

**THE INTERNATIONAL CENTRE FOR
THE SETTLEMENT OF INVESTMENT DISPUTES**

ICSID CASE NO. ARB/07/25

BETWEEN:

TRANS-GLOBAL PETROLEUM, INC.

Claimant

v.

THE HASHEMITE KINGDOM OF JORDAN

Respondent

**THE TRIBUNAL'S DECISION
ON THE RESPONDENT'S OBJECTION
UNDER RULE 41(5) OF THE ICSID ARBITRATION RULES**

THE TRIBUNAL:

**Professor Donald M. McRae;
Professor James Crawford SC; and
V.V. Veeder (President).**

ICSID Secretary: Mr. Tomás Solís

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PART I: INTRODUCTION

(A) The Parties and Others

1. ***The Claimant*** – The Claimant is a U.S. corporation organized under the laws of Texas, United States of America.
2. ***TGPJ***: Trans-Global Petroleum Jordan, Ltd. ("TGPJ"), as described by the Claimant, is a wholly-owned subsidiary of the Claimant established under the laws of the British Virgin Islands to effect the Claimant's investment in the national territory of the Hashemite Kingdom of Jordan.
3. ***The Claimant's Legal Representatives***: The Claimant's legal representative is Matthew H. Adler Esq., of Pepper Hamilton LLP, Eighteen and Arch Streets, Philadelphia, PA 190103-2799, USA.
4. ***The Respondent***: The Respondent is the Hashemite Kingdom of Jordan.
5. ***NRA and the Ministry***: The Natural Resources Authority (the "NRA") and the Ministry of Energy and Natural Resources (the "Ministry") are the principal governmental organs within the Respondent's executive responsible for overseeing petroleum concessions within its national territory.
6. ***The Respondent's Legal Representatives***: The Respondent's legal representatives are Mr Mahmoud Hmoud, Director of the Legal Department, Foreign Ministry, P.O. Box 35217, Amman 1180, Jordan; and Abby Cohen Smutny Esq. & Darryl S. Lew Esq. of White & Case LLP, 701 Thirteen Street, NW, Washington, D.C., 2005, USA.

7. **Mr Hariri and Porosity:** Sheikh Ayman Hariri is a Lebanese national. He owns Porosity Limited, a legal person incorporated under the laws of Bermuda in 2006. Neither is a party to this arbitration; nor are they represented before this Tribunal.
8. Porosity and TGPJ are currently engaged in separate arbitration proceedings before a different tribunal, with claims and counterclaims. (Those other proceedings are not relevant to the issues raised by the Respondent's current Objection in these proceedings).

(B) The Dispute, the Claims and Relief Sought

9. The Tribunal here summarises, insofar as relevant for present purposes, the Claimant's written case as currently pleaded in its Request for Arbitration of 2nd August 2007 in regard to (i) the dispute, (ii) its claims and (iii) the relief sought by the Claimant. (This summary comprises the Claimant's assertions only, without any finding by the Tribunal one way or the other).
10. **The Dispute:** The Claimant's dispute with the Respondent arises out of the Claimant's investment of US \$29 million in a petroleum exploration venture in Jordan's national territory that uncovered, for the first time, numerous and thick "pay zones" which, from a technical standpoint, confirmed the existence of oil deposits in the Dead Sea and Wadi Araba basin in the designated area of exploration.
11. The Claimant performed exploratory work in the designated area over the course of a ten-year period pursuant to the written contract made between TGPJ as "the Contractor" and the NRA, namely the Production Sharing Agreement of April 1996 (the "PSA"). This PSA was ratified and adopted by the Jordanian Parliament on 17th February 1997, as Special Law 3/93.
12. When the Claimant confirmed its discovery of oil pay zones to the Respondent, the Respondent began a systematic campaign to destroy the Claimant's investment by

preventing the Claimant from pursuing any further role in the development of those oil deposits, notwithstanding TGPJ's express entitlement to participate under the PSA.

13. Ultimately, the Respondent removed TGPJ as the "Operator" under the PSA and "forced" TGPJ to assign an 80% interest in the PSA to Porosity.
14. Following this forced assignment, the Respondent revoked TGPJ's contractual customs exemptions, ordered its workers out of Jordan and refused to communicate at all with TGPJ regarding its remaining investment in the PSA.
15. **Three Claims:** By its Request for Arbitration, the Claimant requests the resolution, by these arbitration proceedings under the ICSID Convention, of its three claims that the Respondent violated Article II(3)(a), Article II(3)(b) and Article VIII of the Treaty between the Government of the United States of America and the Government of The Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment, done at Amman on 2nd July 1997 and entering into force on 13th June 2003 (the "BIT").
16. The alleged breaches of the BIT by the Respondent comprising these three "claims" are set out below, verbatim, from the Request for Arbitration (Paragraphs 110, 114 & 118-119, pp. 23-25), which are alleged to have "forced" TGPJ to relinquish its 80% interest in the Concession for "virtually no consideration" and put its US \$29 million "in jeopardy" (Paragraphs 111, 115 & 121).

Paragraph 110: "Claim I: (Breach of Article 2(3)(a) Failure to provide Fair and Equitable Treatment of Investment):

- a. *tortiously interfering with TGPJ's attempts to attract investors to fund a substantial and expanded drilling/appraisal program to commercialize the new fields and turn them into oil producing wells;*
- b. *pressuring TGPJ to assign a majority of its rights in the PSA to a company (Porosity) with no prior experience or expertise in oil exploration, for a monetary investment far*

less than other groups had offered TGPJ, forcing TGPJ to concede a larger share of its interest and lose total control over the project. Jordan's actions in trying to replace TGPJ as Operator and major interest holder of the Concession are even more egregious given that it waited for TGPJ to discover numerous and thick oil "pay zones" before it began a calculated campaign to remove TGPJ from the Concession;

- c. failing and refusing to present the amendments to the PSA - and its conduct in replacing an American oil exploration company with a company owned by Middle Eastern interests with no oil exploration experience- to the Jordanian Parliament for approval as is required by Articles 33 and 117 of the Jordanian Constitution. Jordan knew that if its conduct toward TGPJ was made public, the Jordanian Parliament may not only require the necessary approval of the amendments to the PSA, but may also require the full transparency of the NRA's agreement to allow Porosity to control the most important oil tract in Jordan through the smallest investment of any other group and the least industry knowledge;*
- d. failing and refusing to enforce the terms of the PSA in order to require Porosity to satisfy its minimum work obligations necessary to commercialize the new fields and turn them into oil producing wells in a timely fashion, (i) as promised to TGPJ; (ii) as required to protect TGPJ's investment; and (iii) as Respondent had required from TGPJ itself when TGPJ had control. The lack of pressure on Porosity to perform is itself a further instance of discrimination;*
- e. agreeing to extend the Third Exploration Term of the PSA for Porosity, a company owned by Middle Eastern interests, but refusing TGPJ's similar requests for an extension;*
- f. attempting to cancel TGPJ's customs exemption and effectively denying TGPJ company representatives work and residency rights in the country."*

Paragraph 114: "Claim II: (Breach of Article 2(3)(b) - Impairment of Investment through Unreasonable and Discriminatory Measures):

- a. tortiously interfering with TGPJ's attempts to attract investors to fund a substantial and expanded drilling/appraisal program to commercialize the new fields;*
- b. pressuring TGPJ to assign a majority of its rights in the Concession to a company owned by Middle Eastern interests with no prior experience or expertise in oil exploration;*
- c. replacing TGPJ as Operator of the Concession with a company owned by Middle Eastern interests with no prior experience or expertise in oil exploration activities;*
- d. advising TGPJ that it will not accept any future correspondence from it with regard to the Concession;*
- e. disparaging TGPJ and its President Nick Abraham in articles published in the media; and*
- f. cancelling TGPJ's customs exemption and attempting to have TGPJ company representatives removed from the country."*

Paragraphs 118-119: "Claim III (Breach of Article VIII – Consultations):

[# 118] By letter dated April 17, 2007, TGPJ brought to the NRA's attention certain concerns it had with respect to performance under the PSA, including Porosity's failure and refusal to meet its Operator obligations.

[# 119] Instead of consulting TGPJ promptly to discuss these concerns, by letter dated May 6, 2007, the NRA chastised TGPJ and advised that "it will not accept any future correspondence from [TGPJ] with respect to the [PSA] and its amendments."

17. **Relief:** As pleaded in its Request for Arbitration, the Claimant seeks from the Tribunal the following formal relief (pages 26-27):

“ (a) A requirement that the Respondent provide the difference in funding and economic benefits lost to the Claimant by Porosity's entry into the project at more generous terms than that freely negotiated by the Claimant with another investor parties [sic] which was withdrawn due to NRA interferences (\$60 million for 25% or at a rate of \$2.4 million per 1% equity) versus \$18 to \$40 million in promised funding for 60 to 80% by Porosity). That funding difference is at least \$104 million (USD);

(b) The return of the Claimant's cost recoverable funding (estimated at \$29 (USD) million investment) in the Concession;

(c) An award to the Claimant of at least \$540 million (USD), representing the Claimant's lost revenues of oil production, dating from the Respondent's first act of interference in the Claimant's pursuit of an investor in 2005;

(d) Interest on each of the above amounts;

(e) Entry of an Order removing Porosity as the Operator under the PSA and returning TGPJ as Operator;

(f) Additional PSA extension to cover all the time being lost since Assignment of Interest was made to Porosity Ltd; and

(g) Such other relief as may be proper, including costs and reasonable counsel or attorney fees and other related expenses.”

18. The Respondent denies the Claimant's claims and relief in full; but, as appears below, it is not here necessary to summarise its case on the merits as submitted to date.

(C) The Objection

19. By its written submission of 25th February 2008, the Respondent submitted an Objection under Rule 41(5) of the ICSID Arbitration Rules to the claims set forth in the Claimant's Request for Arbitration on the ground that the same were manifestly without legal merit and should be dismissed by the Tribunal with prejudice, together with an order that the Claimant should bear all legal fees and expenses incurred by the Respondent in these arbitration proceedings (Paragraph 79, p. 26).

(The Respondent withdrew its earlier jurisdictional objections communicated to ICSID by its Response of 30th August 2007).

20. By its Response of 21st March 2008, the Claimant opposed the Respondent's Objection, requesting a decision from the Tribunal denying the Objection under Rule 41(5) of the ICSID Arbitration Rules (Paragraph 95, p. 43).
21. The Parties first presented their respective submissions to the Tribunal in writing, by the Respondent's Objection of 25th February 2008, the Claimant's Response of 21st March 2008, the Respondent's Reply of 4th April 2008 and the Claimant's Rejoinder of 18th April 2008.
22. The Parties presented their respective submissions orally, at the first session held on 22nd April 2008 at the World Bank in Washington D.C. USA¹.
23. This first session was attended for the Claimant by Matthew H. Adler Esq., Angelo A. Stio III Esq. and Frank H. Griffin IV Esq., all of Pepper Hamilton LLP; and for the Respondent by Abby Cohen Smutny Esq., Darryl S. Lew Esq. and Lee A. Steven Esq., all of White & Case LLP, together with Mr Samer Naber of the Embassy of the Hashemite Kingdom of Jordan to the United States of America.

¹ These oral submissions were recorded verbatim in the certified transcript prepared by Mr David Kasdan, to which reference is here made as follows: T.05 = Transcript, page 5.

24. It was agreed at the first session by the Parties that the Tribunal had been properly constituted on 24th January 2008, as declared by ICSID's letter dated 24th January 2008 to the Parties; that neither Party had any objection to the Tribunal's Members; that the language of the proceedings was English; and that these arbitration proceedings, applying Article 44 of the ICSID Convention, were to be conducted in accordance with the ICSID Arbitration Rules (English text) of 10th April 2006, i.e. those in effect "on the date on which the parties consented to arbitration", namely the submission of the Claimant's Request for Arbitration on 2nd August 2007.

PART II: THE RELEVANT LEGAL TEXTS

25. The Claimant's Request for Arbitration exhibits the BIT and the PSA: Exhibits A and B. It describes (but does not exhibit) four other agreements made in December 2006, copies of which were later exhibited to the Respondent's Objection: (1) the Assignment of Partial Interest in Production Sharing Agreement (Law 3/97) between TGPJ and Porosity, also acknowledged by the NRA ("the Assignment Agreement"); (2) the Farmout Agreement between TGPJ and Porosity ("the FA"); (3) the Joint Operating Agreement between TGPJ and Porosity ("the JOA"); and (4) the Extension of the Third Exploration Term agreed between TGPJ, Porosity and the NRA ("the Extension Agreement").
26. It was agreed by the Claimant at the first session that it was appropriate for the Tribunal to consider (*inter alia*) the terms of these four additional agreements for the purpose of deciding the Respondent's Objection, as submitted by the Respondent: see Ms Smutny for the Respondent and Mr Nader for the Claimant at T.12-18 & 104-105 respectively. It is not necessary for the Tribunal to consider other documentation exhibited by the Respondent for the purpose of this Decision.

(A) The BIT

27. The BIT defines "investment" as "every kind of investment owned or controlled directly or indirectly," including "a company" and "contractual rights" (Article 1). The Respondent accepts that the Claimant's indirect ownership of TGPJ and the latter's contractual rights under the PSA constitute a covered investment within the meaning of the BIT: see the Respondent's Objection, Paragraph 6 (page 3) and Ms Smutny for the Respondent at T.26.

28. Article II (3) of the BIT provides: “(a) Each Contracting Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favourable than that required by international law. (b) Neither Contracting Party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments.”
29. Article VII (1)(a) of the BIT provides: “Subject to its laws relating to the entry, sojourn and employment of aliens, each Contracting Party shall permit to enter and to remain in its territory nationals of the other Contracting Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the other Contracting Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.”
30. Article VIII of the BIT provides: “The Contracting Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty or to the realization of the objectives of the Treaty.” The BIT’s preamble defines “Contracting Parties” as: “the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan”.
31. Article IX(1) of the BIT provides for (inter alia) ICSID Arbitration: “For purposes of this Treaty, an investment dispute is a dispute between a Contracting Party and a national or company of the other Contracting Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation.” Article IX (3) then provides, after three months’ standstill and subject to a “fork-in-the-road” provision, for the submission of the dispute for settlement by binding arbitration to (inter alia) ICSID.
32. The BIT contains no “umbrella clause”.

(B) The PSA

33. TGPJ is a contracting party to the PSA agreed with the NRA, whereby TGPJ was granted certain petroleum exploration and production sharing rights in Jordan's national territory.
34. Article III (b) of the PSA provides: "The First Exploration Term of four (4) years shall commence on the Effective Date ["approximately 17th February 1997"]. Providing only that Contractor has fulfilled its obligations hereunder for the First Exploration Term, if Contractor, at least sixty (60) days prior to the expiration of the First Exploration Term, gives written notice to NRA of Contractor's intent to continue Exploration Operations in the Area, the Second Exploration term of two (2) Years shall take effect upon expiration of the First Exploration Term. Providing only that Contractor has fulfilled its obligations hereunder for the Second Exploration Term, if Contractor, at least sixty (60) days prior to the expiration of the Second Exploration Term, gives written notice to NRA of Contractor's intent to continue Exploration Operations in the Area, the Third Exploration Term of two (2) Years (as such term may be extended as hereafter provided) shall take effect upon expiration of the Second Exploration Term. This Agreement shall be terminated if no Commercial Discovery is established by the end of the Third Exploration Term; provided, however, that if Contractor has commenced drilling operations in the final Year of the Third Exploration Term, the Third Exploration Term shall continue until thirty days (30) after Contractor has completed all such drilling operations, including testing and evaluation, provided, however, that such extension shall not exceed six (6) months without the prior approval of NRA. If, as a result of such operations or if during the final Year of the Third Exploration Term a Discovery Well is established, the Third Exploration Term shall continue for an additional period of twenty-four (24) months from the date the Third Exploration Term would have otherwise expired to permit Contractor to conduct appraisal activities."
35. The PSA's term was the subject of the Extension Agreement of December 2006, recited below. Under this extension, the PSA currently remains extant.

36. Article VI (c) of the PSA provides: “If Contractor consists of more than one entity, Contractor shall appoint one such entity as “Operator” for Contractor. Except as otherwise provided herein, the Operator shall be solely responsible for the conduct of operations under this Agreement and to represent Contractor before NRA ...”
37. Article XV (b) of the PSA provides: “The interests, rights and obligations of Jordan, NRA and Contractor under this Agreement and the duration thereof shall be governed by and in accordance with the provisions of this Agreement and can only be altered or amended by the mutual agreement of NRA and Contractor. Jordan has empowered NRA to enter into this Agreement and such other assignments as may be necessary to alter or amend this Agreement on behalf of Jordan, and any such alteration or amendment shall be binding upon Jordan without further action on the part of Jordan.”
38. Article XVII (a)(1) of the PSA provides: “Contractor shall not assign or otherwise dispose to a non-Affiliate person, partnership, corporation or other entity all or any portion of its rights, privileges, duties or obligations hereunder, without the prior written consent of NRA.” The defined term “Affiliate” in Article 1 of the PSA signifies that Porosity is to be treated as a “non-Affiliate” of TGPI, thus requiring NRA’s consent to the Assignment Agreement in December 2006.
39. Article XX of the PSA provides for international commercial arbitration (not ICSID): “(a) Any dispute arising between NRA and Contractor relating to this Agreement or with respect to the interpretation, application or execution of this Agreement and which cannot be settled amicably shall be finally settled by arbitration, except those matters dealt with in Article XX(j) [referring to an expert procedure for “essentially technical matters”]. The arbitration shall be held in Amman, Jordan and conducted ... in accordance with the Arbitration Law of 1953 of Jordan or any successor legislation in effect at the time the dispute arises...”

(C) The Assignment Agreement

40. By the Assignment Agreement of December 2006 between TGPJ and Porosity, the former assigned 80% of its interest to the latter, with the NRA's written acknowledgment. Save for the Respondent's "consent" by the NRA pursuant to Article XVII(a)(1) of the PSA, the Respondent is not a party to this Assignment Agreement; nor is the Claimant.

(D) The Farmout Agreement

41. TGPJ and Porosity concluded the Farmout Agreement (the "FA") in December 2006 to give further effect to the Assignment Agreement. The Respondent is not a party to this FA; nor is the Claimant. As submitted by the Claimant, the FA required Porosity (inter alia) to carry out at least two well drillings in the designated area, not exceeding US \$40 million in cost, by April 2007.

(E) The Joint Operating Agreement

42. TGPJ and Porosity concluded the Joint Operating Agreement (the "JOA") in December 2006, to give further effect to the Assignment Agreement and to appoint Porosity as the Operator under the PSA. The Respondent is not a party to this JOA, nor is the Claimant.

(F) The Extension Agreement

43. After the making of these three agreements in December 2006 between TGPJ and Porosity, the NRA agreed on 23rd December 2006 an extension of the Third Exploration Term to 31st December 2008 with TGPJ and Porosity, so as to allow

additional time for drilling and appraisal of the designated area, provided (*inter alia*) certain work was performed by Porosity and TGPJ at a minimum cost of US \$12 million. The Claimant is not a party to this Extension Agreement.

PART III: THE CLAIMANT'S PLEADED CASE

44. The Tribunal here summarises the relevant parts of the Claimants' pleaded case on the merits, not limited to its Request for Arbitration but including also the explanations made in the Claimant's written and oral submissions responding to the Respondent's Objection.
45. It will be recalled that the Claimant has not yet pleaded its case more fully in any written memorial under the ICSID Arbitration Rules or other order of this Tribunal. In contrast to the different exercise required under Article 36(3) of the ICSID Convention, Rule 41(5) of the ICSID Arbitration Rules does not limit this Tribunal's inquiry to the Claimant's Request for Arbitration. In the circumstances of this case, the Tribunal considers it appropriate to take into account the Claimant's submissions explaining its claims pleaded in the Request for Arbitration, as well as the Respondent's responses thereto.
46. The Tribunal's summary is necessarily not exhaustive: the Claimants' written pleadings now extend over eighty pages, together with its oral submissions at the first session exceeding fifty pages of transcript. The Tribunal has nonetheless considered the Claimant's full case for the purpose of its Decision.
47. It should also be noted, as already recorded above, that all material allegations are denied by the Respondent in full, including any breach of the BIT, causation and loss. The Tribunal does not, of course, by its recitals of the Claimant's case, take any position on any issue of fact or law disputed by the Parties.
48. ***1995-1997:*** Beginning in 1995, the Claimant and the NRA engaged in negotiations regarding a petroleum exploration venture in the "designated area" of the Dead Sea and Wadi Araba basin. It resulted in the PSA between TGPJ and the Respondent agreed in April 2006. Pursuant to Jordanian law, the PSA was ratified by the Jordanian Parliament on 17th February 1997.

49. The PSA provided for a first exploration term of four years and could be extended at TGPJ's option for additional second and third two-year terms, provided TGPJ fulfilled certain obligations under the PSA.
50. **1997-2002:** Between 1997 and 2002, TGPJ performed all of its obligations under the PSA's first exploration term running from February 1997 to February 2002, including the drilling of multiple exploration wells and obtaining extensive seismic data. This work resulted in the discovery of oil deposits in the designated area, but further exploration was necessary to determine whether these deposits were commercially viable.
51. **2002-2005:** Accordingly, TGPJ exercised its contractual option to pursue a second exploration term. During that second term running from February 2002 to August 2005, TGPJ not only confirmed the existence of oil deposits in the designated area, but also had those results confirmed by third party petroleum consultants. TGPJ invested over US \$27 million in the venture during these first and second exploration terms.
52. At the same time, after TGPJ had confirmed the existence of oil deposits, the Respondent decided that it no longer wanted TGPJ, a "foreign drilling company", to participate in the exploitation of those deposits. Accordingly, the Respondent undertook a systematic campaign to remove TGPJ from the PSA in favour of a non-US controlled company.
53. The Claimant submits that the Respondent's discriminatory motive is symbolized by an earlier statement made by the Minister for Energy on 10th August 2004, as reported in the press: "I am against the second extension that the Government granted to Trans Global company, her previous achievements is not efficient, in addition that the company is bankrupt and is not based to any international company which make her without any real roots in the world." [Paragraph 42, Request for Arbitration].
54. The Respondent had initiated this scheme during the second exploration term, significantly only after TGPJ had discovered oil deposits and the investment had become a more valuable asset. During this second exploration term, the NRA

repeatedly breached its obligations under the PSA in a manner designed to frustrate TGPJ's performance of the PSA.

55. The NRA breached the PSA by refusing to provide TGPJ with cost recovery settlements as required by the PSA, interfering with TGPJ's relationships with its subcontractors, failing to provide security for the storage of TGPJ's industrial explosives, failing to support TGPJ in access claims made by landowners regarding drilling sites and recalling employees seconded to TGPJ for pretextual reasons. Moreover, the NRA further inhibited TGPJ's ability to perform its obligations by refusing to meet with TGPJ, in violation of TGPJ's rights under the PSA whilst raising pretextual grounds for "disputes" regarding the PSA.
56. The NRA also repeatedly disparaged TGPJ in the Jordanian press in an effort to destroy its reputation with potential investors and with the Jordanian public. In particular, the Respondent denied TGPJ's statements regarding the discoveries of oil deposits and described TGPJ as "not efficient," "bankrupt," and "without any real roots in the world."
57. The NRA also interfered directly with TGPJ's relationships with potential investors who were attracted by TGPJ's investment and its data on the discovery of oil deposits. TGPJ initiated discussions with seven potential investors, each with experience in the petroleum industry. After making contact with the NRA, however, "virtually all" of those investors withdrew their names from consideration. The NRA falsely advised various of those investors that, among other things, (a) no discoveries or oil potential existed in the designated area; (b) TGPJ manufactured the data that demonstrated the existence of oil deposits; (c) TGPJ consisted of "crooks" and (d) the PSA would expire and would not be renewed for a third term by the Respondent.
58. Given the particular significance of this part of the Claimant's pleaded case for present purposes, the Tribunal here sets out verbatim Paragraphs 58 to 61 of the Claimant's Request for Arbitration (pages 12-13):

"#58 Despite Respondent's damaging of its standing, TGPJ was still able to attract a number of qualified investors, most of whom had some prior petroleum experience in

their organization and they undertook technical and commercial due diligence before negotiating agreements or terms of investment. However, virtually all of the potential investors that TGPJ attracted withdrew their names from consideration after they made contact with representatives of the Ministry/NRA. The potential investment partners that were discouraged from investing in TGPJ's operations were from a number of countries but were interested in providing sufficient funding to support Trans-Global as the 'oil finder' party, PSA Operator and rights-holder and included:

- a. KUFPEC (Kuwait Foreign Petroleum Exploration Company);*
- b. Kuwait Energy Company;*
- c. Gulf Petroleum Limited (Qatar);*
- d. Amwal Al Khaleej (Saudi Arabia);*
- e. Safari Ltd. (Saudi Arabia);*
- f. Moscow for Oil and Gas Technology (Russian);*
- g. Samedan/Noble Affiliates (USA); and*
- h. Sheikh Ayman Hariri (Lebanon).*

"#59 Upon information and belief, representatives of the NRA, falsely advised the above-referenced potential investors with statements such as: (a) no discoveries or even oil potential existed in the Contract Area; (b) TGPJ "poured oil in the wells" and manufactured the well log data that documented the existence of oil deposits; (c) TGPJ and Mr. Abraham are "crooks" [Mr Abraham being TGPJ's President]; and (d) TGPJ's rights in the PSA will expire and will not be renewed."

"#60 Absent the NRA's interference, TGPJ would have been able to conclude investment participation agreements with one or more of these parties, all of whom were qualified and experienced."

"#61 Absent the NRA's interference, TGPJ would have been able to conduct its expanded drilling/appraisal program for the Third Exploration Term which, to date, would have yielded TGPJ a profit in the range of approximately \$540 million (USD)."

(As explained by Mr Adler for the Claimant at the first session, the phrase “information and belief” in Paragraph 59 was intended, as a pleading term customary in US civil procedure, to indicate that the Claimant has detailed and specific information: T.73 & 100-102; and that it was not intended, as understood by Ms Smutny for the Respondent, to signal only “a speculation”: T.58).

59. **2006:** Because the NRA ensured that TGPJ could have no viable investment partner, TGPJ was ultimately forced, under duress, to "negotiate" a new partnership with Porosity. TGPJ considered that the other companies, with which it had been negotiating, would have provided a stable, experienced, and independent partner to grow and protect TGPJ's investment. Unlike these companies, Porosity had no experience in oil exploration or drilling.
60. Porosity was a start-up venture owned by Sheikh Ayman Hariri, a Lebanese national. In meetings, Porosity made clear to TGPJ the NRA's view that Porosity was "accepted and liked," and that the NRA would dissuade any other company from investing with TGPJ. Moreover, the NRA advised TGPJ that, if TGPJ refused to enter into a partnership with Porosity, the NRA would ensure that the third exploratory term would lapse, resulting in the effective forfeit of TGPJ's \$29 million investment.
61. Porosity and the NRA “jointly sought” and acted “in concert” to divest TGPJ from its interest in the PSA: Paragraphs 72, 82 and 83 of the Request for Arbitration. Porosity is also alleged to be the Respondent’s “agent”: Paragraph 99, *ibid.* To this end, Porosity informed TGPJ that, at the behest of the NRA, Porosity intended to assume an 80% interest and operating control of the PSA and that, unless TGPJ accepted this arrangement, TGPJ would lose its investment entirely.
62. With the NRA's approval, Porosity negotiated the terms of the Assignment Agreement, as well as an extension of the PSA directly with the NRA (later to become the Extension Agreement). Faced with the prospect of losing its investment, and being unable to attract additional investors due to the NRA's interference, TGPJ, under duress, acquiesced to the Assignment Agreement, the Farmout Agreement and the Joint Operating Agreement in December 2006.

63. Those agreements effected the 80% assignment and the transfer of operational control from TGPJ to Porosity. By their terms, TGPJ remains ostensibly entitled to recover on 20% of the PSA's profitability, but TGPJ cannot recover any remaining portion of its investment unless and until Porosity first recovers 100% of its own investment.
64. Once the assignment to Porosity was effective and the NRA's hand-picked successor was in place, the NRA agreed to extend the PSA (which the NRA had refused to do when the PSA was under TGPJ's control).
65. [The Tribunal notes that, thus far, the Claimant's allegations relate to a period up to December 2006, involving allegations that TGPJ was coerced, under economic duress, to make its three agreements with Porosity, the latter acting in concert with and as agent for NRA, i.e. the Respondent; and that, as a result, the Claimant's investment was materially harmed, resulting in financial loss, in breach of Article II(3)(a) and (b) of the BIT. The allegations which follow relate to a period after December 2006. In the Tribunal's view, this temporal watershed is significant as to the breach and causation alleged by the Claimant in regard to the BIT.]
66. *2007*: In direct contrast to its practice when the PSA was first concluded, the NRA refused to present the new agreements to the Jordanian Parliament for approval, even though this was required by Jordanian law. The NRA's failure to do so removed Parliament's ability to oversee the NRA's actions; and it made it easier for the NRA to effect the forced assignment of TGPJ's investment to Porosity.
67. Finally, having achieved its goal of relegating TGPJ as the "foreign drilling company" to the status of a minority investor, the NRA took steps to eliminate completely TGPJ's involvement in the ongoing venture, by (1) revoking work exemptions for TGPJ employees and customs exemptions for vehicles, both in violation of the PSA; and (2) refusing to communicate with TGPJ altogether.
68. The NRA has refused to communicate with TGPJ even though Porosity failed to perform its basic obligations under the PSA, TGPJ retains a significant 20% investment in the PSA and TGPJ is a co-equal member of the Joint Operating Committee that oversees site operations under the PSA.

69. Porosity not only failed to meet the PSA's deadline to use its best efforts to commence drilling operations by April 2007, but it also failed to take even the minimum step of contracting for a drilling rig prior to that deadline. In the absence of the NRA's willingness to enforce the PSA as to Porosity, there is no chance that TGPJ will be able to recover on its 20% interest in the PSA.
70. The NRA's refusal to meet with TGPJ has effectively divested TGPJ from its remaining 20% interest in the PSA, as well as its rights and responsibilities as a co-equal member of the Joint Operating Committee that controls operations under the PSA.
71. For its part, Porosity has also attempted to muzzle TGPJ by seeking (unsuccessfully) an injunction against TGPJ in the courts of Texas, USA that would prohibit any contact between TGPJ and the NRA regarding the PSA, and any public statements by TGPJ regarding Porosity's failure to perform. TGPJ and Porosity are now conducting an arbitration in Texas, in which TGPJ has asserted counterclaims based on Porosity's non-performance under the FA and JOA.

PART IV: THE ISSUES OF INTERPRETATION

72. The Parties dispute the interpretation and application of Rule 41(5) of the ICSID Arbitration Rules. The Tribunal was informed that this was the first occasion on which an ICSID tribunal was faced with an objection under this rule, being newly introduced as from 10th April 2006. It is therefore necessary for the Tribunal to explain first the interpretation of Article 41(5) which it has decided to apply in this case.
73. **Rule 41(5):** Rule 41(5) of the ICSID Arbitration Rules provides, here broken down into numbered sub-paragraphs for ease of later reference:

“[1] 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.

[2] The party shall specify as precisely as possible the basis for the objection.

[3] 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.

[4] The decision of the Tribunal shall be without 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.”

It is common ground that these Parties have not agreed “to another expedited procedure” under sub-paragraph [1]; and it is not disputed by the Claimant that the Respondent has met the deadline of “30 days” etc. also under sub-paragraph [1] (The Respondent submitted its Objection on 25th February 2008 following the constitution of the Tribunal

on 24th January 2008 and before the first session on 22nd April 2008). There is no material issue that the Respondent has complied with sub-paragraph [2] of Rule 41(5).

74. **Rule 41(6):** Rule 41(6) of the ICSID Arbitration Rules provides :

“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”.

In other words, the Tribunal can only make an “award” under Rule 47 of the ICSID Arbitration Rules if the Tribunal decides that all three claims made by the Claimant in these proceedings are “manifestly without legal merit”. If otherwise, the Tribunal can make a “decision” only, short of an award. In either event, such award or decision must be issued with expedition, at the first session or (if not) “promptly thereafter” under sub-paragraph [3] of Rule 41(5).

75. The principal issues between the Parties in this case arise from the phrase in sub-paragraph [1] of Article 41(5): “manifestly without legal merit”. It is a succinct phrase susceptible to different meanings.
76. In addition to the Parties’ helpful submissions as to its interpretation, the Tribunal has been much assisted by the Parties’ references to three background texts:
77. In “*Suggested Changes to the ICSID Rules and Regulations*”, Working Paper of the ICSID Secretariat of 12th May 2005, the purpose of the new rule was, as then stated by ICSID, “to make it clear, by the introduction of a new paragraph (5), that the tribunal may at an early stage of the proceeding be asked on an expedited basis to dismiss all or part of a claim on the merits.” (page 7). As the accompanying draft text shows, however, the object of this commentary is differently worded from the present Article 41(5): the relevant phrase provided only “manifestly without merit” with no qualifying adjective “legal”.
78. In “The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes”, 41 *Int. Law.* 47 (2007), ICSID’s Deputy Secretary-

General, Antonio Parra Esq., wrote of the present Rule 41(5): “In accordance with Article 36 of the ICSID Convention, the power of the Secretariat to refuse registration of arbitration requests is limited to those that disclose a manifest lack of jurisdiction. The Secretariat is powerless to prevent the initiation of proceedings that clear this jurisdictional threshold, but are frivolous as to the merits. This had been a source of recurring complaints from some respondent governments. One of the amendments to the ICSID Arbitration Rules made in 2006 was to introduce a procedure, in Rule 41, for the early dismissal by arbitral tribunals of patently unmeritorious claims.”

79. In Aurélia Antonietti, “The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules”, 21 *ICSID Review-Foreign Inv. L.J.* 427, 439 (2006), this experienced former ICSID officer commented: “The rationale behind the new [Article 41(5)] is to offer the possibility to a respondent to raise an objection that the case is manifestly lacking legal merit, once the registration process took place. Indeed, pursuant to [Article 36(3)] of the Convention, the Secretary-General shall register the request unless he finds on the basis of the information contained in the request that the dispute is manifestly outside the jurisdiction of the Centre. This leaves no room for considerations of the merits of the dispute at the stage of the registration process. In addition, subsequently to the registration, a respondent could raise arguments and use supporting documents that were not made available to the Centre at the time of registration.”
80. ***The Claimant’s Case:*** In brief, the Claimant submits that the phrase at issue is directed only at claims that are transparently frivolous, advanced in bad faith or made to vex or embarrass the respondent; and that Rule 41(5) cannot be interpreted as equivalent to a demurrer under national procedural laws that require the claimant to establish a *prima facie* case in its Request for Arbitration. The Claimant also submits that the rule was “carefully crafted to impose a heavy burden on States attempting to contest the legal merits of an investment dispute at the request stage”.
81. ***The Respondent’s Case:*** In brief, the Respondent submits that the Tribunal should adopt a two-fold approach: (i) to accept the facts alleged in the Claimant’s Request for Arbitration insofar as such alleged facts are of a “sufficiently plausible character” and

then (ii) to determine if such alleged facts are capable of constituting a violation of either Article II(3)(a), II(3)(b) or VIII of the BIT, as alleged by the Claimant.

82. It is appropriate for the Tribunal to consider in turn the two different parts of the phrase: (i) “manifestly” and (ii) “without legal merit”.
83. **“Manifestly”**: The ordinary dictionary meaning of the English word “manifest” is “palpable”, “clearly revealed to the eye, mind or judgement” , “open to view or comprehension” or “obvious”. (OED, Murray). The same wording is used elsewhere in the ICSID Convention; its meaning in these different contexts is illuminating; and it can rightly be assumed, as both Parties submitted, that the meaning of the new rule was intended to reflect the well-established meaning of these older provisions.
84. *Article 52(1)(b)*: The word “manifestly” is used in Article 52(1)(b) of the ICSID Convention providing for possible annulment of an ICSID award where the tribunal has “manifestly” exceeded its powers. In this context, as decided by several ICSID *ad hoc* committees, the word has been interpreted to mean “self-evident”, “clear”, “plain on its face” or “certain”, as distinct from “the product of elaborate interpretations one way or the other “ or “susceptible of argument one way or the other” or “... being ... necessary to engage in elaborate analyses.”² The apparent difficulties in applying this interpretation by certain *ad hoc* committees need not diminish the interpretation itself.
85. Professor Schreuer’s well-known work tracks in detail the origin of the word in the drafting of Article 52 (#134ff, pp. 931ff)³. He there concludes: “ ‘Manifest’ may be defined as easily understood or recognized by the mind. Therefore, the manifest nature of an excess of powers is not necessarily an indication of its gravity. Rather, it relates to the ease with which it is perceived [footnote omitted]. The word relates not to the seriousness of the excess or the fundamental nature of the rule that has been violated but rather to the cognitive process that makes it apparent [footnote omitted]. An excess

² These phrases are collected from the decisions in *Wena Hotels v Arab Republic of Egypt*, ICSID Case No. ARB/98/4. Decision on Annulment, 5th February 2005, # 25; *CDC Group Plc v The Republic of Seychelles*, ICSID Case No. ARB/02/04, Decision on Annulment, 29th June 2005, #41; and *Mitchell v The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, 1st November 2006, # 20.

³ Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001)

of powers is manifest if it can be discerned with little effort and without deeper analysis.” (pp.932-933).

86. *Article 57*: The word “manifest” is used Article 57 of the ICSID Convention, permitting a party to propose the disqualification of a tribunal’s member on account of any fact indicating a “manifest lack of the qualities” required under Article 14(1) of the ICSID Convention. As explained by Professor Schreuer, Article 57 imposes “a relatively heavy burden of proof on the party making the proposal⁴; and Reed et al concur: “Article 57 of the Convention sets an extremely high bar for challenging an arbitrator ...”⁵ Accordingly, the word is here intended to impose a high test for challenging an ICSID arbitrator, consistent with the need to prove an obvious and clearly disqualifying deficiency.
87. *Article 36*: The word “manifestly” is used in Article 36(3) of the ICSID Convention, entitling ICSID’s Secretary-General to refuse to register a claimant’s request for arbitration if he finds, on the basis of the information contained in the request, “that the dispute is manifestly outside the jurisdiction of the Centre”. As noted in Professor Schreuer’s work (# 139 & 153, pp. 933 & 938), the Secretary-General does not perform any judicial function in screening such requests, which takes place without adversarial argument or oral hearing with the parties; and he will refuse registration “only if the lack of jurisdiction is so obvious that the request does not deserve consideration by a tribunal” and “only if he concludes that there is a total absence of jurisdiction.” Professor Schreuer also cites the ICSID Convention’s *travaux préparatoires* where it “was pointed out that a refusal to register should only take place where there was not the slightest doubt as to the request’s propriety” (# 48, p.460). Again, the word “manifestly” here suggests a clear, obvious and total lack of jurisdiction under the ICSID Convention.
88. The Tribunal considers that these legal materials confirm that 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. Given the nature of investment disputes generally, the Tribunal nonetheless recognises that this exercise may not

⁴ Schreuer, *The ICSID Convention: A Commentary* (2001), # 16, p. 1200.

⁵ Reed, Paulsson & Blackaby, *Freshfields Guide to ICSID Arbitration* (2004), p. 79.

always be simple, requiring (as in this case) successive rounds of written and oral submissions by the parties, together with questions addressed by the tribunal to those parties. The exercise may thus be complicated; but it should never be difficult.

89. The special procedure imposed by Article 41(5) upon the parties and the tribunal confirms this meaning.
90. First, the prescribed time-limits are severely truncated, indicating a summary procedure not susceptible to elaborate, lengthy memorials requiring detailed preparation, presentation and deliberations. The time-limit of 30 days for the objection is short, as is the requirement that the objection be addressed to the tribunal at or before the first session, the latter ordinarily to take place within 60 days of the tribunal's constitution under Rule 13(1) of the ICSID Arbitration Rules. Moreover, the requirement that the tribunal decide the objection quickly, particularly (if appropriate) by a written, reasoned award "at the first session or promptly thereafter", confirms that the rule is directed only at clear and obvious cases.
91. Contrary to the Respondent's submission, the Tribunal does not consider that Article 41(5) can ordinarily be read with Article 43(a) of the ICSID Convention, whereby the tribunal "may, if it deems necessary at any stage of the proceedings (a) call upon the parties to produce documents or other evidence ...". If the claimant's factual allegations were to be tested by the tribunal requiring oral testimony to be adduced by either party, it is difficult to conceive in practice how the strict timetable imposed by Article 41(5) could be met. Moreover, if the claimant's factual allegation required any rebuttal, it would tend to show that the allegation would survive an objection under Rule 41(5); and, conversely, the reverse if the allegation needed testimony to supplement or support it. (As regards disputed factual allegations, the Tribunal returns to the Respondent's submissions below.)
92. Second, a respondent's objection under Rule 41(5) may produce an ICSID award finally disposing of the claimant's claims, with all its attendant legal effects under the ICSID Convention, the New York Arbitration Convention and national legislation. This is a materially different exercise from that performed by the ICSID Secretary-General under Article 36 of the ICSID Convention, which can produce no award or other

decision having like legal effect. It would therefore 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. In this regard, as a basic principle of procedural fairness, an award under Rule 41(5) can only apply to a clear and obvious case, i.e. in Mr Parra's words cited above, "patently unmeritorious claims."

93. **"Without Legal Merit"**: The Tribunal here notes first the important significance of the adjective "legal" in Rule 41(5). The Tribunal is required to address the *legal* merits of the Claimant's three claims advanced as alleged breaches by the Respondent of Articles II(3)(a), II(3)(b) and VIII of the BIT.
94. The Claimant rejects, as already noted above, any interpretation of Rule 41(5) requiring it to plead and prove a *prima facie* case in its Request for Arbitration. In the Tribunal's view, the Claimant is right to do so; but that is not the argument advanced by the Respondent in this case.
95. The Respondent contends, at the outset of its submissions, that the Claimant's claims in several respects are manifestly without legal merit because they allege infringements of non-existent legal rights of the Claimant or non-existent legal obligations of the Respondent. This part of the Respondent's Objection raises so far little difficulty of interpretation. The difficulty arises from the Respondent's approach to disputed factual allegations in the Claimant's case.
96. The Respondent accepts that the Tribunal's inquiry is limited to the legal merits of the Claimant's claims, but it submits that such an inquiry permits facts alleged by the Claimant to be critically examined by the Tribunal in order to assess whether these factual allegations are capable, as a matter of law, of constituting a breach of the BIT that is claimed by the Claimant to form the basis of the legal dispute with the Respondent. As Ms Smutny for the Respondent submitted during the first session, Article 41(5) does not mean that there can be no consideration of the Claimant's factual allegations: the Tribunal need not accept "legal conclusions that are couched as factual allegations, nor must the Tribunal accept speculative inferences that the Tribunal may

consider to be unwarranted” [T.13]. Ms Smutny submitted that the question should be whether the factual allegations were enough to raise the likelihood that the particular claim was supported above a speculative level: “a threshold of plausibility of the particular claim presented in view of the particular facts asserted should be crossed before a claim is permitted to proceed to a full arbitration on the merits with all the burdens that that imposes” and “something more than the Claimant's optimism and the Tribunal's imagination is needed to cross the line from conceivable to plausible.” [T.13 & 15].

97. 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): see the legal materials cited above. 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. Nonetheless, the Tribunal recognises that it is rarely possible to assess the legal merits of any claim without also examining the factual premise upon which that claim is advanced.
98. The Claimant submits that Rule 41(5) should be interpreted consistently with the minimal requirements prescribed by the ICSID Convention and Rules for its Request for Arbitration. These requirements do not include details regarding the factual bases of a claimant’s claims; nor indeed any material evidence or questions of proof. The Claimant cites Professor Schreuer’s work as to the low level of pleading required for a request: “On most points a mere assertion in the request will suffice and the information thus given may be developed at a later stage” (#27, p. 453). The Claimant submits that it will at a later stage of these proceedings present evidence proving its specific allegations regarding the Respondent’s violations of the BIT. That time is not now. Accordingly, the Respondent’s Objection must be assessed against the requirements of the only formal pleading required of the Claimant before the deadline for the objection under Rule 41(5), being limited to the Request for Arbitration.
99. It is correct that the ICSID Procedural Rules do not expressly require extensive pleading of a claimant’s factual allegations in the request for arbitration, given that traditionally a claimant’s later memorial and reply would ordinarily follow the first

session under the written procedure provided by Article 31 of the ICSID Convention. The minimum content of the request is prescribed by Article 36(2) of the ICSID Convention: “The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.” It is also addressed by Rule 2(e) of ICSID’s Institution Rules, requiring “information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment”, with no further requirement here for documentary support.

100. The request for arbitration must necessarily satisfy the ICSID Secretary-General for the request’s registration under Article 36(3); and to that extent, the request must contain sufficient factual allegations to establish that the dispute satisfies the jurisdictional requirements of Article 25(1) of the ICSID Convention. However, Article 36, Rule 2 and Article 25 do not expressly prescribe anything in the request regarding other factual merits relevant to the claimant’s claims.
101. Accordingly, the Claimant’s submission, as argued by Mr. Adler, has a certain force. It could be said, on the other hand, that the Claimant’s interpretation flies in the face of any common-sense reading of the current ICSID Arbitration Rules as a whole; and that it would not accord with the object and purpose of the ICSID Convention itself. It might well be thought strange if a claimant could mechanically displace the new procedure under Article 41(5) by submitting a request for arbitration shorn of all relevant factual allegations. There was therefore a certain force also in the Respondent’s submission, as argued by Ms Smutny and Mr Lew, to the effect that the existence of this new procedure required a claimant to plead in its request, in addition to the requirements of Articles 36(2), Rule 2 and Article 25, sufficient factual allegations to support the legal merits of its claims so as to enable the tribunal to perform, if necessary, the inquiry under Rule 41(5). It remains the fact, however, that ICSID did not make any corresponding changes to Rule 2, as it might have done when promulgating the new Article 41(5).
102. In this case, fortunately, the Tribunal does not need to decide this particular difference between the Parties. The Claimant has submitted a somewhat full pleading of its claims,

with its Request for Arbitration extending over 122 paragraphs and 27 pages, beyond any minimalist pleading required under the ICSID Convention and Rules. The Claimant having thus pleaded its case so extensively, the Respondent contends that a factual allegation which is deficiently pleaded can here be tested and not blindly accepted by the Tribunal. In other words, the Claimant having said so much on the factual bases for its claims, the Respondent submits that it is not now for this Claimant to defend its pleading on the ground that that it could plead much more at a later stage of these arbitration proceedings.

103. The Tribunal does not consider that the Respondent's submissions were materially advanced by the several ICSID decisions and awards applying Judge Higgins' *dictum* as to disputed facts in the ICJ's *Oil Platforms* case⁶. These ICSID materials were directed at objections based on the tribunal's jurisdiction or competence under Article 41 of the ICSID Convention and Rule 41(1) of the ICSID Arbitration Rules - not Rule 41(5). Moreover, the procedure for such jurisdictional objections is also different from Rule 41(5): the timing of the respondent's jurisdictional objection can follow the claimant's first memorial, long after the request for arbitration and the first session; and the tribunal can postpone its decision or award by joining the objection to the merits of the dispute under Article 41(2) of the ICSID Convention and Article 41(4) of the ICSID Arbitration Rules.
104. Nor is this Tribunal materially assisted by considering concepts of formal or substantive admissibility or other procedural impediments to a claimant's claim advancing to a hearing on the merits under different procedural rules and national procedural laws (such as an application to strike, demurrer, motion to dismiss, etc), albeit with objectives as to saving time, effort and costs similar to those implicit in Article 41(5). It is necessary for the Tribunal to work within the particular concept required by Article 41(5) with its own terminology, as required by Article 44 of the ICSID Convention. It serves therefore little purpose in analysing different rules and procedures, with different wording.

⁶ *The Oil Platforms Case (Iran v US)*, 1996 I.C.J. 803, 856. These ICSID materials include the Decision on Jurisdiction of 29th January 2004 in *SGS v Philippines*, ICSID Case No ARB/02/06 (#26); the Decision on Jurisdiction of 8th February 2005 in *Plama v Bulgaria*, ICSID Case No. ARB/03/24 (#118); the Decision on Jurisdiction of 22nd April 2005 in *Impregilo v Pakistan*, ICSID Case No. ARB/03/03 (#254), the Decision on Jurisdiction of 22nd February 2006 in *Continental Casualty v Argentina* ICSID Case No. ARB/03/9 (#63); and the Decision on Jurisdiction etc of 21st March 2007 in *Saipem v Bangladesh*, ICSID Case No ARB/05/07 (#85).

105. **Conclusion:** In conclusion, as regards the word “manifestly”, the Tribunal requires the Respondent’s Objection to meet the test of clarity, certainty and obviousness discussed above. As regards the phrase “without legal merit”, the Tribunal returns to the primary submission advanced by the Respondent at the outset of its submissions, set out above. In applying Rule 41(5), the Tribunal accepts that, as regards disputed facts relevant to the legal merits of a claimant’s claim, the tribunal need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith; nor need a tribunal accept a legal submission dressed up as a factual allegation. The Tribunal does not accept, however, that a tribunal should otherwise weigh the credibility or plausibility of a disputed factual allegation. Lastly, in applying Article 41(5) to the particular case, the Tribunal accepts, of course, that it must apply these two wordings together.

PART V: THE ISSUES OF APPLICATION

106. It is now appropriate to consider each of the Claimant's three claims in turn, applying the Tribunal's interpretation of Rule 41(5) described above and the relevant legal principles.
107. For reasons apparent from the Tribunal's decision below, these arbitration proceedings will now proceed to the merits, under Chapter IV of the ICSID Arbitration Rules, as to two of the Claimant's three claims: Claims I and II. In these circumstances, so as to avoid any possible misconception that the Tribunal has prejudged the merits of these two claims (which is not the case), the Tribunal considers that the less it says here about the legal merits of those two claims the better.
108. ***Claim I:*** The Tribunal rejects the Respondent's Objection as regards Paragraphs 108, 109, 111 and sub-paragraphs (a) and (b) of Paragraph 110 of the Request for Arbitration (pp. 23-24). Its Objection to the legal merits of this part of Claim I does not satisfy the test imposed by Rule 41(5).
109. If the pleading in sub-paragraphs (c), (d), (e) and (f) of Paragraph 114 were advanced by the Claimant as independent claims, each allegedly capable by itself of establishing a liability against the Respondent, the Tribunal would be minded to decide that these four sub-paragraphs were manifestly without legal merit within the meaning of Rule 41(5) of the ICSID Arbitration Rules.
110. It is clear to the Tribunal that such claims would depend (at best) upon contractual rights allegedly enjoyed by TGPJ; that the Claimant is not privy to the PSA and the Extension Agreement, that the Claimant and the Respondent are not privy to the other agreements between TGPJ and Porosity; that certain events allegedly relevant to breach of the BIT post-date the watershed of December 2006; and that the Claimant could not juridically assert any of these matters as independent breaches by the Respondent of obligations owed to the Claimant under Article II(3)(a) of the BIT.

111. However, as clarified by the Claimant at the first session, these matters are not asserted as independent claims. Mr Adler for the Claimant explained: “We plead a symphony, if you will, in three movements: the conduct by the Respondent before Porosity came to the fore ...; conduct by the Respondent during the Porosity negotiations ...; and the conduct thereafter once Porosity was part of this process ... and like any symphony, it’s best listened to in the whole and not in piecemeal ...” [T.75-76]. Later, Mr Adler confirmed, as regards Claim I, that the four sub-paragraphs (c) to (e) “must be considered within the overall context pleaded over our 122 paragraphs” [T.107-108]. As regards the issue of contractual privity, Mr Adler also explained that the Claimant was “not pleading here breaches of contract by Porosity”, being rather matters directed to causation and damage directed at a breach of the BIT [T.87 & 90]. The Tribunal anticipates that the Claimant may wish to make this position abundantly clear in its next Memorial.
112. Accordingly, the Tribunal does not treat these four sub-paragraphs as independent claims or even as an essential legal part of Claim I. It treats them only as factual submissions made to corroborate, if eventually proven, the allegations made in sub-paragraphs (a) and (b) of Paragraph 110 of the Request for Arbitration.
113. **Claim II:** The Tribunal rejects the Respondent’s Objection as regards Paragraphs 112, 113, 115 and sub-paragraphs (a), (b) and (c) of Paragraph 114 of the Request for Arbitration (p. 25).
114. As with Claim I, if the pleading in sub-paragraphs (d), (e) and (f) of Paragraph 114 were advanced by the Claimant as independent claims, each allegedly capable by itself of establishing a liability against the Respondent, the Tribunal would be minded to decide that these three sub-paragraphs were manifestly without legal merit within the meaning of Rule 41(5) of the ICSID Arbitration Rules.
115. It is clear likewise to the Tribunal that such claims would depend (at best) upon contractual and other private rights allegedly enjoyed by TG PJ and its President (Mr Abraham); that the Claimant is not privy to the PSA and the Extension Agreement, that the Claimant and the Respondent are not privy to the other agreements between TG PJ

and Porosity; that certain events allegedly relevant to breach of the BIT post-date the watershed of December 2006; and that the Claimant could not juridically assert any of these matters as breaches by the Respondent of obligations under the BIT owed to the Claimant.

116. However, as also clarified by the Claimant at the first session, these matters are not asserted as independent claims.
117. Accordingly, the Tribunal does not treat these three sub-paragraphs as independent claims or as an essential legal part of Claim II. It treats them only as factual submissions made to corroborate, if eventually proven, the allegations made in sub-paragraphs (a) to (c) of Paragraph 114 of the Request for Arbitration. The Tribunal again anticipates that the Claimant will wish to make this position also abundantly clear in its Memorial.
118. **Claim III:** The legal merits of Claim III necessarily depend upon the Claimant's rights under Article VIII of the BIT. In the Tribunal's view, whilst the Respondent bears an obligation thereunder to consult with the USA as its "Contracting Party", it is obvious the Respondent owes no similar obligation to the Claimant. The Claimant clearly has no legal rights under Article VIII.
119. Accordingly, the essential legal basis for this claim is entirely missing under the BIT. Indeed, Mr Adler for the Claimant graciously recognised this deficiency during the first session: "I think this is a clear and classic example of where, without any reference whatsoever to facts or without the need to construe facts, this is a claim that is, on further reflection and consideration, manifestly without legal basis, and so that claim is, indeed, withdrawn." [T.39-140]. The Tribunal confirms that this claim was manifestly without legal merit within the meaning of Rule 41(5) of the ICSID Arbitration Rules, as pleaded in Paragraphs 116 to 121 of the Request for Arbitration (p. 26).
120. In the circumstances, Claim III is to be treated as formally and finally withdrawn by the Claimant; and, to this end, the Tribunal records the position in the Operative Part of this Decision below, without prejudice to any other issue between the Parties.

121. **Restitution:** The Tribunal considers that a plea of specific relief could be the subject of an objection under Rule 41(5) as part of a “claim” and “dispute”, contrary to the Claimant’s submission. However, the Tribunal decides to reject the Respondent’s objection to the Claimant’s restitutionary plea of relief in Paragraph 121(e) of its Request for Arbitration on the ground that the Respondent has not satisfied the test imposed by Rule 41(5).
122. **Costs:** Under Rule 47 of the ICSID Arbitration Rules, the Tribunal has a discretionary power in its award to decide the amount and allocation of legal and arbitration costs recoverable by one Party against the other Party. The introduction of Article 41(5) may have been prompted (in part) by the perception held by certain states that a respondent could not expect to recover its costs from the claimant even where the respondent’s case prevailed completely at the end of lengthy and expensive legal proceedings.
123. In this case, both Parties accepted that such discretion could properly be exercised by this Tribunal on the general principle that costs should follow the event, i.e. the result of the award on the merits [T.112-113]. The Tribunal declares its acceptance of this general principle and its intention to apply it as a general guide to costs in these arbitration proceedings, which both Parties are requested henceforth to keep well in mind until an award by the Tribunal.

PART VI - OPERATIVE PART

124. Accordingly, for the reasons set out above, the Tribunal decides:

- (1) As regards Claim I and Claim II, pleaded in Paragraphs 108 to 115 at pages 23 to 25 of the Claimant's Request for Arbitration of 2nd August 2007, the Respondent's Objection of 25th February 2008 is rejected;
- (2) As regards Claim III, pleaded in Paragraphs 116 to 121 at page 26 of the Claimant's Request for Arbitration of 2nd August 2007, the Tribunal confirms that this claim was manifestly without legal merit within the meaning of Rule 41(5) of the ICSID Arbitration Rules; it is hereby to be treated as having been formally withdrawn by the Claimant without prejudice as to any other issue between the Parties; and
- (3) The Tribunal reserves all other issues to a further order, decision or award, including any question as to costs.

Washington DC, USA

May 2008.

[Signed]

Professor Donald M. McRae

Professor James Crawford SC

V. V. Veeder (President)

PART VI - OPERATIVE PART

124. Accordingly, for the reasons set out above, the Tribunal decides:

- (1) As regards Claim I and Claim II, pleaded in Paragraphs 108 to 115 at pages 23 to 25 of the Claimant's Request for Arbitration of 2nd August 2007, the Respondent's Objection of 25th February 2008 is rejected;
- (2) As regards Claim III, pleaded in Paragraphs 116 to 121 at page 26 of the Claimant's Request for Arbitration of 2nd August 2007, the Tribunal confirms that this claim was manifestly without legal merit within the meaning of Rule 41(5) of the ICSID Arbitration Rules; it is hereby to be treated as having been formally withdrawn by the Claimant without prejudice as to any other issue between the Parties; and
- (3) The Tribunal reserves all other issues to a further order, decision or award, including any question as to costs.

Washington DC, USA

May 2008.

[Signed]

Professor Donald M. McRae

Professor James Crawford SC

V.V. Veeder (President)

PART VI - OPERATIVE PART

124. Accordingly, for the reasons set out above, the Tribunal decides:

- (1) As regards Claim I and Claim II, pleaded in Paragraphs 108 to 115 at pages 23 to 25 of the Claimant's Request for Arbitration of 2nd August 2007, the Respondent's Objection of 25th February 2008 is rejected;
- (2) As regards Claim III, pleaded in Paragraphs 116 to 121 at page 26 of the Claimant's Request for Arbitration of 2nd August 2007, the Tribunal confirms that this claim was manifestly without legal merit within the meaning of Rule 41(5) of the ICSID Arbitration Rules; it is hereby to be treated as having been formally withdrawn by the Claimant with the consent of the Respondent, without prejudice as to any award on costs; and
- (3) The Tribunal reserves all other issues to a further order, decision or award, including any question as to costs.

Washington DC, USA

12 May 2008.

Professor Donald M. McRae

Professor James Crawford SC

[Signed]

V.V. Veeder (President)