

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.

In the matter between

**Global Trading Resource Corp. and Globex International, Inc.**  
(Claimants)

and

**Ukraine**  
(Respondent)

**(ICSID Case No. ARB/09/11)**

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**AWARD**

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*Members of the Tribunal*

Sir Franklin Berman (President)  
Prof. Emmanuel Gaillard  
Mr. Christopher Thomas, QC

*Secretary of the Tribunal*

Ms. Aïssatou Diop

*Representing the Claimant*

Mr. Stanley McDermott III  
Ms. Claudia T. Salomon  
Mr. David S. Wenger  
DLA Piper LLP (US)

*Representing the Respondent*

Mr. John Willems  
Mr. Michael Polkinghorne  
Ms. Olga Boltenko  
Ms. Nathalie Makowski  
Ms. Kristen Young  
Ms. Angélica André  
White & Case LLP  
Mr. Serhii Sviriba  
Ms. Olena Koltko  
Magisters

*Date of Dispatch to the Parties: December 1, 2010*

## **The Parties**

1. The Claimants are Global Trading Resource Corp. (“Global”) and Globex International, Inc. (“Globex”), both juridical persons organized under the laws of the United States of America (“United States”) and engaged primarily in the exportation of meat and poultry products. The Claimants are represented by Mr. Stanley McDermott III, Ms. Claudia T. Salomon, and Mr. David S. Wenger of the law firm of DLA Piper LLP (US), New York.
2. The Respondent is Ukraine. It is represented by Mr. John Willems, Mr. Michael Polkinghorne, Ms. Olga Boltenko, and Ms. Nathalie Makowski of the law firm of White & Case LLP, Paris, and by Mr. Serhii Sviriba, Ms. Olena Koltko of the law firm of Magisters, Kyiv.
3. The Request states that the State Committee of Ukraine of the State Reserve (“the State Reserve”) was Ukraine's designated State enterprise responsible for negotiating purchase-and-sale contracts with U.S. poultry exporters during the year 2008, including with the Claimants, and says further that the State Reserve nominated a private company called OOO Alan Trade (“Alan Trade”) to serve as the counterparty for the signature of those contracts. According to the Request Ukraine is liable for the actions of both the State Reserve and Alan Trade.

## **Registration of the Request**

4. On 21 May 2009 the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received a request for arbitration dated 18 May 2009 (the “Request”) filed by Global and Globex (“Claimants”) against Ukraine (“Respondent”) (collectively, “the Parties”).
5. The Request was filed on the basis of the Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, signed on 4 March 1994, which entered into force on 16 November 1996 (“BIT” or “Treaty”). On 28 May 2009 the Centre acknowledged receipt of the Request and transmitted a copy to the Respondent.

6. On 2 June 2009 the Centre asked the Claimants for clarifications of the Request and received answers on 9 June 2009.

7. On 11 June 2009 the Acting Secretary-General of ICSID notified the Parties, in accordance with Article 36(3) of the ICSID Convention, of the registration of the Request.

8. In the Notice of Registration, the Acting Secretary-General invited the Parties, in accordance with Rule 7(d) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, to proceed as soon as possible to constitute an arbitral tribunal pursuant to Articles 37-40 of the ICSID Convention.

### **Constitution of the Tribunal**

9. The Claimants noted in the Request that they did not have an agreement with the Respondent on the constitution of the Tribunal. The Claimants thus proposed a tribunal consisting of three arbitrators, with one arbitrator appointed by each party and the third arbitrator, to serve as the President of the Tribunal, appointed by agreement of the Parties. The Claimants also proposed to appoint their nominated arbitrator within one month of the registration of the Request.

10. On 17 July 2009 the Claimants informed the Centre that they were appointing Professor Emmanuel Gaillard, a national of France, as arbitrator. Professor Gaillard accepted his appointment on 21 July 2009.

11. On 3 August 2009 the Claimants advised the Centre of their intention to invoke Article 38 of the ICSID Convention if the Respondent did not appoint an arbitrator by 9 September 2009. On 3 September 2009 the Claimants communicated to the Centre the Parties' agreement to extend to 10 October 2009 the period for constituting the Tribunal.

12. On 6 August 2009 the Respondent notified the Centre that it agreed to the number of arbitrators and the method of their appointment proposed by the Claimants in their Request for Arbitration.

13. On 3 September 2009 the Respondent informed the Centre that it was appointing Mr. Christopher Thomas QC, a national of Canada, as arbitrator. The same day, the Claimants

advised the Centre of the Parties' agreement to extend until 10 October 2009 the time for constituting the Tribunal. Mr. Thomas accepted his appointment on 11 September 2009.

14. The Parties having failed to constitute the Tribunal by 10 October 2009, the Centre was informed by the Claimants on 15 October 2009 that the Parties were further extending to 23 October 2009 the previously agreed period for constituting the Tribunal.

15. On 2 December 2009 the Claimants notified the Centre that the Parties had agreed to appoint Sir Franklin Berman QC, a national of the United Kingdom, as the President of the Tribunal and to hold the proceedings in London, United Kingdom. Sir Franklin accepted his appointment on 9 December 2009. The same day, the Acting Secretary-General declared the Tribunal constituted and the proceedings begun. The Acting Secretary-General also notified the Tribunal and the Parties that Ms. Aïssatou Diop, Consultant, ICSID, would serve as Secretary of the Tribunal.

### **Written and Oral Proceedings**

16. On 17 December 2009 the Respondent advised the Tribunal that the Respondent intended to raise an objection under Arbitration Rule 41(5) of the Rules of Procedure for Arbitration Proceedings ("the Arbitration Rules") that the claims in the arbitration were manifestly without jurisdiction and therefore without legal merit.

17. On 5 January 2010 the Respondent filed the terms of its objection under the provisions of Rule 41(5).

18. On 3 February 2010 the Tribunal held a preliminary procedural consultation by telephone under Rule 20 to discuss a procedure for the Tribunal's first session and for the handling of the Respondent's Rule 41(5) objection. With respect to the latter, it was agreed during the telephone conference that the written phase of the proceedings on the Rule 41(5) objection would consist of two rounds of written argument, followed by an oral phase to be held in conjunction with the first session of the Tribunal. It was also agreed that the first session would be held in London on 8-9 April 2010.

19. The Claimants submitted their Response to the Respondent's objection on 15 March 2010. The Respondent filed its Reply on 26 March 2010 and the Claimants their Rejoinder

on 9 April 2010, the original deadline of 2 April 2009 having been extended on 30 March 2009 by agreement between the Parties.

20. On 1 April 2009 the Tribunal held a second preliminary procedural consultation by telephone with the Parties, at which it was agreed to reschedule the first session and Rule 41(5) hearing to 7 July 2010.

21. On 18 June 2010 the Tribunal held a pre-hearing telephone conference with the Parties to discuss procedural details outlined in an agenda circulated by the Secretary of the Tribunal in advance. The Tribunal's endorsement of the items on which the Parties had reached agreement and its decisions on the items on which the Parties had been unable to agree were recorded in a letter circulated to participants after the telephone conference.

22. On 7 July 2010 the Tribunal held its first session followed by the Rule 41(5) hearing in London. Appearing on behalf of the Claimants were Mr. Stanley McDermott III and Ms. Claudia Salomon, and on behalf of the Respondent Mr. John Willems, Ms. Kristen Young, and Mr. Markiyan Kliuchkovskyi.

23. In advance of the first session, the Secretary of the Tribunal had circulated an agenda and the Parties had submitted a joint statement recording their agreement on most of the agenda items. During the first session, the parties each expressly confirmed that the Tribunal was properly constituted, and that they had no objection to any of its members serving as arbitrator.

24. These items were duly recorded in the Minutes of the First Session signed by the President and Secretary of the Tribunal and issued on September 1, 2010. The Minutes record in particular that a calendar for the Parties to make further submissions in this proceeding would be left to be discussed after the Tribunal had issued its determination on the Respondent's Rule 41(5) objection.

25. During the Rule 41(5) hearing, Mr. McDermott presented the Claimants' opening statement and rebuttal, and Mr. Willems presented the Respondent's opening statement and rebuttal.

26. The first session and Rule 41(5) hearing were audio recorded. In addition, a verbatim transcript was prepared for the Rule 41(5) hearing.

27. On July 23, 2010, the Parties filed simultaneously their submissions on costs.

## Factual Background

28. The present application is brought by the Respondent, Ukraine, under paragraph (5) of Rule 41 of the Arbitration Rules. Rule 41(5) is a new provision, introduced as part of the amendments that came into effect on 10 April 2006, and thus applies by common consent to these arbitral proceedings, which were commenced by a Request for Arbitration dated 18 May 2009. The application of the Rules in their 2006 version was confirmed by the parties at the first Session of the Tribunal, held on 7 July 2010, immediately before the hearing on the present application.

29. Rule 41(5) opens the way – in the absence of agreement between the parties on another expedited procedure – to either party<sup>1</sup> to apply to the tribunal at a very early stage in the arbitral proceedings to rule that “a claim is manifestly without legal merit.” This is, to the Tribunal’s knowledge, only the third occasion on which a decision has had to be taken on an objection under Rule 41(5). The Tribunal is thus particularly conscious of its responsibility to contribute to shaping both an understanding of the Rule itself and of the procedure which ought to be followed under it.

30. The two previous decisions are those in *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan* (“Trans-Global”)<sup>2</sup> and in *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela* (“Brandes”).<sup>3</sup> In *Trans-Global*, the Tribunal was confronted with an objection on the part of the Respondent State that all three of the claims put forward by the Claimant in its Request for Arbitration were manifestly without substantive legal merit; the Claimant withdrew one of these claims in the course of the proceedings, and the Tribunal rejected the objections to the other two claims which therefore went forward for further argument and eventual hearing. In *Brandes*, on the other hand, the Respondent’s objection

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<sup>1</sup> Though the drafters might equally well have said ‘the respondent’, since the procedure is hardly likely to hold much interest for a claimant.

<sup>2</sup> *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/07/25); Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules (May 12, 2008), available at <http://icsid.worldbank.org/ICSID/FrontServlet>.

<sup>3</sup> *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3), Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules (February 02, 2009), available at <http://icsid.worldbank.org/ICSID/FrontServlet>.

went to jurisdiction not substance, and the Tribunal concluded that Rule 41(5) was apt to cover “an early expedited finding if it is manifest that the jurisdiction of the Centre or the competence of the Tribunal for the claims brought before the Tribunal is lacking.” As the *Brandes* Tribunal remarked (at paragraph 52 of its Decision):

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.

The present Tribunal respectfully agrees, and indeed the Parties in this case appear to have taken the same view in their conduct of the present proceedings. The *Brandes* Tribunal was of course careful to assure itself that the jurisdictional objection before it was one based on the legal merits and not on disputed issues of fact, but declined, in the event, to uphold the objection itself.

31. In the present case as well, the objection raised by the Respondent goes to jurisdiction and competence. Likewise there is no disagreement that the objection is based on an issue (or issues) of law and does not involve disputed issues of fact. The essence of the Respondent’s argument is that the claims brought by the Claimants are not claims in respect of ‘investments,’ within the meaning of the governing legal instruments.

### **Procedure under Rule 41(5)**

32. Rule 41(5) is sparse in its indications to a tribunal as to the procedure to be followed when an objection is lodged. It says no more than that “the parties” (in the plural) must have “the opportunity to present their observations on the objection,” and that the Tribunal is required to notify the parties of its decision “at its first session<sup>4</sup> or shortly thereafter.” To the extent that the Rule leaves the question of procedure there, it is no doubt for each individual Tribunal to fill in the gaps by exercising the general procedural powers given to it by Rule 19. On the other hand, it should be noted that – if a Tribunal does in the event decide that all claims are manifestly without legal merit – it is then required by Rule 41(6) to render “an award” to that effect, thus attracting those elements of the Rules and the ICSID Convention that relate to the rendering of an award. While the full rigour of the rules in question would

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<sup>4</sup> Meaning, presumably, the session envisaged in Rule 13(1).

be difficult to apply to a decision upholding an objection under Rule 41(5), it must be the case that, if the circumstances were to arise, a Tribunal ought to draw inspiration from the general sense of those rules so far as they can be applied to the situation in hand. The problem is, of course, that a Tribunal will by definition not know in advance whether or not the events to come are likely to lead to the objection being upheld and therefore to the rendering of an award striking out the claimant's claims. The very possibility that they might, however, raises an important question about what opportunities ought to be offered to the parties to present their arguments and counter-arguments, and in what form.

33. On that question, the Tribunal has come to the clear view that, in principle, it would not be right to non-suit a claimant under the ICSID system without having allowed the claimant (and therefore the respondent as well) a proper opportunity to be heard, both in writing and orally. That may raise organizational problems, in the face of the requirement that the Tribunal is to rule on the objection "at its first session or shortly thereafter" (see paragraph 32 above), but the Tribunal was able to resolve them in the present case, given the delays that had been introduced into the proceedings for extraneous reasons, by allowing two rounds of short and focussed written argument, complemented by two rounds of well-focussed oral argument completed within one single day at the end of the first formal session. The cooperation of both parties in making this possible was greatly appreciated. The cost has been a slight delay (which the parties accepted was reasonable) between the hearing and the rendering of this Award. But the Tribunal views that as both inevitable and still within the spirit of the Rules. There may be cases in which a tribunal can come to a clear conclusion on a Rule 41(5) objection, simply on the written submissions, but they will be rare, and the assumption must be that, even then, the decision will be one not to uphold the objection, rather than the converse. That is because, if an objection is not upheld at the Rule 41(5) stage, the rights of the objecting party<sup>5</sup> remain intact, as the last sentence of the Rule makes plain: the rejection of an objection under Rule 41(5) at the pre-preliminary stage does not stand in the way of its resurrection later in the normal way as if Rule 41(5) did not exist. The fact that a claim is not 'manifestly' without legal merit does not, self-evidently, mean that it may not subsequently be found without sufficient legal merit for a tribunal to uphold it after full argument.

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<sup>5</sup> i.e. the Respondent; see fn. 1 above.

## **The Propriety of Summary Dismissal**

34. That brings one, however, in the opinion of the Tribunal, to a different question, one that lies half-way between procedure and substance, namely, under what circumstances ought a tribunal to consider it proper to dispose of an objection summarily<sup>6</sup>, at the pre-preliminary stage, under Rule 41(5)? It should be made clear that this is not the same question as the standard to be applied by a tribunal in deciding whether or not the legal demerits of a claim are ‘manifest’ (see below, paragraph 35). It is, rather, the question: when can a tribunal properly be satisfied that it is in possession of sufficient materials to decide the matter summarily? Here, a balance evidently has to be struck between the right (however qualified) given to the objecting party under Rule 41(5) to have a patently unmeritorious claim disposed of before unnecessary trouble and expense is incurred in defending it, and the duty of the tribunal to meet the requirements of due process. Once again, the matter seems to this Tribunal to present itself differently according to whether the outcome is to be to reject the objection, or to uphold it. In the former eventuality, a tribunal that is in doubt as to whether the claim is ‘manifestly’ without legal merit can decide not to determine the issue summarily, but to leave it over for decision later on, at a more developed stage of the proceedings (see the preceding paragraph). In the latter eventuality, it would seem that the tribunal is under an obligation, not only to be sure that the claim objected to is ‘manifestly without legal merit,’ but also to be certain that it has considered all of the relevant materials before reaching a decision to that effect, with all the consequences that follow from it. The present Tribunal accordingly posed itself the question, what other materials might either Party (specifically the Claimants) bring to bear if the question at issue were to be postponed until a later stage in the proceedings? Having posed itself that question, the Tribunal was unable to see what further materials relevant to the question at issue, be it in the shape of legal argument or authority or in the shape of witness or documentary evidence, either Party might wish to, or be able to, bring forward at a later stage. The Tribunal is accordingly satisfied that the conditions are met for it to dispose of the Respondent’s objection pursuant to Article 41(5) of the ICSID Rules.

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<sup>6</sup> Or ‘on an expedited basis,’ as the matter is put in the ICSID Secretariat’s Working Paper of 12 May 2005.

## **The Standard for Review**

35. The Tribunal turns now to the standard that ought to be applied in deciding whether a claim is “manifestly without legal merit,” in the terms of Rule 41(5). The central issue is evidently what is to be understood by ‘manifestly.’ As to this, the *Trans-Global* Tribunal made, in paragraphs 83-92 of its Decision<sup>7</sup>, a careful analysis of the use of the qualifier ‘manifestly’ in this and other contexts in the ICSID Convention and the Arbitration Rules. The present Tribunal has nothing of its own to add and respectfully endorses that analysis and the conclusions reached:

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 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.<sup>8</sup>

## **The Claims**

36. The Claimants’ case is based upon the following key alleged facts (which for the purposes of this application were not disputed by the Respondent and are taken as true by the Tribunal). The Claimants allege that due to the structure of the Ukrainian poultry market, imports had been severely limited with the result that domestic prices soared to the benefit of domestic poultry producers and to the detriment of the Ukrainian consumer. After her election in December 2007, Yulia V. Tymoshenko became Prime Minister of Ukraine and, the Claimants plead, resolved to deal with the poultry supply issue in order to reduce prices to consumers. On 1 June 2008 the Prime Minister requested the United States Embassy in Kyiv to identify US poultry exporters willing to consider exporting to Ukraine and approximately 6 weeks later, a meeting hosted by the Prime Minister was held between US exporters, a US Embassy official, and Ukrainian officials in Kyiv.

37. At this meeting, according to the Claimants, “Prime Minister Tymoshenko proposed a poultry ‘purchase-and-import program’ as a special government initiative for the express

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<sup>7</sup> fn. 2 above.

<sup>8</sup> *ibid.* para. 88.

purpose of correcting what she perceived to be anti-competitive and inflationary conditions in the Ukrainian poultry industry.”<sup>9</sup> This, it is contended, led directly to the poultry sales and purchase contracts negotiated by the Claimants with senior Ukrainian officials.

38. The Claimants allege further that officials of the State Reserve also attended the meeting. The State Reserve subsequently designated Alan Trade as counterparty to the poultry sales and purchase contracts with the Claimants.<sup>10</sup> The Claimants emphasise both the economic development purposes of the Prime Minister's solicitation of the sales and purchase contracts and her assurances of payment by Ukraine.<sup>11</sup>

39. The Request for Arbitration sets out in detail the steps taken by both Claimants to perform their respective purchase and sale contracts, Ukraine's failure to pay for and take delivery of most of the poultry shipped to the designated port, the efforts of the United States Embassy to convince Ukraine to fulfil its contractual obligations to the two exporters, and the resulting losses, including demurrage charges, incurred by the Claimants before they finally disposed of the goods.<sup>12</sup>

40. Article I of the Treaty<sup>13</sup> defines “investment” as “every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts,” including “(iii) a claim to money or a claim to performance having economic value and associated with an investment” and “(v) any right conferred by law or contract, and any licenses and permits pursuant to law.” The Request for Arbitration sought to enforce “the right to be paid for performance of the contractual obligations”<sup>14</sup> and was premised mainly upon Article I(1)(a(v).

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<sup>9</sup> Claimants' Response to Respondent's Rule 41(5) Objection, para. 41

<sup>10</sup> Request for Arbitration, para. 16; see para. 3 above.

<sup>11</sup> *Ibid.*, paras. 8-12,

<sup>12</sup> *Ibid.*, para. 20-33.

<sup>13</sup> For the full text of Article I(1)(a), see para. 47 below.

<sup>14</sup> *Ibid.*, paras. 37-38.

## **The Respondent's Objection**

41. The essence of the Rule 41(5) objection raised by the Respondent is that the Claimants' claims, as formulated in the Request for Arbitration and subsequently in the pleadings, represent nothing more than claims to payment under trading contracts, and do not therefore amount, in law, to 'investments.' More specifically, Ukraine says that claims arising from trade transactions, involving only the cross-border sale of goods, were deliberately excluded by the Contracting Parties from the definition of "investment" set out in Article I of the U.S.-Ukraine BIT, as supporting evidence for which the Respondent invokes the terms in which the BIT was submitted to the US Congress for approval.<sup>15</sup> The Respondent asserts also that these represent purely commercial transactions of a type which falls outside the scope of Article 25(1) of the ICSID Convention defining the jurisdiction of ICSID itself, and thus outside the limits of the jurisdiction of any tribunal set up under the ICSID system.

42. The Claimants' answer, again in essence, is that, while the form of the contracts under which the Claimants claim is that of a conventional purchase and sale contract, the reality is totally different. This difference, as it emerged in the course of argument, was said to reside in the circumstances under which the conclusion of the contracts was solicited by Ukraine, at the highest level, for important reasons of social and economic development policy, and with performance guaranteed by the State. The Claimants contend that the claims do not arise solely from conventional trade transactions, and they do not involve only the cross-border sale of goods. Rather, the claims arise from "(a) the Ukrainian Prime Minister's entreaties that U.S. exporters assist the Prime Minister's efforts to break a domestic-producer monopoly, reduce prices, and curb inflation, and (b) the Prime Minister's explicit assurances that Ukraine would fulfill its obligations to those exporters willing to support the Prime Minister's economic-development efforts."<sup>16</sup> The substantial resources devoted by the Claimants to procuring, shipping and delivering the goods and the purposes for which they were being purchased thus constituted on a proper interpretation, in the Claimants' submission, 'investments' under the BIT and the ICSID Convention.

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<sup>15</sup> Message from the President of the United States, 27 September 1994, p. VII: "The requirement that a 'claim to money' be associated with an investment excludes claims arising solely from trade transactions, such as a transaction involving only a cross-border sale of goods, from being considered investments covered by the Treaty." (Emphasis added.)

<sup>16</sup> Claimants' Response to Respondent's Rule 41(5) Objection, para. 63.

## The Conditions To Be Met for the Tribunal's Jurisdiction

43. There seemed at one stage to have been an issue between the Parties as to whether, in a case like the present in which the consent to arbitration derives from a bilateral investment treaty, the test for determining the existence of an ‘investment’ involved twin parameters or one single one; in other words whether the putative ‘investment’ had to satisfy the requirements of both the treaty and the ICSID Convention, or whether the two melted into one, in the sense that whatever satisfied the test under the treaty would automatically fall within the terms of the Convention as well. As the argument progressed, however, it became clearer that this was not the case, and that the Claimants’ position was a softer one, under which there was no more than some sort of *prima facie* assumption that a BIT would stay within the outer limits set by the Convention, but an assumption that was therefore open to being questioned in particular cases. This concurrence was fortunate as, for the Tribunal, it is now beyond argument that there are two independent parameters that must both be satisfied: what the parties have given their consent to, as the foundation for submission to arbitration; and what the Convention establishes as the framework for the competence of any tribunal set up under its provisions. The Tribunal need do no more than refer in this connection to a long line of previous decisions starting with *Alcoa Minerals v. Jamaica* in 1975<sup>17</sup> through *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*<sup>18</sup> (and the various subsequent cases in which tribunals have discussed, modified and grafted on various indicia to the so called *Salini* test for determining the existence of an investment), and culminating most recently in *Saba Fakes v. Republic of Turkey*.<sup>19</sup> These decisions have held that the notion of ‘investment’, which is one of the conditions to be satisfied for the Centre to have jurisdiction, cannot be defined simply by reference to the parties’ consent. The weight of authority is thus in favour of viewing the term ‘investment’ as having an objective definition within the framework of the ICSID Convention. Accordingly, as noted in the *Joy Mining Machinery Limited v. Arab Republic of Egypt* case, the “parties to the dispute cannot

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<sup>17</sup> *Alcoa Minerals of Jamaica Inc. v. Jamaica* (ICSID Case No. ARB/74/2), Decision on Jurisdiction, July 6, 1975, cited in J. Schmidt, “Arbitration Under the Auspices of The Centre for Settlement of Investment Disputes (ICSID). Implications of the Decision on Jurisdiction in *Alcoa Minerals of Jamaica v. Government of Jamaica*”, (1976) 17 *Harvard Int'l L.J.* 90, at p. 100.

<sup>18</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, paras. 51-52.

<sup>19</sup> *Saba Fakes v. Republic of Turkey* ICSID Case No. ARB/07/20), Award, July 14, 2010, paras, 108-109.

by contract or a treaty define as investment, for the purposes of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention.”<sup>20</sup>

44. Although, no doubt, in the overwhelming majority of cases what the States Parties settled as the definition of ‘investment’ in their bilateral treaty is unarguably inside the boundaries set by the Convention – so that the two-fold test melts, in effect, into one – the generous margin of freedom left under the Convention is not absolute. It does not extend to allowing States Parties (or indeed others) to deem an activity to be an ‘investment’ without regard to whether it meets the meaning of that term as used within the ICSID Convention, and specifically Article 25(1) thereof, properly interpreted according to the applicable rules of international law. Had the drafters of the Convention wished to accord an absolute freedom of that kind, they would have said so, not simply left Article 25 without a formal definition for the term ‘investment.’

45. It seems to the Tribunal that what the drafters of the Convention had in mind was an objective and autonomous definition of the term ‘investment’ in Article 25, without which an essential component of Article 25 itself would have been stripped of its meaning. As the Tribunal in *Victor Pey Casado v. Chile* observed:

... a definition of investment does exist within the meaning of the ICSID Convention and it does not suffice to note the existence of certain of the usual ‘characteristics’ of an investment to satisfy this objective requirement of the Centre’s jurisdiction. Such an interpretation would result in depriving certain terms of Article 25 of the ICSID Convention of any meaning ...<sup>21</sup>

46. Against that background, the Tribunal turns now to an analysis of the two governing treaties, namely the BIT and the ICSID Convention, in the light of the arguments put before it by the parties to the Arbitration. There seems to be no set methodology among ICSID tribunals as to whether the analysis ought to begin with the BIT, which goes to the condition of consent within the meaning of the ICSID Convention, or with the notion of investment under the ICSID Convention. In the present case, it makes no difference where the analysis starts. The Tribunal accordingly finds it convenient to begin with the BIT.

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<sup>20</sup> *Joy Mining Machinery Equipment Ltd v. Arab of Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, August 6, 2004, para. 50.

<sup>21</sup> *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Award, May 8, 2008, para. 232.

## The BIT

47. The starting point is plainly the terms of the BIT itself, as mandated by Article 31 of the Vienna Convention on the Law of Treaties (1969). It is common ground between the parties that the governing provision is the definition of “investment” set out in Article I(1)(a), which reads as follows<sup>22</sup>:

- (a) “investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:
  - (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
  - (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
  - (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
  - (iv) intellectual property which includes, *inter alia*, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and
  - (v) any right conferred by law or contract, and any licenses and permits pursuant to law.

48. The Respondent says that the Claimants’ claims are in respect of the failure to perform under their contracts, that they thus fall within sub-paragraph (a)(iii), and that the text makes clear that any such claim has to be “associated with an investment” in order to fall within the Article I definition of investment. It follows, in its submission, that the claim to money or to performance cannot itself rank as an “investment” under the BIT. It argues further that this conclusion is not affected by sub-paragraph (a)(v), both because it would not be acceptable to interpret this sub-paragraph so as to contradict sub-paragraph (a)(iii), and because even the contract and licence rights referred to under (a)(v) still have to rank as “investments” in their own right, inasmuch as the structure of paragraph 1(a) makes “investment” the overall rubric covering everything that follows when it provides that “‘investment’ means every kind of investment ... and includes ...” The Respondent argues further that the contracts cannot, on any analysis, be construed as investment “in the territory of” Ukraine, as the rubric to paragraph 1(a) also requires. Finally, the Respondent prays in

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<sup>22</sup> An inquiry by the Tribunal disclosed that the Parties were in agreement that the Tribunal could rely on the English text of this provision.

aid, to support the above textual interpretation of Article I(1)(a), a passage in the submission of the BIT for US Congressional approval<sup>23</sup> indicating that the wording of sub-paragraph (a)(iii) had the effect of excluding claims arising solely from trade transactions, such as a transaction involving only a cross-border sale of goods.

49. The Claimants reject this interpretation of the text of Article I(1)(a). They maintain, for their part, that substance should prevail over form, and in substance these are not ordinary purchase and sale contracts. The Claimants tender in evidence witness statements by the principals of both Global and Globex describing the circumstances under which the two companies were asked to tender for the supply and which in due course led to their agreement to do so. The Claimants qualify these circumstances as ‘not only exceptional but in fact extraordinary’ – so that, while they expressly agree that conventional purchase and sale contracts do not constitute investments, it is the highly exceptional circumstances of this case which have the effect of transforming the sale and purchase contracts into investments falling within the protection of the Treaty.<sup>24</sup> The Claimants go on to say that the US transmittal letter,<sup>25</sup> far from undermining their position, in fact reinforces it, when it refers to claims arising solely from trade transactions, and gives as an example transactions involving only a cross-border sale of goods. The Claimants assert that the exceptional circumstances on which they rely show that their claims do not fall within those limited classes.

50. Were it necessary to decide the point, the Tribunal would have little hesitation in preferring the Respondent’s reading of the US transmittal letter to that of the Claimant. There seems to the Tribunal no reasonable room for argument but that what the letter was seeking to describe was the legal characterization of the transaction as such, without seeking to imply that the circumstances surrounding the negotiation and execution of a contract for the sale and purchase of goods or indeed the identity of the parties thereto could serve to transform a trade transaction into an investment. Nevertheless, and despite the fact that both Parties, in one way or another (see above), sought to rely to a certain extent on the letter of transmittal, the Tribunal doubts whether the letter represents a necessary item of

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<sup>23</sup> Text in fn. 14 above.

<sup>24</sup> It would be right to note that the Respondent, questioned directly by the Tribunal on this point, did not contest the Claimants’ factual allegations as such, but declined to accept, in the abstract, the Claimants’ qualification of them as ‘exceptional.’

<sup>25</sup> Fn. 14 above.

interpretative material. Without going into the question of how the letter might properly be categorized within the framework for interpretation given in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the Tribunal does not find that it needs to go beyond the text itself of Article I(1)(a) of the BIT. And, under the text of Article I(1)(a), the Tribunal finds that (as here) claims to moneys alleged to be due can only fall within the scope of Article I, and therefore of the BIT as a whole, whatever the circumstances, if they are (as sub-paragraph (a)(iii) says in plain words) “associated with an investment.”

51. In the Tribunal's view, the Claimants' case under this sub-paragraph founders on the fact that their contracts were simply contracts which lacked the essential connecting factor of being “associated with an investment.”

52. Rested on this basis, the Claimants' claims based on Article I(1)(a)(iii) are therefore ‘manifestly without legal merit’ as provided in Rule 41(5).

53. There remains, however, the question as to whether the claims as put forward by the Claimants are capable of finding their foundation in sub-paragraph (a)(v), as “rights conferred by law or by contract.” Although there would be difficulties in reconciling either reading with the remainder of the text, particularly the territorial requirement stated in paragraph (1)(a), the Tribunal accepts that this sub-paragraph can be read either literally, to include any right of any kind deriving from any form of contract, or alternatively contextually, as restricted to rights capable of constituting investments in themselves; there are arguments either way. That might in itself raise an issue as to whether the question is apt for decision summarily, under Rule 41(5). It therefore makes more sense to leave the matter there for the moment, and proceed instead to the second limb of the analysis, namely the concept of ‘investment’ under Article 25 of the ICSID Convention.

## **Article 25 of the ICSID Convention**

54. It needs no elaboration that the concept of what does – or rather what does not – constitute an ‘investment’ for the purposes of Article 25 of the ICSID Convention has turned out to be one of the most highly contested issues in the development of practice under the Convention. The Claimant invokes the decisions of earlier ICSID tribunals in the *RSM*

*Production v. Grenada*<sup>26</sup>, the *CSOB v. Slovakia*<sup>27</sup>, and the *Biwater Gauff v. Tanzania*<sup>28</sup> arbitrations, in support of two propositions: that the determination of jurisdiction is fact-specific to each particular case; and that the correct approach to this exercise is a flexible and pragmatic one, which should not properly be tied to *a priori* distinctive marks defining what makes up an investment. To which the Respondent counterposes the decisions of the *Jan de Nul v. Egypt*,<sup>29</sup> *Joy Mining Machinery v. Egypt*,<sup>30</sup> and *Salini v. Morocco*<sup>31</sup> Tribunals, as a reminder that, however pragmatic the examination in individual cases, there is still an outer limit; and that purely commercial transactions, such as contracts for the sale of goods, were never intended to fall within ICSID's jurisdiction.

55. The Tribunal does not consider it necessary to analyze each of those arbitral decisions in detail. The existing case law has thrown up no uniform approach as to the identification and respective importance of the criteria that may be resorted to by ICSID tribunals having to define an investment for the purposes of Article 25(1).<sup>32</sup> More to the point, the question before this Tribunal in the present case is a simpler and more straightforward one than that with which most earlier ICSID tribunals have been faced, namely: is the supplier's outlay of money in performing a contract for the transboundary purchase and sale of goods capable of constituting an 'investment'? As to that limited, but precise, question, the tribunal in *Joy Mining Machinery* decided that even a more complex contract of that kind (which contained other elements in addition) would not satisfy the test of an 'investment' for the purposes of Article 25 of the ICSID Convention.<sup>33</sup> The ad hoc Committee in the recent *Malaysian Historical Salvors v. Malaysia* decision likewise considered, with direct reference to the *travaux préparatoires* of the Convention, that "[i]t appears to have been assumed by the Convention's drafters that use of the term 'investment' excluded a simple sale and like

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<sup>26</sup> *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14), Award, March 13, 2009.

<sup>27</sup> *Ceskoslovenska Obchodni Banka v. The Slovak Republic*, Decision on Jurisdiction, May 24, 1999.

<sup>28</sup> *Biwater Gauff v. Tanzania* (ICSID Case No. ARB/05/22), Award, July 24, 2008.

<sup>29</sup> *Jan de Nul v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction, June 16, 2006.

<sup>30</sup> *Joy Mining Machinery Equipment Ltd v. Arab of Republic of Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction, August 6, 2004.

<sup>31</sup> ICSID Case No. ARB/00/4, Decision on Jurisdiction of July 23, 2001.

<sup>32</sup> "solutions established in a series of consistent cases that are comparable to the case at hand" of the kind which the *Bayindir v. Pakistan* Tribunal had in mind (ICSID Case No. ARB/03/29), Award, August 27, 2009, para 145).

<sup>33</sup> *Ibid.* at para. 58.

transient commercial transactions from the jurisdiction of the Centre.”<sup>34</sup> The Committee concluded that: “These fundaments, and the equally fundamental assumption that the term ‘investment’ does not mean ‘sale,’ appear to comprise ‘the outer limits,’ the inner content of which is defined by the terms of the consent of the parties to ICSID jurisdiction.”<sup>35</sup>

56. In the present instance, the Tribunal considers that the purchase and sale contracts entered into by the Claimants were pure commercial transactions and therefore cannot qualify as an investment for the purposes of Article 25 of the Convention. When the circumstances of the present case are examined and weighed, it can readily be seen that the money laid out by the Claimants towards the performance of these contracts was no more than is typical of the trading supplier under a standard CIF contract. The fact that the trade in these particular goods was seen to further the policy priorities of the purchasing State does not bring about a qualitative change in the economic benefit that all legitimate trade brings in its train. *Nor can an undertaking by officials of the State to honour the contractual commitments to be concluded transform a sale and purchase agreement into an investment.* In the present case, having viewed the contracts concluded by Global and by Globex with *Alan-Trade as nominee for the Ukrainian State Reserve*, and having heard the parties’ answers to the questions raised by it during the oral hearing, the Tribunal is compelled to the conclusion that these are each individual contracts, of limited duration, for the purchase and sale of goods,<sup>36</sup> on a commercial basis and under normal CIF trading terms, and which provide for delivery, the transfer of title, and final payment, before the goods are cleared for import into the recipient territory; and that neither contracts of that kind, nor the moneys expended by the supplier in financing its part in their performance, can by any reasonable process of interpretation be construed to be ‘investments’ for the purposes of the ICSID Convention.

57. The Tribunal finds that the foregoing considerations, in and of themselves, are sufficient for it to conclude that the sale and purchase contracts entered into by the Claimants are pure commercial transactions that cannot on any interpretation be considered to constitute ‘investments’ within the meaning of Article 25 of the ICSID Convention.

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<sup>34</sup> *Malaysian Historical Salvors v. Malaysia Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia* (ICSID Case No. ARB/05/10), Decision on the Application for Annulment, April 16, 2009, para. 69.

<sup>35</sup> *Ibid.* at para. 72. Similarly, Judge Shahabuddeen’s dissent, at paras. 7-15.

<sup>36</sup> And, what is more, perishable and consumable goods.

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

59. Having reached the above decision, the Tribunal is required under Article 47 of the Arbitration Rules to turn its mind to the question whether it should make an award of costs. It seems to the Tribunal, however, given the newness of the Rule 41(5) procedure and given the reasonable nature of the arguments concisely presented to it by both parties, that the appropriate outcome is for the costs of the procedure to lie where they fall. It therefore makes no order as to costs.

[*signed*]

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Prof. Emmanuel Gaillard

[*signed*]

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Mr. Christopher Thomas, QC

[22 November 2010]

Date: \_\_\_\_\_

[18 November 2010]

Date: \_\_\_\_\_

[*signed*]

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Sir Franklin Berman, President

[23 November 2010]

Date: \_\_\_\_\_