritorious Claims and Allocation of Costs

How should tribunals allocate costs when deciding on preliminary objections under Rule 41(5)? Unlike a number of recent treaties which provide for rules on cost allocation in the context of similar procedures for the summary dismissal of unmeritorious claims,⁹⁷ Rule 41(5) does not contain any provision to this effect.

In ICSID arbitrations, tribunals enjoy general discretion as to the allocation of costs between the parties.⁹⁸ Two approaches may be discerned in awarding costs in ICSID arbitrations. Some tribunals apportion ICSID costs in equal shares and rule that each party should bear its own costs. Others apply the principle pursuant to which ‘costs follow the event’, with the result that the party that does not prevail bears all or part of the costs of the proceedings, including those of the other party. The latter approach has been followed in particular if the claim was found to be manifestly lacking in merit, to be legally untenable or evidencing abuse of misconduct, fraudulent activity or abuse of process by the losing party.⁹⁹

Tribunals have adopted different approaches also in the specific context of Rule 41(5) proceedings. In *Trans-Global v. Jordan*, the tribunal considered that ‘[t]he introduction of Article 41(5) may have been prompted (in part) by the perception held by certain states that a respondent could not expect to recover its costs from the claimant even where the respondent’s case prevailed completely at the end of lengthy and expensive legal proceedings’.¹⁰⁰ The tribunal recalled its discretionary powers in

97. See Indian Model BIT (2015), Art. 21(6).

98. See Art. 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules. For a different approach see the UNCITRAL (2010) Rules, Art. 42. On costs in investment arbitration, see Susan Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 Washington University Law Review 769 (2011).

99. See Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* 155–156 (2d ed., Kluwer Law International 2010). For case law see, e.g., *CDC Group PLC v. Seychelles*, (ICSID Case No. ARB/02/14), Annulment Decision of 29 June 2005 (where the ad hoc committee awarded costs in favour of the respondent on annulment, finding that the applicant’s case was ‘fundamentally lacking in merit’. Although the committee ‘refrain[ed] from going so far as to say that it was frivolous’, it could ‘state unequivocally that ... the [respondent’s] case was, to any reasonable and impartial observer, most unlikely to succeed’, *id.*, para. 89); *Saba Fakes v. Republic of Turkey*, (ICSID Case No. ARB/07/20), Award of 14 July 2010 (where the tribunal awarded costs in favour of the respondent, explaining that ‘[a] party pursuing a claim which is clearly outside the scope of the Centre’s jurisdiction should not be encouraged, and should bear the risk of paying the full costs of such frivolous proceedings’, *id.*, para. 154); *Europe Cement Investment & Trade S.A. v. Turkey*, (ICSID Case ARB(AF)/07/2), Award of 13 August 2009, para. 185 (where the tribunal made an award of costs in favour of the respondent, stating that ‘[i]n the circumstances of this case, where the tribunal has reached the conclusion that the claim to jurisdiction is based on an assertion of ownership which the evidence suggests was fraudulent, an award to the Respondent of full costs will go some way towards compensating the Respondent for having to defend a claim that had no jurisdictional basis and discourage others from pursuing such unmeritorious claims’). *A contrario*, see *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Republic of Hungary*, (ICSID Case No. ARB/07/22), Award of 23 September 2010, para. 15.3.3 (where the tribunal followed the ‘pay-your-own-way’ approach, on the basis that ‘no frivolous claim was filed in the proceeding and that no bad faith was observed from the parties’). For a detailed discussion on the allocation of costs see also *International Thunderbird Gaming Corporation v. Mexico*, (NAFTA/UNCITRAL), Separate Opinion Thomas Wälde, paras 124–147.

100. *Trans-Global v. Jordan*, para. 122.

this regard, but added that ‘such discretion could properly be exercised by this tribunal on the general principle that costs should follow the event’ and stated that it would apply this principle in the subsequent phase of the arbitration.¹⁰¹ In *RSM Production v. Grenada*, the dismissal of the claimant’s claim for manifest lack of merit prompted the tribunal to allocate the costs entirely in favour of the respondent.¹⁰² In *Global Trading v. Ukraine*, despite dismissing the claim for manifest lack of merit, the tribunal decided to apply the ‘pay-your-own-way’ approach:

given the newness of the Rule 41(5) procedure and given the reasonable nature of the arguments concisely presented to it by both parties, ... the appropriate outcome is for the costs of the procedure to lie where they fall.¹⁰³

In certain cases, tribunals have also taken into account the fact that the objection under 41(5) unnecessarily had increased costs or was unmeritorious. In *Transglobal v. Panama*, for example, the tribunal rejected a 41(5) objection from the respondent as time-barred.¹⁰⁴ In the subsequent phase of the proceedings the respondent succeeded to have the claimant’s case dismissed on abuse of process grounds. Given that finding and in line with other cases where tribunals found an abuse, costs were allocated in favour of the prevailing party.¹⁰⁵ However, the tribunal made an exception for the costs that the respondent had incurred as a result of its untimely objection, which were made to lie where they had fallen.¹⁰⁶

In *MOL v. Croatia*, the tribunal, after rejecting all of the respondent’s objections under Rule 41(5), noted that the costs for that phase of the proceedings had not be ‘negligible’. It added that:

Given that one of the main reasons behind the introduction of Rule 41(5) was to spare respondent States the wasted trouble and expense of having to defend wholly unmeritorious claims, it must follow *per contra* that a Respondent invoking the procedure under the Rule takes on itself the risk of adverse cost consequences should its application fail.¹⁰⁷

Thus, while deferring costs for later determination, it stated that it would ‘take the matter into account when considering the question of costs at the end of the arbitral proceedings’ and recommended that the parties make a separate accounting of the costs incurred in this phase of the arbitration, for subsequent purposes.¹⁰⁸

101. *Id.*, para. 123.

102. *RSM Production v. Grenada*, para. 8.3.4 (where the tribunal concluded that in view of the fact that the claimants’ claims ‘are manifestly without legal merit, and that, it was impermissible for Claimants to advance them in new ICSID proceedings, the Tribunal considers it appropriate that Respondent should be fully indemnified for all of its costs, reasonably incurred or borne, in this proceeding’).

103. *Global Trading v. Ukraine*, para. 59.

104. See *Transglobal v. Panama*, paras 23–29.

105. *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, (ICSID Case No. ARB/13/28), Award of 2 June 2016, paras 124–127.

106. *Transglobal v. Panama*, Award, para. 127.

107. *MOL v. Croatia*, para. 54.

108. *Id.*, para. 54.

While tribunals in the early cases may have exercised caution in the allocation of costs given the novelty of the Rule, a more robust approach to costs may be expected by tribunals in the future as parties may now be presumed to be more familiar with the scope and aims of the procedure. Thus, in principle, a successful 41(5) objection should trigger a cost-follow-the-event approach, as a finding by a tribunal in favour of the objecting party implies that the claim should never have been brought in the first place. Conversely, where a tribunal finds that an objection is clearly unmeritorious, brought in bad faith or raised merely to delay the process, it should consider allocating the costs related to the procedure against the objecting party.

[E] The ‘Focusing-Function’ of Rule 41(5)

Where an objection pursuant to Rule 41(5) is wholly or partially upheld, efficiency is well served as the proceeding is terminated or at least partly narrowed at an early stage with savings in costs and time for the parties. By contrast, where an objection fails, the proceeding may be prolonged and there is a risk that costs be increased.¹⁰⁹ Nonetheless, a good faith 41(5) objection, even if unsuccessful, may serve the purpose of narrowing down certain legal issues. In particular, it may provide an early opportunity for tribunals to seek clarifications from the parties on certain claims and even prompt tribunals to share their preliminary views on certain legal issues.¹¹⁰

In *Trans-Global v. Jordan*, for instance, the tribunal allowed two claims to proceed. However, it noted that if the various elements of those claims ‘were advanced by the Claimant as independent claims, each allegedly capable by itself of establishing a liability against the Respondent, the tribunal would be minded to decide that [those claims] were manifestly without legal merit within the meaning of Rule 41(5) of the ICSID Arbitration Rules’.¹¹¹ Because the claimant clarified that it was not pursuing the various elements as independent claims, the tribunal rejected the respondent’s objection under Rule 41(5), but warned that it expected the claimant ‘to make [its] position abundantly clear in its next Memorial’.¹¹² The tribunal also advised the parties ‘to keep well in mind’ that costs would be awarded to the prevailing party.¹¹³

109. So far, 41(5) objections have been wholly upheld in two cases (*Global Trading v. Ukraine*; *RSM Production v. Grenada*), granted in part and denied in part in three cases (*Trans-Global v. Jordan*; *Accession Mezzanine v. Hungary*; *Emmis v. Hungary*), and denied in all other instances.

110. See Aron Goldsmith, *Trans-Global Petroleum: ‘Rare Bird’ or Significant Step in the Development of Early Merits-Based Claim-Vetting?*, 26(4) ASA Bulletin 667, 675–676 (2008) (discussing *Trans-Global v. Jordan* and noting that ‘the Rule 41(5) procedure provided the tribunal with a valuable opportunity to shape the course of the remainder of the arbitration’). Of course, any preliminary comments offered by a tribunal would have to be crafted carefully so as to avoid prejudging the case. See *id.*, 675, fn. 29.

111. *Trans-Global v. Jordan*, paras 109 and 114.

112. *Id.*, para. 111. The case was subsequently settled. See Award of the Tribunal Embodying the Parties’ Settlement Agreement of 8 April 2009.

113. *Trans-Global v. Jordan*, para. 123.

In *Emmis v. Hungary* and *Accession Mezzanine v. Hungary*, the tribunals considered whether the claimants could assert claims based on customary international law under the applicable BITs. As a result of the respondent's 41(5) objections, in both cases the claimants agreed to strike out certain claims from their request for arbitration, as a result of which the dispute was reduced. In *Emmis v. Hungary*, the tribunal pointed to the 'narrowing of the issues that has been achieved as a result of the discussions and exchanges of pleadings between the Parties'.¹¹⁴ In the operative part of its decision, the *Accession Mezzanine* tribunal also provided a number of 'conclusions' concerning jurisdiction, applicable law, interpretation and the scope of MFN provisions with a view to the subsequent phase of the proceeding.¹¹⁵

In *PNG v. Papua New Guinea*, the tribunal rejected the respondent's Rule 41(5) objections, but declined jurisdiction in the subsequent phase of the arbitration. In that context, it noted that '[the respondent's] Rule 41(5) Application ha[d] significantly expedited and focused the discussion on the issues of jurisdiction'.¹¹⁶

Thus, arbitral case law shows that, even if unsuccessful, a good faith 41(5) objection may result in more focused pleadings in the subsequent phase of the proceedings and, despite the extension of the overall length of the process, in efficiencies.

§9.04 THE APPLICATION OF RULE 41(5) IN ANNULMENT PROCEEDINGS

The question whether the expedited procedure envisaged in Rule 41(5) is applicable in annulment proceedings was first considered in *Elsamex v. Honduras*, where Elsamex sought to have Honduras' annulment application dismissed summarily on the basis of Rule 41(5).¹¹⁷ In a thorough analysis, the ad hoc committee examined whether Rule 41(5) was applicable in annulment proceedings and, if so, what was the scope of such rule.

The committee started by noting that the application of Rule 41(5) in annulment proceedings resulted from the text of Rule 53 of the ICSID Arbitration Rules which makes the Arbitration Rules generally applicable to annulment proceedings, *mutatis*

114. *Emmis v. Hungary*, para. 63.

115. See *Accession Mezzanine v. Hungary*, para. 77.

116. *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, (ICSID Case No. ARB/13/33), Award of 5 May 2015, para. 410.

117. See *Elsamex v. Honduras*. In addition to *Elsamex v. Honduras* and *Venoklim v. Venezuela* (discussed *infra* in this section), Rule 41(5) was also invoked in the annulment proceeding in *Micula v. Romania*, where the annulment committee found that Rule 41(5) was not applicable, as the 2003, and not the 2006, Arbitration Rules applied to those proceedings. See *Ioan Micula, Viorel Micula and others v. Romania*, (ICSID Case No. ARB/05/20), Annulment Proceeding, Decision on Annulment of 26 February 2016, paras 7–20 (also referring to the Decision on the applicable arbitration rules and on the preliminary objections filed by the Respondents on Annulment of 25 June 2014, which is not publicly available). On the application of Rule 41(5) in annulment proceedings, see also Bernardo M. Cremades Román, *The Use of Preliminary Objections in ICSID Annulment Proceedings*, Kluwer Arbitration Blog, 4 September 2013.

mutandis.¹¹⁸ The committee further observed that, while the preparatory works of Rule 41(5) did not mention annulment proceedings,¹¹⁹ the purpose of the rule, consisting in avoiding unnecessary and costly proceedings to the benefit of both parties, suggested that an ad hoc committee would be empowered to put an end to a case at the early stages if for any reason it was manifest that the annulment request could not be granted.¹²⁰

Having found that Rule 41(5) was applicable, the committee next examined the scope of the Rule in annulment proceedings. To that end, it considered whether in view of the special features of annulment, it was to apply a different standard of review from that applied by an arbitral tribunal.¹²¹ After recounting the main features of the summary procedure as emerging from case law,¹²² and in particular the ‘high level of conviction needed for a positive determination’ that a claim manifestly lacks legal merit,¹²³ the committee examined whether, in view of the *mutatis mutandis* requirement in Rule 53, any adaptations had to be made to Rule 41(5) ‘in order to make it suitable and applicable in an annulment proceeding’.¹²⁴ In identifying the distinguishing features of annulment proceedings, the committee in particular noted that Rule 50(1)(c)(iii) on the content of an annulment application does not specify the requisite level of detail, nor does it require a party to indicate the ‘issues in dispute’ or the ‘precise points in dispute’ (as is required for a request for arbitration and for an application for an interpretation of an award, respectively).¹²⁵ By contrast, an annulment application must only be based on one or more of the annulment grounds of Article 52(1) of the Convention.¹²⁶ The committee then identified what it considered the most important difference between an annulment proceeding and a proceeding before a tribunal, namely the lack of any remedy against an annulment decision. The concern that an applicant/claimant was ‘wrongly driven from the judgment seat’¹²⁷ through a summary procedure was thus more significant in annulment than in arbitration proceedings.¹²⁸ According to the *Elsamex v. Honduras* committee, this factor entailed that, in view of the *mutatis mutandis* requirement in Rule 53, the

118. *Elsamex v. Honduras*, paras 89, 100. See ICSID Arbitration Rules, Rule 53, entitled ‘Rules of Procedure’ (‘The provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee’).

119. *Elsamex v. Honduras*, para. 98.

120. *Id.*, para. 100. In this regard, the committee cited to *Brandes v. Venezuela* which had previously relied on a purposive interpretation of Rule 41(5) for its conclusion that the procedure was broad in scope and also comprised jurisdictional questions. See *id.*, para. 99, referring to *Brandes v. Venezuela*, para. 55.

121. *Elsamex v. Honduras*, paras 101–131.

122. *Id.*, paras 103–109, author’s translation.

123. *Id.*, para. 109.

124. *Id.*, para. 117, author’s translation.

125. See ICSID Convention, Art. 36(2) (on the request for arbitration) and ICSID Arbitration Rule 50(1)(c)(i) (on the application for an interpretation of an award).

126. See *Elsamex v. Honduras*, para. 120.

127. *Trans-Global v. Jordan*, para. 92.

128. *Elsamex v. Honduras*, para. 124.

standard of review under Rule 41(5) was higher in annulment proceedings than before arbitral tribunals.¹²⁹

The committee then offered its views on the interaction between Rule 41(5) and the annulment grounds in Article 52(1) ICSID Convention. It posited that, given the high standard of review, it would reject any Rule 41(5) application whenever there were doubts in respect of the legal merit or lack thereof of an annulment application.¹³⁰ By contrast, the committee suggested that a Rule 41(5) application may succeed ‘when the applicant invokes an annulment ground which simply does not exist pursuant to Article 52 of the Convention’¹³¹ or when the applicant, despite relying on a Convention ground, is in reality ‘seeking to re-argue the merits of the case’.¹³²

With that standard in mind, the committee analysed the annulment grounds invoked by the applicant and came to the conclusion that none of the applicant’s grounds manifestly lacked legal merit.¹³³ The committee’s observations are noteworthy as they may provide indications as to when a 41(5) objection may succeed in future annulment proceedings. For instance, in looking at one of the annulment grounds invoked by the applicant – ‘manifest excess of power’ – the committee noted that the applicant complained that the sole arbitrator had not ‘correctly’ applied the *Salini* test when accepting jurisdiction over an ‘investment’ under Article 25 of the ICSID Convention. The committee noted that a review of this issue would approximate a review of the tribunal’s interpretation of Article 25, which would fall outside the ad hoc committee’s scope of review. Because, however, the applicant had also relied on other elements to support its argument that the tribunal had exceeded its powers, the committee was satisfied that the application on that ground was not manifestly without legal merit.¹³⁴ Furthermore, the committee noted that the applicant had argued that the award was in several respects ‘unfair’. The committee observed that if ‘unfairness’ (*injusticia*) had been presented as a separate ground for annulment, it would have dismissed the application on that ground under Rule 41(5). However, because the applicant had only alluded to unfairness in support of its other arguments under Article 52 of the ICSID Convention, such reference was considered irrelevant.¹³⁵ One may note that also in this case, the procedure may have fulfilled a ‘focusing-function’, in that the committee signalled to the parties what arguments it would not be worthwhile pursuing in the subsequent phase and offered its preliminary views on how certain annulment grounds should be interpreted.¹³⁶

In the annulment proceeding in *Venoklim v. Venezuela*, the ad hoc committee agreed with the committee in *Elsamex* on the applicability of Rule 41(5) in annulment

129. *Id.*, para. 125.

130. *Id.*, para. 129.

131. *Id.*, para. 130. *See also id.*, para. 131.

132. *Id.*, paras 130–131.

133. *Id.*, paras 132–147.

134. *Id.*, para. 136.

135. *Id.*, para. 146.

136. *Id.*, esp. paras 132–147. The case was subsequently settled. *See Elsamex v. Honduras*, Order Taking Note of the Discontinuance of the Proceeding of 21 April 2015.

proceedings,¹³⁷ and endorsed its conclusion that the standard for a 41(5) application is more demanding in the annulment context than in arbitration proceedings, referring in particular to the absence of remedies against annulment decisions.¹³⁸ In *Venoklim v. Venezuela*, Venezuela sought the dismissal of Venoklim's annulment request as manifestly without legal merit, as the application merely identified the annulment grounds but did not substantiate them.¹³⁹ Venezuela argued in particular that Rule 50 required the party requesting annulment to 'state in detail' the grounds on which its application was based. The committee considered that noncompliance with the formal requirements set out in Rule 50(1)(c)(iii) could not in itself be the basis of a Rule 41(5) objection unless it also showed a 'manifest lack of legal merit of the claim' pursuant to Rule 41(5).¹⁴⁰ For instance, an annulment request would be manifestly without legal merit if the process was used to bring an 'appeal' against the award.¹⁴¹ The committee further noted that Rule 50 was a rule of procedure contained in the Arbitration Rules (and not in the Convention) and as such would in any event give way to the right to request annulment under Article 52 of the Convention.¹⁴² The Rule 41(5) application was thus dismissed.

The *Venoklim* ad hoc committee's cautious approach – allowing the annulment to proceed despite a 'minimal' application for annulment – was no doubt motivated by overarching due process concerns.¹⁴³ However, such an approach may significantly reduce, if not entirely preclude, any meaningful room for Rule 41(5) objections in annulment proceedings. In fact, a minimalistic and insufficiently substantiated annulment application would make it difficult for the objecting party to 'specify as precisely as possible the basis for the [41(5)] objection' as required by the Rule and for an ad hoc committee to assess whether an annulment application manifestly lacks legal merit.¹⁴⁴

In conclusion, 41(5) applications are admissible in annulment proceedings in view of the broad *renvoi* operated by Rule 53.¹⁴⁵ However, as a consequence of the high threshold required under Rule 41(5) (which committees have found to be even more

137. In *Venoklim*, this was undisputed between the parties. See *Venoklim v. Venezuela*, paras 71–73.

138. *Id.*, paras 74–81.

139. *Id.*, para. 85.

140. *Id.*, para. 87.

141. *Id.*, paras 89–90.

142. *Id.*, para. 92. Furthermore, the amendments to Rule 50 throughout the years show a tendency to lower the level of detail required for an annulment application. See *id.*, paras 93–94.

143. See *id.*, esp. para. 95 ('to prevent the applicant from exercising the procedural right to seek annulment would entail a final effect as far as protection of its rights under the ICSID Convention is concerned, whereas to admit [the applicant's exercise of its right to seek annulment] would not have the same consequences for [the respondent on annulment]', author's translation).

144. See *id.*, para. 97. See also M. Zicat Garofalo, *Preliminary Objections in ICSID Annulment Proceedings after Elsamex*, 6 *Transnational Dispute Management* (2015) (arguing that parties requesting annulment will have an incentive to provide as little information as possible in their applications, in order to prevent ad hoc committees from dismissing their applications summarily).

145. Because Rule 41(5) does not correspond to or implement any provision in the ICSID Convention, Art. 52(4) of the Convention (making certain provisions in the Convention on arbitral tribunals applicable to proceedings before ad hoc committees) does not come into play.

demanding than in arbitration proceedings) and of the minimal content required to an annulment application, the scope for such objections in annulment proceedings appears rather limited in practice.

§9.05 CONCLUSIVE REMARKS

This chapter has examined Rule 41(5) of the ICSID Arbitration Rules in its first ten years of application. Arbitral tribunals and ad hoc committees have shaped the scope of such procedure, by clarifying some of the difficulties which may arise in the interpretation of the Rule. As the early applications of Rule 41(5) had already shown,¹⁴⁶ case law evinces a large consistency on the principal features of the procedure, although tribunals continue to show different nuances on the standard of review to be adopted and diverging approaches in respect of allocation of costs. Arbitral practice has also admitted the application of the Rule in certain situations which may not necessarily have been anticipated by the drafters (so the application of Rule 41(5) in annulment proceedings and the extension of the scope of the procedure to jurisdictional objections).

Because a tribunal's rejection of a 41(5) objection does not prevent the objecting party from filing jurisdictional objections pursuant to Rule 41(1) or from objecting that a claim lacks legal merit in the further course of the proceeding, the risk is that Rule 41(5) may create an unnecessary 'pre-preliminary' procedure, adding further layers to already costly and lengthy proceedings. Considering the instances in which Rule 41(5) has been resorted to so far, such risk should, however, not be overemphasized. More robust decisions on cost allocation insofar as they will be taken by tribunals should in any event discourage the filing of unmeritorious 41(5) objections and address concerns for the misuse of this procedure. Finally, whether or not a 41(5) objection ultimately succeeds, it may, in certain circumstances, provide the parties with an opportunity to test their claims early in the proceedings and allow tribunals to offer certain preliminary views, thus resulting in overall efficiencies.

146. See Potestà and Sobat, *supra* n. 7, 146–168 (discussing the first four cases applying Rule 41(5)).