

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT  
DISPUTES**

**Vasilisa Ershova and Jegor Jeršov**

Claimants

v.

**Republic of Bulgaria**

Respondent

**(ICSID Case No. ARB/22/29)**

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**DECISION ON THE RESPONDENT'S PRELIMINARY OBJECTION  
UNDER ART. 41(5) OF THE ICSID ARBITRATION RULES**

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***Members of the Tribunal***

Juan Fernández-Armesto, President of the Tribunal

Jan Paulsson, Arbitrator

Toby Landau KC, Arbitrator

***Secretary of the Tribunal***

Anna Holloway

***Assistant to the Tribunal***

Francisca Seara Cardoso

**25 July 2023**

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## **I. INTRODUCTION**

1. This case concerns a dispute submitted to the International Centre for the Settlement of Investment Disputes [“**ICSID**” or the “**Centre**”] on the basis of the Energy Charter Treaty [“**ECT**”] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 14 October 1966 [“**ICSID Convention**”]. The dispute relates to investments in the Bulgarian energy sector originally held by Claimants’ deceased father, and the treatment by Bulgaria of these.
2. This Decision sets out the Tribunal’s reasons and decision on the Respondent’s Preliminary Objection under Article 41(5) of the ICSID 2006 Arbitration Rules [“**ICSID Arbitration Rules**”].

## **II. THE PARTIES**

3. Claimants in this arbitration are Ms. Vasilisa Ershova and Mr. Jegor Jeršov [“**Heirs**” or “**Claimants**”], the two surviving children of Mr. Denis Jeršov and both Lithuanian citizens. Respondent is the Republic of Bulgaria [“**Bulgaria**” or “**Respondent**”].
4. Claimants and Respondent are hereinafter collectively referred to as the “**Parties**.” The Parties’ respective representatives and their addresses are listed above on page ii.

## **III. PROCEDURAL BACKGROUND**

5. On 2 November 2022, the ICSID Secretariat received a request for arbitration from Ms. Vasilisa Ershova and Mr. Jegor Jeršov, requesting to institute an ICSID arbitration proceeding against the Republic of Bulgaria, pursuant to Articles 25 and 36 of the ICSID Convention, Rule 1 and 2 of the ICSID Institution Rules [the “**Institution Rules**”], and Article 26 of the ECT<sup>1</sup>.
6. Following an exchange of correspondence between the ICSID Secretariat and Claimants, the request for arbitration, as supplemented by Claimants’ correspondence of 7 and 8 November 2022 [the “**Request for Arbitration**”], was registered on 11 November 2022, in accordance with Article 36(3) of the ICSID Convention and the Parties were notified of the registration. In the Notice of

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<sup>1</sup> Request for Arbitration, para. 1.

Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal.

7. In the absence of an agreement between the Parties, the Tribunal was constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention.
8. The Tribunal is composed of Juan Fernández-Armesto, a national of Spain, President, appointed by agreement of the parties; Jan Paulsson, a national of France, Sweden, and Bahrain, appointed by Claimants; and Toby Landau KC, a national of the U.K., appointed by Respondent.
9. On 4 May 2023, the Secretary-General, in accordance with Rule 6(1) of the ICSID Arbitration Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Anna Holloway, ICSID Counsel, was designated to serve as Secretary of the Tribunal.
10. Following the constitution of the Tribunal, by email of 22 May 2023 transmitted by the Secretary of the Tribunal, the Tribunal confirmed that the first session would be held on 23 June 2023<sup>2</sup>.
11. On 30 May 2023, Bulgaria filed a Preliminary Objection to the Tribunal's jurisdiction under Rule 41(5) of the ICSID Arbitration Rules, on the grounds that Claimants' claims are manifestly without legal merit, together with Exhibits R-0001 through R-0004 and Legal Authorities RL-0001 through RL-0033 [the "**Rule 41(5) Application**" or "**Respondent's Application**"]<sup>3</sup>.
12. On 16 June 2023, the Parties agreed to the appointment of Ms. Francisca Seara Cardoso as Assistant to the Tribunal.
13. On 18 June 2023, Claimants submitted a request for provisional measures together with Exhibits C-0010 through C-0012 and Legal Authorities CLA-4 through CLA-8.
14. On 23 June 2023, the Tribunal and the Parties held a first session by videoconference under Rule 21(1) of the ICSID Arbitration Rules [**"First Session"**], in order to deal with case management issues. During the First Session, it was agreed that the written phase of the proceedings on Respondent's Preliminary Objection would consist of one round of written argument, followed by a short hearing through Zoom (if needed).
15. In accordance with the Tribunal's instructions<sup>4</sup>, on 30 June 2023, Claimants submitted their Answer to Respondent's Preliminary Objection, together with Legal Authorities CL-0009 through CL-0015 [**"Claimants' Answer"**]. At the same time,

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<sup>2</sup> ICSID's email to the Parties of 22 May 2023.

<sup>3</sup> Respondent's Application, para. 1.

<sup>4</sup> ICSID's email to the Parties of 1 June 2023.

Claimants indicated that they would refile their request for provisional measures at some point in the future, and asked the Tribunal to refrain from ruling on the 18 June 2023 request in the meantime.

16. On 17 July 2023, the Tribunal issued Procedural Order No. 1, ruling on a disagreement between the Parties as to which set of ICSID Rules are applicable to this proceeding. The Tribunal confirmed therein that the 2006 ICSID Arbitration Rules are the set of rules applicable. The Secretary of the Tribunal, in the cover letter conveying the procedural order, also conveyed to the Parties the Tribunal's view that no further submissions, written or oral, would be required for the disposition of the Respondent's Application.

#### **IV. FACTUAL BACKGROUND**

17. The following factual background summarily describes the facts that are necessary to understand and adjudicate this Rule 41(5) Application and is based on Claimants' statement of the facts in support of their claims. These facts are accepted for the purposes of this decision only, and without prejudice to a final determination of the facts by the Tribunal at a later stage.

##### Mr. Jeršov's investments in Bulgaria

18. Mr. Denis Jeršov, a Lithuanian citizen<sup>5</sup>, was the co-founder of the oil and gas trading company Naftex<sup>6</sup>. In 1995, Mr. Jeršov entered the Bulgarian market on behalf of one of Naftex's biggest clients – the Russian oil company Yukos – to create a subsidiary - Yukos Petroleum Bulgaria AD [“YBP”] - and run Bulgarian operations in association with a local entrepreneur, Mr. Mitko Sabev<sup>7</sup>. YPB was 99% held by Yukos Finconsult Ltd., Cyprus, whose owner was Mr. Jeršov; the remaining 1% was held by Mr. Sabev, who was also the company's CEO<sup>8</sup>.
19. In 1997, in the context of the privatization of Bulgaria's energy market, YBP was invited by Bulgaria to submit a bid for the privatization of Petrol's majority stake<sup>9</sup>. Two years later, the International Consortium Bulgaria [“ICB”], a consortium led by YBP, was pronounced the winner of the tender<sup>10</sup>.
20. Shortly thereafter, YBP was renamed to Naftex Bulgaria Holding AD [“NBH”]. NBH had a 51% stake in Petrol, while the minority stake was traded publicly on the Bulgarian Stock Exchange. In the following years, NBH began purchasing interests

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<sup>5</sup> C-1.

<sup>6</sup> Request for Arbitration, para. 12.

<sup>7</sup> Request for Arbitration, para. 12.

<sup>8</sup> Request for Arbitration, para. 14.

<sup>9</sup> Request for Arbitration, para. 15.

<sup>10</sup> Request for Arbitration, para. 16.

from other shareholders in Petrol, up to the point of holding over 95% of the shares in Petrol<sup>11</sup>.

Bulgaria's alleged measures

21. In 2001, the National Security Agency of Bulgaria issued a 10-year ban against Mr. Jeršov, alleging that Mr. Jeršov presented a threat to national security. Mr. Jeršov was then forced to leave the country<sup>12</sup>. This ban was overturned four years later<sup>13</sup>. During his absence, Mr. Sabev was left without direct supervision<sup>14</sup>.
22. After his return to Bulgaria in 2005, Mr. Jeršov reorganized the group's business and corporate structure: NHB was renamed to Petrol Holding AD ["PEHOLD"] and, from a majority shareholding of 95%, Mr. Jeršov reduced his shareholding to 47.5%, giving a stake of 47.5% to Mr. Sabev (the remaining 5% was held by Mr. Alexander Melnik, one of Mr. Jeršov's trusted advisors and a classmate)<sup>15</sup>.
23. However, according to Claimants, Mr. Sabev subsequently colluded with the Bulgarian Government, and initiated a series of actions against Mr. Jeršov's interests in Petrol<sup>16</sup>. These actions culminated with Mr. Jeršov being blocked from exercising control over PEHOLD (and, in turn, over Petrol). Despite several attempts to block these events, through subsequent appeals to both the Bulgaria's courts and executive bodies, Mr. Jeršov ended up losing control over Petrol for three years<sup>17</sup>.
24. Shortly after regaining control of PEHOLD<sup>18</sup>, on 2 December 2013, Mr. Jeršov found out that all the shares of PEHOLD in Petrol had been sold on the stock exchange at 1/3 of their actual trading price<sup>19</sup>. Again, despite several attempts to investigate, suspend or cancel the sale of the shares, Mr. Jeršov (through PEHOLD) ended up losing his stake in Petrol, without receiving any of the proceeds of the sale of the shares<sup>20</sup>.

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<sup>11</sup> Request for Arbitration, paras. 19-20.

<sup>12</sup> Request for Arbitration, paras. 23-25.

<sup>13</sup> Request for Arbitration, paras. 26-27.

<sup>14</sup> Request for Arbitration, para. 27.

<sup>15</sup> Request for Arbitration, paras. 28-31.

<sup>16</sup> Request for Arbitration, paras. 32-39.

<sup>17</sup> Request for Arbitration, paras. 40-69.

<sup>18</sup> Request for Arbitration, paras. 70-73.

<sup>19</sup> Request for Arbitration, para. 74.

<sup>20</sup> Request for Arbitration, paras. 75-81.

Mr. Jeršov's death

25. Four years later, in 2017, Mr. Denis Jeršov passed away<sup>21</sup>, leaving behind his two children, Ms. Vasilisa Ershova and Mr. Jegor Jeršov, Claimants in these proceedings – who also hold Lithuanian citizenship<sup>22</sup>.

## V. PARTIES' POSITIONS

### 1. RESPONDENT'S POSITION

26. Respondent argues that, in accordance with ICSID Arbitration Rule 41, the Centre lacks jurisdiction over the dispute, and that the claims presented are without legal merit<sup>23</sup>:
27. First, Respondent argues that Article 26 of the ECT specifically requires, as a condition for the Centre's jurisdiction, written consent on the part of the investor who owned or controlled the investment<sup>24</sup>.
28. Respondent highlights that Mr. Jeršov – the purported investor – passed away in November 2017, almost four years after the alleged wrongful taking of the investment. Nonetheless, as Mr. Jeršov died without invoking any of the procedures of Article 26 of the ECT<sup>25</sup>, it is thus clear that he did not consent in writing to submit a dispute to ICSID arbitration<sup>26</sup>.
29. Second, Respondent submits that Article 26 of the ECT only applies to disputes over an alleged breach of an obligation in ECT Part III relating to an "Investment" of an "Investor" in Bulgaria. It does not apply to other disputes, including those of the heirs of an "Investor". Considering that Claimants – Mr. Jeršov's legal Heirs – do not claim that they are "Investors" under Article 1(7) of the ECT, nor that they owned or controlled any "Investment" in Bulgaria pursuant to Article 1(6) of the ECT, they have no basis to invoke Article 26 of the ECT<sup>27</sup>.
30. Third, the terms of the ECT do not provide a basis for Claimants to bring claims "on behalf of" Mr. Jeršov or "in his stead"<sup>28</sup>. Unless the possibility of substitution is agreed by both parties to the dispute (*quod non*), there is no basis for a party to

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<sup>21</sup> Request for Arbitration, para. 6; C-2.

<sup>22</sup> Request for Arbitration, para. 6; C-3 and C-4.

<sup>23</sup> Respondent's Application, paras. 1 and 6-7.

<sup>24</sup> Respondent's Application, paras. 22-26, citing **RL-11**, Schreuer's Commentary on the ICSID Convention, Vol. I (3d ed. 2022), para. 871; and **RL-12**, Kaj Hobér, The Energy Charter Treaty: A Commentary (2020), para. 439.

<sup>25</sup> Respondent's Application, para. 30.

<sup>26</sup> Respondent's Application, paras. 6(a), 31.

<sup>27</sup> Respondent's Application, paras. 6(b), 32-35.

<sup>28</sup> Respondent's Application, para. 37.



submit a dispute – which is “*intuitu personae*” – to ICSID Arbitration on behalf of another<sup>29</sup>.

31. Furthermore, the ECT provides for the possible assignment of claims only in circumstances of subrogation, pursuant to Article 15. In any case, the assignment contemplated in such provision allows a party to submit a dispute to arbitration on its own behalf, not on behalf of the Investor<sup>30</sup>. Furthermore, rights and obligations of an *intuitu personae* character are not transferred without the counterparty's agreement. Therefore, unless the terms of the treaty allow the proposed succession, it is not possible to assign claims – which is precisely the situation of the ECT.
32. In this case, Respondent argues, Claimants do not claim that Mr. Jeršov's claim was assigned or transferred to them, but only that they are entitled to present Mr. Jeršov's claim, on his behalf, as his Heirs – which is not permitted under the ECT<sup>31</sup>.
33. In light of the above, Respondent requests that the Tribunal declare that Claimants' claims are manifestly without legal merit, due to the failure to establish a basis for asserting jurisdiction, pursuant to Article 25 of the ICSID Convention and Article 26 of the ECT<sup>32</sup>.

## 2. CLAIMANTS' POSITION

34. Claimants aver that the claims presented in their Request for Arbitration are not manifestly without legal merit and, thus, request the Tribunal to dismiss Respondent's Preliminary Objection and the relief sought therein<sup>33</sup>.
35. First, Claimants explain that, at the time that Mr. Jeršov passed away, his investment claims against Bulgaria had already fully crystallized. Such claims are now held by Claimants, as his legal Heirs. Therefore, there is no doubt that Claimants have provided their consent to submit the present dispute to ICSID arbitration under Article 26 of the ECT, which is not contested by Respondent<sup>34</sup>.
36. Second, Claimants reject Bulgaria's argument that Article 26 of the ECT only applies to disputes over an alleged breach of an obligation in ECT Part III relating to an “Investment” of an “Investor” in Bulgaria, on the following three independent and alternative grounds<sup>35</sup>:
  37. (i) Bulgaria's breaches of its ECT obligations vis-à-vis Mr. Jeršov created a right to bring an action to seek compensation (*chose in action*), a purely economic right to compensation. This right can pass or be transferred to Claimants (as legal heirs),

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<sup>29</sup> Respondent's Application, paras. 38-40.

<sup>30</sup> Respondent's Application, paras. 41-43.

<sup>31</sup> Respondent's Application, paras. 43-54.

<sup>32</sup> Respondent's Application, para. 57.

<sup>33</sup> Claimants' Answer, para. 46.

<sup>34</sup> Claimants' Answer, paras. 16-19.

<sup>35</sup> Claimants' Answer, paras. 20-21.

by way of inheritance law, legal succession or other forms of transfer of rights, who then become entitled to exercise that action by putting forward Mr. Jeršov's ECT claim under the same conditions as they would apply to Mr. Jeršov<sup>36</sup>. The ECT in no way precludes this transfer of economic rights, by way of universal succession, which were properly exercised by Claimants<sup>37</sup>.

38. Respondent's position – denying the heirs of a natural person the possibility to exercise their rights under an investment treaty – would give rise to absurd consequences: the host State would be granted an opportunity to do away with any potential investment treaty claim by simply causing the death of the natural person investor right after breaching its obligations under a treaty, before the investor had the chance to accept the host State's standing offer and to submit his/her investment treaty claims to arbitration<sup>38</sup>.
39. (ii) Alternatively, Claimants argue that, in the face of Bulgaria's breaches of the ECT, the investment was transformed into a residual right (*i.e.*, the right to claim damages for breaches of the ECT). Again, by being the current holders of these residual rights arising out of the original investment, the Heirs of Mr. Jeršov can be deemed "investors" for the purposes of Article 26 of the ECT and accept Bulgaria's offer to submit the dispute to arbitration<sup>39</sup>.
40. (iii) Furthermore, and in any case, Claimants are still shareholders in PEHOLD – a company that, despite the wrongful taking of its shares in Petrol (and the entire Petrol Group), still exists. The shares in PEHOLD constitute an investment according to the ECT which, therefore, makes Claimants "investors" for the purposes of the Tribunals' jurisdiction under the ECT and the ICSID Convention<sup>40</sup>.
41. Third, Claimants assert that Respondent has failed to provide support for the proposed radical and unprecedented interpretation of Article 26 of the ECT. The only case cited by Respondent – *Westmoreland v. Canada* [*"Westmoreland"*]<sup>41</sup> – actually favours Claimants' position, as the *Westmoreland's* tribunal found that, in order for it to uphold its jurisdiction, the claimant in that case was expected to "show that it is the legal successor to [the original investor]"<sup>42</sup>. In this case, it is undisputed that Mr. Jeršov's rights were inherited through universal succession by his Heirs and, therefore, Claimants are eligible to submit the present dispute to ICSID arbitration<sup>43</sup>.

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<sup>36</sup> Claimants' Answer, para. 24.

<sup>37</sup> Claimants' Answer, paras. 25-26.

<sup>38</sup> Claimants' Answer, para. 27.

<sup>39</sup> Claimants' Answer, paras. 28-29.

<sup>40</sup> Claimants' Answer, paras. 30-32.

<sup>41</sup> **RL-21**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022.

<sup>42</sup> **RL-21**, *Westmoreland*, para. 220.

<sup>43</sup> Claimants' Answer, paras. 33-36.

42. In light of the foregoing, Claimants aver that Respondent has failed to meet the high standard for an application under Rule 41(5). Claimants’ case cannot be deemed “clear and obvious” nor “patently unmeritorious” based on the arbitrary interpretation presented by Respondent in support of which it has failed to offer any authority<sup>44</sup>.
43. Finally, Claimants assert that Respondent was well aware that its Preliminary Objection did not comply with the legal test applicable under ICSID Arbitration Rule 41(5), which thus constitutes a textbook example of an abuse of process. Consequently, Claimants submit that the Tribunal should grant an adverse costs order in favour of Claimants with immediate effect<sup>45</sup>.

## **VI. DISCUSSION**

44. In its Rule 41(5) Application, Bulgaria requests, pursuant to ICSID Arbitration Rule 41(5) and (6), that the Tribunal dismiss Claimants’ claims, and order Claimants to reimburse all of Bulgaria’s costs<sup>46</sup>.
45. Claimants, in turn, ask the Tribunal to dismiss Respondent’s Application in its entirety and to award Claimants all of their costs associated with defending Respondent’s Application, with immediate effect<sup>47</sup>.
46. The Tribunal considers that Respondent’s Application should be dismissed because Claimants’ claims are not “manifestly without legal merit”.

### **1. THE APPLICABLE STANDARD**

47. For the purpose of determining Respondent’s Application, the relevant provision of the ICSID Arbitration Rules states as follow:

**“Rule 41**

[...]

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

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<sup>44</sup> Claimants’ Answer, paras. 37-39.

<sup>45</sup> Claimants’ Answer, paras. 41-45.

<sup>46</sup> Respondent’s Application, para. 57.

<sup>47</sup> Claimants’ Answer, para. 46.

prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

(6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect”.

48. Under Rule 41(5), the respondent in an arbitration may raise, at the outset of the proceedings, a preliminary objection that the claims brought by the claimant should be dismissed for being “manifestly without legal merit”.
49. The tribunal, after giving claimant an opportunity to be heard, must promptly adopt a decision:
- If the tribunal accepts respondent's objection, it will partially or totally dismiss claimant's claims;
  - If the tribunal rejects the objection, the main proceedings are resumed and respondent may raise the objections again in the normal course of the arbitration.
50. For an objection to succeed in this special procedure, respondent must prove that it refers to a claim that is “manifestly without legal merit”. If the threshold is not reached, the tribunal dismisses the objection *pro tem*.

“Manifestly”

51. The term “manifestly” generally means something that is “evident”, “clear” or “obvious” to the observer. The word has been interpreted by a number of arbitral tribunals.
52. For example, the Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules of the tribunal in *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan* [“*Trans-Global Petroleum*”]<sup>48</sup> analysed the use of the expression “manifestly” in other articles of the Convention and legal authorities, and arrived at the following conclusion<sup>49</sup>:

“[...] the ordinary meaning of the word requires the respondent to establish its objection clearly and obviously, with relative ease and despatch. The standard is thus set high [...] The exercise may thus be complicated; but it should never be difficult”.

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<sup>48</sup> **RL-2**, *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008.

<sup>49</sup> **RL-2**, *Trans-Global Petroleum*, para. 88.

53. The tribunal considered that “the special procedure imposed by Rule 41(5)” confirmed that meaning and went further to state that<sup>50</sup>:

“as a basic principle of procedural fairness, an award under Rule 41(5) can only apply to a clear and obvious case, [...] [to] ‘patently unmeritorious claims’”.

54. This conclusion was later endorsed in *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine* [“**Globex**”]<sup>51</sup>, *RSM Production Corporation and others v. Grenada* [“**RSM**”]<sup>52</sup> and *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela* [“**Brandes**”]<sup>53</sup>. In *Brandes*, the tribunal also made the following observation<sup>54</sup>:

“[T]he new procedure of the preliminary objections under Rule 41(5) is intended to create the possibility to dismiss at an early stage such cases which are clearly unmeritorious”.

55. Likewise, in *Lotus v. Turkmenistan* [“**Lotus**”], the tribunal required that it be “obvious from the submissions of the parties that there is some unavoidable and indisputable fact, or some legal objection in relation to which no possible counterargument is identified”. Therefore, “[i]f the claimant [...] can point to an arguable case, the claim should proceed”<sup>55</sup>.

56. The procedure established by Rule 41(5) is an expedited procedure, directed to cases that are “evident”, “clear” or “obvious”, not those which entail a greater degree of difficulty, or which require a more thorough and extensive analysis of the legal and factual issues to dispose of the claim. Rule 41(5) is thus intended to capture cases that are clearly and unequivocally unmeritorious, not those which are novel, difficult, refer to disputed legal issues, or where claimant has a tenable or arguable case. The standard is demanding and rigorous<sup>56</sup>.

57. The Tribunal therefore sees no reason to depart from the interpretations rendered under ICSID Arbitration Rule 41(5) (and its parallel provision under Rule 45(6) of

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<sup>50</sup> **RL-2**, *Trans-Global Petroleum*, paras. 89, 92.

<sup>51</sup> **RL-4**, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, para. 35.

<sup>52</sup> **RL-5**, *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 6.1.3.

<sup>53</sup> **RL-3**, *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/03, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009, para. 62.

<sup>54</sup> **RL-3**, *Brandes*, para. 62.

<sup>55</sup> **RL-8**, *Lotus Holding Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020, para. 158.

<sup>56</sup> **CL-9**, *PNG Sustainable Development Program Ltd v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Tribunal's Decision on the Respondent's Objections under Rule 41(5) of the ICSID Arbitration Rules, 28 October 2014, para. 88; **RL-1**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Decision on the Respondent's Preliminary Objection under Rule 45(6) of the ICSID Arbitration (Additional Facility) Rules, 12 December 2016, para. 66.

the ICSID Arbitration Additional Facility Rules) and adopts the same approach in this case.

“Without legal merit”

58. According to the language of Rule 41(5), the issue to be determined (*i.e.*, what must be “manifest”) is that a claim is “without legal merit”. The term “legal” is used in Rule 41(5) of the ICSID Arbitration Rules in opposition to “factual” as shown by the drafting history of the provision: the Secretariat’s Working Paper of May 2005 made reference to claims “manifestly without merit”<sup>57</sup>. The term “legal” was added thereafter in order to avoid inappropriate discussion on the facts of the case at that stage<sup>58</sup>. A preliminary objection must therefore relate to “legal” issues, not to matters of fact.

59. The tribunal in *Trans-Global Petroleum* emphasized the same idea<sup>59</sup>:

“The Tribunal considers that the adjective ‘legal’ in Rule 41(5) is clearly used in contradistinction to ‘factual’ given the drafting genesis of Rule 41(5) [...] Accordingly, it would seem that the tribunal is not concerned, *per se*, with the factual merits of the Claimant’s three claims. At this early stage of these proceedings, without any sufficient evidence, the Tribunal is in no position to decide disputed facts alleged by either side in a summary procedure”.

60. The Tribunal is therefore of the view that the expression “without legal merit” in ICSID Arbitration Rule 41(5) limits the issues that can be addressed by the tribunal to legal considerations, as opposed to factual ones.

Objections to jurisdiction v. objections to the merits

61. Rule 41(5) does not specifically state whether objections must refer to the merits of the case, or whether jurisdictional objections are also admissible. The standard required by the Rule – that “a claim is manifestly without legal merit” – is ambiguous.

62. Bulgaria is submitting a jurisdictional objection: that the Tribunal lacks jurisdiction because the investor – Mr. Jeršov – did not consent to arbitrate any alleged dispute, his Heirs do not claim to be “Investors” that owned or controlled an “investment” in Bulgaria and, in any event, Claimants are not eligible to consent to submit the dispute to arbitration “on behalf” of the *de cuius*. Claimants, in turn, while rejecting the substance of Respondent’s Application, have not disputed that Bulgaria is entitled to submit jurisdictional objections by way of the Rule 41(5) procedure.

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<sup>57</sup> Working Paper of the ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations* (May 21, 2005), p. 7.

<sup>58</sup> Aurélia Antonietti, *The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Rev. – FILJ 427, 439, p. 440.

<sup>59</sup> **RL-2**, *Trans-Global Petroleum*, para. 97.

63. The arbitral tribunals that have considered this question have arrived at the conclusion that jurisdictional objections are admissible under the Rule 41(5) procedure.
64. For example, the tribunal in *Brandes* was the first to decide the issue and came to the following conclusion<sup>60</sup>:

“The Tribunal first of all notes that Rule 41(5) does not mention ‘jurisdiction’. The terms employed are ‘legal merit’. This wording, by itself, does not provide a reason why the question whether or not a tribunal has jurisdiction and is competent to hear and decide a claim could not be included in the very general notion that the claim filed is ‘without legal merit’.

\* \* \*

Until 2006 the Rules therefore did not provide for any possibility to terminate the proceedings at an early stage in the case of requests which are patently unmeritorious. 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”.

65. Several tribunals were confronted with the same question, and all explicitly agreed with the findings of *Brandes*<sup>61</sup>.

\* \* \*

66. In light of the foregoing, there seems to be a common ground among arbitral tribunals – which is confirmed by both Parties<sup>62</sup> – as to the requirements of Rule 41(5)'s “manifestly without legal merit” standard. That is, that an objection under this provision:

- Must be established clearly and obviously, with relative ease and dispatch;
- Must raise a legal impediment to a claim, not a factual one; and
- May go either to jurisdiction or the merits.

Additional requirements

67. Rule 41(5) of the ICSID Arbitration Rules further requires that:
- The Parties have not agreed to another expedited procedure for making preliminary objections;

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<sup>60</sup> **RL-3**, *Brandes*, paras. 50-52.

<sup>61</sup> See, for instance, **RL-4**, *Globex*, para. 30; **RL-5**, *RSM*, paras. 6.1.1. and 6.1.2; **CL-9**, *PNG*, para. 91.

<sup>62</sup> Respondent's Application, paras. 9-12; Claimants' Answer, paras. 5-15.

- The party raises the objection within 30 days of the Tribunal's constitution;  
and
- In any case before the First Session.

68. The additional requirements established in Rule 41(5) are met in this case. It is undisputed that the Parties have not agreed to another expedited procedure for making preliminary objections and that Respondent submitted its Preliminary Objection<sup>63</sup> within the timeframe of 30 days after the constitution of the Tribunal<sup>64</sup> and before the First Session<sup>65</sup>.

## 2. APPLICATION OF THE STANDARD TO RESPONDENT'S APPLICATION

69. In its Rule 41(5) Application, Bulgaria alleges that Claimants' claims are manifestly without legal merit because:

- (i) Mr. Jeršov did not consent to arbitrate any alleged dispute;
- (ii) Claimants are not "Investors" who owned or controlled an "Investment" in Bulgaria under the ECT; and
- (iii) Claimants are not eligible under the ECT to submit a dispute "on behalf" of Mr. Jeršov or "in his stead".

70. In other words, Bulgaria submits that because Claimants are allegedly not entitled to bring the present case, for lack of legal standing, their claims are manifestly without legal merit.

71. The Tribunal is unconvinced that, in the present case, it would be appropriate to summarily dismiss Claimants' claims for being manifestly without legal merit.

### Consent

72. Article 25(1) of the ICSID Convention establishes the requirements for the Centre's jurisdiction in the following terms:

"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally".

73. Furthermore, Article 26 ECT provides that:

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<sup>63</sup> Respondent submitted its Application on 30 May 2023.

<sup>64</sup> The Tribunal was constituted on 4 May 2023.

<sup>65</sup> The First Session was held on 23 June 2023.



“(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

[...]”.

#### Tribunal's analysis

74. For Bulgaria's Rule 41(5) Application to be upheld, the Tribunal would have to find that there is a manifest case for the lack of standing of Claimants – as argued by Bulgaria in its objections.
75. Claimants do not dispute that Mr. Jeršov passed away before having provided his consent to arbitration. Neither do they argue that they owned or controlled an “Investment” in Bulgaria at the time of Respondent's alleged breaches. From Claimants' standpoint, Bulgaria's breaches of its ECT obligations *vis-à-vis* Mr. Jeršov created a right to bring an investment claim against Respondent. When Mr. Jeršov passed away, the right to bring such claim – which had fully crystallized by the time of Mr. Jeršov's death – was transferred to Claimants, as his legal Heirs. By way of this universal succession, Claimants are now eligible to consent to arbitration.
76. Thus, the main issue before the Arbitral Tribunal is not whether Mr. Jeršov has consented to ICSID arbitration, nor whether Claimants owned or controlled an “Investment” in Bulgaria at the time of Respondent's alleged breaches, but rather to assess whether Claimants have legal standing to bring investment claims on behalf of their late father.
77. The Tribunal notes that the issue of whether the heirs of an alleged investor who died before giving its consent to arbitration seems to be a rather novel issue, which

has not been addressed in previous decisions studied by the Tribunal – the Parties' failure to submit case-law addressing this specific issue is revealing.

78. After studying each Party's submissions, and examining carefully the evidence presented, the Tribunal considers that the questions at stake raise complex interpretative issues that require a greater degree of consideration and a more thorough analysis of Lithuanian law and international legal principles. The Tribunal requires further legal argument on these issues.
79. On this basis, the Tribunal considers that there is not a manifest case for a lack of legal standing and, therefore, that the Claimants' claims cannot be described as "manifestly without legal merit" on the basis of the record as it currently stands. This is not an appropriate case for the expedited Rule 41(5) procedure and therefore Respondent's Application must be dismissed.

Other requests

80. Finally, Claimants have sought an award of costs. The Tribunal decides to reserve this issue for a future decision.

## **VII. DECISION**

81. For the above reasons, the Tribunal decides as follows:
  1. Respondent's Application is dismissed;
  2. All questions as to the costs of the Respondent's Application are reserved to a future decision;
  3. All other requests are dismissed;
  4. The further procedure for this arbitration will be according to the Tribunal's Procedural Order No. 2, which the Tribunal will issue shortly

On behalf of the Tribunal, in accordance with ICSID Arbitration Rule 16(2),

[signed]

Juan Fernández-Armesto  
President of the Tribunal  
Date: 25 July 2023