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Recent ICSID Decision Confirms High Standard For Preliminary Objections To Claims That Are "Manifestly Without Legal Merit"

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In 2006, the ICSID Arbitration Rules were amended to allow a party to make a preliminary objection to claims that are "manifestly without legal merit." The procedure for this objection is embodied in Rule 41(5).

An ICSID Tribunal composed of Dr. Briner (President), Professor Stern and Professor Böckstiegel, in *Brandes Investment Partners, LP v. Venezuela* recently rejected the second-ever preliminary objection made under Rule 41(5). Previously, in *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*, a tribunal composed of Mr. Veeder (President), Professor Crawford and Professor McRae denied a motion by way of a preliminary objection under Rule 41(5) to dismiss the claim in its entirety, but confirmed the Claimant's withdrawal of one of its claims, which the Claimant later acknowledged to have been without legal merit.*

The claim in *Brandes* was submitted by a U.S. registered investment adviser that controlled a number of American Depository Receipts ("ADRs") and shares in CANTV, a Venezuelan telecommunications company. The Claimant alleged that the Respondent interfered with its investment in CANTV by coercing it into accepting a tender offer to purchase all of the ADRs and shares in CANTV. As Venezuela does not have a bilateral investment treaty with the United States, the arbitration appears to be proceeding on the basis of Venezuela's foreign investment law, which law includes reference to ICSID arbitration. The Respondent argued that the Claimant's claims should be dismissed on a preliminary basis for two main reasons: 1) Claimant agreed to waive and release all claims against the Respondent in connection with the tender; 2) Claimant is not an investor under the ICSID Convention as it was only acting as an agent for its clients and, therefore, did not own the alleged investment.

The first question for the *Brandes* tribunal was whether Rule 41(5) allowed for jurisdictional objections to be made. The tribunal determined that "the term 'legal merit' [as it appears in Rule 41(5)] covers all objections to the effect that the proceedings should be discontinued at an early stage because, for whatever reason, the claim can manifestly not be granted by the Tribunal." (*Brandes* para. 55) The tribunal explained: "this proceeding is not overly burdensome and if it can avoid cases to go ahead if there is a manifest absence of jurisdiction, it can clearly fulfil [sic] the basic objectives of this Rule which is to prevent the continuation of a procedure when the claim is without legal merit." (*Brandes* para. 54)

Second, the tribunal considered whether factual issues can be considered at this preliminary stage-an issue that also concerned the *Trans-Global* tribunal. The *Brandes* tribunal decided that a Rule 41(5) objection "should concern a legal impediment to a claim and not a factual one." (*Brandes* para. 59) However, the tribunal shared the *Trans-Global* tribunal's view 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." (*Brandes* para. 60) The tribunal determined 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." (*Brandes* para. 61) Ultimately, upon a consideration of the relevant burden of proof, the tribunal concluded that "at this preliminary stage, it is sufficient . . . to accept prima facie the plausible facts as presented by the Claimant." By requiring that the facts must be "plausible," the *Brandes* tribunal appeared to adopt a similar approach to the one taken in *Trans-Global*. In that case, the tribunal stated 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." (*Trans-Global*, para. 105)

In assessing the scope of the objection, the tribunal turned to the meaning of the word "manifestly." Here again, the *Brandes* tribunal agreed with the analysis made by the *Trans-Global* tribunal that

> 'the ordinary meaning of the word [manifest] requires the respondent to establish its objection clearly and obviously, with relative ease and dispatch. The standard is thus set high. . . . The exercise may thus be complicated; but it should never be difficult.'
>
> In order to respect the due process, 'the rule is directed only at clear and obvious cases,' and 'as a basic principle of procedural fairness, an award under Rule 41(5) can only apply to a clear and obvious case, i.e. in Mr. Parra's words cited above, "patently unmeritorious claims"' (*Brandes* paras. 63-64)

Given the high standard envisioned by the drafters of Rule 41(5), the tribunal dismissed the Respondent's objections as they involved a consideration of "complex legal and factual issues" which could not be resolved in a summary proceeding. (*Brandes* paras. 71-72)

Though the tribunal dismissed the Respondent's preliminary objection the early vetting of the Claimant's claims may impact the way the case moves forward, as was the case in *Trans-Global*.

In *Trans-Global*, a case concerning the Claimant's investment in an oil concession in Jordan's Dead Sea region, the tribunal accepted one of the Respondent's objections. The tribunal confirmed that Claimant's claim that Jordan violated Article VIII of the US-Jordan BIT by failing to consult the Claimant (an obligation under the BIT that applies only between the Contracting States and has no application between the State and a foreign investor) was manifestly without legal merit and, therefore, treated it as having been withdrawn per the Claimant's request. Though allowing Trans-Global's other two claims to proceed-for violation of the obligations to accord fair and equitable treatment and to refrain from impairment of investments through unreasonable and discriminatory measures-the tribunal signaled that had various elements of those claims been "advanced by the Claimant as independent claims, each allegedly capable by itself of establishing a liability against

the Respondent, the Tribunal would be minded to decide that th[o]se [claims] were manifestly without legal merit." (*Trans-Global*, paras. 109, 114) The tribunal further advised the parties "to keep well in mind" that costs will be awarded to the prevailing party. (*Trans-Glob*al, para. 123)

The *Trans-Global* case settled shortly after the tribunal's Rule 41(5) decision, and prior to the Claimant's filing of its first memorial, as reflected in a consent award that was made public. The Claimant agreed to withdraw all of its claims, with prejudice, without having received any compensation from the Respondent.

Though the standard under Rule 41(5) has been set high, it remains to be seen what impact the *Brandes* Rule 41(5) proceeding will have on the outcome of that case, and to what extent such objections will be continue to be made in the future.

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* For the purpose of full disclosure, it should be noted that White & Case LLP was counsel to Jordan in the *Trans-Global* case.

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