

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

IN THE PROCEEDING BETWEEN

**BRANDES INVESTMENT PARTNERS, LP**  
(CLAIMANT)

AND

**BOLIVARIAN REPUBLIC OF VENEZUELA**  
(RESPONDENT)

**(ICSID CASE NO. ARB/08/3)**

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

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*Members of the Tribunal:*

Dr. Robert Briner, *President*  
Professor Brigitte Stern, *Arbitrator*  
Professor Karl-Heinz Böckstiegel, *Arbitrator*

*Secretary of the Tribunal:*

Ms. Katia Yannaca-Small

*Representing the Claimant:*

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Ms. Lesley A. Benn,  
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*Representing the Respondent:*

c/o Mr. George Kahale III,  
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Mexico City, Mexico

## **1. PROCEDURAL ISSUES**

1. On 14 February 2008, BRANDES INVESTMENT PARTNERS, LP (hereinafter also “Brandes” or “the Claimant”) filed a Request for Arbitration against THE BOLIVARIAN REPUBLIC OF VENEZUELA (hereinafter also “Venezuela” or “the Respondent.”)
2. On 24 March 2008, the Secretary-General registered the Request for Arbitration.
3. On 8 December 2008, the Tribunal was constituted with Dr. Robert Briner, President, Professor Karl-Heinz Böckstiegel, Arbitrator, and Professor Brigitte Stern, Arbitrator.
4. On 19 December 2008, the Respondent filed Preliminary Objections pursuant to ICSID Arbitration Rule 41(5).
5. On 12 January 2009, the Claimant submitted its Observations on the Respondent’s Preliminary Objections of 19 December 2008.
6. At the occasion of the First Session of the Arbitral Tribunal, held on 29 January 2009, in Paris, counsel for both Parties orally presented their positions and answered questions put to them by the Members of the Arbitral Tribunal.
7. As discussed during the First Session, the dispositive of the Decision dated 2 February 2009 was notified on 4 February 2009, whereas the present document also contains the reasons for the Decision.

## **2. THE POSITION OF THE PARTIES**

8. The Arbitral Tribunal summarises below, insofar as relevant for the present Decision, the Claimant’s position as pleaded in its Request for Arbitration, the Respondent’s position as pleaded in its Objections pursuant to Rule 41(5), the Claimant’s position as pleaded in its Response to Claimant’s Objections and the positions as presented orally by counsel for both Parties at the occasion of the First Session.

### **2.1. SUMMARY OF THE CLAIMANT’S REQUEST FOR ARBITRATION**

9. In its Request for Arbitration, the Claimant, a United States registered investment adviser, exposes that prior to the actions challenged in this Arbitration it controlled a substantial number of American Depository Receipts and shares of Compañía Anónima Nacional Teléfonos de Venezuela (hereinafter “CANTV”) that it acquired for and on behalf of its clients.<sup>1</sup>

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<sup>1</sup> Request for Arbitration, 14 Feb. 2008, para. 5.

10. CANTV is a company registered under the laws of Venezuela and is Venezuela's largest telecommunications company.<sup>2</sup>
11. In 1991, CANTV entered into a Concession Agreement with Venezuela with the right to "organize and install, as the case may require, and to render, manage, operate and exploit the telecommunications services" in Venezuela.<sup>3</sup>
12. In 2007, the Respondent offered to purchase all the American Depository Receipts and shares of CANTV. According to the Claimant, the tender offer of the Respondent was substantially below market value.<sup>4</sup> The tender offer took place, according to the Claimant, in a context of nationalization of many private companies by Venezuela.
13. The Claimant states that the Respondent coerced it into accepting the tender by indicating its intention to control and manage CANTV after the tender as a "social, national and regional political tool of the Venezuelan State without regard to economic profitability."<sup>5</sup> The Claimant accepted Respondent's tender and received USD225.5 million in exchange of its shares.<sup>6</sup>
14. The Respondent's tender expired on May 8, 2007. As a consequence of the tender, the Respondent became the owner of 86.2% of CANTV.<sup>7</sup>
15. In its Request for Arbitration, the Claimant alleges that the Respondent's conduct was unlawful and resulted in Brandes' sale to Venezuela of its shares in CANTV at a loss. Said shares constitute an investment of the Claimant within the meaning of the ICSID Convention.<sup>8</sup>
16. Respondent's unlawful measures were tantamount to an expropriation by destroying the value of Claimant's investment without proper indemnification.<sup>9</sup>
17. The Claimant alleges that the Respondent also violated its obligation not to take arbitrary and discriminatory measures and to treat Brandes' investment fairly and equitably.<sup>10</sup>

## 2.2. SUMMARY OF THE RESPONDENT'S OBJECTIONS UNDER RULE 41(5)

18. In its objections of 19 December 2008, pursuant to Rule 41(5) of the ICSID Arbitration Rules, the Respondent alleges that the Claimant's Request for Arbitration omits to mention many facts of the case.

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<sup>2</sup> *Id.*, para. 9.

<sup>3</sup> *Id.*, para. 12.

<sup>4</sup> *Id.*, para. 33.

<sup>5</sup> *Id.*, para. 36.

<sup>6</sup> *Id.*, para. 59.

<sup>7</sup> *Id.*, para. 35.

<sup>8</sup> *Id.*, para. 32.

<sup>9</sup> *Id.*, para. 60.

<sup>10</sup> *Id.*, para. 61.

19. In particular, the Respondent argues that when selling its shares to Venezuela, the Claimant agreed to waive and release any claims it may have had against the latter in connection with the tender. According to the Respondent, the waiver and release expressly covered all claims asserted by the Claimant in the present Arbitration.<sup>11</sup>
20. In addition, the Respondent alleges that the Claimant is not an investor within the meaning of the ICSID Convention, as it was only acting as an agent and not as an owner.<sup>12</sup>
21. In the Respondent's view, the examination of the essential facts omitted by the Claimant in its Request for Arbitration leads to the conclusion that there is neither a jurisdictional nor a substantive basis for the claims in this case and that Venezuela did not violate any duties towards the Claimant.<sup>13</sup>
22. The Respondent emphasises that ICSID Arbitration Rule 41(5) provides for a specific procedure to address a case where claims are manifestly without legal merit. As these conditions are fulfilled the Arbitral Tribunal should dismiss the case on an expedited basis, pursuant to ICSID Arbitration Rule 41(5).

2.3. SUMMARY OF THE CLAIMANT'S RESPONSE TO THE RESPONDENT'S OBJECTIONS

23. In its Response, dated 12 January 2009, the Claimant opposes all the objections raised by the Respondent.
24. The Claimant alleges that the objections addressed by the Respondent do not concern the merits of Brandes' claims but are a form of "*exceptions d'incompétence*."<sup>14</sup>
25. According to the Claimant, the objections fall outside the scope of Rule 41(5) because they do not concern the merits of the dispute but only the Tribunal's jurisdiction.<sup>15</sup> A manifest failure of jurisdiction is to be addressed at the registration stage by the Secretary General, pursuant to Article 36(3) of the ICSID Convention. The Claimant notes that the Respondent did not raise any jurisdictional objection at the registration stage.
26. According to the Claimant, Rule 41(5) applies if the claim is not only without legal merit but if the lack of legal merit is manifest. A claim shall be qualified or considered as without manifest legal merit if it "*frivolous*" or "*patently unmeritorious*."<sup>16</sup> The Respondent has the burden to show that a claim is patently without merit and frivolous. According to the Claimant, the Respondent fails to provide such demonstration.<sup>17</sup>

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<sup>11</sup> Respondent's Objections Pursuant to Rule 41(5) of the ICSID Arbitration Rules, 19 Dec. 2008, para. 17.

<sup>12</sup> *Id.*, para. 19.

<sup>13</sup> *Id.*, para. 25.

<sup>14</sup> Claimant's Response to Respondent's Rule 41(5) Objections, 12 Feb. 2009, para. 4.

<sup>15</sup> *Id.*, para. 19.

<sup>16</sup> *Id.*, para. 23.

<sup>17</sup> *Id.*, para. 18.

27. In addition, the Claimant argues that the Respondent raised factual objections rather than legal objections. Such factual objections do not fall within the scope of Rule 41(5).<sup>18</sup>
28. The Claimant states that the waiver contained in the CANTV tender does not prevent it from bringing its claim in these proceedings. Firstly, Brandes still controls some CANTV shares not tendered to Venezuela. Secondly, the waiver does not apply to issues of compensation for an illegal expropriation and other claims that can be raised in an ICSID Arbitration. Thirdly, the waiver was coercively obtained by the Respondent. Fourthly, the waiver argument is not an objection to the merits of Claimant's claim but rather concerns the issue whether the Tribunal is competent to consider the subject matter of the claims raised by the Claimant.<sup>19</sup>
29. Finally, the Claimant claims to have standing to pursue ICSID claims for and on behalf of its clients. According to the Claimant, it is an investor within the meaning of the ICSID Convention and the Respondent fails to provide concrete facts showing the contrary. The Claimant emphasises that the objection with respect to its standing is a jurisdictional objection not covered by Rule 41(5).<sup>20</sup>
30. The Claimant requests that Respondent's objections be rejected.

#### 2.4. SUMMARY OF THE ORAL SUBMISSIONS

31. The Respondent in its oral presentation on 29 January 2009 again mentioned that its main arguments are that the Respondent has waived all claims asserted in this case<sup>21</sup> and that it has no standing as the Claimant is not an investor, it never owned the shares and everything it did was for and on behalf of clients who are unnamed and the Respondent does not know how many there are.<sup>22</sup>
32. The case does not present any genuine issues of facts and it can be decided on pure legal principles.<sup>23</sup>
33. Reference was also made to the article of Aurelia Antonietti "*The 2006 Amendment to the ICSID Rules and Regulations and the Additional Facility Rules*," where she wrote the following:

*"The expedited objection can be a jurisdictional objection and/or an objection related to the merits. . . . The Discussion and the Working Papers did not necessarily encompass expedited objections to jurisdiction. However, in light of the discussions which followed the Working Paper and given the comments received, it has appeared that expedited objections on jurisdiction could not be*

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<sup>18</sup> *Id.*, paras. 20 *et seq.*

<sup>19</sup> *Id.*, para. 42.

<sup>20</sup> *Id.*, para. 42.

<sup>21</sup> First Session of the Arbitral Tribunal, 29 Jan. 2009, Transcript, pp. 65, 22, 24.

<sup>22</sup> *Id.*, pp. 69, 7–11.

<sup>23</sup> *Id.*, pp. 69, 22–70, 1.

*ruled out of the scope of Rule 41(5). Accordingly, Rule 41(5) does include expedited objections to jurisdiction although it was primarily designed to dismiss frivolous claims on the merit.”*<sup>24</sup>

*“A respondent might for example challenge, in an expedited manner, the temporal application of a treaty in which consent to ICSID arbitration is given; or could object that the claimant had waived its right in writing to bring the case before an arbitral tribunal.”*<sup>25</sup>

34. According to the Respondent, the whole discussion whether legal objections to jurisdiction would be excluded from the application of Rule 41(5) is not really relevant because the objections which the Respondent raises are not purely jurisdictional in nature. Waiver is not a jurisdictional issue and standing is a mixed issue and therefore neither a pure jurisdictional issue.<sup>26</sup>
35. The Respondent agrees that the standard of “manifest” is quite high<sup>27</sup> but “[a]t the end of the day, either there is a waiver or there is not. Either there is standing or there is not. You could raise ten objections to that. That does not mean it is inappropriate to decide on Rule 41(5).”<sup>28</sup>
36. The Respondent then discusses the question of the waiver which, according to it, clearly applies to the claims raised in this case. Furthermore, agents or investment advisers do not have standing to bring an ICSID case.
37. In its oral presentation, the Claimant argues that what has been called a waiver is not a waiver that is applicable with respect to the claims that the Claimant is asserting.<sup>29</sup>
38. According to the Claimant, the ICSID Convention does not define “investor,” Article 25 of the ICSID Convention speaks of “investment” and of “nationals” but not of “investors.” Also the investment law of Venezuela, Article 3 at subparagraph 4, defines as international investor “the owner of an international investment or whoever actually controls it.”<sup>30</sup>
39. According to the Claimant, “[a] 41(5) application is appropriate with respect to merit objections. It is not appropriate with respect to jurisdictional objections.”<sup>31</sup>

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<sup>24</sup> Aurelia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, ICSID REVIEW–FOREIGN INVESTMENT LAW JOURNAL, Vol. 21, No. 2 (Fall 2006), pp. 439–40.

<sup>25</sup> *Id.*, p. 439.

<sup>26</sup> First Session of the Arbitral Tribunal, 29 Jan. 2009, Transcript, pp. 84, 73, 18–23.

<sup>27</sup> *Id.*, pp. 75, 10–11.

<sup>28</sup> *Id.*, pp. 76, 24–77, 3.

<sup>29</sup> *Id.*, pp. 96, 20–22.

<sup>30</sup> *Id.*, pp. 111, 1–8.

<sup>31</sup> *Id.*, pp. 114, 23–115, 1.

### 3. DETERMINATION OF THE ARBITRAL TRIBUNAL

#### 3.1. GENERAL REMARKS

40. In its objections of 19 December 2008, the Respondent asks for the application of Rule 41(5) of the ICSID Arbitration Rules.

41. Rule 41(5) of the ICSID Arbitration Rules provides :

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

42. It is not disputed that the Parties did not agree to another expedited procedure.

43. It is also not disputed that the Respondent filed its objection within the deadline of 30 days after the constitution of the Tribunal. Indeed, the Tribunal was constituted on 8 December 2008 and the Respondent filed its Preliminary Objections on 19 December 2008.

#### 3.2. THE SCOPE OF THE OBJECTIONS RELATED TO JURISDICTION/MERITS

44. According to the Claimant, objections pertaining to the jurisdiction or competence of the Arbitral Tribunal cannot constitute the subject matter of a preliminary objection within the sense of Rule 41(5) as the text only speaks of merit.

45. According to the Respondent, there exist no such limits as the term “*legal merit*” encompasses all possible objections against claims which manifestly do not have any basis.

46. The Arbitral Tribunal notes that Rule 41(1) expressly addresses the issue of objections regarding the jurisdiction of the Centre or the competence of the Arbitral Tribunal which have to be raised “*not later than the expiration of the time-limit for the filing of the counter-memorial.*” The Tribunal then “*may deal with the objection as a preliminary question or join it to the merits of the dispute*” (Rule 41(4)).

47. The Parties are in agreement that the purpose of the introduction of Rule 41(5) in the course of the 2006 Amendments to the Arbitration Rules is to prevent “*patently unmeritorious claims*.” They basically agree with the interpretation given by Antonio R. Parra, former Deputy Secretary-General of the Centre, in his recent article:

*“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.”*<sup>32</sup>

48. According to the Claimant, the change in the ICSID Arbitration Rules was tailored to address frivolous claims on the merits rather than to open a third avenue to raise jurisdictional objections in view of the fact that the Secretary-General of the Centre under Article 36(3) of the Convention already has the authority not to register a 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.*”
49. On the other hand, the Respondent as support for its position that Rule 41(5) also covers objections to the jurisdiction of the Tribunal refers to the article by Aurelia Antonietti,<sup>33</sup> according to whom, the objection can be a jurisdictional one and/or one related to the merits.
50. The Tribunal first of all notes that Rule 41(5) does not mention “*jurisdiction.*” The terms employed are “*legal merit.*” This wording, by itself, does not provide a reason why the question whether or not a tribunal has jurisdiction and is competent to hear and decide a claim could not be included in the very general notion that the claim filed is “*without legal merit.*”
51. The examination by the Secretary-General of the request under Article 36 of the Convention is limited to “*the information contained in the request.*” It is based on this information that the Secretary-General has to decide whether “*the dispute is manifestly outside the jurisdiction of the Centre.*”<sup>34</sup> The argument of a respondent that “*the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal*”<sup>35</sup> can only be filed once the case has been registered and the procedure put in motion.
52. Until 2006 the Rules therefore did not provide for any possibility to terminate the proceedings at an early stage in the case of requests which are patently unmeritorious. There exist no objective reasons why the intent not to burden the parties with a possibly

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<sup>32</sup> Antonio R. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, INTERN’L LAWYER, Vol. 41, No. 1 (Spring 2007), p. 56.

<sup>33</sup> See para. 33, *supra*.

<sup>34</sup> ICSID Convention, Art. 36(3).

<sup>35</sup> Rule 41(1) of the ICSID Arbitration Rules.



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.

53. The Tribunal agrees that such a finding would mean that there are actually three levels at which jurisdictional objections could be examined. First by the Secretariat, and if the case passes that level, it would then be under Rule 41(5), and if it passes that level, it might still be under Rule 41(1).
54. In view of the fact that the revision of 2006 introducing Rule 41(5) provides very short time-limits, as the objection has to be raised "*in any event before the first session of the Tribunal*" and the Tribunal has to give the Parties only "*the opportunity to present their observations on the objection*" and is then compelled to notify its decision to the parties "*at its first session or promptly thereafter,*" this proceeding is not overly burdensome and if it can avoid cases to go ahead if there is a manifest absence of jurisdiction, it can clearly fulfil the basic objectives of this Rule which is to prevent the continuation of a procedure when the claim is without legal merit.
55. The Arbitral Tribunal therefore interprets Rule 41(5) in the sense that the term "*legal merit*" covers all objections to the effect that the proceedings should be discontinued at an early stage because, for whatever reason, the claim can manifestly not be granted by the Tribunal.

### 3.3. THE SCOPE OF THE OBJECTION RELATED TO FACTS/LAW

56. The second question is whether issues of fact can be discussed at this stage and whether a claim having no factual basis at all could be considered in order to be summarily dismissed.
57. The Claimant contends that the objection should be rejected as it is not a proper objection based on an absence of legal merit, but an objection based on facts:

*"The allegations by Respondent also raise factual questions beyond the scope of Brandes' Request for Arbitration that cannot be resolved on the expedited timetable of an application pursuant to Rule 41(5)."*<sup>36</sup>

58. The Tribunal considers it useful to again turn to the earlier mentioned article of Aurelia Antonietti, where it is explained why the final adopted rule mentioned a "*claim manifestly without legal merit*" while the draft referred to a "*claim manifestly without merit.*"

*"This change was introduced to avoid inappropriate discussions on the facts of the case at that stage."*<sup>37</sup>

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<sup>36</sup> Claimant Response to Respondent's Rule 41(5) Objections, para. 4; *see also id.*, para. 13: "*To the extent that an objection raises a factual rather than a legal issue, it does not fall within the scope of permissible preliminary objections . . . .*"

<sup>37</sup> *Id.*, p. 440.

59. The Tribunal has no difficulty to conclude that the objection on an expedited basis should concern a legal impediment to a claim and not a factual one. This does not mean that the question of the proper dealing with the facts is *ipso facto* solved. As said also by Aurélia Antonietti, “[n]onetheless, one can foresee that the question of whether facts and evidentiary issues can be discussed by a tribunal at that stage will be highly debatable.”<sup>38</sup>
60. As an additional remark, the Tribunal wishes to refer here also to a comment made by the tribunal in the *Trans-Global* case, which it shares:

*“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 recognizes 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.”*<sup>39</sup>

61. It is the Tribunal’s view, that basically the factual premise has to be taken as alleged by the Claimant. Only if on the best approach for the Claimant, its case is manifestly without legal merit, it should be summarily dismissed.

#### 3.4. THE SCOPE OF THE OBJECTION: THE MEANING OF *MANIFESTLY*

62. As mentioned repeatedly above, the Tribunal is of the opinion that the new procedure of the preliminary objections under Rule 41(5) is intended to create the possibility to dismiss at an early stage such cases which are clearly unmeritorious. It is a summary proceeding to be conducted on an expedited basis. The rules of due process, however, should continue to be respected. A tribunal should therefore uphold such an objection and come to the final conclusion that all claims are without legal merit only if it concludes that this is “*manifestly*” the case. This applies with respect to the merits of the claims but also when the tribunal examines the question of jurisdiction. The level of scrutiny of “*manifestly*” obviously provides a far higher threshold than the *prima facie* standard normally applied for jurisdiction under Rule 41(1) where the factual premise for the decision on jurisdiction is normally taken as alleged by the Claimant.

63. The Arbitral Tribunal therefore agrees with the analysis as made by the tribunal in the *Trans-Global* case:

*“The Tribunal considers . . . that the ordinary meaning of the word [manifest] requires the respondent to establish its objection clearly and obviously, with relative ease and dispatch. The standard is thus set high. . . . The exercise may thus be complicated; but it should never be difficult.”*<sup>40</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/07/25) [U.S./Jordan BIT], Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, para. 97.

<sup>40</sup> *Id.*, para. 88.

64. In order to respect the due process, “*the rule is directed only at clear and obvious cases,*”<sup>41</sup> and “*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.’*”<sup>42</sup>

### 3.5. THE BURDEN OF PROOF AT A RULE 41(5) OBJECTION STAGE

65. The manner in which a tribunal has to deal with the facts will greatly depend on the role these facts and the proof of their existence play at the different stages of the procedure. It appears to the Tribunal, that facts can play three different roles: (i) facts which are the basis for a finding of responsibility; (ii) facts which are the basis for a finding of jurisdiction; (iii) facts which even if proven cannot be the basis for a finding of jurisdiction or responsibility.
66. If the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT or investment law, they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merit level. If jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage, unless the issue cannot be decided at that stage, in which case it should be joined to the merits.
67. This double approach is routinely followed by arbitral tribunals. The alleged facts complained of have to be accepted *pro tem* at the jurisdictional phase. Recently, the tribunal in *Saipem v. Bangladesh*<sup>43</sup> stated:

*“The Tribunal’s task is to determine the meaning and scope of the provisions upon which [the claimant] relies to assert jurisdiction and to assess whether the facts alleged by [the claimant] fall within those provisions or would be capable, if proven, of constituting breaches of the treaty obligations involved. In performing this task, the Tribunal will apply a prima facie standard, both to the determination of the meaning and scope of the relevant BIT provisions and to the assessment whether the facts alleged may constitute breaches of these provisions. In doing so, the Tribunal will assess whether [the claimant’s] case is reasonably arguable on its face. If the result is affirmative, jurisdiction will be established but the existence of breaches will remain to be litigated on the merit.”*<sup>44</sup>

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<sup>41</sup> *Id.*, para. 90.

<sup>42</sup> *Id.*, para. 92 (quoting Antonio R. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, p. 56.)

<sup>43</sup> *Saipem S.p.A. v. People’s Republic of Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 91. See also for the same approach, *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4), Decision on Annulment, 5 Sept., 2007, paras. 118–19.

<sup>44</sup> See also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction, 14 Nov. 2005, where the tribunal articulated the relevant *prima facie* standard at the jurisdictional stage of the proceeding: “[t]he Tribunal should be satisfied that, if the facts or the contentions alleged by [the claimant] are ultimately proven true, they would be capable of constituting a violation of the BIT.” *Id.*, para. 194.

It is quite clear that the tribunal refers here to facts capable of being analyzed as a breach of the BIT, and not to facts whose existence is necessary to support jurisdiction.

68. If, on the contrary, the alleged facts are facts on which the jurisdiction of a tribunal rests, it seems evident that the tribunal has to decide those facts, if contested between the parties, and cannot accept the facts as alleged by the claimant. The tribunal must take into account the facts and their interpretation as alleged by the claimant as well as the facts and their interpretation as alleged by the respondent, and make a decision on their existence and proper interpretation. This unavoidable analysis has been followed by other international tribunals, like for example the ICSID tribunal in *Inceysa Vallisoletana S.L. v. Republic of El Salvador*:

*“If, in order to rule on its own competence, the Arbitral Tribunal is obligated to analyze facts and substantive normative provisions that constitute premises for the definition of the scope of the Tribunal’s competence, then it has no alternative, but to deal with them.”*<sup>45</sup>

69. The situation here concerns the third hypothesis mentioned in paragraph 65. The Tribunal considers that, if it is manifest that a claim is devoid of any legal merit, even if the facts are proven, the burden of proof should be the same as the one adopted in the reverse situation, being the situation where the claim should be granted if the facts are proven. In other words, at this preliminary stage, it is sufficient, in the Tribunal’s view, to accept *prima facie* the plausible facts as presented by the Claimant. Thus, the Tribunal agrees here with the Claimant, when it states that the Respondent “*must show that on the circumstances as they plausibly arise out of the Request for Arbitration, the claimant cannot be granted legal relief.*”<sup>46</sup>
70. A preliminary objection under Rule 41(5) is an objection based on the manifest absence of legal merit of a claim, not on the absence of a factual basis. It is therefore not necessary to prove facts, if these facts, even if proven, are not capable of supporting a claim that has no legal merit.

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<sup>45</sup> *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, 2 Aug. 2006, para. 155. This evident approach has also been forcefully supported by Sir Franklin Berman QC, in his dissenting opinion in the case *Industria Nacional de Alimentos*, where he stated: “*Factual matters can or should be provisionally accepted at the preliminary phase, because there will be a full opportunity to put them to the test definitively later on. But if particular facts are a critical element in the establishment of jurisdiction itself, so that the decision to accept or to deny jurisdiction disposes of them once and for all for this purpose, how can it be seriously claimed that those facts should be assumed rather than proved?*” *Industria Nacional de Alimentos, S.A. v. Peru* (ICSID Case No. ARB/03/4), Decision on Annulment, Dissenting Opinion of Franklin Berman QC, 5 Sept. 2007, para. 17.

<sup>46</sup> Claimant’s Response to Respondent’s Rule 41(5) Objections, para. 18.

3.6. DOES THE EXISTENCE OF A WAIVER OF THE RIGHT TO PURSUE CLAIMS MANIFESTLY RENDER SUCH CLAIMS WITHOUT LEGAL MERIT, AS OUTSIDE THE JURISDICTION OF THE TRIBUNAL?

71. The waiver issue raises a number of questions which cannot be decided based on the file as it presently exists. It has been alleged by the Claimant that not all shares and/or ADRs have been tendered to the Venezuelan Government. Moreover, the waiver expressly states that the waiver extends only to “*the maximum extent permissible under the applicable law,*” and the Claimant also contends that it has no legal value as it has been obtained by coercion. In addition, the Claimant asserts that it has never signed any waiver, that the so-called waiver referred to by the Respondent is merely “*a unilateral declaration of intent by Respondent to which Brandes is alleged to have acceded by conduct.*”<sup>47</sup> The Tribunal comes to the conclusion that the answers to these questions necessitate the examination of complex legal and factual issues which cannot be resolved in these summary proceedings.

3.7. DOES THE ALLEGATION THAT THE CLAIMANT ACTS AS AN AGENT OF INVESTORS MANIFESTLY RENDERS ITS CLAIM WITHOUT LEGAL STANDING, I.E. LEGAL MERIT?

72. If the Claimant’s position that it is an investor under the ICSID Convention is accepted, the claim does not manifestly lack legal merit on this account. In any case, in order to answer fully such a question, complex issues of fact have to be determined, especially the exact relationship between Brandes, as an investment advisor, and its clients. The Claimant furthermore considered that under the applicable Venezuelan legislation to obtain the investor protection it is not necessary to be the economic or beneficial owner of the shares in question but that control of such shares, which the Claimant stated it had, is sufficient for the Claimant to have its claim examined and decided. The Tribunal therefore again comes to the conclusion that these difficult legal questions cannot be resolved in these summary proceedings.

3.8. CONCLUSIONS

73. The Tribunal considers that the new Rules introduced in 2006 regarding preliminary objections in cases where a claim is manifestly without legal merit allows an examination of the jurisdiction and competence of the Centre and of the Tribunal. Rule 41(5) therefore allows 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.

With respect to the merits of the claim, an award denying such claims can only be made if the facts, as alleged by the Claimant and which *prima facie* seem plausible, are not manifestly of such a nature that the claim would have to be dismissed. The Tribunal does not consider this to be the case.

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<sup>47</sup> *Id.*, para. 28.

After having considered the written submissions by both Parties and having given the Parties the opportunity to present their oral observations on the Objections at its first session held in Paris on 29 January 2009, the Tribunal decides as follows:

1. The Respondent's Objections of 19 December 2008 are rejected;
2. The Tribunal reserves all other issues to a further order, decision or award, including any question as to costs;
3. The further procedure will be according to the agreement reached at the first session.

Paris, France  
2 February 2009

*[signed]*

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Professor Brigitte Stern  
*Arbitrator*

*[signed]*

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Professor Karl-Heinz Böckstiegel  
*Arbitrator*

*[signed]*

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Dr. Robert Briner  
*President of the Tribunal*