

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

GRENADA PRIVATE POWER LIMITED AND WRB ENTERPRISES, INC.

Claimants

and

GRENADA

Respondent

ICSID Case No. ARB/17/13

DECISION ON PROVISIONAL MEASURES

Members of the Tribunal

Hon. Ian Binnie, C.C., Q.C., President of the Tribunal

Ms. Olufunke Adekoya SAN, Arbitrator

Mr. Richard Boulton, Q.C., Arbitrator

Secretary of the Tribunal

Ms. Jara Mínguez Almeida

Date of dispatch to the Parties: 26 September 2018

Decision on Provisional Measures

1. The Claimants, Grenada Private Power Ltd. and WRB Enterprises, Inc., apply for a Provisional Measure directing the Respondent Government to withdraw a formal **demand for information** concerning Grenlec contained in a letter dated 9 May 2018 to Grenlec from the Minister of Infrastructure, Development, Public Utilities, Energy, Transport and Implementation, the Honourable Gregory Bowen.¹ Attached to the Minister’s letter is an appendix containing seven categories of documents and a number of subcategories, all of which the Minister seeks under ss. 44–47 inclusive of the *Electricity Supply Act No. 19* of 2016.

2. In a letter from counsel for the Government to counsel for the Claimants the previous day, 8 May 2018,² the same appendix was attached. Counsel stated that the information “is not only necessary to carry out the purposes and duties set out in the *Act*, and pertinent to the Government’s exercise of its rights as a shareholder in Grenlec, *it is also relevant and material to the issues in dispute in this arbitration*, including the valuation of the Claimants’ shares in Grenlec.” (italics added)

3. The Claimants’ position is that in fact the Minister’s request has no purpose other than the arbitration because insofar as financial information of Grenlec is required for the drafting of regulations, such regulations under the *Act* have already been drafted, and insofar as the regulatory function is concerned, the Public Utilities Regulatory Commission³ of Grenada (“PURC”) is not

¹ Exhibit CE-0058.

² Exhibit CE-0057.

³ While both the Minister and the PURC have statutory powers to obtain information from Grenlec, it appears that the actual regulation is to be performed by PURC at such time as it becomes operational next year.

Decision on Provisional Measures

yet functioning and, according to counsel for the Government, is now not likely to be in operation until an unknown date in 2019. Accordingly, Claimants allege, the Minister's initiative is simply an attempted end run around the agreed documentary production arrangements set out in s. 15 of Procedural Order No. 1 in this arbitration.

4. The Government's response is that the regulatory stream and the arbitration stream can proceed in parallel. Had the Minister asked Grenlec for the information prior to commencement of the arbitration, Grenlec would have been required to comply. The accidental timing of the arbitration, according to the Government, should not displace the Government's sovereign power to regulate the island electricity system. In any event, it is for the Claimants to establish the necessity and urgency of the Provisional Measure. It is not for the Government to establish an urgent need for the Grenlec information.

JURISDICTION

5. Article 47 of the ICSID Convention states:

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.⁴

⁴ ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (October 1966) (CLA-0010), Article 47.

Decision on Provisional Measures

6. Rule 39 of the ICSID Arbitration Rules requires an applicant to “specify the rights to be preserved, the measures the recommendation of which is requested and the circumstances that require such measures.”⁵

The Claimants’ Case

(i) *The Protected Right*

7. It is common ground that provisional measures are available to protect *procedural* rights. In the usual formulation, the Claimants must satisfy the Tribunal that the provisional measure is justified to preserve the fairness and procedural integrity of the arbitration and to ensure that the parties comply with their obligation to arbitrate in good faith.⁶

(ii) *The Measure*

8. The Claimants ask the Tribunal to recommend a Provisional Measure requiring the Respondent to withdraw the Demand for Information addressed to Grenlec on 9 May 2018, or for

⁵ CLA-0048, Rule 39 states:

At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

⁶ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016, para. 186 (Exhibit CLA-0046). See also *Libananco Holdings Co.Limited v. Republic of Turkey*, ICSIB Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, para. 78 (Exhibit CLA-0035); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants’ Request for Provisional Measures, 4 December 2014, para. 121 (Exhibit CLA-0041) (“any party to an arbitration should adhere to some procedural duties, including to conduct itself in good faith...”).

Decision on Provisional Measures

such other order as the Tribunal deems necessary to protect Claimants' rights and the integrity of this proceeding, and costs.

(iii) The Compelling Justification

9. The Claimants argue that the Government has co-mingled the arbitration function and regulatory function. The Honourable Gregory Bowen is to be a principal witness for the Government in the arbitration. The Tribunal's Order for document production declined to require the Claimants to produce certain information and documents. The effect of the order would be nullified if the Government could simply sidestep its effect by having the Minister make a direct demand of Grenlec using the regulatory power under the *Electricity Supply Act 2016*.

The Government's Case

10. The Government points out that it is for the Claimants not only to identify the procedural right sought to be protected, but to prove that the provisional measure is **necessary** to avoid a material risk of serious risk or grave damage to the requesting party⁷ and **urgently** required⁸ and moreover is proportional in that it strikes a fair balance between the Claimants' need for protection from the threatened Government's action on the one hand and any harm that might be caused to the Respondent Government on the other hand.

⁷ *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, 21 January 2015 (Exhibit CLA-0044).

⁸ See, e.g., *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3, 18 January 2005, para. 8 (Exhibit CLA-0031), quoting *Case Concerning Passage Through the Great Belt (Finland v. Denmark)*, ICJ, Request for the Indication of Provisional Measures Order, 29 July 1991, para. 23 (Exhibit CLA-0029).

Decision on Provisional Measures

ANALYSIS

11. In the Tribunal's opinion there is no doubt that the integrity of the arbitration requires both parties to abide by Procedural Order No. 1 and rulings made thereunder. Document production, and the Tribunal's resolution of any contested requests, is a key element of a fair procedure. Protection of the integrity of that procedure is a legitimate objective for a provisional measure.

(i) Necessity

12. The Claimants argue that if the Provisional Measure were granted, the procedural damage will be done in the course of the Government's preparation of its pleadings and submissions. The damage at that stage would be beyond recall.

13. The Government denies any such necessity. In the event documents which the Tribunal declined to order Grenlec to produce were obtained by the Government under its regulatory powers, and the Claimants wished to assert that its use in the arbitration amounted to an abuse, the Claimants could always make a request to the Tribunal to exclude the offending evidence. In the Tribunal's view, however, such a procedure would be unworkable (because Minister Bowen would not be able to rid his mind of the regulatory information) and cumbersome (requiring a close supervision and perhaps intervention on an item by item basis during the hearing). In any event, the Government's suggestion does not resolve the issue of a Government side-step of the agreed procedure set out in Procedural Order No. 1.

14. Accordingly, the Tribunal is satisfied that the measure is necessary in order to protect the integrity of the arbitration by holding both parties to the agreed rules of documentary production.

Decision on Provisional Measures

(ii) *Urgency*

15. The Tribunal is satisfied that if the provisional measure is not issued, the ministerial demand will be maintained, and the Tribunal's order disallowing certain of the Government's requests for documents will be rendered ineffective. Moreover, the Government may declare Grenlec in default and seek administrative sanctions.

(iii) *Proportionality*

16. The Tribunal is conscious of the need for the Claimants to demonstrate that the requested Provisional Measure satisfies a balance of convenience and is proportionate to the respective interests of the parties. In the Tribunal's view, the Claimants' request that "the Tribunal direct the Government to withdraw its information demand"⁹ would be a disproportionate intrusion on the sovereign authority of the Government. (If the Claimants were to take the position that the Government is not entitled to some categories of information request in the Minister's letter, such a contention would be an issue for the Courts of Grenada, not this Tribunal.)

17. Rather than a withdrawal of the demand for information, the integrity of the arbitration would be satisfied by *deferral* of the return date stipulated by the Minister.

18. The evidentiary submissions in this case will be completed on 29 March 2019, when the Government is to file its Rejoinder. At that point, the pleadings will be complete and the

⁹ Claimants' Request for Provisional Measure, 11 June 2018, para. 4.

Decision on Provisional Measures

evidentiary record established. Accordingly, the interest of both sides would be protected by a deferral of the date for compliance with the statutory request for information from Monday, 28 May 2018 until Saturday, 30 March 2019 or as soon thereafter as the Government's Rejoinder has been filed.

19. To the extent Grenlec's response to the Minister's request yields information relevant to the arbitration, an application can be made by the Government to adduce fresh evidence prior to the hearing which is scheduled from 17 to 21 June 2019.

RECOMMENDATION FOR A PROVISIONAL MEASURE

20. Accordingly, the Tribunal recommends by way of Provisional Measure that the Government defer the date for compliance with the Minister's letter of 9 May 2018 until Saturday 30 March 2019, and that in the meantime, the Claimants are not to be considered in default of their informational obligations under the *Electricity Supply Act 2016*.



Hon. Ian Binnie, C.C., Q.C.
President of the Tribunal
Date: 26 September 2018