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Four Tribunals Apply ICSID Rule for Early Ouster of Unmeritorious Claims

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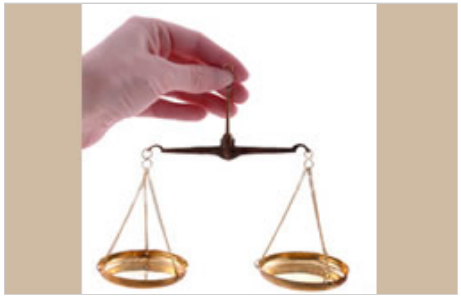

Introduction

Four tribunals composed of leading arbitrators have brought to life an unusual rule adopted by the International Centre for the Settlement of Investment Disputes ("ICSID") in 2006 that allows respondent states to seek early dismissal of unmeritorious claims.[1] The first two cases clarified key parts of the rule, although the disputed claims were not dismissed. More recently, two tribunals for the first time dismissed claims in their entirety. The four unanimous decisions are in harmony on key points and set out standards and procedures that are likely to influence future tribunals. They show that the new rule can be an effective device to limit states' burdens and expenses in the face of legally dubious claims.

ICSID's burgeoning docket[2] has been accompanied by growing criticism of the international investment treaty regime by some states, academics, and non-governmental organizations.[3] Some have complained that respondent states have been unfairly forced to defend against weak or even fabricated claims, perhaps including some brought to induce settlements by embarrassing governments or threatening burdensome and expensive legal proceedings.[4]

In April 2006, as part of a limited revision of its rules, ICSID addressed this concern by amending Paragraphs (5) and (6) of Rule 41 of its Arbitration Rules. The amended rule authorizes tribunals to dismiss at an early stage claims they find to be "manifestly without legal merit":

> (5) [A] party may, no later than 30 days after the constitution 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 . . .
>
> (6) If the Tribunal decides . . . that all claims are manifestly without legal merit, it shall render an award to that effect.

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Ukraine Bilateral Investment Treaty (Treaty Concerning the Encouragement and Reciprocal Protection of Investment)

ORGANIZATIONS OF NOTE

International Centre for the Settlement of Investment Disputes

As explained by ICSID's former Deputy-Secretary:

> The Secretariat is powerless to prevent the initiation of proceedings that . . . are frivolous as to the merits. This had been a source of recurring complaints from some respondent governments. One of the amendments to the ICSID Arbitration Rules made in 2006 was to introduce a procedure, in Rule 41, for the early dismissal by arbitral tribunals of patently unmeritorious claims.[5]

Two Initial Cases Clarify Key Elements

The first two tribunals considering Rule 41(5) did not dismiss the disputed claims, but clarified key issues. While ICSID has no rule of precedent, their analyses are proving influential. In *Trans-Global Petroleum, Inc. v. Jordan*,[6] Jordan contended that all of the claimants' claims were manifestly without merit. One claim was withdrawn. The tribunal[7] allowed the others to proceed, meanwhile addressing what it means for a claim to be "manifestly" without merit: "[T]he 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."[8]

In *Brandes Investment Partners, LP v. Venezuela*,[9] a second tribunal[10] allowed challenged claims to proceed, while making clear that Rule 41(5) is not limited to challenges on the merits. It can be used to dispute jurisdiction and competence,[11] but not to resolve disputed facts.[12] The language of the rule clearly weighs against consideration of factual issues ("manifestly without *legal* merit"). Moreover, it is difficult to conceive of factual disputes that could be addressed adequately in abbreviated proceedings under Rule 41(5).

The First Dismissal Under Rule 41: *Global Trading Resource Corp. v. Ukraine*[13]

In December 2010, a tribunal[14] for the first time dismissed a case under Rule 41(5). *Global Trading Resource Corp v. Ukraine* offers a thoughtful analysis of the rule likely to influence future panels.

The claimants were U.S. exporters of meat and poultry products whose claims grew out of an export deal gone bad. (Ukraine did not dispute the facts alleged by the claimants, and the tribunal took their allegations as true for purposes of its decision.[15]) The claimants alleged that following Ukraine's elections in December 2007, newly elected Prime Minister Yulia Tymoshenko sought to address short domestic supplies of poultry. She hosted a meeting in Kyiv among U.S. poultry exporters, a U.S. embassy official, and Ukrainian officials, at which she "proposed a poultry 'purchase-and-import program' as a special government initiative."[16]

The claimants entered into contracts to supply poultry. For reasons not explained in the award, the Ukrainian parties did not pay for, or take delivery of, most of the poultry, leaving the claimants with substantial losses. [17] In May 2009, they initiated ICSID arbitration, asserting jurisdiction based on the ICSID Convention and the U.S.-Ukraine Bilateral Investment Treaty ("BIT").[18]

Ukraine sought dismissal pursuant to Rule 41(5), arguing that the dispute involved an ordinary sales transaction, not an investment as required for jurisdiction under the ICSID Convention and the BIT. The claimants countered that because of the prime minister's involvement, the assurances she offered, and other exceptional circumstances, their contracts and expenditures constituted investments.[19]

The *Global Trading* tribunal upheld Ukraine's objections, finding the claims manifestly

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without legal merit. Like many other tribunals, it found that ICSID jurisdiction requires an investment satisfying both Article 25 of the ICSID Convention and any definition of investment under a relevant investment treaty. It found no investment for purposes of Article 25, concluding that "the purchase and sale contracts entered into by the Claimants were pure commercial transactions and therefore cannot qualify as an investment."[20] The Tribunal also found no investment for purposes of one element of the BIT's definition of investment, but did not decide whether a second element might apply, given its decision regarding the absence of an investment satisfying Article 25.[21]

The award addressed several significant issues.

— *The Challenges Covered.* The tribunal agreed with *Brandes* that Rule 41(5) is not limited to challenges involving the merits, and can be used to dispute jurisdiction and competence. Although the tribunal did not need to rule on the issue, it also agreed with *Brandes* that factual disputes do not fall within the rule's ambit.[22]

— *Defining "Manifestly."* The tribunal heartily endorsed and applied *Trans-Global's* analysis of "manifestly," quoted above.

— *Squaring Expedition and Due Process.* The tribunal emphasized the significance of any decision to dismiss a claim under Rule 41(5), as it results in a binding award terminating the claim. In the tribunal's view, a claimant therefore must have sufficient opportunity to present its side of the story before any decision to dismiss. "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." [23]

There is a tension between the need to accord a claimant sufficient opportunity to be heard and Rule 41(5)'s direction that the tribunal rule "at its first session or promptly thereafter." The panel squared the circle with a busy schedule including "two rounds of short and focused written argument, complemented by two rounds of well-focused oral argument completed within one single day at the end of the first formal session." [24] The panel was much less concerned with a decision *not* to dismiss, since the claim then proceeds normally. The respondent state retains all of its rights to contest jurisdiction and merits, and the claim will ultimately succeed or fail following normal proceedings.

— *A Further Limit on Summary Dismissal.* The tribunal saw a further requirement prior to dismissing a claim—it must:

> be certain that it has considered all of the relevant materials . . . . The present Tribunal accordingly posed itself the question, what other materials might either Party (specifically the Claimants) bring to bear if the question at issue were to be postponed until a later stage in the proceedings? Having posed itself that question, the Tribunal was unable to see what further materials relevant to the question at issue . . . either Party might wish to, or be able to, bring forward at a later stage.[25]

Some may not find this self-evident and instead see the possibility of additional pertinent evidence or arguments as relevant to whether a claim is "manifestly" without merit.

A Second Rule 41 Dismissal: *RSM Production Corp. v. Grenada*

A few days after *Global Trading* was decided, a second ICSID tribunal[26] in *RSM Production Corp. v. Grenada*[27] again applied Rule 41(5) to dismiss all of the claimants' claims. *RSM* involved BIT claims by a U.S. company and its shareholders predicated upon a petroleum exploration agreement. A previous ICSID tribunal dismissed contract claims based on that agreement. The tribunal agreed with Grenada's contention that the new

claims were manifestly without merit because the underlying legal and factual claims were determined in the earlier arbitration. "[A]s pleaded and argued, the present case is no more than an attempt to re-litigate and overturn the findings of another ICSID tribunal . . . ."[28]

The *RSM* tribunal again endorsed the analyses of Rule 41(5) in *Brandes* and *Trans-Global,* concluding that objections under the rule "(a) may go either to jurisdiction or the merits; (b) must raise a legal impediment to a claim, not a factual one; and (c) must be established clearly and obviously, with relative ease and dispatch." [29] It added that in assessing a claim, a tribunal should consider all of the claimants' claims, submissions, and explanations, not just the initial request for arbitration.[30] Further,

> given the potentially decisive nature of an Article 41(5) objection, we would add that, for a tribunal faced with such an objection, it is appropriate that a claimants' Request for Arbitration be construed liberally and that, in cases of doubt or uncertainty as to the scope of a claimant's allegation(s), any such doubt or uncertainty should be resolved in favour of the claimant.[31]

Costs and Attorneys' Fees

Some ICSID tribunals have made significant awards of costs and attorneys' fees against losing claimants in cases involving marginal claims, [32] but such awards are not universal, and states may have difficulty enforcing any that are made against recalcitrant or impecunious claimants. Indeed, the *Trans-Global* tribunal observed 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."[33]

In the first three cases discussed here, the tribunals did not make such awards. In *Brandes* and *Trans-Global*, the cases continued, and the tribunal deferred issues of costs and fees to the eventual outcome. In *Global Trading*, the tribunal concluded that "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."[34]

The *RSM* tribunal was much less sympathetic.

> Having regard to its' 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.[35]

Concluding Thoughts

The initial cases under Rule 41(5) have set the bar for dismissing a claim fairly high. This is appropriate. As *Global Trading* emphasized, dismissal under the rule is a serious matter. Both parties should have adequate opportunity to be heard prior to any decision to dismiss.

Now that Rule 41(5) has been fleshed out and produced two dismissals, it may be more attractive to respondent states and their officials, particularly officials fearful of being seen as lax in defending the state. Motions to dismiss under Rule 41(5) thus may become a more frequent part of states' defenses in ICSID. If so, future panels will need to carefully design procedures that accomplish the dual objectives of expedition and due process.

About the Author:

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Endnotes:

[1] While national legal systems often have procedures like Rule 12(b) of the U.S. Federal Rules of Civil Procedure that enable courts to dismiss legally insufficient cases without the burden and expense of a full trial, the principal international arbitration rules do not have comparable procedures.

[2] *See ICSID Caseload – Statistics*, Issue 2011-1, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics

[3] *See, e.g., Public Statement on the International Investment Regime* (Aug. 31, 2010), *available at* http://www.osgoode.yorku.ca/public_statement/documents/Public%20Statement.pdf.

[4] Successful defenses can be very expensive. A 2009 award found that the "Claimant asserted jurisdiction on the basis of a claim to ownership of shares, which the uncontradicted evidence before the Tribunal suggests was false. Such a claim cannot be said to have been made in good faith." The tribunal awarded the respondent state over four million dollars for its costs of defending the claim. Eur. Cement Inv. & Trade S.A. v. Turkey, ICSID Case No. ARB(AF)/07/2, Award (Aug. 13. 2009), *available at* http://ita.law.uvic.ca/documents/EuropeCementAward.PDF.

[5] Antonio R. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 41 INT'L LAW. 47, 56 (2007).

[6] Trans-Global Petroleum, Inc. v. Jordan, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules (May 12, 2008), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C254.

[7] V. V. Veeder (President), Professor James Crawford SC, and Professor Donald McRae.

[8] *Trans-Global Petroleum, Inc.*, *supra* note 6, ¶ 88.

[9] Brandes Inv. 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 (Feb. 2, 2009), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1170_En&caseId=C266.

[10] Dr. Robert Briner (President),Professor Karl-Heinz Böckstiegel, and Professor Brigitte Stern.

[11] *Brandes Inv. Partners, LP*, *supra* note 9, ¶¶ 52-55.

[12] *Id.* ¶¶ 58-61.

[13] Global Trading Resource Corp. v. Ukraine, ICSID Case No. ARB/09/11, Award (Dec. 1, 2010), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1771_En&caseId=C660.

[14] Sir Franklin Berman (President), Professor Emmanuel Gaillard, and Christopher Thomas QC.

[15] *Global Trading Resources Corp, supra* note 13, ¶ 36.

[16] *Id.* ¶¶ 36-37.

[17] *Id.* ¶ 39.

[18] Treaty Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Exchange of Letters, U.S.-Ukr., Mar. 4, 1994.

[19] *Global Trading Resource Corp.*, *supra* note 13, ¶ 42.

[20] *Id.* ¶ 56.

[21] *Id.* ¶ 53.

[22] *Id.* ¶¶ 30-31.

[23] *Id.* ¶ 33.

[24] *Id.*

[25] *Id.* ¶ 34.

[26] J. William Rowley QC (President), Edward Nottingham, and Professor Pierre Tercier.

[27] RSM Prod. Corp. v. Grenada, ICSID Case No. ARB/10/6 (Dec. 10, 2010), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1792_En&caseId=C980.

[28] *Id.* ¶ 7.3.6.

[29] *Id.* ¶ 6.1.1.

[30] *Id.* ¶ 6.15.

[31] *Id.* ¶ 6.13.

[32] *See, e.g., Eur. Cement Inv. & Trade S.A*, *supra* note 4 (ordering an award of over four million dollars in costs and attorneys' fees).

[33] *Trans-Global Petroleum, Inc.*, *supra* note 6, ¶ 122.

[34] *Global Trading Resource Corp.*, *supra* note 13, ¶ 59.

[35] *RSM Prod. Corp., supra* note 27, ¶ 8.3.4.