

**INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES**

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**In the matter of**

**TRANSGLOBAL GREEN ENERGY, LLC, and  
TRANSGLOBAL GREEN ENERGY DE PANAMA, S.A,  
Claimants,**

**v.**

**THE REPUBLIC OF PANAMA,  
Respondent**

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**REQUEST FOR ARBITRATION**

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September 19, 2013

**KING & SPALDING LLP**

1100 Louisiana Street, Suite 4000  
Houston, Texas 77002  
U.S.A.

1. Pursuant to Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”), Transglobal Green Energy, LLC, and Transglobal Green Energy de Panama, S.A. (together, “Claimants”), hereby request the institution of an ICSID arbitration proceeding against the Republic of Panama to the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”).

## **I. PRELIMINARY STATEMENT**

2. The Government of Panama has breached the Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment (the “BIT”) by preventing Claimants from formalizing the acquisition of a 50-year hydro-electric power generation concession in Panama. Claimants hereby request that the Tribunal orders the restitution of Claimants’ rights and investments as well as damages.

3. In 2006, the Public Services Agency of the Panamanian State (today “ASEP”) annulled a hydro-electric power plant concession named “Bajo de Mina” from La Mina Hydro-Power (“La Mina”), a company indirectly owned and controlled by Mr. Julio Cesar Lisac, a Panamanian national. La Mina sued ASEP before the Panamanian courts. Instead of waiting on that legal process, ASEP granted a concession to CICSA, one of the companies of Mr. Carlos Slim, a well-known Mexican billionaire. CICSA began to develop La Mina’s concession. During the litigation, La Mina transferred its interest in the litigation to Mr. Lisac personally. Four years later, in 2010, the Panamanian Supreme Court recognized and approved this transfer in an official order. One month after that, the Panamanian Supreme Court vindicated La Mina and Mr. Lisac in a final judgment and declared that La Mina’s concession in the Bajo de Mina was reinstated. The Panamanian Supreme Court also annulled the concession granted to CICSA, and expressly recognized Mr. Lisac as the judgment creditor due to the transfer between Mr. Lisac and La Mina.

4. Shortly thereafter, Mr. Lisac partnered with one of Claimants: Transglobal Green Energy (“Transglobal”), a U.S. corporation that specializes in developing, financing, and operating hydro, wind, and geothermal energy projects in Latin America. In turn, Transglobal created a special-purpose corporation, Transglobal Green Energy de Panama (“Transglobal Panama”), to formally acquire and operate the Bajo de Mina concession and hydroelectric plant.

5. Instead of complying with the Supreme Court's final judgment, ASEP and the Panamanian executive systematically refused in an arbitrary and discriminatory manner to work towards a solution with Mr. Lisac, La Mina, and Transglobal. After a year of delay and despite repeated communications to the contrary, the Panamanian executive commenced an expropriation proceeding in which it stated that transferring the concession from Mr. Slim's company to Mr. Lisac, La Mina, and Transglobal would cause delay, even though Transglobal had demonstrated that its acquisition of ongoing construction would not cause any delay. Panama then went as far as to conclude that it would provide zero compensation for the expropriation.

6. By refusing to enforce the Supreme Court's judgment reinstating the concession and refusing to address the request to transfer that concession to Transglobal Panama, ASEP and the Panamanian executive branch violated the BIT, international law, and Panamanian law, by, among other things, confiscating Transglobal's investment, impeding Transglobal by arbitrary means from acquiring the concession, and committing a denial of justice by failing to comply with the Supreme Court judgment. The nullified concession stayed nullified in breach of the Supreme Court decision, and worse, no compensation was paid for the State-sponsored confiscation. In the process, Panama eviscerated Transglobal and Transglobal Panama's investment in the Bajo de Mina project and breached numerous provisions of the BIT.

## **II. THE PARTIES**

### **A. Claimants**

7. Transglobal Green Energy is a company incorporated under the laws of the State of Texas, U.S.A. Its headquarters and principle place of business are located at:

Transglobal Green Energy, LLC  
410 Pierce St.  
Houston, TX 77002 USA

8. The telephone number for Transglobal is (713) 357-9576, and its facsimile number is (713) 357-9797.

9. Transglobal Green Energy de Panama is incorporated under the laws of Panama. Its headquarters and principle place of business are located at:

Transglobal Green Energy de Panama, S.A.  
Via Argentina No. 52.  
Building, Via Argentina 10th floor Ste B  
Panama City, Republic of Panama

10. Transglobal Green Energy and Transglobal Green Energy de Panama are represented in this arbitration proceeding by King & Spalding LLP. All required notifications should be addressed to:

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**B. Respondent**

11. The Republic of Panama is represented by:

Sr. Presidente de Panamá  
Don Ricardo Marinelli Berrocal  
Presidencia de la República  
Palacio de Las Garzas, San Felipe  
Ciudad de Panamá, República de Panamá

Ms. Ana Isabel Belfron  
Procuradora General de la Nación  
Gobierno de Panamá  
Calidonia, Av. Perú y Calle 33, Edificio Saloon  
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Fiscal Superior de Asuntos Internacionales  
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### **III. FACTUAL BACKGROUND**

12. In 2003, Mr. Lisac approached ASEP and proposed the construction of a hydro-electric power plant on the Chiriqui Viajo River near the border with Costa Rica. In November 2003, ASEP granted Mr. Lisac's majority owned company, La Mina, the right to construct and operate the proposed power plant, which was named Bajo de Mina. Mr. Lisac and La Mina proceeded to develop the technical and financial aspects of the project. In 2005, ASEP and La Mina executed a 50-year concession contract for the Bajo de Mina project.<sup>1</sup>

13. Around the same time, representatives of CICSA approached Mr. Lisac and offered to purchase both the Bajo de Mina project as well as a second hydro-electric power plant that Mr. Lisac was developing in Panama. As a part of those negotiations, Mr. Lisac allowed CICSA's representatives to conduct due diligence and review all of the structural and technical designs and documents that La Mina had developed. CICSA's representatives then made a number of low-ball offers to purchase the Bajo de Mina project, which Mr. Lisac rejected.

14. Under the Bajo de Mina Concession Contract, La Mina was to begin construction within 12 months of its execution.<sup>2</sup> That required La Mina to acquire title to the properties that would constitute the plant's physical premises. In the absence of an agreement with the then-current owners, the Concession Contract as well as Panamanian law permitted La Mina to

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<sup>1</sup> **Exhibit C-1**, Contract of Concession for Hydroelectric Generation Bajo de Mina, May 3, 2005.

<sup>2</sup> *Id.* art. 5.1.

initiate expropriation proceedings.<sup>3</sup> In turn, ASEP was obligated to appear in those proceedings and support La Mina's petition.<sup>4</sup>

15. As it happened, La Mina commenced such expropriation proceedings against certain landowners. But ASEP failed to appear in several of the proceedings, which caused their delay. Then, in December 2006, only 14 months after its execution, ASEP terminated La Mina's concession on the ostensible grounds that it had failed to commence construction by the 12-month time frame set forth in the concession contract.<sup>5</sup> That justification was improper because it was ASEP's failure to appear in the expropriation proceedings that had caused the delay. Several months later, CICSA submitted a proposal to develop the Bajo de Mina project. The proposal used La Mina's confidential operational and technical designs, which CICSA had apparently copied during the due diligence conducted in 2005. ASEP then granted the Bajo de Mina project to CICSA (later "Ideal Panama S.A."). In 2008, ASEP executed a concession contract with Ideal, which began to develop and construct the power plant.

16. In 2007, La Mina brought an action before the Supreme Court of Justice—the highest court in Panama—seeking the nullification of the ASEP resolution that had terminated its concession in Bajo de Mina. In 2010, the Panamanian Supreme Court recognized and approved a transfer of La Mina's interest in the litigation to Mr. Lisac in an official order.<sup>6</sup> On November 11, 2010, the Panamanian Supreme Court ruled in favor of La Mina and Mr. Lisac and issued a final judgment that: a) nullified the resolution that had cancelled the concession contract, b) declared that the concession was reinstated, and c) nullified the concession contract awarded to Ideal.<sup>7</sup>

17. One month later, in anticipation of the imminent reinstatement of the concession which the highest court in Panama had just ordered, Mr. Lisac, as the judgment creditor, partnered with Transglobal Green Energy, a U.S. corporation, to develop the Bajo de Mina

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<sup>3</sup> *Id.* art. 11. See also **Exhibit C-2**, Judgment of the Third Administrative Chamber of the Supreme Court of Justice, Nov. 11, 2010 at 7.

<sup>4</sup> **Exhibit C-2**, Judgment of the Third Administrative Chamber of the Supreme Court of Justice, Nov. 11, 2010 at 15-18.

<sup>5</sup> **Exhibit C-3**, Resolución N° 490 Elec 29 de diciembre de 2006.

<sup>6</sup> **Exhibit C-4**, Order of the Third Administrative Chamber of the Supreme Court of Justice, Aug. 18, 2010

<sup>7</sup> **Exhibit C-2**, Judgement of the Third Administrative Chamber of the Supreme Court of Justice, Nov. 11, 2010.

project. Transglobal is a company comprised of electrical engineers, energy project surveyors, real estate developers, energy market specialists, and business developers. Transglobal specializes in energy-related development projects in Latin America, and has extensive experience with such projects in several countries, including Costa Rica, Guatemala, Chile, Mexico, and Nicaragua. During his long court fight, Mr. Lisac had spent considerable sums of money. By partnering with Transglobal, an experienced company, Mr. Lisac ensured that there would be adequate financial, operational, and technical expertise to acquire and develop the concession.

18. On December 17, 2010, Transglobal and Mr. Lisac agreed to create a special-purpose company (Transglobal Panama) to formally acquire and operate the Bajo de Mina concession and in which Transglobal would own 70% of the shares and Mr. Lisac the remaining 30%. Transglobal incorporated Transglobal Panama to act as the formal concessionaire, arranged hundreds of millions of dollars in financing, engaged technical companies to operate the power plant, and began working with ASEP to acquire both formal title to the concession and physical control of the concession premises. On February 14, 2011, ASEP issued a resolution acknowledging the Supreme Court's judgment.<sup>8</sup> The resolution quotes Article 99 of the Judicial Code, which provides that the Supreme Court's judgments are final, definitive, obligatory, and may not be appealed, and thus ordered that La Mina be registered in ASEP's official records as the company with the concession for the Bajo de Mina project.<sup>9</sup>

19. Transglobal placed special emphasis on preparing plans and resources necessary to acquire the Bajo de Mina concession without delaying or impeding the project's existing ability to provide electricity to the Panamanian grid. Transglobal also offered to compensate Ideal for the infrastructure that that company had developed under a clouded title. Specifically, Mr. Lisac and Transglobal extended that offer in a letter sent directly to Ideal in August 2011 and subsequently wrote a letter to ASEP informing it of that offer and attaching the letter that they had sent directly to Ideal.<sup>10</sup>

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<sup>8</sup> **Exhibit C-5**, ASEP Resolution, Feb. 14, 2011.

<sup>9</sup> *Id.*

<sup>10</sup> **Exhibit C-6**, Letter to ASEP, Aug. 8, 2011.

20. On September 30, 2011, Transglobal and Mr. Lisac executed a partnership and transfer agreement irrevocably transferring Mr. Lisac's interests in the Bajo de Mina project to Transglobal Green de Panama, and Transglobal guaranteed all funds necessary to develop and finance the project.<sup>11</sup> Transglobal and Mr. Lisac formally registered their Partnership and Transfer Agreement with the Panamanian Public Notary.<sup>12</sup> On October 27, 2011, Mr. Lisac and Transglobal Panama submitted a formal request asking ASEP to execute the Supreme Court's judgment and recognize Transglobal Panama as the formal party to the Bajo de Mina concession.<sup>13</sup>

21. A few weeks later, on November 23, 2011, ASEP received Transglobal in person at its offices. In its presentation, Transglobal again explained that it was capable and willing to compensate Ideal for the infrastructure that it had developed on the Bajo de Mina premises. Transglobal also presented the professional group that it had assembled to acquire and develop the project. In particular, Transglobal presented professionals from Geo Ingeniería S.A. from Costa Rica—an engineering firm with over 20 years of experience in renewable energy projects in Central America—to act as technical advisers. And Transglobal presented professionals from Montajes Operación y Mantenimiento, Ltda.—the largest operator of hydroelectric power plants in Central America with over 25 years of experience in the region—to operate and maintain the plant. Transglobal also demonstrated that it had guaranteed access to funding in the U.S. and Europe that was available immediately to both compensate Ideal and commence actual operations.

22. Later that day, Mr. Lisac, as the representative of Transglobal Panama, sent a letter to ASEP thanking it for receiving them.<sup>14</sup> In that letter, Transglobal Panama noted that it had sent several letters to Ideal during the prior months asking for a meeting to discuss an

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<sup>11</sup> **Exhibit C-7**, Partnership and Transfer Agreement between Mr. Lisac and Transglobal, Sept. 30, 2001.

<sup>12</sup> **Exhibit C-8**, Nortarial Act No. 7,600 dated Oct. 26, 2011.

<sup>13</sup> **Exhibit C-9**, ASEP Resolution No. 4936 Elec., Nov. 25, 2011.

<sup>14</sup> **Exhibit C-10**, Letter from Transglobal to ASEP, Nov. 23, 2011.



orderly acquisition of the Bajo de Mina project, and that Ideal had not responded.<sup>15</sup> As a result, Transglobal Panama asked ASEP to facilitate a meeting for that purpose.<sup>16</sup>

23. Two days later, on November 25, 2011, ASEP issued a resolution rejecting Mr. Lisac and Transglobal Panama's request to recognize the latter as the formal concessionaire.<sup>17</sup> In the resolution, ASEP declared that La Mina was the formal concessionaire and that ASEP had complied with the Supreme Court's judgment because it had registered La Mina's name as the concessionaire in its official records.<sup>18</sup> The resolution ignores that ASEP had not recognized the nullification of Ideal's concession or that Ideal had continued occupying the Bajo de Mina premises and developing the project. The resolution further declared that although Mr. Lisac had acquired La Mina's interest in the litigation, he had not acquired the concession because ASEP had not approved such a transfer.<sup>19</sup> ASEP reasoned that La Mina had not formerly asked or received approval for the transfer, and that Mr. Lisac and Transglobal Panama lacked standing to do so.<sup>20</sup> Four days after this resolution, Mr. Lisac and Transglobal submitted a formal request to ASEP asking it to reconsider and recognize their legal interests in the Bajo de Mina concession.<sup>21</sup>

24. Two weeks later, however, ASEP wrote a letter to Ideal stating that its offices were available for a meeting between Ideal and Transglobal.<sup>22</sup> The next day, ASEP issued a formal resolution rejecting Mr. Lisac and Transglobal Panama's request to reconsider ASEP's November 25, 2011 Resolution, refusing to recognize their standing and interests in the Bajo de Mina concession, and declaring that only La Mina could request a transfer.<sup>23</sup>

25. Two weeks later, on December 29, 2011, Mr. Lisac, as the legal representative of La Mina, submitted a formal request asking ASEP to recognize the transfer of the Bajo de Mina

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> **Exhibit C-9**, ASEP Resolution No. 4936 Elec., Nov. 25, 2011.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> **Exhibit C-11**, ASEP Resolution No. 4995 Elec, Dec. 15, 2011.

<sup>22</sup> **Exhibit C-12**, Letter from ASEP to Ideal Panama, Dec. 14, 2011.

<sup>23</sup> **Exhibit C-11**, ASEP Resolution No. 4995 Elec, Dec. 15, 2011.

Concession from La Mina to Transglobal Panama.<sup>24</sup> A month later, on January 26, 2011, ASEP responded asking La Mina to submit sworn documents regarding the persons who owned and controlled Transglobal Panama's shares as well as documents demonstrating its financial status.<sup>25</sup> ASEP granted La Mina eight days to provide this information.<sup>26</sup>

26. Panama, however, continued to act obscurely and only four days later, on January 31, 2012, the Panamanian *Consejo de Gabinete* (Cabinet of Ministers) issued a resolution ordering ASEP to proceed with a formal expropriation of La Mina's Concession for an "urgent social purpose."<sup>27</sup> The resolution recognized that the Supreme Court judgment had ordered La Mina concession's to be reinstated.<sup>28</sup> The resolution further stated that Ideal had informed ASEP that the power plant that it had built would soon be ready for commercial operation.<sup>29</sup> The resolution continued and stated that the commencement of the power plant's commercial operations involved a social and public interest because it would (a) displace other more inefficient power plants, (b) avoid, in the short term, an increase in the electricity tariff for users, and (c) as a result, avoid an increase in the subsidy for the Tariff Stabilization Fund (*Fondo de Establización Tarifaira*).<sup>30</sup> While La Mina held the Concession to the Bajo de Mina project, the Resolution reasoned, the properties and infrastructure to operate the plant were the private property of Ideal. To acquire this property from Ideal, La Mina would need to negotiate or commence formal expropriation proceedings, which could result in litigation that could last several years.<sup>31</sup> For these alleged reasons, the resolution determined that ASEP should expropriate La Mina's concession.<sup>32</sup> The resolution further declared that ASEP should create a

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<sup>24</sup> **Exhibit C-13**, Letter from La Mina to ASEP, Dec. 29, 2011.

<sup>25</sup> **Exhibit C-14**, ASEP Letter to La Mina, Jan. 26, 2011.

<sup>26</sup> *Id.*

<sup>27</sup> **Exhibit C-15**, Resolucion de Gabinete No. 11, Jan. 31, 2012.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

technical team to determine the amount of compensation that the State would award to La Mina for that expropriation.<sup>33</sup>

27. A few months later, on May 3, 2012, ASEP formally expropriated La Mina's concession.<sup>34</sup> That resolution reasoned that La Mina had spent 33,093 Balboas (1 Balboa is equivalent to 1 US dollar) and that it owed a debt of 135,984 Balboas to the National Authority for the Environment.<sup>35</sup> As a result, the State would not provide any compensation to La Mina for the expropriation.<sup>36</sup> On June 8, 2012, ASEP reinstated Ideal's concession in the Bajo de Mina project. Ideal occupied and operated the project during this entire period.

28. Panama's treatment of Transglobal and Transglobal Panama's investment has been arbitrary, discriminatory, unfair, inequitable, expropriatory, and constitutes a denial of justice. The Supreme Court of Panama expressly ordered that Bajo de Mina be reinstated and that Mr. Lisac was the new holder of La Mina's rights and obligations, and Transglobal partnered with Mr. Lisac with the express and legitimate expectation that the Panamanian State would comply with that judgment. ASEP and the Panamanian Executive acknowledged this obligation, but they never gave any real world effect to the Supreme Court's judgment. ASEP registered La Mina in its official records, but it allowed Ideal to continue occupying the concession's premises and constructing the project as if it were the formal concessionaire for almost an entire year after its own resolution acknowledging La Mina as the proper concessionaire. Further, when Claimants filed formal requests to transfer the concession into the name of their special-purpose entity, ASEP repeatedly responded with pedantic resolutions that demanded further steps be taken. After Transglobal and Transglobal Panama's third attempt to satisfy ASEP's demands, ASEP responded with yet more demands. And while that communication informed Transglobal and Transglobal Panama that they had eight days to provide the newly demanded information, the Panamanian Executive initiated an expropriation process only four days later.

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<sup>33</sup> *Id.*

<sup>34</sup> **Exhibit C-16**, ASEP Resolution No. 5296 Elec, May 3, 2012.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

29. But even worse than the prior arbitrary delays, the subsequent expropriation was not for a legitimate public purpose. Contrary to the reasoning in the expropriation resolutions, Claimants' acquisition would not have caused any delay in the ability of the Bajo de Mina plant to provide electricity to the Panamanian grid. Transglobal Panama was financially and technically capable of acquiring and operating the plant without causing any delay—a point that the State never disputed—and while expropriation proceedings regarding compensation for Ideal's infrastructure might have lasted for some time, such proceedings would have concerned the amount of compensation to be paid. There would have been no reason to delay the actual transfer of ownership in the meantime. Moreover, even assuming that the transfer would have caused a certain amount of delay, using more inefficient power sources at a somewhat increased cost for a limited amount of time cannot constitute a legitimate "urgent social purpose" to warrant the expropriation of a 50-year concession for a hydroelectric power plant. That is especially so when the stated reasoning is nothing more than a veneer masking the State's true purpose—to refuse to comply with a judgment of its highest court and leave with Ideal a concession that the Court had ordered be returned. Delays during the construction of large, complex projects like hydroelectric power plants are common. In fact, ASEP granted Ideal several extensions to deadlines under its Concession and for reasons far less urgent than complying with a judgment of the Panamanian Supreme Court.

30. Most importantly, the compensation was entirely inadequate. First, basing the amount of compensation on how much has been invested instead of an assessment of the concession's market value is plainly inconsistent with the standard of compensation for expropriation required under the BIT and international law. But that justification is even worse on the facts in this case. The very reason that more money had not been invested was because ASEP had illegally terminated the concession. Thus, ASEP relied on its own wrongful act of terminating the concession to justify paying zero compensation. And yet the very reason that the Supreme Court found that ASEP's earlier termination of La Mina's concession was illegal was because ASEP had relied on delay that ASEP itself improperly caused.

31. In short, the Supreme Court of Panama reinstated the Bajo de Mina Concession, recognized Mr. Lisac as the new title holder of any right and obligations previously held by La Mina, and Mr. Lisac partnered with Transglobal to acquire and develop that concession. Despite a charade of resolutions purporting to comply with the Supreme Court's judgment, La Mina, Mr.

Lisac and its partner, Transglobal, were left without the concession and without any compensation. That is a denial of justice and an illegal expropriation.

#### **IV. RESOLUTION OF THE DISPUTE BEFORE ICSID**

##### **A. ICSID Jurisdictional Requirements**

32. The jurisdictional requirements set forth in Article 25 of the ICSID Convention may be summarized as follows: (a) the dispute in question must be a legal dispute; (b) the dispute must arise directly out of an investment; (c) one party must be a Contracting State to the ICSID Convention; (d) the opposing party must be a private party that is a national or company of another Contracting State; and (e) the parties must have consented to ICSID jurisdiction. Each requirement is met in this case.

##### 1. Legal Dispute

33. In order to qualify as a “legal dispute,” the dispute must concern “the existence or scope of a legal right or obligation, or the extent of the reparation to be made for breach of a legal obligation . . . .”<sup>37</sup> The issues in dispute in this case involve whether Panama violated its obligations under the BIT and international law. This case also involves restitution or the amount of damages that Panama must pay for those violations. This is a classic legal dispute.

34. Panama, through its own actions and omission, and through the acts and omissions of its instrumentalities and political subdivisions such as ASEP (for which it is internationally responsible), has violated the BIT.

35. The US-Panama BIT imposes certain legally-binding obligations and standards of conduct on Panama and its instrumentalities. Those obligations and standards of conduct include the following:

- Investments shall be accorded fair and equitable treatment;
- Investments shall be accorded full protection and security;
- Investments shall be provided treatment in accordance with international law, which prohibits denials of justice;

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<sup>37</sup> **Exhibit C-17**, Report of the Executive Director on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 1 ICSID Rep. 23, 28 (1993).

- Investments shall not be expropriated or nationalized directly or indirectly or through measures tantamount to expropriation except:
  - for a public purpose;
  - in a non-discriminatory manner;
  - upon payment of prompt, adequate, and effective compensation; and
  - in accordance with due process;
- Parties shall not impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of an investment;
- Investments shall be accorded most favored nations treatment.<sup>38</sup>

36. Panama and its instrumentalities have violated each of these obligations and standards of conduct with respect to Claimants' investment.

## 2. Investment

37. Although the ICSID Convention does not define the term "investment," most ICSID tribunals held that the term should be interpreted broadly. The BIT, which governs the present dispute, defines "investment" to include the following:

(a) "investment" means every kind of investment owned or controlled directly or indirectly including 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;

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- (v) any right conferred by law or contract, including rights to search for or utilize natural resources."<sup>39</sup>

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<sup>38</sup> **Exhibit C-18**, The Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments art. II, Oct. 27, 1982 ("BIT").

<sup>39</sup> *Id.* at art. I(1)(d).

The BIT defines “own or control” as “ownership or control that is exercised through subsidiaries or affiliates wherever located.”<sup>40</sup> The BIT defines a “company of a Party” as “a company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Party or a political subdivision thereof in which: (i) natural persons who are nationals of such party...have a substantial interest as determined by such Party.”<sup>41</sup>

38. Transglobal is a company incorporated under the laws of the State of Texas, USA, and Transglobal is 100% owned and controlled by nationals of the United States.<sup>42</sup> Therefore, Transglobal is a U.S. Company. Transglobal executed a Partnership and Transfer of Rights Agreement in which it indirectly acquired a 70% interest in the La Mina Hydro-Power Concession.<sup>43</sup> As provided for under that agreement, Transglobal created a Panamanian-incorporated subsidiary in which it owns 70% of the shares with Mr. Lisac owning the remaining 30%, and Mr. Lisac and Transglobal agreed to formally transfer the La Mina concession to Transglobal Panama.<sup>44</sup> As provided for in that agreement, Transglobal, La Mina Hydro-Power, and Mr. Lisac all worked with ASEP to transfer formal title of La Mina’s concession to Transglobal Panama.<sup>45</sup>

39. Transglobal’s legal rights under its Agreement of Partnership and Transfer of Rights with Mr. Lisac are rights with economic value that fall within the express definition of “investment” in the BIT. Transglobal’s shares in Transglobal Panama also fall within the definition of “investment” in the BIT. Further, through this agreement, Transglobal indirectly acquired a 70% ownership interest and control over La Mina’s concession in the Bajo de Mina project, including the legal rights set forth the Supreme Court of Justice’s final judgment and the legitimate expectation that ASEP and the Panamanian executive would honor and enforce that judgment.

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<sup>40</sup> *Id.* at art. I(1)(e).

<sup>41</sup> *Id.* at art. I(1)(c).

<sup>42</sup> **Exhibit C-19**, Certificate of Filing of Transglobal Green Energy, LLC, Office of the Secretary of State of Texas, Apr. 14, 2010.

<sup>43</sup> **Exhibit C-7**, Partnership and Transfer Agreement between Mr. Lisac and Transglobal, Sept. 30, 2001.

<sup>44</sup> *Id.*; **Exhibit C-20**, Certificate of Incorporation of Transglobal Green Energy de Panama S.A., Registry of Panama, Oct. 24, 2012.

<sup>45</sup> **Exhibit C-7**, Partnership and Transfer Agreement between Mr. Lisac and Transglobal, Sept. 30, 2001.

40. These legal rights fall within the definition of investment in the BIT. Accordingly, Transglobal and Transglobal Panama's claims arise out of their "investment[s]" in Panama. Transglobal and Transglobal Panama's dispute with the Government concerning Panama's obligations under the BIT constitutes a dispute arising directly out of an investment. Thus, this is an "investment dispute" under Article 25 of the ICSID Convention.

### 3. Contracting State

41. Article 25 of the ICSID Convention provides that the jurisdiction of the Centre shall extend to any legal dispute arising "between a Contracting State...and a national of another Contracting State."<sup>46</sup>

42. Panama signed the ICSID Convention on November 22, 1995 and deposited its instrument of ratification on April 8, 1996.<sup>47</sup> The ICSID Convention entered into force for Panama on May 8, 1996.<sup>48</sup> Thus, Panama is a Contracting State to the ICSID Convention.

### 4. National of Another Contracting State

43. As explained, Transglobal is a company incorporated under the laws of the State of Texas, U.S.A. Its headquarters and principle place of business is in the state of Texas.

44. The United States is a Contracting Party to the ICSID Convention.<sup>49</sup> The United States signed the ICSID Convention on August 27, 1965, and deposited its ratification on June 10, 1966.<sup>50</sup> The ICSID Convention entered into force for the United States on October 14, 1966.<sup>51</sup> Consequently, Transglobal is a national of another Contracting State for purposes of ICSID jurisdiction.

45. Article 25(2) of the ICSID Convention provides that:

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<sup>46</sup> **Exhibit C-21**, ICSID Convention art. 25.

<sup>47</sup> List of Contracting and Signatory States to the ICSID Convention, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*



National of another Contract State” includes: “any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.<sup>52</sup>

Article VII(5) of the U.S.-Panama BIT stipulates:

For purposes of Article 25(2)(b) of the ICSID Convention and this Article, any company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of either Party or political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was owned or controlled by nationals or companies of the other Party, shall be treated as a national or company of the other Party.<sup>53</sup>

46. Transglobal Panama is incorporated under the laws of Panama and, at all times, has been owned and controlled by Transglobal, including before the events giving rise to the dispute. Therefore, for purpose of this arbitration, Transglobal Panama is a company of the United States and thus a “national of another Contracting State” for purposes of ICSID Article 25.

#### 5. Consent

47. The Government of Panama expressly consented in writing to ICSID jurisdiction when it signed and ratified an amendment to the BIT with the United States. Article VII(3)(b) of the BIT provides that: “Each Party hereby consents to the submission of an investment dispute in accordance with the choice of the national or company .... This consent and submission of the dispute by a national or company ... shall satisfy the requirement of: (i) Chapter II of the ICSID Convention (Jurisdiction of the Centre) ....”<sup>54</sup>

48. Transglobal and Transglobal Panama hereby consent to the jurisdiction of the Centre over the claims in this Request for Arbitration. Thus, the parties have expressly given their consent to submit this dispute to the Centre.

### **B. The BIT’s Provisions Regarding Submission of a Dispute to ICSID**

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<sup>52</sup> Exhibit C-21, ICSID Convention art. 25(b)(2).

<sup>53</sup> Exhibit C-18, BIT art. VII(5).

<sup>54</sup> *Id.* art. VII(3)(b).

49. The BIT is currently in force. On October 31, 2012, the U.S.-Panama Trade Promotion Agreement entered into force.<sup>1</sup> Article 1.3(2) of that Trade Promotion Agreement suspends Articles VII and VII of the BIT, but Article 1.3(3) provides that Articles VII and VII shall not be suspended in the case of investments covered by the BIT as of the date of entry into force of the Trade Promotion Agreement or in the case of a dispute that arose prior to the date of entry into force of the Trade Promotion Agreement (*i.e.*, October 31, 2012).<sup>2</sup> Claimants' investments were covered by the BIT when the Trade Promotion Agreement entered into force, and the present dispute arose before the Trade Promotion Agreement entered into force. In fact, Claimants provided Panama with notice of this dispute on October 30, 2012—one day before the Trade Promotion Agreement entered into force.<sup>3</sup> Thus, Articles VII and VIII are not suspended with regards to the present dispute.

50. Under Article VII(3) of the BIT, an investor may pursue ICSID arbitration if: (i) the party has not submitted the dispute for resolution either to the courts or administrative tribunals of the host State or in accordance with any previously-agreed dispute settlement procedures, (ii) six months have elapsed from the date on which the dispute arose, and (iii) the investment dispute involves violations of the BIT.<sup>4</sup> In addition, the BIT suggests that the parties “should” initially seek a resolution through consultation and negotiation.<sup>5</sup> Transglobal and Transglobal Panama have satisfied each of those requirements and that suggestion.

1. Transglobal and Transglobal Panama have submitted their BIT Dispute Only to ICSID

51. Transglobal and Transglobal Panama have not submitted this investment dispute under the BIT either to the courts or administrative tribunals of Panama or to any other previously-agreed dispute-settlement procedure.

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<sup>1</sup> **Exhibit C-23**, “U.S. and Panama Set Date for Entry-Into-Force of the U.S.-Panama Trade Promotion Agreement,” USTR Press Office, Oct. 22, 2012.

<sup>2</sup> **Exhibit C-24**, U.S.-Panama Trade Promotion Agreement.

<sup>3</sup> **Exhibit C-25**, Request for consultations before MICI, Oct. 30, 2012.

<sup>4</sup> **Exhibit C-18**, BIT art. VII(3).

<sup>5</sup> *Id.* art. VII(2).

## 2. Six Months Have Elapsed Since the Dispute Arose

52. On October 30, 2012, Transglobal and Transglobal Panama provided notice to the Panamanian government regarding their dispute under the BIT and requested formal consultations to attempt to resolve the dispute amicably.<sup>6</sup> On December 14, 2012, the Government instead issued a resolution asserting that Transglobal and Transglobal Panama have no rights under the BIT.<sup>7</sup> On December 26, 2012, Transglobal and Transglobal Panama appealed that ruling.<sup>8</sup> On April 26, 2013, the Government issued a decision rejecting that appeal.<sup>9</sup> On June 11, 2013, Transglobal and Transglobal Panama sent an additional notice letter again requesting consultations to attempt to resolve the dispute amicably.<sup>10</sup> Transglobal and Transglobal Panama stated in that letter that if they did not receive a response, they would exercise their right to submit this dispute for resolution to international arbitration under the BIT.<sup>11</sup> In response, Panama sent a delegate for one meeting with Transglobal and Transglobal Panama in Houston, Texas in early September 2013.<sup>12</sup> After that meeting however, Panama's delegate informed Transglobal and Transglobal Panama that Panama would no longer meet with them regarding this dispute.<sup>13</sup> Therefore, the six-month requirement in Article VII(3)(a) of the BIT has been met.

## 3. The Dispute Involves Violations of the BIT and International Law

53. Panama's acts and omissions violate a number of Panama's obligations under the Treaty, including its obligations: (a) not to expropriate investments unless for a public purpose, in a non-discriminatory manner, and upon payment of prompt, adequate, and effective compensation; (b) to accord fair and equitable treatment and full protection and security to investments; (c) not to impair the management, operation, maintenance, use, enjoyment,

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<sup>6</sup> **Exhibit C-25**, Request for consultations before MICI, Oct. 30, 2012.

<sup>7</sup> **Exhibit C-26**, MICI Resolution No. 3, Dec. 14, 2012.

<sup>8</sup> **Exhibit C-27**, Appeal for reconsideration of MICI Resolution No. 3, Dec. 26, 2012.

<sup>9</sup> **Exhibit C-28**, MICI Resolution NO. 51, Apr. 26, 2013.

<sup>10</sup> **Exhibit C-29**, BIT Notice Letter from Transglobal and Transglobal Panama to Panama, June 11, 2013.

<sup>11</sup> *Id.*

<sup>12</sup> **Exhibit C-30**, Nota No. DVM/064-2013, Aug. 29, 2013.

<sup>13</sup> **Exhibit C-31**, Email from Mr. Cochez, delegate for Panama, to Roberto Aguirre Luzi, Sept. 18, 2013.

acquisition, expansion, or disposal of an investment by arbitrary and discriminatory measures; (d) the obligation to accord investments most favored nations treatment; and (e) the obligation to provide investments treatment in accordance with international law, including, in particular, the obligation not to subject investments to denials of justice.

54. The BIT expressly provides that the Parties may not “impair by arbitrary or discriminatory measures the...acquisition...of investments.”<sup>14</sup> Panama’s arbitrary and discriminatory measures impaired Transglobal Panama’s acquisition of the Bajo de Mina concession.

55. In sum, all of the BIT’s provisions regarding submission of a dispute to ICSID arbitration, as well as all jurisdictional requirements under Article 25 of the ICSID Convention, have been satisfied.

## **V. DOCUMENTATION**

56. Attached to this Request for Arbitration is the documentation required by Rule 2(2) of the Institution Rules. In particular, Transglobal’s and Transglobal Panama’s instruments of consent to ICSID—which are set forth in Board Resolutions authorizing the initiation of this arbitration proceeding—are attached as Exhibits C-22. A Wire Transfer Receipt demonstrating that Claimants have paid the ICSID’s Lodging Fee is attached as Exhibit C-32.

## **VI. PLACE OF ARBITRATION**

57. Pursuant to Article 62 of the ICSID Convention, Transglobal, and Transglobal Panama desire that the arbitration proceedings be held at the seat of ICSID in Washington, DC, U.S., which is the headquarters of ICSID.

## **VII. LANGUAGE**

58. Pursuant to Rule 22(1) of the ICSID Rules of Procedure for Arbitration Proceedings, Transglobal, and Transglobal Panama select English as the procedural language for this arbitration proceeding.

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<sup>14</sup> Exhibit C-18, BIT art. II(2).

## VIII. REQUEST FOR RELIEF

59. For the reasons stated herein, Transglobal and Transglobal Panama request an award granting them the following relief:

- i) A declaration that the dispute is within the jurisdiction and competence of the Centre and the Tribunal;
- ii) A declaration that Panama has violated the Treaty and international law with respect to Transglobal and Transglobal Panama's investment;
- iii) A declaration that Panama's actions and omissions at issue and those of its instrumentalities for which it is internationally responsible, among others things, are unlawful, arbitrary, discriminatory, unfair and inequitable; constitute an expropriation or measures tantamount to expropriation without prompt, adequate and effective compensation; failed to provide fair and equitable treatment; failed to provide full protection and security; and failed to provide most favored nations treatment and treatment in accordance with international law; constitute a denial of justice; and
- iv) An award to Transglobal and Transglobal Panama of restitution of the concession to operate La Mina plus damages or the monetary equivalent of all damages caused to their investments, as set forth herein and as may be further developed and quantified in the course of this proceeding;
- v) Pre-and post-award interest until the date of Panama's full and effective payment;
- vi) An award to Transglobal and Transglobal Panama for all costs of these proceedings, including attorneys' fees and expenses; and
- vii) Any other relief the Tribunal may deem just and proper.

DATED: September 19, 2013

Respectfully submitted,

King & Spalding LLP

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