

Frivolous claims in international adjudication: a study of ICSID Rule 41(5) and of procedures of other courts and tribunals to dismiss claims summarily

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I. Introduction

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’.¹ Domestic legal systems have developed mechanisms to allow courts to dismiss or strike out, on an expedited basis, such frivolous claims,² and similar rules are not unknown also in the procedures of international courts and tribunals. In the domain of investor-state arbitration an explicit provision allowing an arbitral tribunal to deal with frivolous claims has been lacking until fairly recently. This normative gap created discontent in certain states which felt they were forced to undergo lengthy and costly litigation to resist a claim which from the beginning appeared to have no or very little prospects of success. The need for new procedures allowing tribunals to dispose of frivolous claims on an expedited basis was perceived as crucial considering the upsurge of investor-state cases in the last decades, before the International Centre for Settlement of Investment Disputes (ICSID) and other fora.³ The latest amendments in 2006 of the ICSID Arbitration Rules have taken those concerns into consideration: a new provision inserted within the ICSID Arbitration Rules, Rule 41(5), designs a specific procedure, pursuant to which a party may raise, *in limine litis*, an objection that a claim is ‘manifestly without legal merit’.⁴

An examination of the scope of ICSID Rule 41(5) is particularly timely since, in its first five years of existence, arbitral practice has now begun to develop. Four tribunals have assessed the scope, purpose and limits of the new Rule, in a way that certainly has shown considerable consistency amongst the four adjudicators, but also certain differences in approach.⁵ A careful understanding of ICSID Rule 41(5) is also

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¹ Black’s Law Dictionary (8th ed., 2004), at 692.

² For example, in the United States 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’).

³ See the figures provided by UNCTAD (‘Latest Developments in Investor - State Dispute Settlement’, IIA Monitor No. 1, March 2011, p. 2, available at www.unctad.org) and ICSID (‘The ICSID Caseload – Statistics, 2011, no. 2, p. 7, available at <http://icsid.worldbank.org>).

⁴ ICSID Arbitration Rule 41(5). Also the ICSID Arbitration (Additional Facility) Rules have been amended in 2006 and contain a provision, Rule 45(6), which is identical to ICSID Rule 41(5). Both set of arbitration rules are available on ICSID’s website at <http://icsid.worldbank.org>.

⁵ *Trans-Global Petroleum, Inc. v. Jordan*, ICSID Case No. ARB/7/25, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008; *Brandes Investment Partners LP 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; *Global Trading Resource Corporation and*

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particularly important since a few recent investment treaties, to which the United States (US) is a party, include a differently crafted provision which allows dismissal of unmeritorious claims on an expedited basis. One such treaty is the Dominican Republic-United States-Central American Free Trade Agreement (CAFTA), where the new summary procedure has been recently applied by the arbitral tribunal in *Pac Rim v. El Salvador*.⁶ The presence of the new procedure within the ICSID system and of the special procedures provided for in those investment treaties entered into by the US begs an inevitable question: whether arbitral tribunals benefitting of no explicit provision – because the arbitration is conducted under Rules other than ICSID and under an investment treaty containing no special summary procedure – are bereft of the possibility to summarily dismiss frivolous claims. Is, for example, a tribunal working under the United Nations Commission on International Trade Law (UNCITRAL) Rules, which have no direct equivalent to ICSID Rule 41(5), prevented from dismissing a manifestly without legal merit claim on an expedited basis?

This article focuses mainly on the summary dismissal of frivolous claims in investor-state arbitration (and within that, particular attention is devoted to the ICSID context). However, the paper first intends to provide an overview of procedures to dismiss unmeritorious claims before other international courts and tribunals. It will be seen that the new ICSID Rule 41(5) does not exist in a *vacuum* but knows parallels and antecedents in other dispute settlement fora. Thus, part II of the paper will begin by describing the approach followed in dealing with frivolous claims by individual-state (other than investment arbitration), as well as state-state dispute settlement mechanisms. With regard to the first ones, regional human rights courts, and in particular the European Court of Human Rights, provide the premier example for the use of an effective filter against unmeritorious claims (II.1). In inter-state litigation, while no such mechanism exists in the procedure before the International Court of Justice (ICJ) (II.2), the dispute settlement bodies envisaged by the United Nations Convention on the Law of the Sea provide, on the other hand, for a special procedure to dismiss frivolous claims, although it has significantly never been used to date (II.3). Part III will turn to the investment arbitration context. It will first analyze origins, purpose and potential of ICSID Rule 41(5). Special attention will be devoted to the analysis of the four cases which, so far, have given life to the new Rule and which have tackled the legal challenges which Rule 41(5) poses (III.1). Thereafter, the alternative summary procedure contained in certain recent bilateral or multilateral investment agreements will be examined, with CAFTA providing the first example where these new rules have been tested (III.2). Prospects of utilizing summary dismissal procedures in investor-state arbitrations conducted under non-ICSID rules are further explored (III.3). Finally, the article will draw some conclusions.

Globex International, Inc. v. Ukraine , ICSID Case No. ARB/09/11, Award, 1 December 2010; Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Production Corporation v. Grenada, ICSID Case No. ARB/10/6, Award, 10 December 2010.

⁶ *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.

II. Frivolous Claims Before International Courts and Tribunals: An Overview

1. The European Court of Human Rights

Among international courts and tribunals, the European Court of Human Rights stands out as perhaps the most successful example for the use of the filtering mechanism provided by its constituent treaty to strike out unmeritorious claims. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) sets forth, in its Article 35 § 3, that:

The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, *manifestly ill-founded* or an abuse of the right of individual application.⁷

Similar provisions are to be found in other human rights treaties (e.g., the American Convention on Human Rights⁸ and the Convention on Elimination of the Discrimination against Women⁹).

The mechanism established in Article 35 § 3 ECHR provides the Court with a tool intended to root out the weakest cases.¹⁰ The Court (and, before 1998, also the European Commission of Human Rights) have widely used the power to declare complaints inadmissible if ‘manifestly ill-founded’.¹¹ It is worth noting that only individual complaints, and not inter-state complaints, are subject to such filtering mechanism.¹²

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (emphasis added).

⁸ See American Convention on Human Rights, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978), Art. 47(c) (‘The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: [...] c. the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order [...]’).

⁹ Optional Protocol to the Convention for the Elimination of Discrimination against Women, opened for signature 6 October 1999, (2000) 39 ILM 281, U.N. Doc. A/54/4 (entered into force 22 December 2000), Art. 4(2)(c) (‘The Committee shall declare a communication inadmissible where: [...] (c) It is manifestly ill-founded or not sufficiently substantiated [...]’).

¹⁰ Philip Leach, ‘Taking a Case to the European Court of Human Rights’ (OUP, 2005), at 159.

¹¹ The majority of manifestly ill-founded applications are declared inadmissible by a single judge or a three-judge committee (articles 27 and 28 ECHR). However, some application of this type are examined by a Chamber or even – in exceptional cases – by the Grand Chamber. See Practical Guide on Admissibility Criteria, December 2010, available at www.echr.coe.int, para. 341, with relating references.

¹² Art. 35(3) makes reference only to an ‘individual application submitted under Art. 34’, and not to applications submitted under Art. 33 ECHR (inter-state cases). See also Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds.) ‘Theory and Practice of the European Convention on Human Rights’ (Intersentia, 4th ed., 2006), at 198 (noting that ‘[i]nter-State applications, which may be assumed to be filed only after extensive deliberation and to have been prepared by expert legal advisers

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The ‘Practical Guide on Admissibility Criteria’,¹³ prepared by the Research Division of the Court, which provides an authoritative (though not binding) review of the Court’s case law, has classified ‘manifestly ill-founded’ complaints into four main categories:

(i) *‘Fourth instance’ complaints.* Such cases stem from a misunderstanding by the applicant as to the Court’s role and function: the Court may not act as a court of appeal (a ‘fourth instance’) to retry cases heard by domestic courts,¹⁴ except where findings by those courts have infringed rights and freedoms protected by the ECHR or are flagrantly and manifestly arbitrary.¹⁵ Complaints formulated so as to envisage a ‘fourth instance’ role for the Court would be deemed manifestly ill-founded.¹⁶

(ii) *Clear or apparent absence of a violation.* An applicant’s complaint will be declared manifestly ill-founded if, despite fulfilling all the formal conditions of admissibility, it does not disclose any appearance of a violation of the rights guaranteed by the Convention.¹⁷ This can for example be the case where there is a settled and abundant case law of the Court in identical or similar cases, on the basis of which it can conclude that there has been no violation of the Convention in the case before it.¹⁸

(iii) *Unsubstantiated complaints.* The Court will declare a complaint manifestly ill-founded, where either the application simply cites one or more provisions of the Convention, without explaining in what way they have been breached,¹⁹ or where the application has completely failed to produce relevant evidence.²⁰

(iv) *Confused or far-fetched complaints.* These will be complaints where it is impossible to make sense of the facts complained of or the facts are objectively impossible, or manifestly contrary to common sense.²¹

It bears noting that Convention institutions (the Court and the Commission) have interpreted the word ‘manifest’ in a broad way, beyond what its literal meaning would suggest. In fact, manifestly ill-founded cases have not only included cases where it was ‘immediately obvious to the average reader’ that the application was far-fetched and lacked foundation.²² Complaints have also been declared manifestly ill-founded

of the Government, may in general be expected not to be manifestly ill-founded’). But see Art. 47(c) of the American Convention on Human Rights, *supra* n. 8, which applies also to inter-state complaints.

¹³ Practical Guide on Admissibility Criteria, *supra* n. 11, esp. paras 339-368.

¹⁴ See, e.g., *Kemmache v. France* (No. 3), 24 November 1994, Series A no. 296-C, para. 44; *García Ruiz v. Spain* [GC], no. 30544/96, ECHR 1999-I, para. 28; *Perlala v. Greece*, no. 17721/04, 22 February 2007, para. 25; *Soyuer et al. v. Turkey* (dec.), no. 49445/07, 21 June 2011, para. 76.

¹⁵ See *Sisojeva and Others v. Latvia* [GC], no. 60654/00, ECHR 2007-II, para. 89.

¹⁶ See Practical Guide on Admissibility Criteria, *supra* n. 11, paras 345-352.

¹⁷ *Ibid.*, paras 353-363. See, e.g., *Anomeritis v. Greece* (dec.), no. 23169/94, 11 January 1995; *Cable Music Europe v. Netherlands* (dec.), no. 18033/91, 29 November 1993; *Hámorsky et al. v. Slovak Republic* (dec.), no. 27391/95, 11 April 1996; *Thind v. Germany* (dec.), no. 29752/04 and 16771/06, 23 March 2010.

¹⁸ See *Galev and Others v. Bulgaria* (dec.), no. 18324/04, 29 September 2009.

¹⁹ See *Trofimchuk v. Ukraine* (dec.), no. 4241/03, 31 May 2005; *Baillard v. France* (dec.), no. 6032/04, 25 September 2008.

²⁰ See Practical Guide on Admissibility Criteria, *supra* n. 11, paras 364-367.

²¹ *Ibid.*, para. 368.

²² *Ibid.*, paras 339-340.

following detailed examination of the parties' observations and where lengthy legal reasoning by the Court was required.²³

2. The International Court of Justice

Neither the Statute nor the Rules of the ICJ contain any provision allowing the Court to dismiss a claim for manifest unfoundedness on a summary basis.²⁴ Sir Gerald Fitzmaurice, in his Separate Opinion in the *Northern Cameroons* case, referring to the screening procedure available before the European Court of Human Rights, suggested that the ICJ could 'take similar action, on similar grounds' within its inherent powers:

In the general international legal field there is nothing corresponding to the procedures found under most national systems of law, for eliminating at a relatively early stage, before they reach the court which would otherwise hear and decide them, claims that are considered to be objectionable or not entertainable on some *a priori* ground. The absence of any corresponding "filter" procedures in the Court's jurisdictional field makes it necessary to regard a right to take similar action, on similar grounds, as being part of the inherent powers or jurisdiction of the Court as an international tribunal.²⁵

There appear to be no cases where the ICJ has dismissed a claim *in limine litis* on the basis that it was manifestly without legal merit. In certain instances, the Court has struck out the case from its list, however for reasons of 'manifest lack of jurisdiction'. In the provisional measures phase of the *Legality of Use of Force* cases brought by the former Yugoslavia against ten NATO states, the Court denied the request for the indication of provisional measures and ordered that two of such cases (against Spain

²³ *Mentzen v. Latvia* (dec.), no. 71074/01, ECHR 2004-XII. For a discussion on the relationship between a manifestly ill-founded complaint and its 'arguable character', see *Boyle and Rice v. the United Kingdom*, no. 9659/82 and 9658/82, 27 April 1988, paras 52-55; *Powell and Rayner v. the United Kingdom*, Commission Report, 19 January 1989, para. 59; and Judgment, 21 February 1990, Series A no. 172, paras 31-33. For a critical view on the Convention institutions' position on this issue, see *van Dijk et al., supra* n. 12, at 199 (submitting that 'an application should be declared to be manifestly ill-founded only if its ill-founded character is actually evident at first sight or if the decision is based on standing case law'). For the standard emerging from the practice under the American Convention on Human Rights, see Jo M. Pasqualucci, 'The Practice and Procedure of the Inter-American Court of Human Rights' (Cambridge University Press, 2003), at 95, citing to *Genie Lacayo* (Preliminary Objections), Inter-Am. Ct HR, 27 January 1995, Ser. C, No. 21, para. 36 (according to which '[t]he terms of Article 47(c) exclude any conclusion based on appearance and demand a "clear, manifest certainty so perceptible that nobody may rationally place it in doubt"').

²⁴ Art. 29 of the ICJ Statute provides for the constitution of a 'Chamber of Summary Procedure', which is formed on a yearly basis, but has never been used to date. According to Art. 29, '[w]ith a view to the speedy dispatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure. [...]'. On the Chamber of Summary Procedure, see Shabtai Rosenne, 'The Law and Practice of the International Court, 1920-2005' (Martinus Nijhoff Publishers, 2006), at 1077-1079.

²⁵ *Northern Cameroons (Cameroon v. UK)* (Preliminary Objections) [1963] ICJ Rep 15, 97 (Separate Opinion Fitzmaurice), at 106-7 (internal footnote omitted).

and the United States) be removed from the list for manifest lack of jurisdiction.²⁶ In the subsequent preliminary objections phase, the Court had to deal with a ‘preliminary question’ that had been raised in each of the eight cases which had remained on the list:²⁷ whether, as a result of the changed attitude of the applicant state to the question of the Court’s jurisdiction, the Court should, by a “pre-preliminary” or summary decision’,²⁸ ‘take a decision to dismiss the case *in limine litis*, without further entering into the examination of the question whether the Court has jurisdiction under the circumstances’.²⁹ The Court did not accede to this request, and held that such power was restricted to two circumstances, namely, where proceedings are instituted and no title of jurisdiction is relied on, and where it ‘manifestly lacks jurisdiction’.³⁰

Such limitations imposed by the ICJ to its power to dismiss a case *in limine litis* have not escaped criticism, both by judges sitting on the Court³¹ and by commentators.³²

3. Dispute Settlement Bodies in the Law of the Sea

The United Nations Convention on the Law of the Sea (UNCLOS) provides a specific procedure to filter out *in limine litis* frivolous claims.³³ Article 294 UNCLOS allows a court or tribunal exercising compulsory jurisdiction to determine whether a claim ‘constitutes an abuse of legal process or whether *prima facie* it is well founded’.³⁴ This provision was inserted at quite a late stage of the negotiations of the Convention to meet the concern of certain coastal states that they might be hampered

²⁶ See *Legality of the Use of Force (Yugoslavia v. Spain) (Provisional Measures)* [1999] ICJ Rep 761; *Legality of the Use of Force (Yugoslavia v. United States) (Provisional Measures)* [1999] ICJ Rep 916.

²⁷ *Legality of Use of Force (Serbia and Montenegro v. Belgium) (Preliminary Objections)* (2005) 44 ILM 299, paras 25-44.

²⁸ *Ibid.*, para. 26.

²⁹ *Ibid.*, para. 30.

³⁰ *Legality of Use of Force (Serbia and Montenegro v. Belgium) (Preliminary Objections)* (2005) 44 ILM 299, para. 33. See also Chester Brown, ‘A Common Law of International Adjudication’ (Oxford University Press, 2007), at 249.

³¹ See *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *supra* n. 27, Separate Opinion Higgins and Separate Opinion Kooijmans.

³² See Brown, *supra* n. 30, at 250, with further references.

³³ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3, 21 ILM 1261 (entered into force 16 November 1994), Art. 294.

³⁴ Art. 294 UNCLOS, entitled “Preliminary proceedings”, reads:

‘1. A court or tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall take no further action in the case.

2. Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time-limit within which they may request it to make a determination in accordance with paragraph 1.

3. Nothing in this article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure.’

in exercising their rights within the exclusive economic zone by a proliferation of groundless applications.³⁵

Article 294 provides no definition for either ‘abuse of legal process’ or ‘*prima facie* unfounded’ claim.³⁶ One author has observed that ‘only the most blatant cases of abuse and the most evident cases of unfoundedness are likely to be stopped’ by the filtering mechanism set forth in this provision.³⁷ Several commentators have noted that in inter-state litigation vexatious claims would be rare,³⁸ and that the assessment to this effect by a court or tribunal under Article 294 should require prudence, given that ‘the perception of what is vexatious or *de minimis* may be in the eyes of the beholder’.³⁹ This consideration may arguably apply more generally to any type of inter-state litigation, also outside the UNCLOS framework.

A finding that the claim is ‘*prima facie* unfounded’ concerns a ‘claim’, and thus goes both to jurisdiction and merits.⁴⁰ If the court or tribunal is satisfied that the test under Article 294 has been met, the *prima facie* finding has the consequence that the court or tribunal ‘shall take no further action in the case’.⁴¹

Article 294 applies to a ‘court or tribunal provided for in article 287’. Thus, the ICJ, the International Tribunal for the Law of the Sea (‘ITLOS’) and an arbitral tribunal might be called upon to entertain ‘preliminary proceedings’ under this rule.⁴² While the Rules of the ICJ do not envisage a specific procedure to be followed with regard to these ‘preliminary proceedings’ (and the same applies of course for an arbitral tribunal),⁴³ with regard to ITLOS Article 294 is implemented by Article 96 of the Rules of the Tribunal.⁴⁴ The procedure laid down by Article 96 of such Rules includes both written and oral pleadings.⁴⁵

Paragraph 7 of article 96 of the Rules, after stating that submissions and evidence ‘shall be confined to those matters which are relevant to the determination of whether

³⁵ Chittharanjan F. Amerasinghe, ‘Jurisdiction of Specific International Tribunals’ (Martinus Nijhoff, 2009), at 259; Tullio Treves, ‘Preliminary Proceedings in the Settlement of Disputes under the United Nations Law of the Sea Convention: Some Observations’, in N. Ando et al. (eds.), ‘Liber Amicorum Judge Shigeru Oda’ (Kluwer Law, 2002), Vol. I, pp. 749-761, at 751 (citing to the *travaux préparatoires*).

³⁶ It is unclear whether there is any difference between the affirmative ‘*prima facie* well founded’ language in the first sentence as opposed to the negative ‘*prima facie* unfounded’ language to be found in the second sentence of Art. 294(1).

³⁷ Treves, *supra* n. 35, at 752.

³⁸ Shabtai Rosenne, ‘Settlement of Fisheries Disputes in the Exclusive Economic Zone’, 73 American Journal of International Law 89 (1979), at 101; Gudmundur Eiriksson, ‘The International Tribunal for the Law of the Sea’ (Martinus Nijhoff, 2000), at 233.

³⁹ Eiriksson, *supra* n. 38, at 233.

⁴⁰ Treves, *supra* n. 35, at 751-752.

⁴¹ See the last sentence of Art. 294(1) UNCLOS.

⁴² P. Chandrasekhara Rao & Philippe Gautier (ed.), ‘The Rules of the International Tribunal for the Law of the Sea: A Commentary’ (Martinus Nijhoff, 2006), pp. 263-270, at 266.

⁴³ See Treves, *supra* n. 35, at 753 (noting the ‘[t]he International Court of Justice or the arbitral tribunal will have to address these questions on the basis of general principles and *ad hoc* procedural decisions’).

⁴⁴ International Tribunal for the Law of the Sea Rules of the Tribunal, available at www.itlos.org, Art. 96.

⁴⁵ See in particular Art. 96(5)-(7) Rules of the Tribunal.

the claim constitutes an abuse of legal process or is *prima facie* unfounded', envisages the possibility for ITLOS to request the parties 'to argue all questions of law and fact, and to adduce all evidence, bearing on the issue'. It has been noted that this might frustrate the purpose underlying Article 294, because '[a]rgument on all questions of law and fact opens the way, at least in most cases, to a complete examination of the dispute which is incompatible with a *prima facie* determination as to whether the claim is unfounded and makes it highly unlikely that the claim will be found abusive'.⁴⁶ In case the Tribunal wishes the parties to argue all questions of law and fact and to adduce all evidence bearing on the issue, a more likely scenario would rather be that the Tribunal rejects the request for 'preliminary proceedings' and provides for the continuation of the case.⁴⁷

Finally, paragraph 3 of Article 294 UNCLOS distinguishes between an application to determine that a claim is abusive or *prima facie* unfounded and ordinary 'preliminary objections'. In light of this distinction and of the provision in the Rules of the Tribunal under which preliminary proceedings have the effect of suspending the proceedings on the merits,⁴⁸ the question has been asked as to whether preliminary proceedings pursuant to Article 294 may be held in parallel with proceedings on preliminary objections, or whether the former must be considered as 'preliminary' also to the latter.⁴⁹ Shabtai Rosenne had in fact used the term 'pre-preliminary procedure' to describe the direct antecedent of what later became the adopted Article 294 UNCLOS.⁵⁰ It would seem that if the court or tribunal decides to continue the case, because it finds neither abuse of legal process nor *prima facie* unfoundedness, any party to the dispute is entitled to raise preliminary objections in accordance with the applicable rules of procedure, and the determination made in the preliminary proceedings should not in any way affect the right of any party to the dispute to raise such preliminary objections.⁵¹ It will be seen that this is also the process established both under ICSID Rule 41(5) and under investment treaties following the 2004 US Model Bilateral Investment Treaty (BIT), such as CAFTA, where the party having raised the objection as to the 'frivolity' of the claim remains entitled, in case the tribunal dismisses the objection, to raise 'ordinary' preliminary objections as to the Tribunal's jurisdiction.⁵²

There appears to be no practice of applications made under Article 294 UNCLOS or of *proprio motu* determinations by ITLOS. The provision has been quoted in certain pleadings by disputing parties,⁵³ but has found so far no reflection in the Tribunal's judgments.⁵⁴

⁴⁶ Treves, *supra* n. 35, at 758.

⁴⁷ *Ibid.*

⁴⁸ See Art. 96(5) of the Rules of the Tribunal.

⁴⁹ Treves, *supra* n. 35, at 760.

⁵⁰ Rosenne, *supra* n. 38, at 101.

⁵¹ Myron H. Nordquist (ed.), 'United Nations Convention on the Law of the Sea 1982. A Commentary', Vol. V (Martinus Nijhoff, 1989), at 77-78.

⁵² See *infra* Para. III.1.3.1 and Para. III.2.

⁵³ See, *e.g.*, The "Camouco" Case (Panama v. France), Statement in response of the French Government, 25 January 2000, para. 8; Southern Bluefin Tuna Cases (Australia and New Zealand v. Japan), Reply on Jurisdiction of Australia and New Zealand, 31 March 2000, paras 185-187; The M/V

III. Frivolous Claims in Investment Arbitration

1. ICSID Arbitration Rule 41(5)

1.1. The origins of the Rule and its position within the ICSID Convention framework

In investment arbitrations conducted under the ICSID Rules, arbitral tribunals are empowered by ICSID Arbitration Rule 41(5) to dismiss proceedings summarily if they find that the underlying claims are ‘manifestly without legal merit’. Rule 41(5) reads:

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

ICSID Rule 41(5) came to life with the 2006 amendments of the ICSID Arbitration Rules. As of September 1984, when the first amendments of the ICSID Institution, Conciliation and Arbitration Rules were enacted, ICSID had registered only 20 cases.⁵⁵ Since then, the caseload grew constantly and as of June 2011 the number of cases registered under the ICSID Convention and Additional Facility Rules amounted to 351.⁵⁶ The need for more efficient procedures to deal with the increase in caseload of the early 2000s prompted the Secretariat to prepare a Discussion Paper addressing certain concerns of state parties and proposing a number of changes to the ICSID Regulations and Rules.⁵⁷ The 2004 Discussion Paper suggested, *inter alia*, that consideration should be given to dealing with the situation where a party could seek from the Tribunal, once it is constituted, the dismissal on an expedited basis of an unmeritorious claim.⁵⁸ Such new procedure was put in relation with the limited screening power of the Secretary-General which under Article 36(3) of the ICSID Convention is closely circumscribed to cases where the request for arbitration

“Louisa” Case (Saint Vincent and Grenadines v. Spain), Provisional Measures, Written Response of the Kingdom of Spain, para. 75.

⁵⁴ But see The “Camouco” Case, *supra* n. 53, Declaration of Judge Th. Mensah.

⁵⁵ See ‘The ICSID Caseload’, *supra* n. 3, at 7.

⁵⁶ *Ibid.*

⁵⁷ ‘Possible Improvements of the Framework for ICSID Arbitration’, ICSID Secretariat, Discussion Paper, 22 October 2004, available at <http://icsid.worldbank.org>, at 3, para. 5.

⁵⁸ *Ibid.*, at 3-4, para. 6.

discloses a manifest lack of jurisdiction⁵⁹ and which therefore does not extend to the merits of the dispute (or to cases where jurisdiction is merely doubtful). In the words of Antonio Parra, '[t]he Secretariat is powerless to prevent the initiation of proceedings that clear this jurisdictional threshold, but are frivolous as to the merits.'⁶⁰ In a subsequent Working Paper of 2005, ICSID suggested a first 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.⁶¹ The ICSID Rules and Regulations were finally amended in 2006, and the new Rule 41(5) became effective as of 10 April 2006.

1.2. Arbitral practice applying Rule 41(5)

The new Rule has been invoked so far in four instances.⁶² While this paper does not intend to delve in great detail into the underlying facts at issue in the four cases, but rather seeks to discuss the four tribunals' approaches to the legal challenges which the Rule poses, it is nevertheless useful to provide a brief overview of what was at stake in each case.

In *Trans-Global v. Jordan*, the first case in which Rule 41(5) was applied, claimant brought an ICSID claim against respondent, alleging that Jordan had violated Article II(3)(a) (failure to provide fair and equitable treatment), Article II(3)(b) (impairment through unreasonable and discriminatory measures), and Article VIII (failure to hold consultations) of the US-Jordan BIT. Respondent raised a 41(5) objection, contending that claimant's claims were in several respects manifestly without legal merit because they alleged 'infringements of non-existent legal rights of the Claimant or non-

⁵⁹ Ibid.

⁶⁰ Antonio R. Parra, 'The Development of the Regulations and Rules of the International Centre for Settlement of International Disputes', 41 *International Lawyer* 47 (2007), at 56.

⁶¹ 'Suggested Changes to the ICSID Rules and Regulations', ICSID Secretariat, Working Paper, 12 May 2005, available at <http://icsid.worldbank.org>, at 7.

⁶² See *supra* n. 5. It is interesting to note that in two closely related ICSID Additional Facility cases brought against Turkey, respondent chose not to invoke Rule 45(6) – which is the Additional Facility Rule equivalent to ICSID Rule 41(5) – but nonetheless asked the tribunal to grant a declaration that the claimants' claim was 'manifestly ill-founded'. In *Europe Cement Investment & Trade S.A. v. Turkey* (ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009), respondent sought a declaration that the claim was 'manifestly ill-founded' (as to jurisdiction, as it later was specified, see *ibid.*, paras 126-129) because it was based on documents that were inauthentic. The Tribunal ultimately ruled in favour of respondent, finding that it had no jurisdiction over the case, but refused to make any additional declaration as to the manifest ill-foundedness of the claim (para. 176). Also in *Cementownia 'Nowa Huta' S.A. v. Turkey* (ICSID Case No. ARB(AF)06/2, Award, 11 September 2009), respondent asked the Tribunal to grant 'a declaration that Cementownia's claim [was] manifestly ill-founded, and ha[d] been asserted using inauthentic documents' (*ibid.*, para. 106). The Tribunal found that claimant had 'intentionally and in bad faith abused the arbitration' and that it was 'guilty of procedural misconduct' (para. 159), and, unlike the Tribunal in *Europe Cement*, decided to grant the requested declaration to the effect that 'Claimant ha[d] filed a fraudulent claim before ICSID' (para. 179(1)(b)). The Tribunal explained that '[a] formal declaration in the present Award would [...] constitute a fully justified remedy in order to prevent the Claimant from filing this baseless claim before other international jurisdictions or even before ICSID again' (para. 162). It is noteworthy that parallel proceedings relating to the same facts have also been brought before the European Court of Human Rights, which declared them inadmissible as 'manifestly ill-founded'. See *Uzan et al. v. Turkey* (dec.), no. 18240/03, 29 March 2011; *Soyuer et al. v. Turkey* (dec.), no. 49445/07, 21 June 2011.

existent legal obligations of the Respondent'.⁶³ The Arbitral Tribunal rejected Jordan's objection concerning the first two claims finding that the test imposed by Rule 41(5) was not met.⁶⁴ On the contrary, the Tribunal found that the 'essential legal basis' for the third claim was 'entirely missing under the BIT'⁶⁵ because the respondent had only a legal obligation to consult with the US as the contracting party to the treaty and it was obvious that no similar obligation existed towards the claimant. This claim was withdrawn by the claimant during the proceedings, and the Tribunal confirmed in the operative part of its decision that the claim was manifestly without legal merit.⁶⁶

In *Brandes v. Venezuela*, respondent invoked Rule 41(5) on the two grounds that claimant had allegedly agreed to release and waive the claims it was asserting and that it was simply an agent for its clients and thus not an investor under the ICSID Convention. The Tribunal dismissed the two objections holding that both questions were such as to 'necessitate the examination of the complex legal and factual issue which cannot be raised in the summary proceedings'.⁶⁷

Global Trading v. Ukraine was the first instance in which a 41(5) objection was used successfully and proceedings were put to an end through the expedited procedure envisaged by the Rule. The Tribunal found that the claim brought against Ukraine was manifestly without legal merit, because the sale and purchase contracts entered into by the claimants, at stake in that arbitration, were 'pure commercial transactions that cannot on any interpretation be considered to constitute "investments" within the meaning of Article 25 of the ICSID Convention'.⁶⁸

Finally, in *RSM Production v. Grenada*, claimants asserted treaty claims against respondent. An objection pursuant to Rule 41(5) was raised on the grounds that the legal and factual contentions on which the claims depended had already been fully litigated in a previous ICSID arbitration.⁶⁹ The Tribunal decided that the 'Claimants' present case is [...] 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'.⁷⁰ Therefore, the Tribunal determined that all of claimant's claim were manifestly without legal merit and accordingly dismissed them.⁷¹

1.3. Critical issues in the application of Rule 41(5)

1.3.1. General remarks and uncontroversial issues

⁶³ *Trans-Global v. Jordan*, *supra* n. 5, para. 95.

⁶⁴ *Ibid.*, paras 108 and 114.

⁶⁵ *Ibid.*, para 119.

⁶⁶ The case was later settled. See *Trans-Global Petroleum, Inc. v. Jordan*, ICSID Case No. ARB/7/25, Consent Award, 8 April 2009.

⁶⁷ *Brandes v. Venezuela*, *supra* n. 5, paras 71 and 72. At the end of the subsequent jurisdictional phase, the Tribunal dismissed the case for lack of jurisdiction. See *Brandes Investment Partners LP v. Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011.

⁶⁸ *Global Trading v. Ukraine*, *supra* n. 5, para. 57.

⁶⁹ *RSM Production v. Grenada*, *supra* n. 5, para. 4.1.1.

⁷⁰ *Ibid.*, para. 7.3.7.

⁷¹ *Ibid.*, para. 9.1.

A number of issues relating to the interpretation and application of Rule 41(5) do not raise particular controversies.

First, the rule is residual in nature, i.e. it applies only '[u]nless the parties have agreed to another expedited procedure for making preliminary objections'. As we shall see further, a number of investment treaties (BITs or multilateral investment agreements, such as CAFTA) provide for an alternative procedure for making preliminary objections on an expedited basis,⁷² which thus shall have precedence over ICSID Rule 41(5).⁷³ The residual role for 41(5) may also come into play where the disputing parties themselves (as opposed to the state parties to a treaty) were to mutually agree, e.g. in an investment contract containing an ICSID clause, on the use of an alternative procedure, although this would seem a rather unusual scenario.

Secondly, it is clear that a successful objection as to the manifest lack of legal merit of a claim will trigger the issuance of an award⁷⁴ 'finally disposing of the Claimant's claim with all its attendant legal affects under the ICSID Convention'.⁷⁵ Thus, the award will have *res judicata* effect, it will be subject to the usual remedies envisaged by the ICSID Convention (*in primis*, application for annulment) and may be subject to enforcement. If the objection pursuant to 41(5) fails, the ruling will likely be in the form of a decision (although it could even be made orally).⁷⁶ As the last sentence of Rule 41(5) clarifies, the dismissal of an objection that a claim lacks legal merit will not affect the party's right to subsequently file jurisdictional objections according to the ordinary procedure.

Thirdly, the use of the Rule is open to 'a party' which, read literally, would seem to encompass both claimant and respondent. The observation by the *Global Trading Tribunal* to the effect that 'the drafters might equally well have said "the respondent", since the procedure is hardly likely to hold much interest for a claimant',⁷⁷ is certainly to be shared in principle, although it may not be completely ruled out that a claimant may attempt to rely on the Rule's linguistic ambiguity to seek the dismissal of a 'frivolous' counterclaim.⁷⁸

1.3.2. The procedure and due process concerns

⁷² See *infra* Para. III.2.

⁷³ See Aurélia Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules', 21 ICSID Review – Foreign Investment Law Journal 427 (2006), at 441-2.

⁷⁴ See ICSID Arbitration Rule 41(6).

⁷⁵ *Trans-Global v. Jordan*, *supra* n. 5, para. 92.

⁷⁶ See Chester Brown & 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 (2011), at 256-7.

⁷⁷ *Global Trading v. Ukraine*, *supra* n. 5, para. 29.

⁷⁸ For the Rule to work, however, the counterclaim would have to be raised within the very short time-frame provided by Rule 41(5), i.e., 'no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal', which is not a very likely scenario. Further, even if this was the case, the possible dismissal of a counterclaim as 'manifestly without legal merit' would obviously not trigger the end of the proceedings and the issuance of an award, which is the natural effect of a successful use of the Rule, but would simply entail that the proceedings continue and the counterclaim is struck out by the tribunal. Thus, it would seem that in practice Rule 41(5) provides a tool available solely to the respondent, rather than to either party.

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.⁷⁹ 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. The Tribunal should decide upon the issue at the first session or promptly thereafter.⁸⁰ The practice of the four tribunals which dealt with the objection under Rule 41(5) shows that a decision on the expedited objection was reached *after* the first session rather than strictly *at* the first session. Thus, ‘promptly thereafter’ has been interpreted as to mean a time-span between four days and five months after the first session of the Tribunal.⁸¹

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 evidence which a party would otherwise wish to present under ordinary proceedings. But ‘how far can a tribunal go down the path of curtailing the process or the evidence’⁸² without infringing due process rights and thus committing a ‘serious departure from a fundamental rule of procedure’ (in the words of one of the grounds for annulment pursuant to Article 52 ICSID Convention)? The text of Rule 41(5) does not provide much guidance, except for the indication that the tribunal must ‘giv[e] the parties the opportunity to present their observations on the objection’. In the words of the *Global Trading* 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.’ The *Trans-Global* Tribunal 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 Article 41(5), with no opportunity to develop and present its case under the written and oral procedures prescribed by [the ICSID Arbitration Rules].⁸³

⁷⁹ Christoph Schreuer *et al.*, ‘The ICSID Convention: A Commentary’ (2nd edn., CUP, 2009), at 543.

⁸⁰ 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.

⁸¹ The *Trans-Global* Tribunal held its first session on 22 April 2008 (see *Trans-Global v. Jordan*, *supra* n. 5, para. 22) and rendered its decision on 12 May 2008 (20 days after). In *RSM* the Tribunal held its first session on 25 October 2010 (see *RSM Production v. Grenada*, *supra* n. 5, para. 1.3.6) and rendered its decision on 10 December 2010 (46 days after). In *Brandes* the Tribunal held its first session on 29 January 2009 (see *Brandes v. Venezuela*, *supra* n. 5, para. 6) and rendered its decision on 2 February 2009 (4 days after). In *Global Trading*, the Tribunal held its first session on 7 July 2010 (*Global Trading v. Ukraine*, *supra* n. 5, para. 22) and rendered its decision on 1 December 2010 (147 days after). For a detailed overview of the procedural timeframe in each of the four cases, see Aïssatou Diop, ‘Objection under Rule 41(5) of the ICSID Arbitration Rules’, 25 *ICSID Review – Foreign Investment Law Journal* 312 (2010), at 333.

⁸² Judith Gill, ‘Application for the Early Disposition of Claims in Arbitration Proceedings’, in A. J. van den Berg (ed.), ‘50 Years of the New York Convention: ICCA International Arbitration Conference’, ICCA Congress Series No. 14 (Kluwer Law International, 2009), pp. 513-525, at 520.

⁸³ *Trans-Global v. Jordan*, *supra* n. 5, para. 92.

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 ‘well-focussed oral argument’⁸⁴ was deemed indispensable by all four tribunals.⁸⁵ Oral submissions were heard at the first session and after one or two rounds of written arguments.⁸⁶ The Tribunal in *Global Trading* 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.⁸⁷

On the other hand, the taking of oral testimony would hardly fit into the strict timetable imposed by Rule 41(5). As the *Trans-Global* Tribunal noted,

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.⁸⁸

1.3.3. 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’.⁸⁹

A. The meaning of the word ‘manifestly’

The lack of legal merit must be ‘manifest’. As noted already by the first Tribunal to apply the Rule, the word ‘manifest’ is also used in certain provisions of the ICSID Convention⁹⁰ and it may be assumed that ‘the meaning of the new rule was intended

⁸⁴ *Global Trading v. Ukraine*, *supra* n. 5, para. 33.

⁸⁵ *Ibid.*, para. 33; *Trans-Global v. Jordan*, *supra* n. 5, paras 19-22; *Brandes v. Venezuela*, *supra* n. 5, para. 6; *RSM Production v. Grenada*, *supra* n. 5, para. 1.3.4.

⁸⁶ *Trans-Global v. Jordan*, *supra* n. 5, paras 19-22; *Brandes v. Venezuela*, *supra* n. 5, para. 6; *RSM Production v. Grenada*, *supra* n. 5, para. 1.3.6; *Global Trading v. Ukraine*, *supra* n. 5, para. 33. See also *Diop*, *supra* n. 81, at 333.

⁸⁷ *Global Trading v. Ukraine*, *supra* n. 5, para. 33 (emphasis in original).

⁸⁸ *Trans-Global v. Jordan*, *supra* n. 5, para. 91.

⁸⁹ *Ibid.*, para. 75.

⁹⁰ Those are the already mentioned Article 36(3) (providing that the Secretary-General will not register the request if ‘the dispute is manifestly outside the jurisdiction of the Centre’); Article 52(1)(b) (one of the grounds for annulment being that the ‘Tribunal has manifestly exceeded its powers’); Article 57 (disqualification of an arbitrator for ‘any fact indicating a manifest lack of the qualities’ required by the

to reflect the well-established meaning of these older provisions.⁹¹ The *Trans-Global* Tribunal observed, in what will likely become the standard quotation for the definition of ‘manifest’, 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.⁹²

The other three Tribunals cited this passage with approval.⁹³

B. ‘Legal’ as opposed to ‘factual’. The qualification of disputed facts and the ambiguous relationship with the *prima facie* test

In the initial proposal made by the ICSID Secretariat in the 2005 Working Paper, the new procedure was to concern claims which were ‘manifestly without merit’.⁹⁴ 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.⁹⁵ After reviewing the ICSID preparatory papers and other background documents, the *Trans-Global* Tribunal noted that ‘the adjective “legal” [...] is clearly used in contradistinction to “factual”’.⁹⁶ Nevertheless, it concluded that it is ‘rarely possible to assess the legal merits of any claim without also examining the factual premise upon which that claim is advanced’.⁹⁷

The most thorny question, and the one which tribunals have struggled to answer in an entirely coherent fashion, concerns the way in which a tribunal should, for the purpose of the exercise of Rule 41(5), qualify claimant’s factual allegations. The difficulty arises out of the Rule’s lack of guidance in this respect. While CAFTA-like investment treaties contain a provision to the effect that ‘the tribunal shall assume to be true claimant’s factual allegations’,⁹⁸ a similar provision is not to be found in Rule 41(5). It was thus inevitable that tribunals were faced with the issue as to what kind of

Convention). With regard to the use of the word manifest in one of these ICSID Convention provisions (Art. 52(1)(b)), the well-known commentary by 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. 79, at 938.

⁹¹ *Trans-Global v. Jordan*, *supra* n. 5, para. 83.

⁹² *Ibid.*, para. 88. The Tribunal later concluded that the test to be met by respondent’s objection must be one of ‘clarity, certainty and obviousness’ (*ibid.*, para. 105).

⁹³ See *Brandes v. Venezuela*, *supra* n. 5, para. 63; *Global Trading v. Ukraine*, *supra* n. 5, para. 35; *RSM Production v. Grenada*, *supra* n. 5, paras 4.2.1 and 6.1.1.

⁹⁴ ICSID Working Paper, *supra* n. 61, at 7.

⁹⁵ Antonietti, *supra* n. 73, at 440.

⁹⁶ *Trans-Global v. Jordan*, *supra* n. 5, para. 97.

⁹⁷ *Ibid.*

⁹⁸ See *infra* Para. III.2.

scrutiny, if any, they should subject claimant's factual allegations to. In arbitral practice existing to date under 41(5), the issue of the tribunal's qualification of the facts in the assessment of the lack of legal merit of a claim has been closely tied to the problem of the so-called '*prima facie* test at the jurisdictional phase', which has been widely used amongst investment tribunals.⁹⁹ It is necessary to briefly examine the salient features of the *prima facie* test, in order to understand which role this has to play in a tribunal's examination of the facts within the framework of 41(5).

The *prima facie* test has its origin in decisions of the Permanent Court of International Justice (PCIJ)¹⁰⁰ and the ICJ.¹⁰¹ Reference is often made to Judge Higgins' separate opinion in *Oil Platforms*.¹⁰² In this case, the Court had to decide whether the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the US afforded a basis of jurisdiction in respect of the claims advanced by Iran. In her Separate Opinion, Judge Higgins noted that:

⁹⁹ See Audley Sheppard, 'The Jurisdictional Threshold of a Prima-Facie Case', in P. Muchlinski, F. Ortino & C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (OUP, 2008), pp. 932-961.

¹⁰⁰ *Mavrommatis Palestine Concessions (Jurisdiction)*, (Greece v. United Kingdom), Ser A (No. 2) (PCIJ 1924), at 23, where the PCIJ for the first time considered the threshold to be applied when *ratione materiae* jurisdiction was contested. The PCIJ held that it had to determine 'whether the international obligations mentioned in Article II [of the Palestine Mandate] affect the merits of the case and whether any breach of them would involve a breach of the provisions of this Article.'

¹⁰¹ *Ambatielos (Greece v. United Kingdom) (Merits: Obligation to arbitrate)* [1953] ICJ Rep 10 (where the Court stated that its task was to determine whether 'the arguments advanced by the Hellenic Government in respect of the treaty provisions on which the Ambatielos claim is said to be based, are of a *sufficiently plausible character* to warrant a conclusion that the claim is based on the Treaty', *ibid.*, at 18, emphasis added); *Oil Platforms (Iran v. US) (Preliminary objections)* [1996] ICJ Rep 803, at 810.

¹⁰² *Oil Platforms (Iran v. US) (Preliminary objections)* [1996] ICJ Rep 847 (Sep. Op. Higgins). See, e.g., the following decisions, quoting with approval either the ICJ Judgment in *Oil Platforms* or Judge Higgins' separate opinion in the same case: *El Paso Energy International Co. v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, para. 42; *Pan American Energy LLC and BP Argentina Exploration Co v. Argentina*, and joined case, ICSID Case Nos. ARB/03/13 and ARB/04/8, Decision, Preliminary Objections, 27 July 2006, para. 44; *Canfor Corporation v. United States*, NAFTA/UNCITRAL, Decision on Preliminary Question, 6 June 2006, para. 168 et seq.; *Chevron Corp and Texaco Petroleum Corp. v. Ecuador*, UNCITRAL, Interim Award, 1 December 2008, para. 105 et seq.; *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006, para. 63; *Duke Energy Investments Peru No. 1, Limited v. Peru*, ICSID Case No. ARB/03/28, Annulment Proceedings, Decision of the *Ad Hoc* Committee, 1 March 2011, para. 119 et seq.; *Jan de Nul NV and Dredging International NV v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, para. 70; *Impregilo SpA v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 239 et seq.; *Methanex Corporation v. United States*, NAFTA/UNCITRAL, Partial award, 7 August 2002, para. 116 et seq.; *Noble Energy Inc. and MachalaPower Cia Ltd. v. Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, para. 151; *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, paras. 118-119; *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 85; *Salini Costruttori SpA and Italstrade SpA v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 15 November 2004, para. 139 et seq.; *SGS Société Générale de Surveillance SA v. Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction and Separate Declaration, 29 January 2004, paras. 26 and 157; Annulment Proceedings, Decision of the *Ad Hoc* Committee, 1 March 2011, para. 118; *Société Générale v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008 para. 54; *UPS v. Canada*, NAFTA/UNCITRAL, Award on Jurisdiction, 22 November 2002, para. 35.

The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes - that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them.¹⁰³

In investment treaty arbitrations, the object of the *prima facie* test is for the tribunal to evaluate, at the jurisdictional stage of the proceedings, whether the 'facts alleged may be capable, if proved, of constituting breaches of the BIT'.¹⁰⁴ In the words of the *Salini* tribunal, the utilization of the *prima facie* test strikes a balance between two opposing concerns:

to ensure that courts and tribunals are not flooded with claims which have no chance of success and sometimes are even of an abusive nature; but to ensure equally that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate.¹⁰⁵

The consequence of a failure for the claimant to meet the *prima facie* test is that the tribunal will decline jurisdiction over that particular claim. For example, in *Telenor v. Hungary* the tribunal, after reviewing the facts alleged by claimant and the governmental acts complained of, found that there was no evidence to suggest any activity on the part of the government that remotely approached the effect of expropriation.¹⁰⁶ Thus, the claimant had 'failed to make out a *prima facie* case of expropriation', and the tribunal had therefore 'no jurisdiction over claims for expropriation made under Article VI of the BIT'.¹⁰⁷ Despite a few notable other

¹⁰³ Oil Platforms (Sep. Op. Higgins), *supra* n. 102, at 856.

¹⁰⁴ Noble Energy v. Ecuador, *supra* n. 102, para. 153. For similar, though not identical, formulations of the *prima facie* test, see, e.g., Burlington Resources, Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 110; Canfor Corporation v. United States, *supra* n. 102, para. 117; Micula et al. v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, para. 66; Saipem v. Bangladesh, *supra* n. 102, para. 86; Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Paraguay, ICSID Case No. ARB/07/9, Decision on Objection to Jurisdiction, 29 May 2009, para. 112; Continental Casualty Company v. Argentina, *supra* n. 102, para. 63; Salini v. Jordan, *supra* n. 102, para. 151; Impregilo v. Pakistan, *supra* n. 102, para. 254; Pan American v. Argentina, and joined case, *supra* n. 102, para. 51; El Paso v. Argentina, *supra* n. 102, para. 45. The UPS tribunal, in observing the different nuances in the wording used by investment tribunals in this respect, noted that '[t]he reference to the facts alleged being "capable" of constituting a violation of the invoked obligations, as opposed to their "falling within" the provisions, may be of little or no consequence' (UPS v. Canada, *supra* n. 102, para. 36).

¹⁰⁵ Salini v. Jordan, *supra* n. 102, para. 151.

¹⁰⁶ Telenor Mobile Communications AS v. Hungary, ICSID Case No. ARB/04/15, Award, 22 June 2006, para. 79.

¹⁰⁷ *Ibid.*, para. 80.

examples,¹⁰⁸ case law shows that the instances where the application of the *prima facie* test has resulted in jurisdiction being declined are extremely rare.¹⁰⁹

The critical issue in the *prima facie* examination by tribunals is the treatment to be accorded to the claimant's own characterization of the alleged facts. Should – for the purpose of the *prima facie* test only - the facts alleged by claimant be taken as true, or should the tribunal conduct a more thorough scrutiny into the veracity of the facts, taking into consideration also the respondent's pleadings? A first and widely followed adopted approach has been, for the purpose of determining jurisdiction, to accept as true *pro tempore* the facts alleged by claimant.¹¹⁰ For easier classification purposes, we could label this first approach as the 'simple *prima facie* test'. The *Chevron* tribunal, for example, stated that:

As for the definition of the *prima facie* test, the Tribunal accepts that, in principle, it should be presumed that the Claimant's factual allegations are true.¹¹¹

However, a thorough examination of investment cases applying the *prima facie* test shows that the picture is more complex. Certain tribunals have adopted more nuanced positions and have refused to take plainly the facts alleged by claimant as true, without further examination, warning that 'labelling is not enough'¹¹² or that 'a mere allegation of breach is not enough'.¹¹³ Thus, according to a second line of cases, adopting what we could define a 'medium *prima facie* test', claimant's characterization of facts has been accepted as *pro tempore* controlling, *unless*, however, they are 'frivolous or abusive',¹¹⁴ 'incredible, frivolous or vexatious',¹¹⁵ 'improbable, frivolous or reckless',¹¹⁶ 'plainly without any foundation',¹¹⁷ or 'entirely baseless at first sight'.¹¹⁸ The last two formulations closely resemble the 'manifestly without legal merit' language contained in ICSID Rule 41(5). Finally, according to a third line of cases, which could be said to apply a 'high *prima facie* test', a tribunal may conduct a further examination beyond the claimant's own characterization,

¹⁰⁸ See, e.g., *Bureau Veritas v. Paraguay*, *supra* n. 104, para. 117; *Impregilo v. Pakistan*, *supra* n. 102, paras. 268-269; *Salini v. Jordan*, *supra* n. 102, para. 163.

¹⁰⁹ Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), at 276.

¹¹⁰ See, e.g., *Canfor Corporation v. United States*, *supra* n. 102, para. 171; *Mytilineos Holdings SA v. Serbia and Montenegro and Serbia*, UNCITRAL, Partial Award on Jurisdiction and Dissenting Opinion, 8 September 2006, para. 187; *Telenor v. Hungary*, *supra* n. 106, para. 21; *SGS v. Pakistan*, *supra* n. 102, para. 145.

¹¹¹ *Chevron v. Ecuador*, *supra* n. 102, para. 105.

¹¹² *Pan American v. Argentina*, and joined case, *supra* n. 102, para. 50.

¹¹³ *Noble Energy v. Ecuador*, *supra* n. 102, para. 151.

¹¹⁴ *El Paso v. Argentina*, *supra* n. 102, para. 45.

¹¹⁵ *Methanex Corporation v. United States*, *supra* n. 102, para. 112.

¹¹⁶ *Murphy Exploration and Production Company International v. Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction and Dissenting Opinion, 15 December 2010, para. 10.

¹¹⁷ *Duke v. Peru*, *supra* n. 102, para. 118.

¹¹⁸ *Société Générale v. Dominican Republic*, *supra* n. 102, para. 61.

especially if the parties have completely opposing views on the facts.¹¹⁹ In those instances, the tribunal could – or rather should – look at contrary evidence supplied by the respondent,¹²⁰ so as to put claimant’s contentions ‘in a broader perspective’.¹²¹

Three out of the four tribunals utilizing the new 41(5) expedited procedure were confronted with the discussion about the possible applicability of the *prima facie* test within the particular context of 41(5).¹²²

In *Trans-Global*, the respondent proposed that the Tribunal adopt a two-fold approach: (i) to accept the facts alleged by claimant insofar they were of ‘sufficiently plausible character’, and then (ii) to determine whether such alleged facts were capable of constituting a violation of the BIT.¹²³ The Tribunal refused to adopt this approach proposed by respondent, which resembles the ‘high *prima facie* test’ described above. The Tribunal stated:

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.¹²⁴

Thus, while the Tribunal stressed that it was working ‘within the particular concept required by Article 41(5) with its own terminology’¹²⁵ and that it was not helped by the *prima facie* investment case law following *Oil Platforms*,¹²⁶ it ultimately adopted a test which would very much approximate to the ‘medium *prima facie* test’ seen above.

The *RSM v. Grenada* Tribunal professed its agreement with the *Trans-Global* approach, by citing to the decision’s paragraph adopting the ‘medium *prima facie* test’ described above.¹²⁷ However, the Tribunal added that in construing a Rule 41(5) objection

¹¹⁹ PSEG Global Inc. et al. v. Turkey, ICSID Case No ARB/02/5, Decision on Jurisdiction, 4 June 2004, para. 64.

¹²⁰ See *Continental Casualty Company v. Argentina*, *supra* n. 102, para. 61; *Total SA v. Argentina*, ICSID Case No ARB/04/01, Decision on Objections to Jurisdiction, 25 August 2004, para. 53.

¹²¹ *Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction, 30 July 2004, para. 30. See also *Douglas*, *supra* n. 109, at 274.

¹²² The issue has not arisen in *Global Trading*, because in that case the facts were not disputed by respondent, and thus could easily be assumed to be true by the Tribunal. See *Global Trading v. Ukraine*, *supra* n. 5, para. 36.

¹²³ *Trans-Global v. Jordan*, *supra* n. 5, para. 81.

¹²⁴ *Ibid.*, para. 105.

¹²⁵ *Ibid.*, para. 104.

¹²⁶ *Ibid.*, para. 103.

¹²⁷ *RSM Production v. Grenada*, *supra* n. 5, para. 6.1.2. But see *ibid.*, fn. 33, where the Tribunal correctly hinted at the ‘slight difference’ between the *Trans-Global* Tribunal’s conclusion as to the qualification of disputed facts and the Claimants’ view as to this issue, which is tantamount to

[...] 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.

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 claimant before the filing by 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.¹²⁸

The stance taken by the *Brandes* tribunal to this issue is not entirely clear. First the Tribunal appeared to endorse 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'.¹²⁹ Subsequently, however, 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.¹³⁰

What is clear from the discussion that followed is that the Tribunal introduced a threshold of 'plausibility' which has to be met by claimant in the allegation of the relevant facts.¹³¹ 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.¹³²

In conclusion, despite the claims of general agreement between all tribunals, one may note a difference between the standards used. Requiring that the facts be '*prima facie* plausible' (*Brandes*) rather than assuming them to be true, unless 'manifestly incredible, frivolous, vexatious or inaccurate or made in bad faith' (*Trans-Global*,

recognising that the former adopted a 'medium *prima facie* test' (as submitted *supra* in the text) while the latter were advocating a 'simple *prima facie* test'.

¹²⁸ See the requirements pursuant to Art. 36(2) ICSID Convention and Rule 2 Institution Rules. On this, see the discussion in *Trans-Global v. Jordan*, *supra* n. 5, paras 98-102.

¹²⁹ *Brandes v. Venezuela*, *supra* n. 5, para. 61.

¹³⁰ *Ibid.*, para. 62.

¹³¹ *Ibid.*, 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'.

¹³² *Ibid.*, para. 73.

followed by *RSM*) may entail a higher threshold to be met for the claimant. The latter approach would seem to be the more convincing one, given that the very nature of a summary procedure appears less suited to an in-depth scrutiny as to the plausibility of the facts. One could thus conclude that, in line with respondent's burden to prove that a claim is manifestly without legal merit,¹³³ a correct standard of review would be one that adopts a 'reversed medium *prima facie* test'. That is, a claim will be considered as manifestly without legal merit if the facts - as alleged by claimant and taken as true by the tribunal, provided they are not patently frivolous or absurd – are manifestly incapable of constituting a breach of the invoked treaty.

1.4. Future directions: in which instances may Rule 41(5) be used?

An objection pursuant to Rule 41(5) may go to both jurisdiction and merits. The argument made by claimant in *Brandes* that such objection could only concern the merits was not shared by the Arbitral Tribunal. The arbitrators explained that if the Rule's intent was 'not to burden the parties with a possibly long and costly proceeding' there was no reason why the scope should not encompass jurisdictional flaws in a claimant's case.¹³⁴ This interpretation of the scope of Rule 41(5) has been shared both by the *Global Trading*¹³⁵ and the *RSM*¹³⁶ Tribunals.¹³⁷ One may wonder if, as a result of this interpretation, the initial jurisdictional check performed by the Secretary-General pursuant to Article 36(3) ICSID Convention will undergo any change as a matter of practice. One could imagine that perhaps the scrutiny may become less strict in future, given that an objection that a claim manifestly lacks in jurisdiction is now open to a judicial examination pursuant to Rule 41(5) (as well as, in addition, to the ordinary procedure pursuant to 41(1)).

Examples where a 41(5) objection may be successfully raised in future include, in addition to the ones seen in the arbitrations held so far, scenarios of inapplicability of the treaty *ratione temporis*,¹³⁸ or issues of manifest lack of attribution of an allegedly wrongful act to the respondent (an issue typically to be decided at the merits phase,¹³⁹ but which may lend itself well to a 41(5)-type of examination).

¹³³ *Brandes v. Venezuela*, *supra* n. 5, para. 69.

¹³⁴ *Ibid.*, para. 52.

¹³⁵ *Global Trading v. Ukraine*, *supra* n. 5, para. 30.

¹³⁶ *RSM Production v. Grenada*, *supra* n. 5, para. 6.1.1.

¹³⁷ But see, for a different view, Carolyn B. Lamm, Hansel T. Pham & Chiara Giorgetti, 'Interim Measures and Dismissal under the 2006 ICSID Rules', in C. Rogers & R. Alford (eds.), *The Future of Investment Arbitration* (OUP, 2009), pp. 89-106, at 101.

¹³⁸ See Antonietti, *supra* n. 73, at 439.

¹³⁹ See *Jan de Nul NV v. Egypt*, *supra* n. 102, para. 85 (where the Tribunal noted that 'it is not for the Tribunal at the jurisdictional stage to examine whether the case is in effect brought against the State and involves the latter's responsibility. An exception is made in the event that if it is manifest that the entity involved has no link whatsoever with the State'). See also *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 145 (citing to *Jan de Nul*'s passage with approval: 'This approach – to deal with the question of attribution as a merits question – is particularly appropriate, in the Tribunal's view, in this case. The Tribunal is not faced here with a situation where it is readily evident that the State is not involved at all, or where the issue is capable of an answer based upon a limited enquiry (akin to other jurisdictional issues)').

2. Frivolous claims under recent US investment treaties and CAFTA

The 2004 US Model BIT provides a particular procedure to address preliminary objections by respondents.¹⁴⁰ This provision has been incorporated in recent BITs as well as in the investment chapters of bilateral and multilateral Free Trade Agreements (FTAs) concluded by the US, including CAFTA.¹⁴¹ CAFTA provides so far the only example where such procedure has been tested,¹⁴² and thus reference will be made to the numbering of CAFTA's articles. Under the quite elaborate provision of Article 10.20.4 CAFTA, an arbitral tribunal may be called to decide, 'as a preliminary question', an 'objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made'.¹⁴³ In addition to certain more procedural features (such as that the objection must be filed 'as soon as possible after the tribunal is constituted'),¹⁴⁴ the new rule designs the following framework:

- Upon receipt of such an objection, the arbitral tribunal shall suspend proceedings on the merits;¹⁴⁵
- In deciding the objection, the tribunal 'shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration',¹⁴⁶
- The tribunal 'may also consider any relevant facts not in dispute',¹⁴⁷
- By raising an objection of this kind, the respondent 'does not waive any objection as to competence or any argument on the merits'.¹⁴⁸

The procedure for filing an objection that 'as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made' is coupled with the provision of a special expedited procedure, set forth in the subsequent paragraph. Under Article 10.20.5 CAFTA (and similar provisions in BITs or FTAs entered into by the US, all reflecting Art. 28.5 US Model BIT), the respondent may request that an objection under the previous paragraph be decided 'on an expedited basis'.¹⁴⁹ Rather

¹⁴⁰ US Model BIT (2004), Arts. 28.4 and 28.5, reprinted in Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (OUP, 2008), at 385.

¹⁴¹ See Arts. 10.20.4 and 10.20.5 of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA), 5 August 2004, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republiccentral-america-fta/final-text>; US-Uruguay BIT (2004), Arts. 28.4 and 28.5; US-Rwanda BIT (2008, not yet entered into force), Arts. 28.4 and 28.5; US-Singapore FTA (2003), Arts. 15.19.4 and 15.19.5; US-Chile FTA (2003), Arts. 10.19.4 and 10.19.5; US-Morocco FTA (2004), Arts. 10.19.4 and 10.19.5; US-Oman FTA (2006), Arts. 10.19.4 and 10.19.5; US-Peru TPA (2006), Arts. 10.20.4 and 10.20.5; US-Panama TPA (2007, not yet entered into force), Arts. 10.20.4 and 10.20.5.

¹⁴² See *Pac Rim v. El Salvador*, *supra* n. 6, discussed *infra*.

¹⁴³ Art. 10.24 CAFTA.

¹⁴⁴ Art. 10.24(a) CAFTA.

¹⁴⁵ Art. 10.24(b) CAFTA.

¹⁴⁶ Art. 10.24(c) CAFTA.

¹⁴⁷ Art. 10.24(c) CAFTA.

¹⁴⁸ Art. 10.24(d) CAFTA.

¹⁴⁹ The expedited procedure under Art. 10.24.5 may be used also for objections 'that the dispute is not within the tribunal's competence'.

tight time-limits (including for the arbitral tribunal to issue the award) are provided so as to ensure the effectiveness of such expedited procedure.

This novel procedure incorporated in US investment agreements reflects specific negotiating objectives set forth by the US Congress in the ‘Bipartisan Trade Promotion Act’ of 2002,¹⁵⁰ and has their origin in the United States’ experience with NAFTA Chapter Eleven arbitration.¹⁵¹ It precisely provides one of the instances where the parties ‘have agreed to another expedited procedure for making preliminary objections’ in alternative to ICSID Arbitration Rule 41(5), which is thus rendered inapplicable by recourse to the *lex specialis*.¹⁵²

The CAFTA case of *Pac Rim v. El Salvador* was the first one where the respondent raised an objection under Article 10.20.4 that the investor’s claim was not, as a matter of law, ‘a claim for which an award ... may be made’.¹⁵³ The award rendered on 2 August 2010 by the arbitral tribunal provides a commendable analysis of many of the issues raised by CAFTA’s provision, and will thus likely serve as an important reference for future tribunals called to apply the same rule.

At the heart of the parties’ pleadings and of the tribunal’s discussion was the standard of review to be applied by the arbitrators in their decision as to whether or not the claim should be dismissed because ‘as a matter of law’ it was ‘not a claim for which an award in favor of the claimant may be made’. The claimant attempted to draw analogies with Rule 41(5), and argued that the applicable standard was one of ‘legal impossibility of the claim’, i.e. that, in order to meet the requirements set forth in the CAFTA provision, the claim ‘must be so palpably without merit that, as a matter of law, the claim could not possibly be the basis on which an award may be made [...]’.¹⁵⁴ The tribunal rejected possible comparisons with ICSID Arbitration Rule 41(5) (‘which [has] different wording and [does] not share exactly the same

¹⁵⁰ See Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, 116 Stat. 993, 19 U.S.C. Sec. 3802 (urging ‘to improve mechanisms used to resolve disputes between an investor and a government through (i) mechanisms to eliminate frivolous claims and to deter the filing of frivolous claims [...]’). See also the Message from the President of the United States Transmitting Legislation and Supporting Documents to Implement the Dominican Republic-Central America-United States Free Trade Agreement, 24 June 2005, at 1085 (noting that ‘Chapter [Ten] includes provisions similar to those used in U.S. courts to dispose quickly of frivolous claims’).

¹⁵¹ Andrea Menaker, ‘Benefitting from Experience: Development in the United States’ Most Recent Investment Agreements’, 12 U.C. Davis J. Int’l L. & Pol’y 121 (2005), at 122, 127-128. In *Methanex v. USA*, the United States made a motion challenging ‘admissibility’ with respect to ‘lack of legal merit’ of the claimant’s substantive claims under NAFTA. In particular, the US had submitted that ‘taking all of the allegations of fact made to be true, including uncontested facts, [...] as a matter of law, there can be no claim, and that the claim is ripe for dismissal at this stage for that reason’. See *Methanex Corporation v. USA*, *supra* n. 102, para. 109. The Tribunal found that it had no power, under either the UNCITRAL Rules or NAFTA, to dismiss this kind of objection (*ibid.*, paras 122-126).

¹⁵² See *supra* Para. III.1.3.1. The tribunal in *Pac Rim v. El Salvador*, while not expressly ruling on the inapplicability of Rule 41(5), plainly applied the CAFTA rule, on the premise that respondent’s submissions as to the application of CAFTA Arts. 10.20.4 and 10.20.5 to the arbitration proceedings ‘were not materially disputed by the Claimant’. See *Pac Rim v. El Salvador*, *supra* n. 6, para. 85.

¹⁵³ In two other CAFTA arbitrations (*Railroad Development v. Guatemala* and *Commerce Group v. El Salvador*), respondent raised preliminary objections that the dispute was not ‘within the tribunal’s competence’ under Art. 10.20.25 of the CAFTA (and not that the claim was not, as a matter of law, ‘a claim for which an award... may be made’).

¹⁵⁴ *Pac Rim v. El Salvador*, Claimant’s Response to Respondent’s Preliminary Objections, 26 February 2010, para. 1.

object and purpose’),¹⁵⁵ and noted that it did not consider that the standard of review under Article 10.20.4 was limited to either ‘frivolous’ or ‘legally impossible’ claims – words which are ‘significantly absent’ from CAFTA’s provision.¹⁵⁶ In view of the negative language in Article 10.20.4 (‘not a claim for which an award may be made’), the tribunal concluded that

to grant a preliminary objection, a tribunal must have reached a position, both as to all relevant questions of law and all relevant alleged or undisputed facts, that an award should be made finally dismissing the claimant’s claim at the very outset of the arbitration proceedings, without more. Depending on the particular circumstances of each case, there are many reasons why a tribunal might reasonably decide not to exercise such a power against a claimant, even where it considered that such a claim appeared likely (but not certain) to fail if assessed only at the time of the preliminary objection.¹⁵⁷

The threshold is thus put quite high: the claim must be deemed at the outset of the arbitration proceedings ‘certain’ - and not simply ‘likely’ - to fail.

Secondly, the tribunal analyzed Art. 10.20.4(c), which on the one hand provides that in its decision the tribunal ‘shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration [...]’, and on the other hand sets forth that it ‘may also consider any relevant facts not in dispute’. The rule is not entirely clear as to those two specifications. In particular it leaves open the question as to how those undisputed facts ought to be brought to the attention of the tribunal and whether, for the purpose of the procedure under Article 10.20.4, a respondent may be allowed to submit evidence to rebut the factual allegations contained in the notice of arbitration. On the first part of the provision (*factual allegations shall be assumed to be true*), the tribunal observed that only the notice of arbitration (or the amendment thereof) benefits from such a presumption of truthfulness, to the exclusion of other factual allegations made elsewhere by claimant.¹⁵⁸ The tribunal also made a distinction between ‘factual’ and ‘legal allegations’. Echoing (without however citing)¹⁵⁹ *Trans-Global* where the tribunal had held that it need not ‘accept a legal submission dressed up as a factual allegation’,¹⁶⁰ the *Pac Rim* tribunal concluded that ‘factual allegations’ (the only ones to benefit from the seen presumption of truthfulness) could not ‘include a legal allegation clothed as a factual allegation’.¹⁶¹ As to the second part of the provision (*the tribunal may also consider any relevant facts not in dispute*), the tribunal highlighted the purely discretionary power for the

¹⁵⁵ *Pac Rim v. El Salvador*, *supra* n. 6, para. 118.

¹⁵⁶ *Ibid.*, para. 108. But see the wording of Art. 10.20.6 CAFTA, discussed *infra*.

¹⁵⁷ *Pac Rim v. El Salvador*, *supra* n. 6, para. 110.

¹⁵⁸ *Ibid.*, para. 90. But it would seem that an arbitral tribunal may be able to disregard those claimant’s factual allegations which are ‘fanciful’ and ‘unreasonable’. See *ibid.*, para. 79.

¹⁵⁹ See also *ibid.*, para. 118 (where the Tribunal stated that it ‘has placed no reliance in this decision on the Decision of 12 May 2008 in *Trans-Global v. Jordan* and the Decision of 2 February 2009 in *Brandes v. Venezuela*’).

¹⁶⁰ *Trans-Global v. Jordan*, *supra* n. 5, para. 105.

¹⁶¹ *Pac Rim v. El Salvador*, *supra* n. 6, para. 91.

tribunal to do so (as opposed to the obligation for the tribunal to assume claimant's factual allegations as true),¹⁶² and opined that respondent may not be allowed to submit evidence with a view to contradict the assumed facts alleged in the notice of arbitration:

The procedure under CAFTA Article 10.20.4 is clearly intended to avoid the time and cost of a trial and not to replicate it. To that end, there can be no evidence from the respondent contradicting the assumed facts alleged in the notice of arbitration; and it should not ordinarily be necessary to address at length complex issues of law, still less legal issues dependent on complex questions of fact or mixed questions of law and fact.¹⁶³

Finally, the tribunal addressed the issue of the relationship between the special procedure under Articles 10.20.4 and 10.20.5 and the possible objections to jurisdiction or arguments on the merits which the respondent may raise further in the proceedings.¹⁶⁴ In this regard, the procedure described above could in fact be seen as a sort of 'pre-preliminary' phase available to respondents. The *Pac Rim* Tribunal appeared to warn against an improper use of such procedure, which may in fact add an additional layer of cost and time to an arbitration proceeding.¹⁶⁵

In its Decision, the Tribunal found that the standard for dismissing a claim under CAFTA Articles 10.20.4 and 10.20.5 had not been met by respondent, and thus rejected El Salvador's objections.¹⁶⁶ In order not to be seen to prejudice the parties' respective cases in the subsequent phase of the proceedings, the Tribunal decided to 'state the grounds for its decision as succinctly as possible'.¹⁶⁷

3. Frivolous Claims in Investor-State Arbitrations Conducted Under Non-ICSID Rules

ICSID is not the only forum where investor-state claims are filed. According to a recent report published by UNCTAD, of a total of 390 known investor-state arbitrations, 'the majority of cases accru[ed] under ICSID (in total now 245 cases) and

¹⁶² *Ibid.*, para. 101.

¹⁶³ *Ibid.*, para. 112.

¹⁶⁴ See in particular Art. 10.20.4(d) CAFTA.

¹⁶⁵ *Pac Rim v. El Salvador*, *supra* n. 6, para. 113 (noting that 'it may be correct, as the Claimant submitted, that the non-waiver provision in Article 10.20.4(d) as to competence may allow a further intermediate stage under the ICSID Arbitration Rules before the claimant can reach the merits, thereby leading a respondent to have, in the Claimant's words, "more than one bite at the cherry." If this approach were correct (albeit recently doubted by another CAFTA tribunal), there would therefore be a further reason not to make the procedure under Articles 10.20.4 and 10.20.5 even more onerous for the disputing parties than it may be already'). A possible safeguard against an abuse of preliminary objections under Article 10.20, paragraphs 4 and 5, may be found in the provision on costs contained in Article 10.20.6, on which see *infra* Para. III.4.

¹⁶⁶ *Pac Rim v. El Salvador*, *supra* n. 6, paras 244-258.

¹⁶⁷ *Ibid.*, para. 244.

UNCITRAL (109). Other venues [were] used only marginally [...]'.¹⁶⁸ Thus, besides the ICSID Rules, the other most significant set of rules that apply in investment arbitration are the UNCITRAL Arbitration Rules.¹⁶⁹ In relation to frivolous claims, the question therefore arises whether a respondent in an investor-state arbitration commenced pursuant to such rules may be entitled to raise an objection that the claimant's claim is manifestly without legal merit, in order to have it promptly dismissed by the arbitral tribunal.

Neither the 1976 version, nor the recently amended 2010 version of the UNCITRAL Rules¹⁷⁰ contain any explicit rule equivalent to 41(5) ICSID. The Iran-US Claims Tribunal, working under a slightly modified version of the 1976 Rules, was confronted a number of times with patently unmeritorious claims,¹⁷¹ but lacked a specific procedure to dismiss at an early stage such frivolous claims. In *M & M Productions, Inc. v. Iran*, the Tribunal dismissed the claim, because 'the pleadings and evidence [...] fail[ed] to establish to the Tribunal's satisfaction any substantive basis for Claimant's claim against Respondent', and awarded to Iran the costs of the proceedings.¹⁷² Judge Kashani, while agreeing with the outcome of the case and the allocation of costs 'because of the frivolousness of the claim', observed, in a note appended to the award, that 'from the start of its business [...] this Tribunal should have adopted a mechanism sorting out such frivolous and baseless claims and dealt with them in a manner not disabling the Islamic Republic to defend against the serious claims fully and properly [...]'.¹⁷³

As already noted, also the 2010 revised UNCITRAL Rules lack an explicit provision allowing the arbitral tribunal to weed out patently unmeritorious claims. Lack of explicit authority may create a concern in the arbitrators that their award dismissing a frivolous claim on an expedited basis may be annulled (or refused enforcement) on the basis of allegations that due process has been violated or that the arbitral procedure was not in accordance with the parties' agreement.¹⁷⁴ However, it is

¹⁶⁸ See UNCTAD, 'Latest Developments', *op. cit. supra* n. 3, at 2.

¹⁶⁹ On the UNCITRAL Rules, see David Caron, Lee Caplan & Matti Pellonpää, *The UNCITRAL Arbitration Rules, A Commentary* (OUP 2006).

¹⁷⁰ Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17), chap. III.

¹⁷¹ See, e.g., *Karim-Panahi v. United States*, 28 Iran-US CTR 225 (1992), at 228, where the claim was eventually dismissed because '[a]part from generalized allegations of the United States involvement, the Claimant's statements remain so vague and devoid of any supporting evidence as to fail to state a cognizable claim or cause of action.' It took ten years from the filing of the Statement of Claim by the claimant until the Tribunal's award was issued. In *Cyprus Petroleum Ltd. v. Iran*, 11 Iran-US CTR 70 (1986), at 71, the claim was dismissed because the 'pleadings fail[ed] to establish to the Tribunal's satisfaction any basis for the claim'. In this case, four years passed from the filing of the Statement of Claim until the Tribunal's award.

¹⁷² *M & M Productions, Inc. v. Iran*, 6 Iran-US CTR 125 (1984), at 127-129.

¹⁷³ *Ibid.*, at 129.

¹⁷⁴ According to Gary Born & Kenneth Beale, 'Party Autonomy and Default Rules: Reframing the Debate over Summary Disposition in International Arbitration', 21 ICC International Court of Arbitration Bulletin 19 (2010), at 21, 'three factors often make arbitrators reluctant to grant requests for the summary disposition of claims: (1) the absence of provisions in most leading institutional arbitration rules expressly authorizing tribunals to utilize such procedures; (2) concerns about due process and the enforceability of awards summarily disposing of a party's claims; and (3) cultural prejudices against summary disposition procedures.' See also Gill, *supra* n. 82, at 520 (noting that 'a

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submitted that the new formulation of Article 17 (Article 15 in the old Rules) provides sufficient authority for a tribunal to deal with a claim which is manifestly without legal merit on an expedited basis. Article 17 of the new UNCITRAL Rules reads, in its first paragraph:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. *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.* (emphasis added)¹⁷⁵

Thus, in addition to the usual residual powers of the arbitral tribunal (Article 17(1) first sentence), the second sentence of Article 17(1) prompts the tribunal to conduct the proceedings in an efficient way so as to save time and costs.¹⁷⁶ When requested by a party to deal with a manifestly unmeritorious claim on an expedited basis, this provision will provide leverage to the tribunal's discretion to 'tailor its proceedings as necessary to deal with a manifestly unmeritorious claim'¹⁷⁷ and should thus wipe out arbitrators' possible concerns about the validity and enforceability of the award.

4. Frivolous claims and allocation of costs

A final issue to be considered is the question of the allocation of costs of the arbitration in the case a tribunal is satisfied that a claim was frivolous.

In ICSID arbitrations, tribunals enjoy general discretion as to the allocation of costs between the parties.¹⁷⁸ Prevailing practice under investor-state arbitrations has been for tribunals to order each party to bear its own costs irrespective of the outcome of the case (so-called 'pay-your-own-way' approach).¹⁷⁹ However, tribunals have on a

successful party would feel understandably aggrieved if the result of a tribunal taking a bold stance on early disposition of issues was to bring into question the validity of the award').

¹⁷⁵ For background information on the revision of this provision, see in particular the following UNCITRAL Working Group II documents: U.N. Doc. A/CN.9/614, para. 76; A/CN.9/WG.II/WP.143, para. 62; A/CN.9/619, para. 114; A/CN.9/WG.II/WP.145/Add.1, para. 3.

¹⁷⁶ Similar provisions may also be found in certain other arbitral rules, which may possibly be used for investor-state arbitrations. See, e.g., the London Court of International Arbitration (LCIA) Rules, Art. 14(1) ('The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with the Arbitral Tribunal's general duties at all times: [...] (ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute').

¹⁷⁷ Jan Paulsson & Georgios Petrochilos, 'Revision of the UNCITRAL Arbitration Rules', Report available at http://www.uncitral.org/pdf/english/news/arbrules_report.pdf, at 65, fn. 130.

¹⁷⁸ 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 the issue of costs in investment arbitration, see in particular Susan Franck, 'Rationalizing Costs in Investment Treaty Arbitration', 88 Wash. U. L. Rev. 769 (2011).

¹⁷⁹ See Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration* (OUP, 2007), at 346-348.

number of occasions allocated costs in favour of the winning party (so-called ‘costs-follow-the-event’ rule), especially if the claim was found to be manifestly lacking in merit, to be legally untenable or disclosing abuse of misconduct, fraudulent activity or abuse of process by the losing party.¹⁸⁰

The ICSID rules do not contain any provision as to how costs should be allocated within the specific context of 41(5) proceedings. In *Trans-Global*, the Tribunal was of the opinion 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’.¹⁸¹ The Tribunal recalled its discretionary powers in 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.¹⁸² The *Brandes* Tribunal did not discuss the issue and, given the fact that the proceedings continued, it reserved its decision on costs to a later stage.¹⁸³ In *RSM Production*, the dismissal of the claimant’s claim for manifest lack of merit prompted the tribunal to allocate the costs entirely in favour of respondent.¹⁸⁴ Finally, the *Global Trading* Tribunal took a different approach from *Trans-Global* and *RSM*. Despite dismissing claimant’s claim for manifest lack of merit, the Tribunal decided to follow the ‘pay-your-own-way’ approach:

¹⁸⁰ See Lucy Reed, Jan Paulsson & Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International, 2nd ed., 2010), at 155-6. For case law see, e.g., *CDC Group PLC v. Seychelles*, ICSID Case No. ARB/02/14, Annulment Decision, 29 June 2005 (where the Ad Hoc Committee awarded costs in favour of claimant, finding that the respondent’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’, *ibid.*, para. 89); *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (where the Tribunal awarded costs in favour of 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’, *ibid.*, para. 154); *Europe Cement v. Turkey*, *supra* n. 62 (where the Tribunal made an award of costs in favour of 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’, *ibid.*, para. 185). *A contrario*, see *Aes Summit Generation Limited and Aes-Tisza Erömu Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 (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’, *ibid.*, para. 15.3.3). 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.

¹⁸¹ *Trans-Global v. Jordan*, *supra* n. 5, para. 122.

¹⁸² *Ibid.*, para. 123.

¹⁸³ *Brandes v. Venezuela*, *supra* n. 5, para. 73.

¹⁸⁴ *RSM Production v. Grenada*, *supra* n. 5, para. 8.3.4 (where the Tribunal concluded that ‘[h]aving regard to its’ (*sic*) conclusions that Claimants present 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’).

[...] 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.¹⁸⁵

In light of this non-unanimous approach, it remains to be seen how future tribunals will deal with the issue of costs in the framework of 41(5) proceedings.

Unlike in the 41(5) ICSID context, a rule on costs is provided within the framework of the expedited procedure of CAFTA. Article 10.20.6. CAFTA reads:

When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

Thus, the tribunal's authority to award reasonable costs and attorney's fees to the prevailing party is here spelled out explicitly. Interestingly, the rule makes expressly reference to the concept of 'frivolous', with regard to either the claimant's claim or the respondent's objection under paragraphs 4 and 5. The deterrent factor associated with the possible award on costs may thus come into play for both the filing of frivolous claims and for an abuse of the procedure by respondents. It is noteworthy that the notion of 'frivolity' is introduced solely in this paragraph - in relation to costs - whereas it is absent when the general requirements for dismissing a claim under the seen preliminary procedure are set out. In applying Article 10.20.6 CAFTA, the *Pac Rim* Tribunal, while dismissing respondent's objection, did not find that such objection could qualify as 'frivolous', and therefore made no order as to costs.¹⁸⁶

It is still to be seen how future tribunals will apply the power that Article 10.20.6 grants them. It would seem that a rule such as the one provided in CAFTA would further strengthen attempts to discourage the filing of frivolous claims in investment arbitration, and is thus a welcome step in treaty-making towards more efficient, rapid and cost-saving procedures.

IV. Conclusions

This study has attempted to analyse tools available to international courts and tribunals for the dismissal of patently unmeritorious claims on a summary basis. The latest in time of dispute settlement mechanisms to benefit from such a procedure has been ICSID arbitration, to which the main part of our analysis has been devoted. Objections pursuant to the new ICSID Rule 41(5) have been raised in four occasions so far, giving four different tribunals the opportunity to clarify some of the difficulties which may arise in the application of the rule. The examination of arbitral practice to

¹⁸⁵ *Global Trading v. Ukraine*, *supra* n. 5, para. 59.

¹⁸⁶ *Pac Rim v. El Salvador*, *supra* n. 6, paras 259-265.

date has shown that the four ICSID adjudicators have ruled on a number of issues in a consistent way, whereas in certain areas certain discrepancies remain (notably, on the issue of the qualification of the facts alleged by claimant and on the allocation of costs). It has been seen that the Rule leaves unfettered the party's right to file 'ordinary' preliminary objections in case a tribunal rejects a 41(5) objection, a feature which is common, *mutatis mutandis*, to the procedure under UNCLOS and to the CAFTA rule.¹⁸⁷ The ensuing risk is that a possible abuse of the summary procedure by respondents would simply add an additional layer to already costly and lengthy proceedings.¹⁸⁸ However, of a total of 146 cases registered at ICSID since the entry into force of the Rule,¹⁸⁹ four cases represent quite a small number (less than 3 per cent), and this would show that so far there has been no misuse of the procedure. The drafters' hope that the employment of the Rule should be 'exceptional' has thus not been upset so far.¹⁹⁰ Rule 41 (5) will allow states to commit time and resources only to the opposition of serious claims, while they will be dispensed with having to defend claims that do not deserve to be litigated. At the same time, the fair balance between the procedural positions of the state and the investor will be maintained. Because the threshold for proving a manifest lack of legal claim has been put relatively high by tribunals, investors will not face the risk that their claims be dismissed too easily as frivolous. Thus, a wise use of Rule 41(5) will certainly contribute to the strengthening of the overall efficiency of ICSID arbitration, while maintaining investors and host states on an equal footing in the arbitral process.

¹⁸⁷ See *supra* Para. II. 3 and Para. III. 2.

¹⁸⁸ See Schreuer *et al.*, *supra* n. 79, at 544. See also *Pac Rim v. El Salvador*, *supra* n. 6, para. 113.

¹⁸⁹ See the ICSID Statistics, *supra* n. 3, at 7, as well as the registration dates of all cases available at <http://icsid.worldbank.org>.

¹⁹⁰ See Antonietti, *supra* note 73, at 440.