

# *Trans-Global Petroleum:* 'Rare Bird' or Significant Step in the Development of Early Merits-Based Claim-Vetting?

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## Introduction

In a recently published opinion, the tribunal presiding over the ICSID arbitration *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan* rendered the first ever decision under Rule 41(5) of the ICSID Arbitration Rules, which allows a respondent to object at the outset of ICSID proceedings to any claim(s) "manifestly without legal merit".<sup>1</sup> Where the objection is sustained, Rule 41(5) authorizes the dismissal of all or part of an arbitration at the very outset of the proceedings.<sup>2</sup> This form of threshold, merits-oriented challenge, which has been discussed in terms of "early assessment" and claim "testing"/"vetting",<sup>3</sup> forms an integral aspect of common law practice, where it is generally known in the United States and England (respectively) as the "motion to dismiss" and "strike-out".<sup>4</sup>

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<sup>1</sup> ICSID Case No. ARB/07/25 (Decision on Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules).

<sup>2</sup> Pursuant to Rule 41(6), an "award" may be rendered only when "all claims are manifestly without legal merit". Thus, depending upon whether the Rule 41(5) objection is directed to some or all of the claims registered, a successful objection may lead either to the entry of an award dispositive of the action and ripe for challenge under Article 52 of the ICSID Convention (in the former case) or to a "decision" carrying no immediate effects but to be joined to the final award on the merits (the latter case). This is because ICSID practice does not recognize partial awards, see A. Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 41 *International Lawyer*, 427, 440 (2007).

<sup>3</sup> See J. Coe, Jr., *The State of Investor-State Arbitration – Some Reflections On Professor Brower's Plea for Sensible Principles*, 20 *American University International Law Review*, 929 (2004-2005). Professor Coe's discussion focuses upon "vetting" in the NAFTA arbitration context, where early assessment has been identified and advanced by the United States government as a tool for the suppression of vexatious claims.

<sup>4</sup> These concepts are to be distinguished from "summary judgment" in both American and English practice. The essential difference between these concepts is that the former assumes facts alleged to

Although not usually presented in such terms, early assessment of claim theories may also be observed in certain jurisdictional and/or admissibility-oriented challenges in treaty arbitration practice, particularly in the expropriations context.<sup>5</sup> However, the formal codification of such a mechanism in the ICSID Rules – which has itself become a reference point in subsequent discussions regarding revisions to the UNCITRAL Rules and IBA Rules of Evidence<sup>6</sup> – as well as the resulting and emerging jurisprudence to which *Trans-Global Petroleum* will surely offer an important early contribution,<sup>7</sup> mark a significant development of which all practitioners of international arbitration should take note.

The purpose of this article is therefore to situate the recent *Trans-Global Petroleum* decision in the broader context of what appears to be an emerging arbitral jurisprudence related to early merits-based claim-vetting. The article begins by considering *Trans-Global Petroleum* in view of the policy concerns that led ICSID in April 2006 to adopt the provision now known as Rule 41(5). With those principles in mind, the article discusses the *Trans-Global Petroleum* tribunal's interpretation of manifest legal invalidity as a basis for rejecting a claim prior to receiving evidence. Taking the lessons learned from *Trans-Global Petroleum*, the article next explains why other treaty-based decisions regarding admissibility and jurisdiction *ratione materiae* may offer alternative and more robust forms of claim-vetting. In this context, as explained below, the article notes the importance of labeling, an exercise which has given rise to significant discussion in the treaty arbitration context and which can have significant ramifications in terms of recourse to domestic courts, both on an interlocutory basis and at the enforcement stage.

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be true and tests the facial validity of the claim asserted while the latter normally are raised after evidence has been adduced but before trial in order to show, based upon the evidence in the record, that there is no material issue of fact warranting a trial and that a decision can therefore be rendered based upon the existing record.

<sup>5</sup> See J. Coe, note 3; A. Sheppard, *The Jurisdictional Threshold of a Prima-Facie Case*, in *The Oxford Handbook of International Investment Law*, 933 (2008) *et seq.* Sheppard notes the resemblance between the “motion to dismiss” and decisions challenging jurisdiction *ratione materiae*, particularly in the expropriations context. Similarly, Jan Paulsson has observed that the “jurisdictional” decision in *Methanex v. US* (a NAFTA dispute arbitrated at ICSID) was akin to a US “motion to dismiss” or English “strike-out application”. See J. Paulsson, *Jurisdiction and Admissibility*, *Liber Amicorum* in honour of Robert Briner, 601, 606 (2005) (discussing *Methanex Corporation v. United States of America*, Partial Award on Jurisdiction and Admissibility, August 7, 2002 (7 ICSID Reports 239)).

<sup>6</sup> See note 38.

<sup>7</sup> Indeed, *Trans-Global Petroleum* has already been cited by another ICSID tribunal as authority relating to the interpretation of an objection under ICSID Rule 41(5). See *Micula v. Romania*, Decision on Jurisdiction and Admissibility, September 24, 2008, (ICSID Case No. ARB/05/20) at ¶66, n.2.

Finally, the article turns to the issue of procedural reform in international commercial arbitration, and discusses early claim-vetting as an important potential contribution to such efforts. Responding to certain objections often encountered when the concept is introduced, such as the fear of unenforceability, the article explains why there is reason to believe that claim-vetting should be permissible under the curial laws of a number of key arbitration jurisdictions. Indeed, as discussed below, the fact that such a mechanism has become part of the discussion surrounding the UNCITRAL and IBA rule revision projects suggests that it is, at a minimum, now on the map as a generally viable tool. Thus, where most would agree that there is an acute need to address what has been identified as a serious problem of delay, costs and “*déviaton processuelle*” in international commercial arbitration,<sup>8</sup> preliminary claim-vetting as a tried and true tool of common law practice might just offer commercial arbitration a “fast-track” back to its roots. Of course, as this article attempts to establish, although claim-vetting does indeed represent an additional form of “procedure” and might create certain “delays” at the outset of the proceedings, the properly regulated use of the mechanism should have a positive net impact on arbitral efficiency and is therefore justified.

#### I. INDICIA OF AN EMERGING CLAIM-VETTING JURISPRUDENCE IN INTERNATIONAL ARBITRATION

In force since April 10, 2006, ICSID Rule 41(5) was adopted in response to growing criticism from certain respondent governments regarding the absence of any mechanism under the former ICSID regime for the early screening of “patently unmeritorious claims.”<sup>9</sup> Such criticism derived from

<sup>8</sup> See, e.g., B. Hanotiau, *L'arbitre, garant du respect des valeurs de l'arbitrage*, Liber Amicorum in honour of Robert Briner, ICC Publication no. 693, 365; S. Lazareff, *L'arbitre singe ou comment assassiner l'arbitrage*, Liber Amicorum in honour of Robert Briner, 477. This problem has also been discussed in terms of the “Americanisation” of commercial arbitration. See C. Bower, *W(h)ither International Commercial Arbitration*, Arbitration International, Vol. 24, Issue 2, 181, 191 (citation omitted). For a useful overview of various empirical studies regarding increased costs and delay in international arbitration, set in the context of an important, groundbreaking proposal of a new way of approaching arbitration altogether (which, not coincidentally, would include claim-vetting as one of its tools), see D. Rivkin, *Toward a New Paradigm in International Arbitration: The Town Elder Model Revisited*, Arbitration International, Vol. 24, No. 3 (2008). Recently, sophisticated corporate users of commercial arbitration, such as Michael Mellwrath and Roland Schroeder of General Electric, have also spoken out to in an effort to alert institutions to the growing sense of alarm in the corporate community in response to these increasing problems. See M. Mellwrath and R. Schroeder, *The View from an International Arbitration Customer: In Dire Need of Early Resolution*, 74 Arbitration 3-11 (2008).

<sup>9</sup> See, e.g., A. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 41 Int. Law. 47, 56 (2007); see also *Organisation of the Defense and the Proceedings – Act II, Scene II*, 24 Arbitration International 37, 53 (2008).

the view of many states that reforms were needed to rectify what was perceived to be “un déséquilibre significatif [] au profit des investisseurs dans l'état actuel du droit de l'investissement international”.<sup>10</sup> Although intended as a reform, the efficacy of the resulting provision was initially questioned by some commentators, with Abby Cohen Smutny observing that the successful Rule 41(5) objection would be a “rare bird”<sup>11</sup> and Francisco Orrego Vicuña neither sure how this objection would fit into the ICSID process nor convinced the new provision would “prove useful”.<sup>12</sup>

As the first tribunal ever forced to decide an objection under the new rule, the *Trans-Global Petroleum* tribunal<sup>13</sup> tackled many of the ambiguities surrounding Rule 41(5) and developed a reasonable approach to a number of essential questions, both procedural and substantive, concerning the meaning and operation of this important new element of ICSID practice. As explained below, *Trans-Global Petroleum* takes the position that an objection under Rule 41(5) should be sustained only where it is “clear and obvious” that the challenged claims are “patently unmeritorious”.<sup>14</sup> This approach, creating a standard of manifest legal deficiency, reflects the Center’s “hope[]” that Rule 41(5) would be reserved for “exceptional” cases and “circumscribed to frivolous claims only”.<sup>15</sup>

#### A. The *Trans-Global Petroleum v. Jordan* Decision As One Model of Merits-Based Claim-Vetting

##### 1. Mode of Analysis

*Trans-Global Petroleum* is an arbitration involving claims by Trans-Global Petroleum, Inc. (“TGPI”), a United States corporation, against Jordan

<sup>10</sup> See N. Rubins and A. Canivet, *Les modifications récentes du règlement CIRDI*, 3 April 2008 (draft paper submitted at colloquium sponsored by the Institut des Hautes Etudes Internationales, Université Panthéon-Assas (Paris II) regarding *La procédure arbitrale relative aux investissements internationaux: aspects récents*).

<sup>11</sup> See *Organisation of the Defense and the Proceedings – Act II, Scene II*, 53. Fortuitously, it would be Cohen Smutny who would craft the first known objection under Rule 41(5) in the *Trans-Global Petroleum v. Jordan* dispute.

<sup>12</sup> See *Organisation of the Defense and the Proceedings – Act II, Scene II*, 53.

<sup>13</sup> The distinguished Tribunal is comprised of V.V. Veeder, acting as President, along with co-arbitrators Professors Donald McRae and James Crawford.

<sup>14</sup> See *Trans-Global Petroleum v. Jordan* (Rule 41(5) Decision) at ¶92 (citing, in part, A. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 56).

<sup>15</sup> See A. Antonietti, note 2.

in connection with alleged violations of TGPI's rights as an investor under the US-Jordan BIT.<sup>16</sup>

Acting within 30-days of the constitution of the tribunal and prior to the first session of the tribunal, as required by Rule 41(5), Jordan filed an objection to each of TGPI's claims pursuant to Rule 41(5). Jordan argued that TGPI's claims were "manifestly without legal merit" because they alleged "infringements of non-existent legal rights of the Claimant or non-existent legal obligations of the Respondent". For purposes of evaluating whether or not TGPI's claim was "manifestly without legal merit", the tribunal did not limit itself to the TGPI's Request for Arbitration, but also invited the parties to exchange two rounds of successive submissions on each side and called a hearing for oral submissions on the issue.<sup>17</sup>

Jordan appears to have argued that Rule 41(5) should be read with Article 43(a) of the ICSID Convention also to permit the submission of documentary evidence and/or oral testimony. That position would have followed from Jordan's argument that while the correct analysis under Rule 41(5) is of a legal nature, the facts alleged by TGPI should be "critically examined by the Tribunal" to determine whether "the factual allegations were enough to raise the likelihood that the particular claim was supported above a speculative level". The tribunal resisted Jordan's apparent push for a significantly expanded evidentiary procedure based upon its view that such a procedure would be inconsistent with the strict timetable contemplated under the Rule 41(5)<sup>18</sup> and that Rule 41(5) applies only to "patently unmeritorious claims". If it were necessary for the respondent to adduce substantial

<sup>16</sup> These claims arose out of a petroleum exploration venture in which TGPI (through its subsidiary, Trans-Global Petroleum Jordan, Ltd. ("TGPJ")) was granted rights to explore and drill in Jordanian national territory. As alleged by TGPI, once the exploratory activity succeeded, the Jordanian government launched a campaign to pressure TGPI to cause TGPJ to effectively transfer its interest in the venture at a below fair market value price to a Lebanese entity favored by Jordan. TGPI alleges that Jordan's campaign succeeded, resulting in a series of additional agreements into which TGPJ was forced to enter under duress with the Lebanese entity and ultimately in the effective exclusion of TGPJ from the exploration venture.

<sup>17</sup> The tribunal's decision to allow an expanded evidentiary record was taken without any express guidance from the text of Rule 41(5), which is generally silent with regard to matters of procedure. This "procedural gap" reflects the apparent intention of the amendment's drafters to free tribunals to craft *ad hoc* procedures for hearing objections under Rule 41(5). See A. Antonietti, note 2. Although it allowed the parties to exchange views regarding Jordan's objection and to submit oral arguments, the additional evidence admitted appears to have been extremely limited and there does not appear to have been any hearing of witnesses. Thus, the tribunal was careful to limit the procedure in time and scope to ensure that it would not derail the overall procedure. This streamlined approach appears advisable for purposes of any claim-vetting process in arbitration.

<sup>18</sup> See ICSID Rule 41(5). Pursuant to ICSID Rule 13(1), the first session is ordinarily held within 60 days of constitution of the tribunal.

additional evidence to rebut claimant's factual allegations, the tribunal reasoned, the claims would not be "manifestly without legal merit".

Given the expedited nature of the procedure and its design to filter out only those claims "manifestly" without "legal" merit, this compromise appears reasonable. Indeed, an earlier draft version of the rule which envisioned objections to any claim "manifestly without merit" was revised to add the qualifying term "legal" in order "to avoid inappropriate discussions on the facts of the case at that stage".<sup>19</sup> Moreover, as an administrative matter, it is important that any preliminary objection directed to the merits be treated on an expedited basis so that the objection cannot be used as a tool to derail the progress of the arbitration.

After addressing the evidentiary issues described above, the tribunal turned to the central question presented, *i.e.* how correctly to interpret Rule 41(5). Given the potentially dispositive character of the new Rule 41(5) procedure, the tribunal appears to have preferred to tread cautiously in developing its methodology, noting 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 Rules 29, 31 and 32 of the ICSID Arbitration Rules".

A full description of the tribunal's analysis would be beyond the scope of this discussion. The essential approach, however, consisted in establishing an extremely high hurdle for the objecting respondent, which requires a finding "manifest" *legal* deficiency. This standard precludes, *ipso jure*, close analysis of competing arguments or consideration of the "plausibility" or credibility of factual allegations. In other words, it must be obvious that the claim is legally deficient. The tribunal's reasoning dovetails with the evidentiary approach adopted because the limited materials admitted would not have offered an appropriate basis for more detailed factual analysis. The tribunal also noted the policy motivating enactment of ICSID Rule 41(5), *i.e.*, the need for a screening mechanism to address "proceedings that clear th[e] jurisdictional threshold, but are frivolous as to the merits".<sup>20</sup> Thus, the purpose of Rule 41(5) was to allow screening but not force a claimant to establish, *prima facie*, the merits of its case.

<sup>19</sup> See A. Antonietti, note 2, at 440 (referring to Working Paper of the ICSID Secretariat dated May 12, 2005 entitled *Suggested Changes to the ICSID Rules and Regulations*).

<sup>20</sup> Here, the tribunal looked to an article by Antonio Parra, former ICSID Deputy Secretary-General who long acted as the *de facto* Secretary General of the Center. See A. Parra, note 9, at 56.

In arriving at this interpretation, the tribunal rejected Jordan's attempts to introduce a higher degree of factual scrutiny into the claim-vetting procedure. Specifically, while Jordan accepted the essentially legal nature of the inquiry under Rule 41(5), Jordan "submit[ed] that such an inquiry permits facts alleged by the Claimant to be critically examined by the tribunal".<sup>21</sup> The tribunal's task, according to Jordan, was to satisfy itself that the claims were "supported above a speculative level" by determining whether such facts satisfied "a threshold of plausibility".<sup>22</sup> Thus, the fact that such claims might theoretically or "conceivably" succeed in the best of all possible worlds would not be sufficient to survive an objection under Rule 41(5).

One of Jordan's principal lines of argumentation in support of its attempt to introduce a higher level of factual scrutiny appears to have been Judge Higgins' *Oil Platforms*<sup>23</sup> methodology as to disputed facts in the context of jurisdictional *prima facie* analysis. Judge Higgins' approach asks whether, on the facts alleged, the actions complained of "might violate the Treaty articles".<sup>24</sup> Jordan presumably sought to direct the tribunal to subsequent investment treaty arbitration decisions adopting what might be characterized, at least with respect to the level of factual scrutiny involved, as a more rigorous form of Judge Higgins' methodology.

For instance, in its Decision on Jurisdiction (a decision cited by Jordan), the tribunal in *Continental Casualty v. Argentina*, while generally accepting the facts alleged as true, displayed a willingness to consider the "contrary evidence supplied by the Respondent" and dismiss if such evidence was convincing, even if "at a summary exam".<sup>25</sup> Such factual scrutiny appears to well beyond the analysis contemplated by the *Trans-Global Petroleum* tribunal in its search for "obviously" unmeritorious claims under Rule 41(5). Instead, as noted above, the *Trans-Global Petroleum* tribunal would have viewed the need to consider "contrary evidence" as proof *ipso jure* that any deficiency alleged was not "manifest".

In declining to rely upon such earlier treaty arbitration "precedents", the tribunal noted, among other considerations, that it found such decisions

<sup>21</sup> See Decision, note 14, at ¶96.

<sup>22</sup> See Decision, note 14, at ¶96 (internal quotation marks omitted) (quoting Cohen Smutny).

<sup>23</sup> See the *Oil Platforms Case (Iran v. US)*, I.C.J. 803, 856 (1996).

<sup>24</sup> See *Oil Platforms*, note 23, at ¶33.

<sup>25</sup> See *Continental Casualty Company v. Argentine Republic*, (ICSID Case No. ARB/03/9), Decision on Jurisdiction, February 23, 2006 at ¶¶61-64 ("The Respondent might supply evidence showing that the case has no factual basis even at a preliminary scrutiny, so that the Tribunal would not be competent to address the subject matter of the dispute as properly determined. In such an instance, the Tribunal would have to look to the contrary evidence supplied by the Respondent and should dismiss the case if it found such evidence convincing at a summary exam").

unhelpful because they arose in the context of objections as to “jurisdiction or competence” under Rule 41(1) and Article 41 of the ICSID Convention, and in the context of a procedure that allowed for more substantial proceedings and evidentiary submissions. In the end, the tribunal reaffirmed that it would only consider factual issues if “manifestly . . . incredible, frivolous, vexatious or inaccurate or made in bad faith”. As discussed below in Part I.B, while the tribunal’s approach might make sense as a default standard under ICSID Rule 41(5) practice, the *prima facie* jurisdiction/admissibility cases cannot be discounted as a reference point for future discussions regarding claim-vetting. Of course, there will be room for reasonable differences as to where exactly on the pendulum the standard should be set. At a minimum, however, those hoping to set the standard should have these competing standards in mind as they consider the issue.

## 2. Application of the Manifest Invalidity Standard

Through the approach elected, the *Trans-Global Petroleum* tribunal appears to have achieved a practical result that should enhance the efficiency of the future proceedings. While denying two of Jordan’s objections, the tribunal used the occasion to encourage TGPI to clarify the nature of its legal theories and case. Specifically, a literal and objective reading of TGPI’s pleading in support of its claims regarding “fair and equitable treatment” and “unreasonable and discriminatory measures” suggests that TGPI asserted a number of factual theories in support of each of these legal claims. Jordan’s objections, with which the tribunal agreed, asserted that a number of TGPI’s apparent theories were “manifestly without legal merit” in a number of key respects. It appears that it was only during the Rule 41(5) hearing that TGPI’s counsel clarified that the majority of its theories were in fact not asserted as “independent claims” against Jordan, but instead were “matters directed to causation and damage directed at a breach of the BIT” which “must be considered within the overall context pleaded over [] 122 paragraphs”.

However, it is clear that neither Jordan nor the tribunal recognized where one movement ended and the next began. The tribunal therefore reminded TGPI that had such theories been pleaded “as independent claims or even as an essential legal part” of each claim, which on an objective reading of the pleading certainly appeared to be the nature of such theories, the tribunal would have been inclined to dismiss the majority of TGPI’s theories of breach as “manifestly without legal merit”.<sup>26</sup> Accordingly, the

<sup>26</sup> See Decision, note 14, at ¶¶ 109-117.



tribunal allowed those theories to survive but only insofar as they were alleged as “factual submissions made to corroborate” the allegations made by TGPI in support of the parts of its claims that were not “manifestly without legal merit”.<sup>27</sup> Thus, although TGPI’s counsel was able to save his client’s theories, the tribunal reminded TGPI that it should “make [its] position abundantly clear in its next Memorial”.<sup>28</sup>

One might ask whether the time spent and expense incurred in connection with Jordan’s partially unsuccessful Rule 41(5) objections was worthwhile. The answer appears to be yes, if for no reason other than that the Rule 41(5) procedure provided the tribunal with a valuable opportunity to shape the course of the remainder of the arbitration. Like a judge in a common law jurisdiction denying a motion to dismiss or strikeout, but offering preliminary views as to deficiencies in the plaintiff’s case or directing the parties’ attention to substantive issues that should be addressed as the case proceeds, the Rule 41(5) procedure offered the *Trans-Global Petroleum* tribunal an opportunity that might not otherwise have existed to clarify TGPI’s case.<sup>29</sup>

Absent such an opportunity, TGPI likely would have set out a statement of claim detailing and developing substantive claims based upon theories that had no chance of succeeding. This would have forced Jordan to respond to such misguided theories, leading both the parties and the tribunal on detours that might not have been corrected until the final award. For instance, Jordan might have been forced to dedicate lengthy legal argumentation, including expert testimony, to problems of privity that might have been relevant in the context of an actual legal theory of recovery but which would not be necessary in response to “factual corroboration” evidence. By taking this preliminary opportunity to better focus claimant’s case, the tribunal thereby rendered a valuable service. Although it was not necessary in *Trans-Global Petroleum*, future tribunals might also seize such an opportunity to allow a claimant to amend its claims to reflect the guidance resulting from the early assessment procedure.<sup>30</sup>

<sup>27</sup> See Decision, note 14, at ¶¶112, 117.

<sup>28</sup> See Decision, note 14, at ¶¶111, 117.

<sup>29</sup> Of course, given the preliminary nature of the proceedings, any such comments would have to be crafted carefully so as to avoid prejudging the merits and offered only by way of preliminary observation. Even when couched in such provisional terms, of course, such commentary can have a real impact upon the parties and their strategy going forward.

<sup>30</sup> Professor Coe notes that the possibility of amendment in this context means that “outright dismissal is not invariably the sanction for sponsoring an untenable theory of recovery”. See J. Coe, note 3, at 934.

The same can of course be said with respect to TGPI's third claim, which TGPI agreed to withdraw during the Rule 41(5) hearing because it was based upon an obligation not running to it as an investor. One wonders whether TGPI's counsel would have made the same concession in the absence of the tribunal's scrutiny at the outset of the proceedings. In the absence of such pressure, TGPI, in the interest of zealous advocacy, would likely have fought tooth and nail to justify its claim, thereby forcing Jordan to incur costs, which would have been avoided altogether through claim-vetting at the outset.

#### B. Other Relevant Approaches to Claim-Vetting

The tribunal in *Trans-Global Petroleum* certainly arrived at a reasonable result consistent with the drafting history, purpose, text and procedural framework in which Rule 41(5) is imbedded. However, the tribunal's refusal to rely upon the *prima facie* jurisdictional cases cited by Jordan, right or wrong, does not mean that such decisions have nothing to offer for those considering the broader concept of early claim-vetting and how it should be analyzed outside the ICSID Rule 41(5) context. As discussed below, such cases and the questions/problems they themselves have raised, warrant serious consideration in the context of emerging efforts, such as that of the IBA in its recent rule revision project, to work with claim-vetting procedures.

At the outset, it is worth noting that the *prima facie* jurisprudence cited by Jordan in *Trans-Global Petroleum* will likely continue to appear in the context of analysis under ICSID Rule 41(5). This is because the distinction between ICSID Rule 41(5) and ICSID Rule 41(1) (which the tribunal identified as limited to "jurisdiction") is not as clear as the tribunal's comments suggest. Specifically, Rule 41(1) has itself often been invoked to raise merits-related claim-vetting objections, albeit formulated in terms of admissibility and/or jurisdiction *ratione materiae*.<sup>31</sup> It would be difficult to argue that decisions on jurisdiction, such as those dismissing expropriation claims in *SGS Société Générale de Surveillance SA v Republic of the*

<sup>31</sup> A very good example is the Decision on Objections to Jurisdiction in *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on Objections to Jurisdiction, January 29, 2004. There while accepting the claimant's formulation of the facts, the tribunal concluded that it did not have jurisdiction over the expropriation claim, finding that "a mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal". See *SGS Société Générale de Surveillance SA v Republic of the Philippines*, Decision on Objections to Jurisdiction at ¶161. See also *Pope & Talbot Inc. v. The Government of Canada*, Award on Motion to Dismiss (re whether measures relate to the investment), January 26, 2000; See also *Telenor Mobile Communications AS v The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, September 13, 2006, at ¶¶ 79, 81.

*Philippines and Telenor Mobile Communications AS v. The Republic of Hungary*, did not find that the claims dismissed were “manifestly without legal merit”.<sup>32</sup> The nature of the inquiry involved in such cases, which generally assumes the facts alleged to be true and asks whether “what is alleged to constitute expropriation is at least capable of so doing”,<sup>33</sup> clearly involves claim-vetting and early assessment.<sup>34</sup> The real key to distinguishing ICSID Rule 41(1) decisions from the Rule 41(5) objection would appear instead to be the different standards of review contemplated under each provision. Unlike a challenge to jurisdiction, where the tribunal is called upon to make an objective<sup>35</sup> and determinative decision with respect thereto, Rule 41(5) requires the tribunal to allow a claim to proceed unless it is *patently* lacking in legal merit.<sup>36</sup>

<sup>32</sup> After observing that “[t]here is no evidence before the Tribunal to suggest any activity on the part of the Hungarian Government that remotely approaches the effect of expropriation”, the tribunal concluded that the claimant “had failed to make out a *prima facie* case of expropriation”. See *Telenor Mobile Communications AS v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, September 13, 2006, at ¶¶ 79, 81. The tribunal in *Telenor v. Hungary* looked to the tribunal’s similar analysis in *Pope & Talbot v. Canada*, where the respondent’s objection was styled a “Motion to Dismiss”. As noted above, another non-ICSID decision involving a “motion to dismiss” for failure to state a claim was *Methanex v. United States*. See J. Paulsson, note 5, at 606 (describing respondent’s motion as “a defense on the merits”). Another UNCITRAL BIT decision dismissing an expropriation claim on the merits (while also misapplying the term “admissibility”) is found in *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. US3472. There, the final award concluded, “A claim of expropriation should normally be considered in the context of the merits of a case. However, it is so evident that there is no expropriation in this case that the Tribunal will deal with this claim as a question of admissibility”. ¶ 80. The merits-based nature of the tribunal’s analysis was upheld by the High Court, which characterized Ecuador’s objection as “submitting that the expropriation claim was hopeless as a matter of fact and law”. EWHC 345 (Comm) at ¶¶ 135-136 [2006]. The extent to which the tribunal should test the merits of the claim is, of course, another open matter. The recent ICSID decision in *Micula v. Romania* offers an example of a conservative approach. There, the respondent argued that an expropriation claim should be dismissed because claimants “failed to state a claim in their Memorial because they have not made any showing of existing or certain future harm from the measures complained of”. See note 7, at ¶135. The tribunal declined to adopt respondent’s “arguable merits” analysis, which was directed to the “plausibility” of the claims. *Id.* at ¶59. Instead, the tribunal asked only whether the claims “are capable of constituting violations of the provisions”. *Id.* at ¶66. In reaching that position, the tribunal distinguished the analysis appropriate under ICSID Rule 41(5), which it presumably viewed as the appropriate procedure for objections regarding the outer limits of “plausibility”, *i.e.* arguments that a claim is “frivolous” or “abusive”. *Id.* at ¶167.

<sup>33</sup> See *Telenor v. Hungary*, note 31, at ¶ 79.

<sup>34</sup> Likewise, it has been observed that ICSID Rule 41(5) itself may be directed to jurisdictional objections. See A. Antonietti, note 2.

<sup>35</sup> Of course, this point is not undisputed. The question of whether the analysis of jurisdiction should be “weighted” in favor of or against claimant is an important one that has been considered in the context of *prima facie* analysis of “jurisdictional” objections, where the question has been described in terms of jurisdictional “bias”. See A. Sheppard, *The Jurisdictional Threshold of a Prima-Facie Case*, 961 (concluding that the preferred approach is “jurisdictional neutrality”).

<sup>36</sup> From the perspective of ICSID practice, it is interesting to consider the fact that a Rule 41(5) style objection directed to the merits will likely again be raised under Rule 41(1) in the form of an objection to “admissibility”. The standard of review applied to such an objection may change to

Even in the context of ICSID Rule 41(5), such cases will likely remain relevant because Rule 41(5) appears to contemplate the possibility of party-agreed expedited review procedures, which could entail more rigorous scrutiny at the preliminary stage.<sup>37</sup> Outside of ICSID, rule revision projects, such as those with respect to the UNCITRAL Rules and the IBA Rules of Evidence, appear to have recognized (directly or indirectly), the relevance of claim-vetting procedures akin to ICSID Rule 41(5).<sup>38</sup> As part of discussions surrounding such reforms and any future arbitrations decided under rules promulgated as a result thereof, guidance will surely be sought in existing decisional practices which, although not usually labeled in terms of a “motion to dismiss” or “strike-out”, operate substantively in an identical or substantially similar manner.

Such decisional practice should also offer a valuable reference in flagging some of the questions that will arise surrounding the use of claim-vetting outside of the ICSID context, where the unique annulment process obviates the need to consider the New York Convention or local curial law. Whether in *ad hoc* treaty arbitration or in international commercial arbitration (a topic specifically addressed below), the designation of a claim-vetting objection as jurisdictional, admissibility-based and/or a simple “motion to dismiss”/“strike-out”, will carry important ramifications for (1) the timing

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reflect the stage and nature of the procedure, with a higher level of review possible at the Rule 41(1) stage.

- <sup>37</sup> Rule 41(5) expressly recognizes the ability of the parties to create their own “expedited procedure for making preliminary objections”. The Center was aware at the time it implemented the amendment to Rule 41 that certain treaties containing consent to ICSID arbitration already recognized “a different expedited procedure for preliminary objections”. See A. Antonietti, note 2, at 441 (citing U.S. Model BIT Articles 28(4) and 28(5) and the final version of the Trade Promotion Agreement between Peru and the United States). Such procedures do not involve the “manifest” invalidity standard reflected in Rule 41(5). Thus, it appears that a certain flexibility exists under Rule 41(5) for treaties to modify the terms of claim-vetting practice. Article 28(4) of the U.S. Model BIT also contemplates the use of claim-vetting in connection with UNCITRAL proceedings.
- <sup>38</sup> The UNCITRAL Working Committee has adopted proposed revisions to Article 15(1) of the UNCITRAL Rules. See *Report of 46<sup>th</sup> Session of Working Group on Arbitration and Conciliation* (New York, February 5-9, 2007). The revised text, in relevant part, reads: “The arbitral tribunal, in exercising its discretion, shall conduct the proceedings with a view to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute”. Paulsson and Petrochilos commented in support of their proposed revisions of Article 15(1) of the UNCITRAL Rules, the terms of which are reflected in those adopted by the Working Committee, that these revisions would make clear the power of tribunals to “deal with manifestly unmeritorious claims”. J. Paulsson and G. Petrochilos, *Revisions of the UNCITRAL Arbitration Rules: A Report*, p. 65 n. 130 (citing ICSID Rule 41(5)) (September 6, 2006), available at [www.uncitral.org/pdf/english/news/arbrules\\_report.pdf](http://www.uncitral.org/pdf/english/news/arbrules_report.pdf)). Additionally, the International Bar Association, in connection with the updating of its rules of evidence, has recently released a web-survey asking participants if they believe that a rule akin to ICSID Rule 41(5) should be adopted in the event the IBA Rules of Evidence were revised to include rules governing investment arbitration. The survey was no longer available after October 5, 2008.

and level of access to domestic courts in their supervisory capacity and (2) appropriate review at the enforcement stage.

With respect to interlocutory access to supervisory courts, and assuming a partial decision not disposing of all claims, characterization of a claim-vetting decision as “jurisdictional” would raise the possibility in many jurisdictions of immediate interlocutory access to domestic courts for a challenge.<sup>39</sup> With respect to setting aside proceedings, characterization of a claim-vetting objection as jurisdictional would under the New York Convention and curial laws of many jurisdictions open the door to broader review of the merits, including all legal arguments raised.<sup>40</sup> Of course, the question of how to designate such decisions is one that is at times elusive and has commanded attention in the treaty arbitration literature.<sup>41</sup> Future parties and tribunals therefore will no doubt need to return to the cases discussed in this literature, particularly those cases involving claim-vetting, for guidance as to how to characterize the procedures adopted. In short, there is a lot in a name.

Finally, as reflected in the *Trans-Global Petroleum* decision, where the tribunal referred to but declined to consider domestic evidentiary practices in common law countries, reference will surely also be made to decisional practices and conventions in the countries that have developed their own jurisprudence around claim-vetting. As will no doubt be noted by future respondents seeking to strengthen the level of scrutiny available, it is ironic that even in the United States, where a plaintiff was long able to survive a motion to dismiss unless “it appear[ed] that the plaintiff c[ould] prove no set of facts . . . which would entitle him to relief”,<sup>42</sup> the Supreme Court has recently issued two important decisions declaring that something more specific and plausible is required to survive the motion to dismiss.<sup>43</sup>

<sup>39</sup> To take but one example from a jurisdiction of central importance to international arbitration, a partial or interim award may be immediately challenged in the Swiss courts if it is alleged that the tribunal decided wrongly for or against its own jurisdiction. See Article 190(2) of the PILA.

<sup>40</sup> See J. Paulsson, *Jurisdiction and Admissibility*, Liber Amicorum in honour of Robert Briner, 601 (2005) (discussing the “twilight zone”); see, e.g., for Swiss perspective, E. Geisinger & V. Frossard, Eds. G. Kaufmann-Kohler and B. Stuckim *Challenge and Revision of the Award*, 144 (2004).

<sup>41</sup> See e.g., J. Paulsson, note 5; I. Laird, ed. T. Weiler, *A Distinction without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction*, International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law.

<sup>42</sup> See *Conley v. Gibson*, 355 U.S. 41 (1957). To avoid any possible confusion, this standard asked whether, on the basis of the complaint, it was clear that it would in effect be impossible for the plaintiff to adduce evidence to establish a cognizable claim.

<sup>43</sup> See *Bell Atlantic Corp. v. Townshly*, 127 S. Ct. 1955 (2007) (decided in context of antitrust conspiracy claims) and *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007) (decided in context of securities fraud claims).

## II. IMPORTING CLAIM-VETTING MECHANISMS INTO INTERNATIONAL COMMERCIAL ARBITRATION

Although it is mentioned from time to time, the concept of claim-vetting requires greater attention in the world of international commercial arbitration. In the face of major concerns regarding “*déviaton processuelle*”, mounting costs and delay,<sup>44</sup> key members of the user-community and forward-thinking commentators have zeroed in on early claim resolution as a vital opportunity for reform.<sup>45</sup> Indeed, an October 2006 informal survey by Michael McIlwrath and Roland Schroeder of General Electric revealed a broad consensus among company counsel, the ultimate customers of international commercial arbitration, “in favour of measures that would encourage early resolution of issues in international arbitration”.<sup>46</sup> This tool has also been identified by David Rivkin as a component of his new “Town Elder Paradigm”, a proposal for a fundamental reassessment of the nature of commercial arbitration practice.<sup>47</sup> Notwithstanding this agitation, it appears that tribunals rarely entertain applications for early claim-vetting.<sup>48</sup>

In view of the need identified by users for more effective early claims resolution procedures, institutions should consider the adoption of a mechanism such as ICSID Rule 41(5) to encourage the dismissal of unmeritorious claims at the outset of proceedings where appropriate. With major rule revisions now underway, the timing is certainly favorable.<sup>49</sup> Of

<sup>44</sup> See note 8.

<sup>45</sup> See note 8. In their call for “Woolf Reforms” in international construction arbitration, Paul Hobeck, Volker Mahnken and Max Keobke of Siemens AG, a major user of commercial arbitration services, have noted that international arbitration has become a “last resort” for the company. P. Hobeck, V. Mahnken and M. Koebke, *Time for Woolf Reforms In International Construction Arbitration*, Int. A.L.R. 2. (2008).

<sup>46</sup> See M. McIlwrath and R. Schroeder, *The View from an International Arbitration Customer: In Dire Need of Early Resolution*, 74 *International Arbitration*, 3-11 (2008).

<sup>47</sup> See D. Rivkin, note 8.

<sup>48</sup> Indeed, although he could not say whether a “trend” has taken hold, McIlwrath commented to the author that in his recent experience very well known international arbitrators had begun to demonstrate an increased willingness to focus up front on, and dispose of, preliminary issues. According to McIlwrath, it is clear at a minimum that the general level of receptivity to such procedures has improved over that which would have been observed 10 years ago. While noting the general reluctance of arbitrators to permit such procedures, Rivkin discusses some recent successes in his article regarding the “Town Elder Model”. See also *Compte-Rendu du séminaire de L’IAI (Institut Pour L’Arbitrage International) (Paris, 9 Novembre 2006) : Les dispositifs motions dans l’arbitrage international*, *Revue de l’arbitrage* 2006, No. 4 (describing discussion of 3-4 unidentified ICC decisions and no known LCIA decisions involving claim-vetting at a 2006 IAI conference dedicated to this issue).

<sup>49</sup> In addition to the UNCITRAL and IBA developments noted above, in early 2008, the ICC asked its National Committees to comment as to possible areas where the ICC Rules might be revised. The author understands that such comments have been collected and are being considered. It should be noted that the IBA appears to have linked its discussion of a mechanism akin to ICSID Rule 41(5)

course, in addition to institutions, counsel representing respondents should consider the possibility of moving to dismiss unmeritorious claims at the outset of proceedings.<sup>50</sup>

One objection to such reforms is the argument that additional rule-making is unnecessary where it is widely accepted that tribunals can resolve preliminary issues in the form of a partial award. Where such a possibility exists, the argument goes, why should institutions such as the ICC adopt additional rules or clarify powers imbedded in existing rules? For example, in a report entitled "Techniques for Controlling Time and Costs in Arbitration", a special Task Force for Reducing Time and Costs in Arbitration set up by the ICC Commission on Arbitration helpfully advocated bifurcation and partial awards as a means for arbitral tribunals to improve efficiency "when doing so may genuinely be expected to result in a more efficient resolution of the case".<sup>51</sup> The proposed revisions to Article 15(1) of the UNCITRAL Rules, as discussed above, also aim to grant flexibility to tribunals to pick off issues ripe for preliminary adjudication. Institutions modeling their rules on the UNCITRAL Rules, such as the Swiss Rules, already respect the tribunal's procedural discretion not to hear witnesses and to call preliminary issues.<sup>52</sup> Similarly, it was the purpose of relevant provisions of the LCIA Rules (in conjunction with duties under the English Arbitration Act), Article 16 of the AAA International Arbitration Rules and the IBA Rules of Evidence to encourage tribunals to "dispose of cases at an earlier stage where it may be appropriate and possible to do so".<sup>53</sup> Such mechanisms could theoretically be

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to the treaty arbitration context. As reflected in the discussion here, the author's view is that it should not be so limited. In addition, the ICC will consider whether to appoint a task force to study or recommend possible revisions to the 1998 rules. Rule revisions are also underway at other institutions such as the Madrid Court of International Arbitration.

<sup>50</sup> As with any novel procedure, it is entirely possible that such claims will face resistance. Accordingly, a client should be well apprised of the risks surrounding such an approach. However, where the client wishes nonetheless to take a chance in the hope of eliminating what it believes to be facially invalid claims at the outset, there is good reason to forge ahead.

<sup>51</sup> ICC Commission on Arbitration, *Techniques for Controlling Costs in Arbitration* (ICC Publication 843), Recommendation 41, 2007. Citing a study of statistics provided by the ICC based upon arbitrations that went to a final award in 2003 and 2004, the Task Force noted that the overwhelming majority of costs associated with those arbitrations was comprised of costs associated with the parties' presentation of their cases, as opposed to arbitrators' fees and expenses or the ICC's administrative expenses. Accordingly, the Task Force issued recommendations designed to offer "steps aimed at reducing the costs connected with the parties' presentation of their cases".

<sup>52</sup> See Swiss Rules of International Arbitration Sections Articles 15.1-2, 21.

<sup>53</sup> See D. Rivkin, note 8, at 11 (discussing the relevant provisions). By way of example, the Preamble to the IBA Rules of Evidence currently provides, "Each arbitral tribunal is encouraged to identify to the parties as soon as it considers to be appropriate, the issues that it may regard as relevant and material to the outcome of the case, including issues where a preliminary determination may be appropriate". Article 16(3) of the AAA International Arbitration Rules provides, "The tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant

utilized to accomplish a wide range of “early adjudications”, including the staging of proceedings to allow an early determination of potentially dispositive issues such as time limitations, *res judicata* and collateral estoppel.<sup>54</sup>

Although the recommendations of the ICC’s Task Force and mechanisms such as Article 16(3) of the AAA International Arbitration Rules certainly represent significant steps forward in signaling institutional encouragement of efficient case management, such generalized recommendations and recognitions of procedural flexibility arguably fall short of the “cover” typically needed to convince a tribunal to permit a full-blown motion to dismiss before any evidence is submitted. As reflected in the experience of cases such as *Methanex v. United States*, in the absence of express authorization it is likely that different tribunals will take different views as to the permissibility of adopting such a procedure.<sup>55</sup> For those unfamiliar with mechanisms such as that now in place under ICSID Rule 41(5), the idea of terminating a claimant’s case at the outset of the proceedings – as opposed to, for example, merely staging a determination of liability prior to quantum as a “preliminary issue” (as it is known in English practice), deciding a narrow issue of applicable law or language at the outset and/or rendering summary judgment after receiving factual submissions<sup>56</sup> – might appear to threaten a claimant’s right to be heard. By contrast, where tribunals know that the parties have consented in advance to the claim-vetting procedures, for instance through consent to arbitral rules recognizing such a possibility, they will surely be more inclined to find consent and have less fear of recognition issues (an issue discussed below).

As discussed above in the context of *Trans-Global Petroleum*, the possibility of raising an objection to unmeritorious claims at the outset of the proceedings offers a number of benefits, and will no doubt please frustrated corporate users of international arbitration who have developed experience with such procedures through transnational litigation in common law courts. Thus, increasing the availability of claim-vetting through formal recognition in institutional rules (where such recognition would increase comfort levels with the practice) would represent a significant step forward in bringing

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testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case”.

<sup>54</sup> See D. Rivkin, note 8, at 11.

<sup>55</sup> See J. Coe, note 3, at 934-35.

<sup>56</sup> See note 4, for distinction between “summary judgment” and a motion to dismiss or strike-out. Both mechanisms are forms of summary adjudication.



about preliminary claims screening in commercial arbitration.<sup>57</sup> Formal codification of such procedures would also help to eliminate uncertainty regarding how to structure the mechanism in terms of evidentiary submissions, burdens of proof and standards of review. Finally, codification directing the resolution of any such objection on an expedited basis and recognizing the possibility of an award of fees and costs against the party who moves without a *bona fide* basis would address the concern that such motions invariably would be invoked by respondents as an instrument of delay to further exacerbate the problem of “*déviation processuelle*”. Where properly advocated as a means to dispose of an invalid claim at the outset, the short-term “delay” associated with any additional procedure would be justified in terms of the potential benefits to be realized.

In view of the growing acceptance of preliminary claims testing in treaty arbitration practice, both under Rule 41(5) and in the context of the merits-oriented *prima facie* cases (within and outside of the ICSID context), commercial institutions as well as non-ICSID tribunals embracing this concept could take comfort in the fact that they are acting in line with a larger trend in international arbitration. Importantly, institutions willing to innovate in this respect could also look to the growing jurisprudence discussed above in formulating their rules and identifying the best possible approach.

Another typical concern heard regarding early disposal of patently unmeritorious claims is the fear that such procedures might lead to recognition problems. It is obviously beyond the scope of this article to survey the law of every jurisdiction in which such concerns might arise. However, a brief survey of the laws of several major jurisdictions reveals that such concerns are often misplaced or overstated. In the United States, for example, a number of courts have recognized the permissibility of dismissals in arbitration.<sup>58</sup> The basic logic behind permitting such dismissals is that no

<sup>57</sup> For example, the UNCITRAL Working Group included the proposed revisions to Article 15(1) “to provide leverage for arbitrators to take certain steps both vis-à-vis the other arbitrators and the parties” (remarks on annotated draft of revised UNCITRAL Rules based on deliberations of the Working Group). Individual institutions would have to address the exact mechanics of any such motion and the important issue of whether it should be mandatory once invoked. Although the author is of the view that the possibility of a mandatory procedure would be most beneficial, the codification of an optional procedure would also help to encourage use of the procedure by increasing comfort levels with the practice.

<sup>58</sup> See *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10<sup>th</sup> Cir. 2001) (citing, as also recognizing the principle that an arbitration tribunal may dismiss facially invalid claims, *Prudential Sec., Inc. v. Dalton*, 929 F. Supp. 1411, 1417 (N.D. Okla. 1996) and *Warren v. Tacher*, 114 F. Supp. 2d 600, 602-603 (W.D. Ky. 2000)). In non-Federal Arbitration Act cases, it is necessary to ensure that dismissal would be consistent with applicable state laws, which in certain cases may require evidentiary hearings. In the case of California, this concern is particularly relevant. See A. Ferris and W. Biddle, *The Use of Dispositive Motions In Arbitration*, 62 OCT Dispute Resolution Journal 17, 19 (2007) (discussing possible arguments against such powers under the California Arbitration

one has the right to force a tribunal to hear irrelevant evidence that cannot save an otherwise hopeless claim.<sup>59</sup>

As noted above, English law recognizes the strikeout application, a procedure similar to the motion to dismiss in the United States, which addresses the facial validity of a claim. Unfortunately, the English Arbitration Act is silent with respect to the issue of whether a tribunal may strike a facially invalid claim without conducting hearings and no court yet appears to have reviewed any such decision. Nonetheless, at least one commentator has observed that “there is no reason why arbitrators, if empowered to determine their own procedures cannot agree to hear an application for summary judgment or the hearing of a preliminary issue, provided doing so would not put them in breach of their mandatory duty . . . to avoid ‘unnecessary delay or expense’ and if ordered, will not place them in breach of its duties to ‘act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent’”.<sup>60</sup> Where the Court of Appeal has recognized – in the context of reviewing a Swiss ICC award – that “the arbitrator is under no obligation to allow a party to lead evidence when . . . he has come to the conclusion, that, having regard to the nature of the questions at issue, this is entirely unnecessary”,<sup>61</sup> it is difficult to imagine that a court would not uphold an award based upon an arbitrator’s refusal to accept evidence in support of a facially invalid claim.

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Act). Interestingly, Section 15 of the Revised Uniform Arbitration Act (RUAA), a model law drafted by the National Conference of Commissioners on Uniform State Laws that has been enacted in a number of states, makes clear that an arbitral tribunal shall have the power to “decide a request for summary disposition of a claim or particular issue”.

<sup>59</sup> As the court in *Sheldon* noted, “if a party’s claims are facially deficient and the party therefore has no relevant or material evidence to present at an evidentiary hearing, the arbitration panel has full authority to dismiss the claims without permitting discovery or holding an evidentiary hearing”. 269 F.3d at 1207.

<sup>60</sup> See S. Netherway, *The Arbitration Act 1996 And Its Potential Impact On Insurance And Reinsurance Dispute Resolution*, Int. LL.R., 5(9), 276, 280 (1997). This discussion was in the context of “summary judgment” but the same principle should apply in claim-vetting – *i.e.* there should be no reason to permit the presentation of necessarily irrelevant evidence. In a decision rendered prior to the enactment of the Act, the Court of Appeal in *Dalmia Dairy Industries Ltd. v. National Bank of Pakistan*, 2 Lloyd’s Rep. 223, 269-270 [1978], rejected the challenge of a Swiss ICC award based upon the argument that “the awards [were] void and unenforceable because the arbitrator failed to observe the principles of natural justice by refusing to hear oral evidence”. The court observed that “where both parties have had more than ample opportunity to present and argue the case, orally as well as in writing” and “the dispute being . . . exclusively [] of a legal nature . . . it was completely unnecessary to collect testimonies and hear witnesses”. *Id.* at 269. Although the author unfortunately is not in a position to offer definitive comments on Swiss law, it is worth noting that Swiss curial law, while enforcing the right to be heard, interprets that right restrictively and limits the right to “only such evidence as is material and relevant to adjudicate the case”. E. Geisinger and V. Frossard, *Challenge and Revision of the Award*, in *International Arbitration In Switzerland* (Eds. G. Kaufmann-Kohler and B. Stucki), 147 (2004).

<sup>61</sup> See *Dalmia Dairy Industries Ltd. v. National Bank of Pakistan*, note 60 at 223 and 269.

French curial law would also appear to permit a tribunal to grant an objection such as that raised in *Trans-Global Petroleum*. While Article 1502-4 of the *Code de procédure civile* requires that any arbitral award respect *le principe de la contradiction*,<sup>62</sup> French curial law accords a substantial degree of deference to the arbitrator in crafting matters of procedure and will only sanction "*des atteintes flagrantes à la contradiction*".<sup>63</sup> Consistent with this deference, it is widely recognized that a tribunal may refuse to hear witnesses, call a hearing of any kind or entertain oral arguments, if such measures are deemed unwarranted.<sup>64</sup> Accordingly, where a tribunal deems a claim to be facially invalid and incapable of being upheld no matter the volume of evidence that its proponent plans to adduce in favor of the claim or number of witnesses who will be called, a tribunal's decision to dismiss that claim as patently unmeritorious should in principle represent a valid exercise of procedural discretion under French curial law. This of course assumes that the party opposing such an objection has a full and fair opportunity to present arguments against dismissal.

Finally, it is interesting to note that German civil procedure provides for a form of dismissal independent of any action by the parties. Specifically, under German procedure, the judge has an inherent obligation to screen, *ex officio*, the merits of each and every claim asserted. Thus, once a claim is filed, the judge must in effect play the role of gatekeeper, examining whether the facts alleged, if found to be true, would entitle the party to the relief requested. Where a claim is facially invalid, the case is dismissed and not allowed to reach the evidentiary phase. This review is undertaken independent of any action by the parties and is required under the concept of "*Schlüssigkeit*".<sup>65</sup>

Of course, it is clear that the best means to ensure acceptance of a procedure akin to ICSID Rule 41(5) is through *ex ante* party consent, whether through the drafting of appropriate language in agreements to arbitrate or through consent to institutional rules recognizing the possibility of such a mechanism. Appropriate language could track that used in ICSID Rule 41(5)

<sup>62</sup> This right means that a party must be allowed not only to challenge arguments and evidence against it, but also to present arguments in support of its own position. See Fouchard, Gaillard, Goldman, *Traité de l'arbitrage commercial international*, Litec, §.1639, 963 (1996).

<sup>63</sup> See Mathieu de Boissésou, *Le droit français de l'arbitrage international*, Paris, §797 (1990).

<sup>64</sup> See Mathieu de Boissésou, *Le droit français de l'arbitrage international*, Paris, §797/§ 752 (1990) (cf. C.A Paris 15 mars 1984, CA Paris 13 mai 1980 inédit); ( CA Paris 15 mars 1984, CA Paris 13 juillet 1987 inédit); Poudret et Besson, *Droit comparé de l'arbitrage international*, LGDJ, §6433, (2002); Ch. Seraglini, sous la direction de J.Béguin et M.Menjuq, *Droit du commerce international*, Litec, §2641/ §2678 (2005).

<sup>65</sup> To be permitted to proceed, a claim must be "*schlüssig*", i.e. must establish a cause of action, see BGH, JZ 1963, 32; BGH, NJW 1984, 2889; Zöller/Greger, *Zivilprozessordnung*, 26, ¶¶ 22, 23 before § 253, ed. (2007); Musielak/Stadler, ZPO, 6. ed., § 331 ¶7 (2008).

or in the U.S. model BIT. In reality, in the absence of evidence of such consent, many arbitrators from civil law backgrounds, particularly in arbitrations seated in jurisdictions not recognizing claim-vetting, will likely hesitate to endorse such a procedure. Thus, the need for party-agreed procedures and institutional reform is real.

### **Conclusion**

In the discussion above, the author has attempted to identify the viability of preliminary, merits-based vetting procedures as a valuable tool for all forms of arbitration. In view of the increasing use of such mechanisms in treaty arbitration, there is every reason for parties eager to explore means to decrease costs associated with arbitration, in whatever the setting, to encourage institutions and tribunals to make such procedures possible. Whether or not it is appropriate to seek to dismiss a claim at the outset, of course, will depend upon the nature of the claims alleged in each individual proceeding. Nonetheless, the experienced practitioner surely will have no difficulty thinking of a number of occasions on which the availability of such a procedure would have been of tremendous value. Thus, the author hopes that what will surely be an emerging jurisprudence around ICSID Rule 41(5), treaty provisions such as those found in the US Model BIT and any future rule adopted in connection with the various rule revisions discussed above, will have a positive and meaningful impact upon the world of international arbitration.

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Aren GOLDSMITH, *Trans-Global Petroleum: 'Rare Bird' or Significant Step in the Development of Early Merits-Based Claim-Vetting?*

**Summary:**

In this article, the author considers the role for early, merits-based claim-vetting procedures in the practice of international arbitration, both treaty-based and commercial. Taking as its point of departure the recent decision under ICSID Rule 41(5) in *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*, the first ever rendered under this 2006 amendment to the ICSID Rules, the article identifies a broader jurisprudence of claim-vetting in treaty arbitration, particularly in connection with challenges to jurisdiction *ratione materiae*, and considers different approaches to adjudicating challenges to claims alleged to be “manifestly without legal merit”.

Based upon the salutary effects observed, the article next considers the question of whether similar mechanisms should be imported into the practice of international commercial arbitration and how best to go about doing so. In anticipation of one familiar objection, and based upon a brief survey of several key curial laws, the article also considers why claim-vetting procedures, particularly where supported by party-consent (express or implied), should not necessarily create problems of recognition. The article concludes that this common law tradition has valuable potential, under appropriate circumstances, to narrow disputes and/or eliminate frivolous claims entirely, and thereby to help return international commercial arbitration closer to its roots.

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