

**INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES**

Lion Mexico Consolidated L.P.

v.

United Mexican States

(ICSID Case No. ARB(AF)/15/2)

**DECISION ON THE RESPONDENT'S PRELIMINARY OBJECTION
UNDER ART. 45(6) OF THE ICSID ARBITRATION
(ADDITIONAL FACILITY) RULES**

Members of the Tribunal

Juan Fernández-Armesto, President of the Tribunal

David J.A. Cairns, Arbitrator

Ricardo Ramírez, Arbitrator

Secretary of the Tribunal

Anneliese Fleckenstein

Assistant to the Tribunal

Luis Fernando Rodríguez

December 12, 2016

TABLE OF CONTENTS

I. INTRODUCTION..... 3

II. THE PARTIES..... 3

III. PROCEDURAL BACKGROUND 3

IV. FACTUAL BACKGROUND 4

V. THE PARTIES' POSITIONS..... 8

VI. DISCUSSION 10

VII. THE TRIBUNAL'S DECISION..... 18

I. INTRODUCTION

1. This Decision sets out the Tribunal’s reasons and the Tribunal’s decision on the Respondent’s Preliminary Objection under Art. 45(6) of the ICSID Arbitration (Additional Facility) Rules [**“Arbitration AF Rules”**].

II. THE PARTIES

2. The Claimant in this arbitration is Lion Mexico Consolidated LP [**“Lion”** or **“Claimant”**], a partnership constituted under the laws of Quebec, Canada, and with its main place of business in Texas, USA.
3. Lion is represented in this arbitration by Onay Payne, of Lion Mexico Consolidated L.P.; Robert J. Kriss, of Mayer Brown LLP (Chicago, USA); and Dany Khayat, Alejandro López-Ortiz, and José J. Caicedo, of Mayer Brown (Paris, France).
4. The Respondent is the United Mexican States [**“Mexico”**]. Mexico is represented in this arbitration by Leticia Ramírez Aguilar, Cindy Rayo Zapata, and Geovanni Hernández Salvador, of the Consultoría Jurídica de Comercio Internacional (Secretaría de Economía, Mexico); Aristeo López Sánchez, of Embajada de México (Washington D.C., USA); J. Cameron Mowatt and Alejandro Barragán, of J. Cameron Mowatt, Law Corporation; and Stephan Becker, of Pillsbury Winthrop Shaw Pittman.

III. PROCEDURAL BACKGROUND

5. On December 11, 2015 Lion filed with the International Centre for Settlement of Investment Disputes [**“ICSID”**] a Request for Arbitration against Mexico, pursuant to the Arbitration AF Rules and Chapter 11 of the North American Free Trade Agreement [**“NAFTA”**].
6. On August 24, 2016 Mexico filed a Preliminary Objection to the Tribunal’s jurisdiction under Art. 45(6) Arbitration AF Rules, on the grounds that Lion’s claims are manifestly without legal merit¹.

¹ Preliminary Objection, para. 6.

7. On August 31, 2016 the Arbitral Tribunal issued a procedural schedule for the Parties to exchange two rounds of pleadings on the Preliminary Objection.
8. On September 26, 2016 the Tribunal and the Parties held a first session by teleconference under Art. 21(1) Arbitration AF Rules, in order to deal with case management issues.
9. On the same date, Lion submitted its Response to Mexico's Preliminary Objection.
10. On October 13, 2016 Mexico submitted its Reply to Lion's Response on the Preliminary Objection.
11. On October 14, 2016 the Tribunal issued its Procedural Order No. 1, setting out the procedural rules that govern this arbitration, in accordance with Arts. 21 and 28 Arbitration AF Rules.
12. Finally, on October 31, 2016 Lion submitted its Rejoinder on Mexico's Preliminary Objection.

IV. FACTUAL BACKGROUND

13. The following factual background summarily describes the facts that are necessary to understand and adjudicate this Preliminary Objection, and is based on Claimant's statement of the facts in support of its claims. These facts are accepted for the purposes of this decision only, and without prejudice to a final determination of the facts by the Tribunal at a later stage.

1. THE LOANS

14. Lion is a Canadian company that for the last decade has invested over \$1 billion in real estate projects throughout Mexico. From February to September 2007 Lion made three loans [collectively "**Loans**"], for a total amount of \$32 million, to three Mexican companies: Inmobiliaria Bains, S.A. de C.V. [**Bains**], C&C Ingeniería y Proyectos, S.A. de C.V. [**C&C Ingeniería**] and C&C Capital, S.A. de C.V. [**C&C Capital**]. The three corporations are controlled by the same Mexican citizen.
15. The purpose of the Loans was to provide funds to develop three real estate projects in the Mexican states of Nayarit and Jalisco².

² Request for institution of arbitration proceedings, para. 33.

16. The loans were structured through three loan agreements [the “**Loan Agreements**”], secured by certain *pagarés* (promissory notes) and *hipotecas* (mortgages).
17. The Loan Agreements present certain common features, including:
 - short-term maturities (ranging from 90 days to 18 months);
 - ordinary interest at an annual rate of 18% compounded quarterly; and
 - default interest at an annual rate of 25%, to be charged in addition to ordinary interest.
18. Each loan was not only formalized in a loan agreement, but also secured by a *pagaré* and by one or more *hipotecas*.

1.1 THE FIRST LOAN

19. A loan agreement dated February 28, 2007 was executed by and between Lion as Lender, Bains as Borrower and C&C Ingeniería as Joint and Several Obligor [“**First Loan**”]³.
20. The First Loan had the following features⁴:
 - principal amount of \$15 million;
 - original maturity of 18 months;
 - it was documented by and conditional upon the execution and delivery of a \$15 million *pagaré* in favor of Lion;
 - it was secured by an *hipoteca* granted by Inmobiliaria Bains in favor of Lion over lots of land located in the state of Nayarit, Mexico.
21. The First Loan was amended on four occasions⁵. Each of those amendments extended the loan for time periods ranging from 60 to 156 days, and left the other terms of the loan largely unchanged. Every time the First Loan was amended, the *pagaré* was cancelled and replaced with a new one that reflected the new due date.

³ Exhibit C-008.

⁴ Exhibits C-008, C-009, and C-010.

⁵ Exhibit C-011.

22. Taking all the amendments into consideration, the First Loan had an ultimate maturity of 945 days (or 2.6 years)⁶.

1.2 THE SECOND LOAN

23. Another loan agreement dated June 13, 2007 was executed by and between Lion as Lender, C&C Capital as Borrower and Bains as Joint and Several Obligor [“**Second Loan**”]⁷.

24. This Second Loan had the following features⁸:

- principal amount of \$12.45 million;
- original maturity of 90 days;
- it was documented by and conditional upon the execution and delivery of a \$12.45 million *pagaré* in favor of Lion;
- it was secured by an *hipoteca* granted by a company called “Bansi S.A., Institución de Banca Múltiple” as trustee as per the instructions of C&C Capital, as founder and beneficiary of the trust in favor of Lion over a property located in Guadalajara, Jalisco⁹.

25. The Second Loan was amended on seven occasions¹⁰ in order to extend the due date.

26. Taking all the amendments into consideration, the Second Loan had an ultimate maturity of 839 days (or 2.3 years)¹¹.

1.3 THE THIRD LOAN

27. Another loan agreement dated September 26, 2007 was executed by and between Lion as Lender, C&C Capital as Borrower, and Bains as Joint and Several Obligor [“**Third Loan**”]¹².

28. This Third Loan had the following features¹³:

- principal amount of \$5.35 million;

⁶ Preliminary Objection, para. 28.

⁷ Exhibit C-012.

⁸ Exhibits C-012, C-013, C-014, and C-015.

⁹ Exhibit C-041.

¹⁰ Request for institution of arbitration proceedings, para. 34.b). *See* Exhibit C-015.

¹¹ Preliminary Objection, para. 35.

¹² Exhibit C-016.

¹³ Exhibits C-016 to C-019.

- original maturity of 18 months¹⁴;
- it was documented by and conditional upon the execution and delivery of \$5.35 million promissory note in favor of Lion;
- it was secured by an *hipoteca* granted by a company called “Bansi S.A., Institución de Banca Múltiple” as trustee as per the instructions of C&C Capital as founder and beneficiary of the trust in favour of Lion over a property located in Guadalajara, Jalisco¹⁵.

29. The Third Loan was amended six times to extend the due date¹⁶.
30. Taking all the amendments into consideration, the Third Loan had an ultimate maturity of 735 days (or two years)¹⁷.

2. LION HAS NOT RECOVERED THE LOANS

31. On September 30, 2009 and after several extensions, the total amount of the Loans became overdue. No additional extensions were granted.
32. For the next two years Lion tried and failed to recover the outstanding debt. Eventually, in February 2012, Lion decided to sue the three debtor companies, demanding immediate payment of the Loans, plus ordinary and default interest¹⁸.
33. Lion says that in December 2012, it chanced to learn from third parties that, a few months earlier, a commercial judge in Jalisco – without Lion’s knowledge – had ordered the cancellation of the *hipotecas* and the return of the *pagarés* that secured the Loans.
34. Since then, Lion has pursued several legal actions to collect the outstanding debt or to reverse the cancellation of the *hipotecas* and *pagarés*. Lion alleges to have been the victim of a series of fraudulent actions and judicial errors that the Mexican judicial system has proved unable to address or remedy to this day¹⁹.
35. Against this backdrop, on December 11, 2015 Lion commenced the present proceedings against Mexico, claiming that the State has violated Arts. 1110 and 1105 NAFTA, on the following grounds:

¹⁴ See Clause 1.1(6), Exhibit C-016.

¹⁵ Exhibit C-018.

¹⁶ Exhibit C-019.

¹⁷ Preliminary Objection, para. 42.

¹⁸ This is the Claimant’s version as per Request for institution of arbitration proceedings, paras.36–38.

¹⁹ Request for institution of arbitration proceedings, paras. 42–50.

- Mexico has expropriated Lion's investment by unlawfully cancelling the *pagarés* and *hipotecas* issued in favor of Claimant, and
 - Mexico has not guaranteed fair and equitable treatment and full protection and security of Lion's investment by failing to guarantee an adequate legal system to protect Lion's rights²⁰.
36. Lion seeks to recover over \$223 million in damages resulting from these violations, together with interest and costs²¹.
37. On August 24, 2016 Mexico filed a Preliminary Objection to the Tribunal's jurisdiction under Art. 45(6) Arbitration AF Rules, on grounds that Lion's claims are manifestly without legal merit²².

V. THE PARTIES' POSITIONS

1. MEXICO'S POSITION

38. Mexico's application is straightforward: it submits that the Tribunal lacks jurisdiction *ratione materiae* because Lion has no investment in Mexico under Chapter 11 NAFTA²³.
39. Mexico contends that, pursuant to Art. 1139(d) NAFTA, a loan to an enterprise can be considered an "investment" for the purposes of Chapter 11 NAFTA only if
- it is a loan to an affiliate of the investor or
 - the original maturity of the loan is at least three years.
40. Otherwise, loans and debt securities fall outside the scope of Chapter 11 NAFTA.
41. In this case – Mexico argues – the three Loans made to Mexican borrowers do not qualify as an investment under Chapter 11, because they do not meet the three-year original maturity requirement. The longest loan was the First Loan, which had an original maturity of 18 months.

²⁰ Request for institution of arbitration proceedings, paras. 51–64.

²¹ Request for institution of arbitration proceedings, para. 16, footnote n. 7.

²² Preliminary Objection, para. 6.

²³ Preliminary Objection, para. 6.

42. As the Claimant does not dispute this fact, it is “plainly obvious” – Mexico submits – that the Claimant’s Loans do not qualify as a protected investment under Chapter 11 NAFTA²⁴.
43. Finally, Respondent says that if the Tribunal dismisses the objection because Lion’s claims are not “manifestly without legal merit,” or for any other reason, Mexico still reserves its right to raise this objection under Art. 45(2) Arbitration AF Rules. Mexico states²⁵:

“97. Si el Tribunal no considera satisfecha la objeción preliminar con respecto a que la reclamación carece manifiestamente de mérito legal, o concluye que los escritos de las partes son muy extensos y elaborados, o considera que los aspectos controvertidos de derecho mexicano que se expusieron en los escritos son importantes para la decisión, o si es de la opinión que existe ambigüedad en el Artículo 1139 y ello requiere considerar la historia de negociaciones del Tratado y/o del punto de vista de las otras Partes del TLCAN, y decide desechar la solicitud de la Demandada presentada al amparo del Artículo 45(6), esto será sin perjuicio del derecho de la Demandada a plantear la objeción al amparo del Artículo 45(2).”

44. Mexico requests that the Tribunal dismiss the claims pursuant to Art. 45(6) Arbitration AF Rules and order Lion to reimburse Mexico for its costs of the arbitration and costs of legal representation.
45. The Respondent in its Preliminary Objection sought further relief in the nature of suspension of the proceedings. This request has been superseded by Procedural Order No. 1 and does not need to be further considered²⁶.

2. CLAIMANT’S POSITION

46. Claimant rejects Mexico’s objection as an attempt to mischaracterize Lion’s claims. Claimant submits that its claims are not based on the Loans themselves, but on the *hipotecas* and *pagarés* that secured and formalized the Loans and that the Mexican judicial authorities unlawfully cancelled²⁷. These *hipotecas* and *pagarés* do meet the definition of *investment* as required by Arts. 1139(g) and (h) NAFTA.
47. First, Lion says that Mexico is incorrect as a matter of Mexican and international law. The three-year requirement in Art. 1139(d) NAFTA and other subparagraphs do not apply to subparagraphs Arts. 1139(g) or (h) NAFTA. The duration of the investment is not relevant for property or interests that fall within the meaning of Arts. 1139(g) or (h) NAFTA.

²⁴ Preliminary Objection, paras. 49, 50, and 51.

²⁵ Reply to Lion’s Response, para. 97.

²⁶ Preliminary Objection, para 77; Response to Mexico’s Preliminary Objection, paras 168-169.

²⁷ Rejoinder on Mexico’s Preliminary Objection, para. 11.

48. Second, Lion argues that *hipotecas* and *pagarés* under Mexican law provide different and additional rights to their holders and are enforced in a different way than the Loans. *Hipotecas* and *pagarés* are intended to furnish additional certainty and predictability in commercial transactions, which promote investment – NAFTA objectives as described in its Preamble.
49. The conduct of the Mexican courts in this case highlights that the *hipotecas* and *pagarés* are separate from the loan agreements, since the judicial authorities ordered the cancellation of those property interests separately, as they represented property interests in addition to the loan agreements²⁸.
50. In conclusion, the Claimant requests the Tribunal:
- to reject Mexico’s Preliminary Objection since the claims are not “manifestly without legal merit”, and
 - to declare that the *hipotecas* and *pagarés* are indeed investments under Art. 1139(g) and (h) NAFTA and, consequently, that the Tribunal has *ratione materiae* jurisdiction to adjudicate the claims brought by Lion.
51. Lion finally contends that, at any rate, Mexico’s arguments should be adjudicated by the Tribunal after offering Claimant full procedural opportunities – including an evidentiary hearing – in an ordinary arbitral proceeding²⁹.

VI. DISCUSSION

52. In its Preliminary Objection Mexico requests, pursuant to Art. 45(6) Arbitration AF Rules, that the Tribunal dismiss Lion’s claims, and order the company to reimburse all of Mexico’s costs³⁰.
53. Lion asks the Tribunal to dismiss Mexico’s Preliminary Objection in its entirety.
54. The Tribunal considers that the Preliminary Objection should be dismissed because the Claimant’s allegation that its *hipotecas* and *pagarés* constitute protected investments under Art. 1139 (g) and (h) NAFTA is not “manifestly without legal merit”.
1. **THE APPLICABLE STANDARD**
55. Article 45(6) Arbitration AF Rules describes the present application as follows:

²⁸ Response to Mexico’s Preliminary Objection, paras. 5.c), f), and g).

²⁹ Rejoinder on Mexico’s Preliminary Objection, paras. 128 and 129.

(6) 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 (2) or to object, in the course of the proceeding, that a claim lacks legal merit.

56. Article 45(6) Arbitration AF Rules contains effectively the same language as Rule 41(5) ICSID Arbitration Rules. Thus, the Tribunal draws guidance, as to the applicable standard, from the jurisprudence developed in the interpretation of Art. 45(6).
57. The relevant provisions of NAFTA are Art. 1101 and 1139:

“**Article 1101:** *Scope and Coverage.*

1. This Chapter applies to measures adopted or maintained by a Party relating to:

- (a) investors of another Party;
 - (b) investments of investors of another Party in the territory of the Party;
- and

[...]

Article 1139: *Definitions.*

For purposes of this Chapter:

[...]

investment means:

- (a) an enterprise;
- (b) an equity security of an enterprise;
- (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;
- (d) a loan to an enterprise

- (i) where the enterprise is an affiliate of the investor, or
- (ii) where the original maturity of the loan is at least three years,
but does not include a loan, regardless of original maturity, to a state enterprise;
- (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
- (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
- (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
- (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
 - (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
 - (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;but investment does not mean,
 - (i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or
 - (j) any other claims to money,
that do not involve the kinds of interests set out in subparagraphs (a) through (h).”

58. The general rule of interpretation in the Vienna Convention on the Law of Treaties [**“Vienna Convention”**] requires that a treaty be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”³¹.

³¹ *Vienna Convention on the Law of Treaties*, United Nations Treaty Series, Vol. 1155, p. 331 (May 23, 1969), Article 31.

Preliminary objection

59. Under Art. 45(6) Arbitration AF Rules the respondent in an arbitration pursuant to the ICSID Arbitration AF Rules may raise, at the outset of the proceedings, a preliminary objection that the claims brought by the claimant should be dismissed for being “manifestly without legal merit”.
60. The tribunal, after giving claimant an opportunity to be heard, must promptly adopt a decision:
- If the tribunal accepts the respondent’s objection, it will partially or totally dismiss claimant’s claims;
 - If the tribunal rejects the objection, the main proceedings are resumed and respondent may raise the objections again in the normal course of the arbitration.
61. For an objection to succeed in this special procedure, respondent must prove that it refers to a claim that is “manifestly without legal merit.” If the threshold is not reached, the Tribunal dismisses the objection *pro tem*.

“Manifestly”

62. The term “manifestly” generally means something that is “evident”, “clear” or “obvious” to the observer. The word appears not only in Art. 45(6) ICSID Arbitration AF Rules, but also in Rule 41(5) of the ICSID Arbitration Rules, which has been interpreted by a number of arbitral tribunals.
63. For example, the Decision on the Respondent’s Objection Under Rule 41(5) of the ICSID Arbitration Rules of the tribunal in *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25 [“**Trans-Global Petroleum**”] analysed the use of the expression “manifestly” in other articles of the Convention and the opinion of legal authorities, and arrived to the following conclusion:
- “the ordinary meaning of the word requires the respondent to establish its objection clearly and obviously, with relative ease and despatch. The standard is thus set high [...] The exercise may thus be complicated; but it should never be difficult³².”
64. The Tribunal considered that “the special procedure imposed by Rule 41(5)” confirmed that meaning and went further to state that “as a basic principle of

³² *Trans-Global Petroleum*, § 88.

procedural fairness, an award under Rule 41(5) can only apply to a clear and obvious case, [...] [to] ‘patently unmeritorious claims’³³.

65. This conclusion was later endorsed in *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11 [“*Globex*”]³⁴, *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6 [“*RSM*”]³⁵ and *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/03 [“*Brandes*”]³⁶. In *Brandes*, the Tribunal also made the following consideration³⁷:

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

66. The procedure established by Art. 45(6) Arbitration AF Rules is an expedited procedure. It is directed to cases that are “evident”, “clear” or “obvious”, not those which entail a greater degree of difficulty or which require a more thorough and extensive analysis of the legal and factual issues to dispose of the claim. Article 45(6) is thus intended to capture cases that are clearly and unequivocally unmeritorious, not those which are novel, difficult, refer to disputed legal issues or where claimant has a tenable or arguable case. The standard is demanding and rigorous³⁸.
67. The Tribunal therefore sees no reason to depart from the interpretations rendered under Rule 41(5) ICSID Arbitration Rules, and adopts the same approach in this case.

“Without legal merit”

68. According to the language of Art. 45(6), the issue to be determined (i.e. what must be “manifest”) is that a claim is “without legal merit”. The term “legal” is used in Rule 41(5) ICSID Arbitration Rules (and by analogy in Art. 45(6) Arbitration AF Rules) in opposition to “factual,” as shown by the drafting history of the provision: the Secretariat’s Working Paper of May 2004 made reference to claims “manifestly without merit”³⁹. The term “legal” was added thereafter in order to avoid inappropriate discussion on the facts of the case at

³³ *Trans-Global Petroleum*, § 89, 92.

³⁴ *Globex*, § 35.

³⁵ *RSM*, § 6.1.3.

³⁶ *Brandes*, § 62.

³⁷ *Brandes*, § 62.

³⁸ *PNG*, § 88.

³⁹ Working Paper of the ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations* (May 21, 2005), p. 7.

that stage⁴⁰. A preliminary objection must therefore relate to “legal” issues, not to matters of fact.

69. The Tribunal in *Trans-Global Petroleum* emphasized the same idea:

“The tribunal considers that the adjective “legal” in Rule 41(5) is clearly used in contradistinction to “factual” given the drafting genesis of Rule 41(5) [...] Accordingly, it would seem that the tribunal is not concerned, *per se*, with the factual merits of the Claimant’s three claims. At this early stage of these proceedings, without any sufficient evidence, the Tribunal is in no position to decide disputed facts alleged by either side in a summary procedure⁴¹.”

70. The Tribunal is therefore of the view that the expression “without legal merit” in Article 45(6) Arbitration AF Rules limits the issues that can be addressed by the panel to legal considerations as opposed to factual.

Objections to jurisdiction v. objections to the merits

71. Article 45(6) Arbitration AF Rules does not specifically state whether objections must refer to the merits of the case, or whether jurisdictional objections are also admissible. The standard required by the Rule – that “a claim is manifestly without legal merit” – is ambiguous.

72. Mexico is submitting a jurisdictional objection: that the Tribunal lacks jurisdiction *ratione materiae* because Claimant does not hold an investment in Mexico. Claimant has not disputed that Mexico is entitled to submit jurisdictional objections by way of the Art. 45(6) procedure.

73. The arbitral tribunals that have considered this question have arrived at the conclusion that jurisdictional objections are admissible under the Art. 45(6) procedure.

74. For example, the Tribunal in *Brandes* was the first to decide the issue and it came to the following conclusion⁴²:

“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’.

⁴⁰ Aurélia Antonietti, *The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Rev. – FILJ 427, 439, p. 440.

⁴¹ *Trans-Global Petroleum*, § 97.

⁴² *Brandes*, §§ 50-52.

* * *

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 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.”

75. The Tribunals in *Globex*, *RSM* and *PNG* were confronted with the same question, and all explicitly agreed with the findings of *Brandes*⁴³.

Additional requirements

76. The additional requirements established in Art. 45(6) Arbitration AF Rules are met in this case. It is undisputed that the Parties have not agreed to another expedited procedure for making preliminary objections and that Respondent submitted its Preliminary Objection within the timeframe of 30 days after the constitution of the Tribunal.

2. APPLICATION OF THE STANDARD TO THE OBJECTION

77. Under the Preliminary Objection Mexico alleges that *hipotecas* and *pagarés* do not qualify as an investment under any of the categories defined in Art. 1139 NAFTA. The key question in order to adjudicate this Objection is whether Lion's claim – that the *pagarés* and *hipotecas* qualify as protected investments under Art. 1139 (g) and (h) NAFTA – is manifestly without legal merit.
78. Both Mexico and Lion have made extensive submissions and have marshalled significant evidence and legal authority in support of their respective positions. Lion's submissions cover almost a hundred pages, accompanied by over 130 legal exhibits, on the legal characterization of *hipotecas* and *pagarés* as investments according to NAFTA and international law; Mexico's submissions, shorter than those of Lion, include, quote, and cite to a similar wealth of legal authorities and case law.
79. The amount of evidence and the length and detail of the arguments shows the complexity of the underlying legal question.
80. The Tribunal further notes that the issue of whether *pagarés* and *hipotecas* that formalize and secure loans with a maturity of less than three years can be considered as investments under Art. 1139 (g) and (h) NAFTA – separately from contemporaneous loan transactions – seems to be a novel issue, which has never been addressed in previous decisions.

⁴³ *Globex*, § 30; *RSM*, § 6.1.1. and 6.1.2; *PNG* § 91.

81. After studying each Party's submissions, and examining carefully the evidence presented, the Tribunal considers that the question whether the *pagarés* and *hipotecas* constitute an investment pursuant to Art. 1139 (g) and (h) NAFTA, or whether their status must be considered exclusively pursuant to Art. 1139 (d) NAFTA, raises complex interpretative issues and requires a greater degree of consideration and a more thorough analysis of Mexican law and international legal principles. The Tribunal requires further legal argument on these issues within the context of the full development of the Parties' cases.
82. Furthermore, the issue of what constitutes precisely an investment under NAFTA is relevant, not only to the Parties involved in the present proceedings, but also to other countries signatories of NAFTA – and Art. 1128 permits that the position of other NAFTA Parties be heard.
83. On this basis, the Tribunal considers that the Claimant's claims cannot be described as "manifestly without legal merit". This is not an appropriate case for the expedited Art. 45(6) procedure and therefore the Preliminary Objection must be dismissed.

Other requests

84. Lion has also sought a declaration that the *hipotecas* and *pagarés* are investments under Art. 1139(g) and (h) NAFTA and, consequently, that the Tribunal has *ratione materiae* jurisdiction to adjudicate the claims brought by Lion. It is not appropriate under the expedited procedure of Art. 45(6) for a claimant to seek a final declaration of rights with *res judicata* effects. Accordingly, the Claimant's application to this effect is also dismissed.
85. Finally, Mexico has sought an award of costs. The Tribunal considers that costs on the complex issue of whether the Claimant has an investment for the purposes of NAFTA should be reserved.

VII. THE TRIBUNAL'S DECISION

86. For the foregoing reasons, the Tribunal decides as follows:
1. Respondent's Preliminary Objection is dismissed;
 2. All questions as to the costs of the Preliminary Objection are reserved;
 3. All other requests are dismissed;
 4. The further procedure for this arbitration will be according to the Tribunal's Procedural Order No. 1.

On behalf of the Tribunal,

[Signed]

Juan Fernández-Armesto
President of the Tribunal