

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Transglobal Green Energy, LLC and Transglobal Green Panama, S.A.

v.

Republic of Panama

(ICSID Case No. ARB/13/28)

**DECISION ON THE RESPONDENT'S REQUEST FOR PROVISIONAL MEASURES
RELATING TO SECURITY FOR COSTS**

Members of the Tribunal

Dr. Andrés Rigo Sureda, President of the Tribunal
Prof. Christoph Schreuer, Arbitrator
Prof. Jan Paulsson, Arbitrator

Secretary of the Tribunal

Ms. Mercedes Cordido-Freytes de Kurowski

Date of the Decision: January 21, 2016

I. Introduction

1. On December 18, 2015, the Republic of Panama ("Panama" or "Respondent") filed simultaneously "Panama's Jurisdictional Objections and Memorial on Jurisdiction" (the "Memorial on Jurisdiction") and the "Request for Provisional Measures relating to Security for Costs" (the "Request").
2. On December 22, 2015, the Tribunal invited Transglobal Green Energy, LLC ("TGGE" or "Transglobal") and Transglobal Green Panama, S.A. ("Claimants") to comment on the Request no later than January 6, 2016.
3. On January 4, 2016, Claimants requested the Tribunal "how much time [it] may have to respond to these issues in an organized and appropriate manner".
4. On January 6, 2016, the Tribunal extended the time limit for Claimants to reply until January 13, 2016.
5. On January 13, 2013, Claimants replied and opposed the Request (the "Response").

II. Respondent's Arguments

6. Respondent recalls that the Tribunal denied its previous request for shifting the costs of this arbitration¹ on the basis of the limited nature of the record before the Tribunal at that time. Respondent argues that, now that the Tribunal has received the Memorial on the Merits, it is in a better position to evaluate the Claimants' financial condition and the weakness of Claimants' case.
7. Respondent acknowledges that the standard for recommending provisional measures is high and that few tribunals have required security for costs, but "[t]he Tribunal should not be so focused on the decisions of other tribunals facing circumstances distinct from this one that it loses sight of the particular facts and circumstances before it."²
8. According to Respondent, the evidence before the Tribunal confirms that Claimants never owned or held a qualifying investment, lack any meaningful assets, their financial

¹ Decision on Respondent's Request for Shifting the Costs of the Arbitration, dated March 4, 2015 ("Decision on Shifting Costs").

² Request, para. 5.

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situation is not in any way attributable to Panama, and have not been able to replace counsel or secure third party funding.

9. Respondent complains that Claimants prosecute their case in an abusive manner by not providing English translations of some exhibits as mandated in Procedural Order No. 1, and the translations provided are slanted in Claimants' favor. Respondent further notes that the Claimants' Memorial on the Merits is not accompanied by any witness statement or report on *quantum* by an independent expert. According to Respondent, "This chaotic style of litigation has greatly increased the cost and burden on Panama to ascertain the essence of Claimants' complaints, and to address them appropriately"³.
10. Respondent submits that when these facts are considered together they constitute a sufficient basis for the Tribunal to recommend provisional measures for security for costs.
11. Respondent recalls that Panama was unable to enforce a cost award in the case of *Nations Energy Corp. et al v. Panama* and states that if it were "left without the ability to collect an award of costs and legal fees from a financially irresponsible claimant *for the second time*, could force Panama to rethink its participation in the ICSID system generally."⁴
12. Respondent argues that the Tribunal has the authority to recommend provisional measures under Article 47 of the Convention and Arbitration Rule 39 and that the term "recommend" in Article 47 of the Convention is functionally equivalent to "order". Respondent further argues that provisional measures may be granted even if parties contest the jurisdiction of the Tribunal.
13. According to Respondent, the Request meets the requirements for provisional measures: there is a legal right to be preserved, and the measures requested are urgent and necessary. Respondent explains that it has the right to claim reimbursement of the costs it incurs in the course of the arbitration, and the measure is urgent because it cannot await the outcome of an award on the merits. Given the funds left in this arbitration account, the "granting of provisional measures at this juncture would protect Panama against the considerable additional legal costs of a hearing or further written submissions."⁵
14. Respondent further explains that the measures are necessary because the evidence before the Tribunal confirms the lack of funds of Claimants. Transglobal Panama is a special purpose vehicle with no assets, and TGGE is a limited liability corporation the balance sheet of which states: "To date, the company has been supported financially by its

³ *Id.*, para. 8.

⁴ *Id.*, para. 13. Emphasis in the original.

⁵ *Id.*, para. 26.

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members who have contributed all necessary capital and therefore the Company has no debt.”⁶

15. Respondent argues that it “should not be forced to pursue and pay for post-award litigation to pierce the veil of a financially-challenged limited liability corporation when this Tribunal can protect Panama now with a security for costs order.”⁷ It is also Respondent's contention that, “[o]n balance, Panama runs a far greater risk of suffering potential harm in the absence of provisional measures than do Claimants in the event the Tribunal recommends security for costs.”⁸

16. As relief, Respondent requests that the Tribunal order Claimants to:

“a) Post a bond, payable to the order of the Republic of Panama, in the amount of US\$2,500,000 issued by a creditworthy bank or insurance company in the Republic of Panama or in the United States to cover an award of costs, legal fees and/or expenses of Respondent; and that

b) it renew such a bond as necessary so that it be effective from the date of the Tribunal's decision on the request for Provisional Measures, until drawn by Respondents [*sic*], or until Claimants pay to Panama any arbitral costs, legal fees and/or expenses awarded to Respondent in this case.”⁹

17. In a footnote to the amount of the bond, Respondent explains that “Panama offers this figure as a good faith estimate of the procedural costs and legal fees that it expects it will accrue as part of defending this case. This sum may require periodic increases depending on developments in the proceeding.”

III. Claimants' Arguments

18. Claimants recall that ICSID tribunals have held that security for costs requests should be granted only in exceptional circumstances. According to Claimants, it is not unusual for tribunals to be faced with claimants who are corporate investment vehicles with few assets created for the purpose of the investment. Furthermore, if security for costs would be granted every time there is the risk of an unpaid costs award, access to justice might be frustrated notwithstanding potentially meritorious claims.

⁶ Quoted in para. 30 of the Request.

⁷ Request, para. 30.

⁸ *Id.*, para. 31.

⁹ *Id.*, para. 32.

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19. Claimants distinguish themselves from RSM and the exceptional circumstances on which the *RSM* tribunal justified to grant the request for security for costs, namely, a history of unpaid adverse costs awards, admitted lack of financial capacity, and admitted but undisclosed third-party funder.
20. Claimants argue that none of these circumstances are applicable to them. Claimants affirm that Transglobal has never had an ICSID proceeding discontinued or failed to pay an ICSID costs award. Claimants point out that their failure to pay their share of the initial advance payment is mirrored by Panama's own failure to pay by the deadline set by the Tribunal.
21. According to Claimants, Transglobal has not admitted that it lacks the financial capacity to prosecute this arbitration or satisfy an adverse costs award. Claimants explain that they are project companies and "[t]heir owners contribute capital and the subsequent investments are reflected as losses on a balance sheet until the project is successfully developed."¹⁰ Claimants further explain that, when in late 2011 Transglobal presented its balance sheet to ASEP¹¹, Transglobal demonstrated that it could arrange the financing that it needed to acquire the power plant that Ideal had developed and ASEP never disputed it.
22. Claimants confirm that they do not currently have third party funding and conclude by affirming their opposition to the Request.

IV. Analysis of the Tribunal

1. The Legal Framework

23. The authority of the Tribunal to recommend provisional measures is based on Article 47 of the Convention and Arbitration Rule 39(1), which are reproduced here for ease of reference. Article 47 provides:

“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.”

24. Arbitration Rule 39(1) reads as follows:

“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

¹⁰ Response, para. 13.

¹¹ The National Public Services Authority of Panama.

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recommendation of which is requested, and the circumstances that require such measures.”

25. Based on a long line of decisions of ICSID tribunals starting with the *Maffezini* tribunal¹², Respondent has argued that the term “to recommend” provisional measures in Article 47 is the functional equivalent of “to order” and, hence, provisional measures recommended by the Tribunal are binding. Claimants have not disputed this interpretation. The Tribunal will limit itself to add that the Spanish version of the Arbitration Rules uses the verb “dictar”, a term equivalent “to order”: “[...] y las circunstancias que hacen necesario el dictado de tales medidas.” Furthermore, the measure requested by Respondent is related to the allocation of costs of the proceeding; the Tribunal has authority to mandate cost allocation under Article 61(2) of the Convention.

2. The Jurisdiction of the Tribunal

26. Respondent has argued that the Tribunal's authority to recommend provisional measures is unaffected by objections to its jurisdiction. Claimants have not contested this authority. The Tribunal is satisfied that it has *prima facie* jurisdiction to recommend provisional measures the urgency and need of which may require a decision before the Tribunal decides on objections to its jurisdiction. Arbitration Rule 39(2) mandates the Tribunal to give priority to the consideration of a provisional measures request. Furthermore, ICSID tribunals have consistently held that they have jurisdiction to decide on provisional measures in such circumstances since *Holiday Inns and Others v. Morocco*¹³, the first ICSID case.

3. Requirements of a Request for Provisional Measures

27. As provided by Article 47 of the Convention, a request for provisional measures must concern the rights to be preserved, include the measures to be taken by the Tribunal and explain the circumstances that require them.
28. Respondent has argued that the rights to be preserved include substantive rights -the rights in dispute- and procedural rights. Tribunals differ on whether Article 47 covers only “the rights in dispute”¹⁴ or may be read to include “rights relating to the dispute.”¹⁵ The

¹² *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 on Provisional Measures dated October 28, 1999, para. 9 (“*Maffezini* Procedural Order”).

¹³ *Holiday Inns S.A. and others v. Morocco* (ICSID Case No. ARB/72/1), Decision of July 2, 1972, P. Lalive, “The First “World Bank” Arbitration – Some Legal Problems”, *B.Y.I.L.*, 1980, p. 123 at, p. 136.

¹⁴ *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Provisional Measures dated December 9, 1983, para. 3.

¹⁵ *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Order dated September 6, 2005, para. 40.

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Tribunal concurs in that a wider reading of the parties' rights is justified in light of the unspecified nature of the rights to be preserved in Article 47. Procedural rights may include the right to the *status quo*, the right to the non-aggravation of the dispute and the right not to prejudice the execution of the award.¹⁶

29. Article 47 of the Convention leaves open the circumstances that may require provisional measures. Tribunals have determined that they must be urgent and necessary. These terms have been understood in the sense that the measures requested are required to preserve the rights, but their need makes it peremptory for the Tribunal to recommend them before the decision on objections to jurisdiction or the award on the merits.

4. Does the Request meet these requirements?

30. The Tribunal is satisfied that the Request meets the requirements of specifying the right to be preserved -the right to claim reimbursement of its arbitration costs- and the measures to be recommended. The issue for the Tribunal is whether the circumstances meet the necessity and urgency requirements inherent to the extraordinary nature of the provisional measures.

31. In the Request before the Tribunal the extraordinary quality of the remedy requested is combined with the exceptional nature of the petitioned measure. Indeed, seldom tribunals order a party to provide security for costs and, as a provisional measure, only one instance has been brought to the attention of the Tribunal: the majority decision on provisional measures in the case of *RSM v. Saint Lucia*¹⁷.

32. Respondent already brought this decision to the consideration of the Tribunal as part of its arguments in support of the Request for Shifting Costs. In rejecting that request, the Tribunal distinguished the circumstances that prompted the *RSM* tribunal to grant the request from the circumstances in this case. Given the extraordinary nature of provisional measures and that the standard applicable to security for costs is less flexible¹⁸, has there been a change in circumstances to justify that the Tribunal grants now the Request?

33. The distinction made by the Tribunal in its Decision on Shifting Costs between the circumstances of Claimants and those occurring in the case of *RSM* continues to be valid. The changes argued by Respondent are related to the availability of funds in the arbitration

¹⁶ *Id.*, para. 38. See also *Burlington Resources, Inc. and others v. Republic of Ecuador and Empresa Estatal de Petróleos del Ecuador (PetroEcuador)* (ICSID Case No. ARB/08/5), Procedural Order No. 1, paras. 60-62.

¹⁷ *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs dated August 13, 2014.

¹⁸ As noted by the Tribunal in its Decision on Shifting Costs, "[b]oth parties agree that the standard applicable to the Request is more flexible than in the case of a request for security for costs", para. 41.

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account to finance a potential cost award against Claimants, and what Respondent has termed the chaotic nature of the litigation conducted by Claimants.

34. The Tribunal is not persuaded by the argument related to how the litigation is conducted by Claimants. Claimants may or may not be assisted by counsel. Assistance by counsel is not a requirement to prosecute a claim before an ICSID tribunal. Admittedly it may facilitate the task of the parties and the Tribunal if competent counsel assists the parties, but the incidences pointed out by Respondent, even if taken together, would not support a finding of exceptional circumstances that in turn would justify an order for security for costs. In this respect, the Tribunal notes the willingness of Claimants to discuss with counsel to Respondent the issues related to documentation set forth in the Request.¹⁹
35. As pointed out by Respondent, the record available now to the Tribunal is more substantive than it was at the time of the Decision on Shifting Costs. Claimants have addressed Respondent's objections to jurisdiction in their Memorial on the Merits and now in the Response. However, as requested by Respondent, the Tribunal has decided to bifurcate the proceeding, hence to order security for the estimated costs of the whole proceeding is not justified. Furthermore, as envisioned by the Tribunal in Procedural Order No. 1, only one round of submissions is contemplated. It follows that the Tribunal will be in a position to decide on the objections to jurisdiction without a significant increase in the proceeding costs. Therefore, the measure requested is of doubtful need and urgency.
36. The Tribunal is not oblivious to the concerns of Respondent when faced with claims prosecuted not by the investors who have actually provided the funds, but by corporate entities through which those investors have chosen to channel their investment. At the same time, the Tribunal is mindful of the potential consequences of a decision favorable to granting security for costs on the procedural rights of the Claimants even before the Tribunal decides on its own jurisdiction.
37. On balance and given the decision of the Tribunal to bifurcate the proceeding, the Tribunal is of the view that the potential limitation on the procedural rights of Claimants outweighs the relatively minor increase in arbitration costs. If requested, the Tribunal would be willing to reconsider this matter in light of its understanding of the case if the Tribunal in due course upholds jurisdiction.

¹⁹ Exhibit C-62.

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V. Decision

For the above reasons, the Tribunal has decided to reject the Request.

[signed]

Prof. Christoph Schreuer
Arbitrator

[signed]

Prof. Jan Paulsson
Arbitrator

[signed]

Dr. Andrés Rigo Sureda
President of the Tribunal