School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date:

Transglobal Green Energy and Transglobal Green Panama, S.A. v. Republic of Panama (ICSID Case No. Arb/13/28) - Award - 2 June 2016

Case Report by:

J. Michael King**, editor Ignacio Torterola***

Summary:

In its Award rendered on June 2, 2016, the Tribunal decided to uphold Panama's jurisdictional objection on the basis of Claimants' abuse of the international investment treaty system by attempting to establish artificial international jurisdiction over a pre-existing domestic dispute. In making its decision, the Tribunal considered: (i) the timing of the alleged investment in the hydroelectric power project; (ii) the terms of the transaction; and (iii) relevant incidents transpiring during the course of the proceeding. The Tribunal concluded that Claimants were inserted into the dispute for the purpose of securing international remedies soon after it became clear that execution of the Judgment of the Supreme Court of Panama at the center of the ongoing domestic dispute was not forthcoming. The Tribunal also found that the terms of the transaction pointed to a Panamanian national exercising *de facto* control of Claimants. The Tribunal further concluded that Claimants' multiple requests to suspend the ICSID proceedings revealed an intimate relationship between the ongoing domestic dispute and the present arbitration. Claimants' attempt to internationalize their purely domestic dispute therefore constituted an abuse of the arbitral process. Having satisfied this threshold jurisdictional bar, the Tribunal held that it did not need to consider the remaining jurisdictional objections. The Tribunal ordered Claimants to pay all of the costs of the arbitration as well as the vast majority of Respondent's legal fees and expenses.

Main Issues:

Jurisdiction – abuse of process – foreign control – exclusive remedy – fork-in-the-road clause – security for costs – expropriation.

Tribunal:

Dr. Andrés Rigo Sureda – President, Prof. Christoph Schreuer, Prof. Jan Paulsson.

Claimant's Counsel:

Mr. Jeffrey Carlitz, Mr. Don Stringham, Mr. Rick Reyes and Mr. Roger Fearon (Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, S.A., Houston, Texas, U.S.A.).

Respondent's Counsel:

Mr. Whitney Debevoise, Ms. Gaela K. Gehring Flores, Ms. Natalia Giraldo-Carrillo, Mr. Pedro G. Soto and Ms. M. Alejandra Parra-Orlandoni (Arnold & Porter LLP, Washington, D.C., U.S.A.).

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Digest:

1. Relevant Facts and Procedural Dates

Claimants are Transglobal Green Energy, LLC, a company incorporated under the laws of the State of Texas, U.S.A., with its seat in Houston ("TGGE"), and Transglobal Green Panama, S.A., a company incorporated in the Republic of Panama, with its seat in Panama City ("TGGE Panama") (together "Transglobal" or "Claimants") (¶ 2). Respondent is the Republic of Panama ("Panama" or "Respondent") (¶ 3).

The case concerns a dispute which arose out of a hydroelectric power generation concession in Panama named "Bajo de Mina" (¶ 1). Transglobal submitted the dispute to ICSID on the basis of the 1982 Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments, as amended in 2001 (the "BIT"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") (¶ 1).

On November 7, 2003, the *Ente Regulador de los Servicios Públicos* ("ASEP") granted to La Mina Hydro-Power Corp. ("La Mina"), a Panamanian company owned by Mr. Julio César Lisac, a Panamanian national, a concession to design, build and operate a hydroelectric power plant at Bajo de Mina in Panama (the "Concession") (¶ 50). ASEP and La Mina entered into a 50-year concession contract on May 3, 2005 (the "Concession Contract"), which the Office of the Comptroller General of Panama ratified on October 21, 2005 (¶ 50).

The Concession Contract required La Mina to begin construction of the power plant (the "Project") within 12 months of the Comptroller's ratification, and to complete construction

and begin operations within 24 months (¶ 51). Panama reserved the right to terminate the Concession Contract if La Mina failed to meet these deadlines (¶ 51).

On October 17, 2006, La Mina requested a six-month extension of the deadline to start construction (¶ 52). In order to grant the requested extension, ASEP required that La Mina provide it with evidence that the lenders were willing to finance the Project (¶ 52). Because La Mina did not provide the required evidence and failed to begin construction within 12 months, on December 20, 2006 ASEP terminated the Concession Contract (¶ 52).

Beginning in January 2007, La Mina sought redress before ASEP and the Supreme Court of Panama to overturn ASEP's termination of the Concession Contract (¶¶ 53-54). Meanwhile, ASEP reopened the bidding process for the Project (¶ 55). On May 10, 2007, ASEP granted CICSA (now Ideal Panama S.A. ("Ideal")) the exclusive right to obtain all necessary permits to enter into a concession contract with ASEP (¶ 55). On March 12, 2008, ASEP granted Ideal the concession rights to the Project, and on March 27, 2008, ASEP entered into a concession contract with Ideal for the Project (the "Ideal Concession Contract") (¶ 56). The Comptroller General ratified it on April 11, 2008 (¶ 56).

On November 11, 2010, the Supreme Court invalidated ASEP's termination of the Concession Contract with La Mina, cancelled the Ideal Concession Contract, and declared that Mr. Lisac possessed the *crédito litigioso* (right to bring action) arising from the proceedings (¶ 58).

On December 17, 2010, TGGE and Mr. Lisac signed a Memorandum of Understanding ("MOU") which set out terms for executing and operating the Project, setting up a new special purpose company, and arranging payments for Mr. Lisac (¶ 58, 110). Under the MOU, Mr. Lisac agreed to supply TGGE with all Project documentation in his possession, and TGGE agreed to a complete due diligence of the Project (¶¶ 58, 105).

Between January and August 2011, Mr. Lisac and ASEP litigated before the Supreme Court their disagreement over the Court's November 11, 2010 Judgment (¶¶ 60-61, 85).

On September 30, 2011, Mr. Lisac entered into a Partnership and Transfer Agreement ("PTA") with Ideal with the express purpose of "individually or jointly look for and obtaining [*sic*] mechanisms to enable the execution of the November 11, 2011 [*sic*] Judgment, and enable the partnership to acquire the concession rights, that is, THE PROJECT" (¶¶ 63, 85).

TGGE Panama was incorporated on October 6, 2011 (¶ 64).

On October 27, 2011, Mr. Gondola, Mr. Lisac's counsel, filed a request with ASEP for the execution of the 2010 Judgment, and informed ASEP that Mr. Lisac had assigned his rights to the Concession Contract to TGGE Panama (¶ 65). ASEP rejected his request on November 25, 2011 on the grounds that the assignment had not been approved by ASEP (¶ 66). On December 29, 2011, Mr. Lisac requested ASEP to transfer the Concession to TGGE Panama (¶ 68). ASEP rejected this request because the documentation attached to the request lacked the required evidence that TGGE Panama had the technical and financial capability to develop and operate the Project (¶ 68).

In early 2012, the Ministry of Economy and Finance and the Comptroller General commissioned a valuation experts' report for the Concession, which concluded that La Mina was not entitled to compensation for the *rescate administrativo* ("administrative

repossession") because its liabilities to the State surpassed its investments and expenses associated with the Project (¶ 69).

On May 1, 2012, the Cabinet authorized ASEP to proceed with the *rescate administrativo* of the Concession on grounds of urgent social interest as permitted under the Concession Contract (¶¶ 69-70). On May 3, 2012, ASEP declared the *rescate administrativo* of the Concession (¶ 70).

On June 8, 2012, ASEP restored the concession rights to Ideal (¶ 72), and on July 16, 2012, La Mina began commercial production of electricity (¶ 73).

On September 19, 2013, Transglobal, then represented by King & Spalding LLP, filed a Request for Arbitration against Panama (¶ 5). On October 10, 2013, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention (¶ 6).

The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention (¶ 7). Under this procedure, the Tribunal was composed of a President, Dr. Andrés Rigo Sureda, a national of Spain, appointed by agreement of the co-arbitrators; Professor Christoph H. Schreuer, a national of Austria, appointed by Claimants; and Professor Jan Paulsson, a national of France, Sweden and Bahrain, appointed by Respondent (¶ 8). On February 19, 2014, the ICSID Secretary-General notified the Parties of the constitution of the Tribunal (¶ 9).

On May 6, 2014, the Tribunal stayed the proceeding due to the Parties' failure to pay the outstanding advances since first requested by the ICSID Secretariat on February 20, 2014 (¶¶ 10-14). On November 6, 2014, the proceeding was resumed following Claimants' payment on November 5, 2014 of half of the outstanding balance of advances (¶ 15). On November 13, 2014, Respondent requested the Tribunal to order Claimants to bear the responsibility for all future advance costs payments (¶ 16).

On February 18, 2015, Respondent filed preliminary objections pursuant to ICSID Arbitration Rule 41(5) (¶ 20). On February 19, 2015, the Tribunal held a First Session in Washington, D.C., during which *inter alia* the Parties presented oral arguments on Respondent's November 13, 2014 request for the Tribunal to shift the responsibility for all future advance costs payments to Claimants (¶¶ 16, 19, 21-23).

In late February and early March 2015, the Parties exchanged submissions on Panama's Rule 41(5) Preliminary Objection (¶ 24).

On March 4, 2015, the Tribunal issued its Decision on the Respondent's Request for Shifting the Cost of the Arbitration in which it rejected Respondent's request (¶¶ 25, 127). On March 17, 2015, the Tribunal issued its Decision on the Admissibility of Respondent's Preliminary Objection to the Jurisdiction of the Tribunal under Rule 41(5) of the Arbitration Rules (¶ 26). The Tribunal rejected the objection for being out of time, but it nonetheless accepted it as a notice of future jurisdictional objections (¶ 127). On the same day, the Tribunal issued its Procedural Order No. 1 (¶ 27).

On May 22, 2015, King & Spalding informed the Tribunal and Claimants of its withdrawal as counsel for Claimants (¶ 30).

On August 14, 2015, Claimants filed their Memorial on the Merits (¶ 35). On December 18, 2015, Respondent filed its Memorial on Jurisdiction as well as a Request for Bifurcation and a Request for Provisional Measures related to Security for Costs (¶ 36). On January 13, 2016, Claimants filed their response to Respondent's two requests (¶ 38). On January 21, 2016, the Tribunal issued Procedural Order No. 2 concerning Respondent's Request for Bifurcation, in which it decided to determine Respondent's jurisdictional objections as a preliminary question and to suspend the proceedings on the merits (¶ 39). On the same day, the Tribunal issued a Decision on Respondent's Request for Provisional Measures Relating to Security for Costs (¶ 40). Finding "doubtful need and urgency" of the measure, particularly in light of the Tribunal's decision to bifurcate the proceedings, the Tribunal rejected the Request (¶ 40).

On March 16, 2016, Claimants requested the suspension of the proceeding (¶ 41). On March 25, 2016, the Tribunal issued Procedural Order No. 3 concerning Claimants' Suspension Request (¶ 45). On April 4, 2016, the Parties' agreed with the Tribunal's March 25, 2015 invitation to limit the proceeding on jurisdiction to a written phase (¶¶ 45-46).

On May 2, 2016, Claimants filed a Statement of Costs, and on May 3, 2016, Respondent filed a Submission on Costs (¶ 47). On June 2, 2016, the Tribunal declared the proceeding closed in accordance with Arbitration Rule 38(1) (¶ 49).

2. Respondent's Jurisdictional Objections

2.1. Respondent's Position

Panama argued that the Tribunal lacked jurisdiction on five grounds: (a) there was no investment under the BIT or the ICSID Convention; (b) Claimants manipulated the international investment treaty system in an attempt to internationalize a preexisting domestic dispute; (c) Claimants waived their right to bring a dispute at ICSID; (d) there was no merit to the claim which was based on the Most-Favored-Nation Clause; and (e) TGGE Panama was a domestically-controlled entity (¶ 75).

2.1.1 Absence of an Investment

Panama argued that all of Transglobal's activities, which it characterized as contacts with ASEP and negotiations with Ideal, were pre-investment activities that did not meet the definition of investment under the ICSID Convention or the jurisdictional requirements of the BIT (¶¶ 76, 84). The MOU and PTA memorialized TGGE's agreement to make future payments should it acquire rights to the Concession, commitments that constituted planned—and not actual—investments which failed to satisfy the criterion of an effective contribution to the host country's economy as required by the ICSID Convention (¶¶ 76, 84).

According to Panama, Claimants furthermore did not own or control the rights to the Concession at the time of the relevant State conduct because, under the PTA and domestic law, Mr. Lisac did not have the right or authority to unilaterally transfer them to TGGE without the approval of ASEP (¶ 77-79).

2.1.2 Abuse of the International Investment Treaty System

Panama contended that Claimants wrongfully attempted to create artificial international jurisdiction over a pre-existing domestic dispute between Mr. Lisac, on the one hand, and ASEP and Panama, on the other hand (¶ 85). The dispute concerned the refusal by ASEP and

Panama to execute the Supreme Court's November 11, 2010 Judgment. Panama argued that Mr. Lisac's introduction of TGGE, a foreign investor, into the Project while it was the subject of a domestic dispute—for the express purpose of resolving the dispute—constituted an abuse of process on the part of Claimants (¶ 85).

2.1.3 Waiver of the Right to Bring a Dispute at ICSID

Panama next argued that Claimants were precluded from pursuing their claims before ICSID by: (i) Article VII(3)(a) of the BIT, the fork-in-the-road clause; and (ii) Article 26 of the ICSID Convention, which provides that consent to ICSID arbitration is exclusive to any other remedy (¶¶ 86, 88). Resolution of the domestic proceedings required a ruling (¶ 88). As Claimants had already sought recourse for their claims in various domestic fora on the same fundamental basis as the claims brought before ICSID, i.e., challenging the legality of the *Rescate Administrativo* of the Concession and Panama's refusal to enforce the Supreme Court's Judgment, Claimants were not permitted to consent to ICSID arbitration (¶¶ 87, 88).

On the question of which test the Tribunal should apply to determine whether the fork-in-the-road clause had been breached, Panama argued that the Tribunal should employ the "fundamental basis" test applied in *Pantechniki v. Albania* and *H&H Enterprises v. Egypt*, rather than the triple-identity test (i.e., same parties, same facts and same cause of action), because no tribunal had ever used the latter test to find that a fork-in-the-road clause had been triggered (¶ 88). Using the triple-identity test, therefore, would deprive the fork-in-the-road clause of practical effect in violation of Article 31 of the Vienna Convention (¶ 88).

2.1.4 The Claim Based on the MFN Clause is Without Legal Merit

Panama argued that Claimants' MFN clause claim should be dismissed *in limine* because they did not even allege facts that could form the basis of a claim (¶ 89). Transglobal failed to show that they were in a "like situation" with Ideal, that Panama treated Ideal more favorably than Transglobal, and that Panama's treatment of Claimants was unrelated to a legitimate State interest (¶ 89).

2.1.5 TGGE Panama is Domestically Controlled

Panama contended that all available evidence indicated that Mr. Lisac, a Panamanian national, owned and controlled TGGE Panama because he controlled nearly 90% of the company's voting rights (¶¶ 90, 93). According to Panama, TGGE's minority stake did not meet the foreign control test under Article 25(2)(b) of the ICSID Convention (¶ 92), and therefore the Tribunal lacked jurisdiction over TGGE Panama's claims (¶¶ 90, 93). Panama also pointed out that the PTA obligated Mr. Lisac to use the power which TGGE Panama had granted to him to pursue all administrative formalities in order to obtain assignment of the Project concession to TGGE Panama and the means to implement it (¶ 93).

2.2. Claimants' Position

Claimants did not submit a Counter-Memorial on Jurisdiction; thus their arguments on jurisdictional objections came from their Memorial on the Merits which responded only to Panama's Preliminary Objections under Arbitration Rule 41(5) (¶ 94).

2.2.1 Presence of an Investment

According to Claimants, TGGE made an investment in Panama by signing the investment contract with Mr. Lisac, thereby creating TGGE Panama and obligating TGGE: (i) to reimburse Mr. Lisac for the funds he had previously invested in the Project; and (ii) to compensate him for his efforts to secure the Concession (¶ 95). Transglobal also argued that TGGE Panama made an investment by contracting with Mr. Lisac to acquire the Concession rights, regardless of whether ASEP recognized and approved the assignment to TGGE (¶ 96). Claimants further maintained that Mr. Lisac only needed to inform ASEP about the assignment rather than seek its prior approval (¶ 96).

2.2.2 ICSID Arbitration as Exclusive Remedy

Claimants asserted that, in accordance with the BIT's fork-in-the-road clause (Article VII(3)(a)), TGGE and TGGE Panama had submitted their dispute over the Concession only to ICSID and not to local courts (¶ 99).

2.2.3 TGGE Panama is Foreign Controlled

Claimants argued that for purposes of the ICSID Convention and the BIT, TGGE Panama was under foreign control (¶ 98). Citing the Decision on Respondent's Objections to Jurisdiction in *Aguas del Tunari S.A. v. Bolivia*, Claimants argued that ICSID tribunals have treated the "foreign control" requirement under Article 25(2)(b) of the ICSID Convention with flexibility (¶ 97). According to Transglobal, since "foreign control" was not defined in the ICSID Convention or the BIT, the concept should be interpreted in light of Panamanian law, specifically Executive Decree No. 22 of June 19, 1998 and Article 50 of Panama's Company Act (¶ 97). Transglobal submitted that this body of law supported its argument that TGGE Panama was majority owned and controlled by TGGE because: (i) TGGE held more than 50% of TGGE Panama's shares; and (ii) TGGE appointed a majority of the members of TGGE Panama's board, which gave it control and management of the affairs of TGGE Panama (¶¶ 97, 98).

2.3 Tribunal's Analysis

The Tribunal elected to first consider Panama's objection to jurisdiction based on its allegation that Claimants abused the international investment treaty system by attempting to create artificial international jurisdiction over a pre-existing domestic dispute (¶ 100). The Tribunal cited the *Pac Rim v. El Salvador* Decision on Jurisdiction for the proposition that abuse of process is a threshold issue that would bar the exercise of the Tribunal's jurisdiction even if jurisdiction existed (¶ 100). The Tribunal noted that Claimants ignored the issue of abuse of process altogether and instead sought repeatedly to suspend the proceedings (¶ 101).

Citing four different ICSID cases in support of its approach to determining the objection to jurisdiction based on abuse of the investment treaty system—namely the *Phoenix Action v. Czech Republic* Award, the *Venezuela Holdings v. Venezuela* Decision on Jurisdiction, the *Renée Rose Levy v. Peru* Award, and the *Tidewater v. Venezuela* Decision on Jurisdiction—the Tribunal decided to consider: (i) the timing of the alleged investment; (ii) the terms of the transaction; and (iii) relevant incidents transpiring during the course of the proceeding (¶¶ 102, 103).

The Tribunal noted that Mr. Lisac and TGGE signed the MOU on December 17, 2010, just over one month after the Supreme Court's Judgment restored the Concession to Mr. Lisac (¶ 105). It also noted Mr. Lisac's August 2011 warning to ASEP that if the transfer of the Concession from Ideal did not succeed, Mr. Lisac and TGGE would pursue an enforcement action against ASEP in order to execute the Supreme Court's Judgment (¶ 107). The Tribunal then highlighted how the PTA signed between Mr. Lisac and TGGE on September 30, 2011 "was a distinctive change from the terms of the MOU" which "reflected a new reality": (i) it mentioned ASEP's failure to comply with the Supreme Court's Judgment; (ii) it explained TGGE's collaboration through TGGE Panama in the "*perfeccionamiento*" of the compliance with the Judgment; and (3) it confirmed that the purpose of the PTA was for TGGE and Mr. Lisac to establish TGGE Panama in order to obtain execution of the Judgment (¶¶ 108- 110).

The Tribunal found that TGGE Panama's voting arrangements and the PTA's granting Mr. Lisac with exclusive authority to carry out acts agreed by the shareholders evidenced Mr. Lisac's intent to exercise *de facto* control of TGGE Panama and to benefit from TGGE's foreign nationality upon recourse to ICSID arbitration (¶ 111). Likewise, the Tribunal found that the favorability towards Mr. Lisac of the PTA's provisions on compensation and on distributing proceeds of a sale of the Project demonstrated that Mr. Lisac's role in TGGE was disproportionate to his minority shareholding in the company (¶ 112).

Turning to parallel procedural developments, the Tribunal concluded that Claimants' multiple requests to suspend the ICSID proceedings revealed the "intimate relationship" between the ongoing domestic proceedings and the present arbitration, and moreover confirmed Mr. Lisac's intent to "internationalize" his domestic dispute with Panama (¶ 113).

The Tribunal concluded that the timing of Mr. Lisac's insertion of TGGE and TGGE Panama into his own efforts to seek execution of the Supreme Court's Judgment was "telling": soon after it became clear to Mr. Lisac that implementation of the Judgment was not forthcoming, he sought Claimants' help to secure international remedies (¶¶ 116, 117). The Tribunal therefore decided to uphold Panama's objection to its jurisdiction on the basis of Claimants' abuse of the investment treaty system by attempting to create artificial international jurisdiction over a pre-existing domestic dispute (¶ 118). Having satisfied this threshold jurisdictional bar, the Tribunal held that it did not need to consider the remaining jurisdictional objections (¶ 119).

3. Costs

3.1 Positions of the Parties

Respondent filed a statement of fees and expenses along with a detailed submission in support of its request for a full award of costs and fees, while Claimants only provided a statement of fees and expenses (¶ 120). Panama argued that an award of full costs was particularly appropriate in abuse of process cases (¶ 121). Respondent complained that Claimants' conducting of the arbitration unnecessarily complicated Panama's analysis of the claims, including by failing to provide translations of key documents, submitting documentary evidence containing discrepancies, and filing multiple suspension requests that it knew Respondent would oppose (¶ 121). Respondent also reiterated its request that the Tribunal order that any of the case's remaining administrative account funds be transferred to Panama as partial credit against a cost award in its favor (¶ 123).

3.2 Tribunal's Analysis

The Tribunal observed that under Article 61(2) of the ICSID Convention it had discretion to allocate costs between the Parties (¶ 124). The Tribunal concluded that the default rule in abuse of process cases called for Claimants to bear both the costs of the proceeding and Respondent's reasonable attorneys' fees and expenses (¶ 126). Following the tribunal's approach in *Renée Rose Levy v. Peru*, the Tribunal assessed the proportionality of fees and expenses claimed by both Parties (¶ 126). The Tribunal agreed with Respondent's arguments on costs, finding that: (i) the "fits and starts" of Claimants' pleadings likely increased Respondent's legal costs; and (ii) Claimants' repeated unilateral requests for suspension of the proceeding evidenced a "cavalier attitude" in the face of its knowledge that Respondent would oppose them (¶ 126).

The Tribunal concluded that Claimants should pay the attorneys' fees and expenses of Respondent except for those claimed by Respondent for its three preliminary requests that were rejected by the Tribunal (totaling USD 183,822.35) (¶ 127). In light of its finding of Claimants' abuse of process, the Tribunal further awarded Respondent interest to be compounded annually at LIBOR plus two percentage points per year (¶ 127).

The Tribunal rejected Respondent's request that the Tribunal order that the remaining funds in the administrative account for the arbitration be paid to Respondent (¶ 128). The Tribunal concluded that it had no authority to issue such an order—whether under the ICSID Convention, Arbitration Rules or Administrative and Financial Regulations—and that the ICSID Secretariat would have no basis for implementing it (¶¶ 128, 129).

4. Decision

The Tribunal decided: (i) to uphold Respondent's objection of abuse of process, without needing to consider the other objections to its jurisdiction; (ii) to award Respondent the costs of the arbitration, and legal fees and expenses of Respondent in the amount of USD 2,209,532.70; (iii) that Claimants must pay post-award interest on the amount awarded to Respondent at the rate of LIBOR plus two percentage points, compounded annually, calculated from the date of the Award until full payment; (iv) to reject Respondent's request for an award of any funds remaining in the administrative account for the case; and (v) to dismiss all other requests for relief. (¶ 130).