

# Kluwer Arbitration Blog

## Global Trading Resource Corp. and Globex International, Inc. vs. Ukraine

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### *Introduction*

On 1 December 2010 an Arbitral Tribunal, constituted under the auspices of the International Center for Settlement of Investment Disputes (ICSID) delivered its award in the case *Global Trading Resource Corp. and Globex International, Inc. vs. Ukraine*. The Tribunal decided to dismiss all claims filed by Global Trading Resources Corp. and Globex International Inc. against Ukraine under Article 41 (5) of the ICSID Arbitration Rules.

The Arbitral Tribunal was constituted of Prof. Emmanuel Gaillard, appointed by the Claimants, J. Christopher Thomas QC, appointed by the Respondent, and Sir Franklin Berman QC, who acted as the President of the Arbitral Tribunal.

### *Facts*

Global Trading Resource Corp. and Globex International, Inc. are US companies, which are engaged primarily in the exportation of meat and poultry products. The Claimants had concluded with Alan Trade, a private Ukrainian company, the contracts for the delivery and sale of poultry products. After Alan Trade failed to pay under the contracts, Global Trading Resource Corp. and Globex International, Inc. filed the claim against Ukraine to ICSID seeking compensation.

The Claimants stated that the State Committee of Ukraine of the State Reserve was Ukraine's designated State enterprise responsible for negotiating contracts with U.S. poultry exporters during the year 2008, including with the Claimants, and said further that the State Committee of Ukraine of the State Reserve nominated Alan Trade to serve as the counterparty for the signature of those contracts. According to the Claimants argumentation Ukraine is liable for the actions of both the State Committee of Ukraine of the State Reserve and Alan Trade.

The Respondent filed the application under paragraph (5) of Rule 41 of the Arbitration Rules and stated that Claimants' claims represented nothing more than claims to payment under trading contracts, and do not therefore amount, in law, to 'investments'.

### *Rule 41 (5) of the ICSID Arbitration Rules*

Rule 41(5) is a new provision, introduced as part of the amendments that came into effect on 10 April 2006. The Rule 41 (5) opens the way – in the absence of agreement between the parties on

another expedited procedure – to either party for making preliminary objections, no later than 30 days after the constitution of the Tribunal that a claim is manifestly without legal merit.

The Arbitral Tribunal found that the purchase and sale contracts entered into by the Claimants were pure commercial transactions and therefore cannot qualify as an investment for the purposes of Article 25 of the Convention.

The Tribunal accordingly decides that the claims brought by Global Trading Resource Corp. and Globex International, Inc. against Ukraine are manifestly without legal merit, within the meaning of Article 41, paragraph (5) of the ICSID Arbitration Rules.

This was the third occasion on which a decision has had to be taken on an objection under Rule 41(5) of the ICSID Arbitration Rules, and the present case is the first ever in which Tribunal sustained objection and subsequently dismissed the claim under the Rule 41 (5). Therefore the Tribunal was in particularly conscious of its responsibility to contribute to shaping both an understanding of the Rule itself and of the procedure which ought to be followed under it. The two previous decisions are those in *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan* and in *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*.

In *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan* the Respondent had filed objections under the Rule 41 (5) as to all three of the claims put forward by the Claimant in its Request for Arbitration. Subsequently the Claimant withdrew one of these claims in the course of the proceedings and the Tribunal rejected the objections to the other two claims.

In *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela* Respondent objected as to jurisdiction (not substance) and the objections had been also rejected. The Tribunal considers that the new Rules introduced in 2006 regarding preliminary objections in cases where a claim is manifestly without legal merit allows an examination of the jurisdiction and competence of the Centre and of the Tribunal. Rule 41(5) therefore allows an early expedited finding if it is manifest that the jurisdiction of the Centre or the competence of the Tribunal for the claims brought before the Tribunal is lacking.

Arbitral Tribunal in *Global Trading Resource Corp. and Globex International, Inc. vs. Ukraine* also confirmed that a preliminary objection under Rule 41(5) can be related to the merits or jurisdictional objection. The Tribunal in particular cited the following paragraph of the *Brandes Investment Partners, LP* case: “There exist no objective reasons why the intent not to burden the parties with a possibly long and costly proceeding when dealing with such unmeritorious claims should be limited to an evaluation of the merits of the case and should not also englobe an examination of the jurisdictional basis on which the tribunal’s powers to decide the case rest”.

### ***Ukraine in ICSID Arbitration***

There are 10 ICSID claims lodged against Ukraine so far. Six of them are concluded and the rest four are still pending. Recently Ukraine suffered its first defeat in ICSID arbitration in the *Alpha Projektholding GmbH* case under which Ukraine has been ordered to pay USD 5,250,782. Previously Ukraine was quite successful in ICSID arbitration: two cases have been won by Ukraine (*Generation Ukraine Inc. vs. Ukraine* and *Tokios Tokelés vs. Ukraine*) and two were concluded by amicable settlement (*Joseph C. Lemire vs. Ukraine* and *Western NIS Enterprise Fund vs. Ukraine*).

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