

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE PROCEEDINGS BETWEEN

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

v.

Republic of Panama

(ICSID Case No. ARB/13/28)

**DECISION ON RESPONDENT'S REQUEST FOR SHIFTING THE COSTS OF THE
ARBITRATION**

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: March 4, 2015

I. Procedural History

1. On September 19, 2013, the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) received a Request for Arbitration of the same date from Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. (“Transglobal” or “Claimants”) against the Republic of Panama (“Respondent” or “Panama”) (the “RFA”).
2. On October 10, 2013, the Secretary-General of ICSID registered the RFA, in accordance with Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”) and so notified the Parties. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute the Tribunal as soon as possible in accordance with Articles 37 to 40 of the ICSID Convention.
3. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention and that the Tribunal would consist of three arbitrators, one appointed by each party, and the third arbitrator and President of the Tribunal to be appointed by agreement of the two co-arbitrators.
4. The Tribunal is composed of Dr. Andrés Rigo Sureda, a national of Spain, President, 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.
5. On February 19, 2014, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“Arbitration Rules”) notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Mercedes Cordido-Freytes de Kurowski, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

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6. On February 20, 2014, the ICSID Secretariat requested an initial advance payment from the Parties of US\$400,000 (US\$200,000 each party). The Parties were informed that each party should make its payment within 30 days, and in any event at least ten (10) business days before the First Session of the Tribunal is held.
7. By letter of March 28, 2014, on instructions of the President of the Tribunal, the Parties were informed that if the Parties' advance payments (or at least the share of one of them) were not received by the Centre by April 3, 2014, the First Session scheduled to be held on April 23, 2014, would be canceled. It was also noted that in accordance with ICSID Administrative and Financial Regulation ("AFR") 14(3)(d), if the Parties' advance payments were not received in full by April 3, 2014, the Secretary-General would inform both Parties of the default and give an opportunity to either of them to make the required payment. The Parties were further reminded that at any time 15 days after such information was sent by the Secretary-General, she might move that the Tribunal stay the proceeding, if by that the date of such motion any part of the required payment was still outstanding. Further, if the proceeding was stayed for non-payment for a consecutive period in excess of six months, the Secretary-General might, after notice to and as far as possible in consultation with the parties, move that the Tribunal discontinue the proceeding.
8. By letter of April 2, 2014, Counsel for Claimants informed the Tribunal that its clients were in the process of making arrangements to pay their portion of the advance on cost and that payment would be made as soon as possible and no later than April 13, 2014. It also requested the Tribunal not to cancel the First Session scheduled for April 23, 2014.
9. By letter of April 3, 2014, Respondent requested the Tribunal to postpone the First Session; to suspend the proceedings until Claimants made their first advance payment; and reserved the right to seek security for costs, cost shifting of deposits and any other relief as appropriate. Claimants responded by letter of the same date, reiterating their intent to make their payment as soon as possible and no later than April 13, 2014, and once again requested the Tribunal not to cancel the First Session.

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10. By letter of April 4, 2014, the Tribunal informed the Parties that in accordance with its directions of March 28, 2014, the First Session had been canceled. The Tribunal further noted that as soon as the Parties paid their advances, the Tribunal would propose the earliest possible dates for which the three Members were available for the First Session.
11. By letter of April 14, 2014, the Secretary of the Tribunal, noting that to that date neither party's share of the advance payment had been received by the Centre, informed the Parties of the default, and in accordance with ICSID AFR 14(3)(d), invited either party to pay the outstanding amount of US\$400,000 within 15 days (i.e., by April 29, 2014).
12. By letter of May 5, 2014, the Secretary of the Tribunal informed the Parties that, since the outstanding advance payments had not been received, the Secretary-General was moving the Tribunal to stay the proceeding for lack of payment. As a result, by letter of May 6, 2014, the Tribunal stayed the proceeding for lack of payment pursuant to ICSID AFR 14(3)(d).
13. On November 6, 2014, the Secretary of the Tribunal informed the Parties that Claimants' payment of US\$200,000 had been received on November 5, 2014.
14. By letter of the same date, the Tribunal took note of Claimants' payment, and informed the Parties that the proceeding was resumed. Respondent was invited to inform the Tribunal by November 13, 2013 of the steps taken to make its share of the advance payment, and to indicate the estimated date on which the Secretariat would receive such payment. The Parties were further invited to confirm by November 20, 2014, whether their Joint Report on the First Session Agenda items, submitted by Claimants on April 1, 2014, still reflected their agreement.
15. By letter of November 13, 2014, Respondent ratified its concern that Claimants might not possess "the financial wherewithal to commence the arbitration and continue to its conclusion – much less to satisfy any eventual award of costs against them", requested the Tribunal to issue an order shifting the responsibility for all future advance costs payments

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to Claimants, after giving both Parties the opportunity to present argument on this issue in writing and orally at the First Session. Respondent further indicated that it would “refrain from making payment of its half of the advance deposit until the Tribunal has heard the Parties and had an opportunity to rule.

16. On November 14, 2014, the Tribunal invited Claimants to comment on Respondent's letter of November 13, 2014, by November 18, 2014. This deadline was extended, at Claimants' request, until November 25, 2014.
17. By letter of November 25, 2014, Claimants objected to Respondent's request that Claimants be forced to fund the entire arbitration, arguing that such request was “part of an overall strategy designed to make this arbitration as expensive as possible and thereby frustrate Claimants' access to justice.” Claimants further requested that the Tribunal order Respondent to pay its portion of the outstanding advance.
18. By letter of November 26, 2014, Respondent responded to Claimants' letter of November 25, 2014, and reiterated its request for the Tribunal to issue and order shifting the responsibility for all advance costs payments to Claimants, without prejudice to a final decision of the Tribunal as to the allocation of costs. Respondent further confirmed that it would continue refraining from paying its outstanding share of the requested advance until the Tribunal has ruled on this issue.
19. By letter of November 27, 2014, the Secretary of the Tribunal confirmed that Respondent's share of the first advance payment request had not been received; informed the Parties of the default; and invited either of them to pay the outstanding amount of US\$200,000 within 15 days (i.e., by December 12, 2014).
20. By letter of the same date, the Tribunal acknowledged receipt of the Parties' recent correspondence concerning Respondent's intention to request the Tribunal to shift the responsibility for all future advance costs to Claimants (Respondent's letters of November 13 and 26, 2014, and Claimants' letter of November 25, 2014), fixed a procedural calendar

for the Parties' written submissions; and informed the Parties that they would further be given the opportunity for oral arguments on this matter during the First Session, if they so wished. On December 4, 2014, the Tribunal approved a revised schedule for the Parties' written submissions, as agreed by the Parties.

21. In accordance with the agreed schedule, on December 11, 2014, Respondent filed a written submission reaffirming its request for the Tribunal to shift the responsibility for all future advance costs payments to Claimants, without prejudice to a final decision of the Tribunal as to the allocation of costs; and on December 18, 2014, Claimants filed their written submission in response, requesting the Tribunal to reject Respondent's cost-shifting request and to order Respondent to pay its portion of the initial advance on costs.
22. Late on February 18, 2015, Respondent filed preliminary objections pursuant to ICSID Arbitration Rule 41(5).
23. On February 19, 2015, the Tribunal held a First Session, with the President participating in-person with the Parties at the seat of the Centre in Washington, D.C., and Professor Christoph Schreuer and Professor Jan Paulsson participating by video conference.
24. During the First Session, as previously agreed, the Tribunal heard oral arguments from each of the Parties on the cost-shifting request.

II. Summary of the Parties' Positions

A. Respondent

25. Respondent has requested that Claimants be ordered to pay the entirety of the interim advances on account of ICSID administrative fees and expenses and the fees and expenses of the arbitrators (the "Request")¹. In support of the Request, Respondent has argued (a) that in case of default of a party in paying its share of an advance request ICSID AFR 14(3)(d) includes a mandatory cost shifting mechanism; (b) that the standard applicable is

¹ Respondent's letters of November 13 and November 26, 2014.

one of "good cause" to be distinguished from the more stringent standard of "exceptional circumstances" applicable to requests for provisional measures; and (c) that Claimants abused the process by their prolonged failure to pay their portion of the advance requested by the Centre.²

26. According to Respondent the following are compelling reasons to order the shift of costs of this proceeding: (a) Claimants have been unwilling or financially unable to comply with advance payment requests on four occasions and only succeeded in paying their portion of the advance; (b) Claimants have made no effort to show their financial wherewithal and have provided documents to Panama confirming their precarious financial position; and (c) Claimants have conceded their lack of resources to prosecute this arbitration by seeking third party funds. Respondent recalls that for the same reasons the *RSM* tribunal shifted payment of advances to claimant.³
27. Respondent explains that, although it is not requesting that Claimants post security for costs, its request meets the standard applied to requests for security for costs. Indeed, the *RSM* tribunal also found the exceptional circumstances listed in the previous paragraph sufficient to grant security for costs.
28. Respondent questions the legal merit of the claim because the dispute is a domestic dispute that ICSID cannot and was never meant to address, and because Claimants do not have an investment under the ICSID Convention. Therefore, Claimants have a low likelihood of success.
29. Respondent requests as relief that "the Tribunal, pursuant to its authority under Rule 28 and Administrative and Financial regulation 14(3)(d), issue an order shifting the responsibility for all advance costs payments to Claimants, without prejudice to a final decision of the Tribunal as to the allocation of costs."⁴

² Respondent's letter of December 11, 2014, pages 4-7.

³ *Id.*

⁴ *Id.* page 12.

B. Claimants

30. Claimants argue that "shifting costs under Rule 28 and Financial Regulation 13(3)(d) for 'good cause' is a more flexible standard, but it is not necessarily less stringent. What constitutes 'good cause' depends on the context. The standard is more flexible because there are other circumstances when cost shifting might be warranted, [...]."⁵ It does not follow that different standards would apply to a request for shifting costs or a request for security for costs when the alleged justifications are the same. According to Claimants, granting one or the other creates tension with two fundamental principles of arbitration: treating the parties equally and fostering access to justice. Therefore, "whether considered under a 'good cause' standard or a 'provisional measures' standard, the requested order should only be granted in exceptional circumstances."⁶
31. Claimants dispute that their case can be compared to claims pursued by RSM. Claimants argue that Transglobal's history is nothing like RSM's; Transglobal has never had an ICSID proceeding discontinued, failed to pay an ICSID costs award or acquired the notorious reputation of RSM. Claimants recall that "[e]very payment deadline that ICSID imposed on Transglobal applied equally to Panama and yet Panama also failed to pay."⁷ Claimants explain that "RSM was exceptional because of three unique findings: a) a history of failing to pay final adverse cost awards in prior ICSID arbitration proceedings and in prior U.S. litigation proceedings, b) an 'admitted lack of financial capacity', and c) an admitted, but undisclosed, third-party funder."⁸
32. Claimants distance themselves from RSM by recounting the alternatives that they have pursued to address Panama's concern and have discussed with Panama but to no avail. Claimants point out that, in the *RSM* case and in contrast to Respondent's conduct in this proceeding, Grenada paid ICSID when RSM failed to pay its advance payments.

⁵ Claimants' Letter of December 18, 2014, page 1.

⁶ *Id.* page 2.

⁷ *Id.* page 3.

⁸ *Id.* page 3.

33. Claimants deny that Transglobal has admitted that it lacks the financial capacity to prosecute this arbitration and they confirm that currently Transglobal has no financing from third parties.⁹ Claimants express the concern that the overall strategy of Respondent is to make this proceeding as expensive as possible and thus frustrate Claimants' access to justice. In this respect, Claimants recall that their financial difficulties are the Respondent's measures alleged in this arbitration in breach of the investment treaty.
34. Claimants contend that the jurisdictional arguments advanced by Respondent mischaracterize Claimant's case. Claimants point out the inconsistency in Respondent's argument: it first states that a request such as Respondent's should not prejudice the merits and then argues that "this Tribunal should grant its current request on the grounds that Transglobal's claims 'manifestly lack merit'."¹⁰
35. As relief, Claimants request that "the Tribunal reject Panama's current cost-shifting request and order it to pay its portion of the initial advance on costs."¹¹

III. Analysis of the Tribunal

36. The competence of the Tribunal to vary the portion of the advance payments for the arbitration costs for which each party is responsible under ICSID Arbitration Rule 28 and AFR 14(3)(d) is undisputed by the parties. The matters in dispute concern the meaning of AFR 14(3)(d), the standard applicable to a request for shifting of costs and the circumstances alleged by Respondent to justify such request.

⁹ During the First Session Claimants disclosed that they might have third party financing in the future.

¹⁰ Id. page 5.

¹¹ Id. page 6.

A. AFR 14(3)(d)

37. The starting point for the analysis of the Tribunal is AFR 14(3)(d), which is reproduced here in relevant part for ease of reference:

"(d) in connection with every conciliation proceeding, and in connection with every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to to Article 61(2) of the Convention [...] If the amounts requested are not paid in full within 30 days, then the Secretary-General shall inform both parties of the default and give an opportunity to either of them to make the required payment [...]"

38. Respondent has argued that AFR 14(3)(d) includes a mandatory cost-shifting mechanism in the case of default of a party to pay its half share of an advance payment. The Tribunal disagrees with this reading of AFR 14(3)(d). AFR 14(3)(d) requires each party to pay half of each advance. The terms of the regulation are mandatory: "each party *shall* pay one half of each advance". In contrast, when one of the parties defaults, the Secretary-General shall give an opportunity to either of them to make the payment. Here the provision is couched as an opportunity not as a mandate. The opportunity is given to both parties. There is no mandatory cost shifting mechanism from one party to another in AFR 14(3)(d).

B. The Applicable Standard

39. The parties have argued about the standard to apply to a request for shifting costs as compared to a request for security for costs. Respondent has relied on the Decisions on Saint Lucia's Request for Provisional Measures and Saint Lucia's Request for Security for

Costs in the case of *RSM v Saint Lucia*.¹² Based on the first of these requests Respondent contends that it is sufficient to show "'good cause' to alter the presumptive allocation of advance payments"¹³, as opposed to the standard of exceptional circumstances applicable to a request for security for costs.

40. The Tribunal should first note that the evidence provided by Respondent is limited to the Decision on Saint Lucia's Request for Security for Costs, which includes a quotation of paragraphs 71-74 of the Decision on Saint Lucia's Request for Provisional Measures. On the basis of the evidence before the Tribunal, the Tribunal has difficulty in appreciating the difference in the analysis of the *RSM* tribunal between "good cause" in a request for shifting costs and "exceptional circumstances" in a request for security for costs; apparently in both instances the *RSM* tribunal based its decision on the same findings.
41. Both Parties agree that the standard applicable to the Request is more flexible than in the case of a request for security for costs. As already noted, the Tribunal has discretion under ICSID Arbitration Rule 28 to allocate provisionally between the Parties the portion to be paid of the costs of the arbitration without prejudice to the final decision of the Tribunal on the payment of the cost of the proceeding. In exercising its discretion the Tribunal shall take into account all pertinent circumstances. The Tribunal shall also bear in mind that the Tribunal is requested to alter the balance between the parties set forth in AFR 14(3)(d), and that the only instance in which such balance is altered in the Administrative and Financial Regulations is in the case of an annulment proceeding -an extraordinary remedy- where the applicant is required to advance the entirety of the costs of the proceeding.¹⁴

C. Is the Shifting of Costs to Claimants Justified?

42. The first two reasons for cost shifting adduced by Respondent are the delays in Claimants paying their share of the advance as opposed to the full advance payment and the

¹² *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10).

¹³ See para. 74 of the Decision on Request for Provisional Measures quoted in para. 76 of the Decision on the Request for Security for Costs. Exhibit RA-1 to the Request.

¹⁴ AFR 14(3)(e). This paragraph was only introduced in 1984.

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precarious financial position of Claimants. On the first point the Tribunal notes that, as opposed to the case of *RSM v. Saint Lucia*, relied on by Respondent, Claimants have no history of non-payment of costs awards, a fact undisputed by Respondent.

43. As regards the financial condition of Claimants, it is a contentious matter between the Parties whether such condition is the result of alleged measures of Respondent subject of this arbitration. It is also disputed whether Claimants have conceded to Respondent that their financial condition is precarious. At this very early stage of the proceeding it would be premature for the Tribunal to make a determination on the financial condition of Claimants and the extent to which it may or may not be the result of Respondent's measures.
44. The Respondent has brought to the Tribunal's attention that it has been faced with a cost order against an insolvent claimant in another ICSID arbitration. While this may explain Panama's reluctance to pay its portion of the advance, the Tribunal cannot consider Respondent's predicament in that arbitration as if it were attributable to conduct of the Claimants.
45. A further reason advanced by Respondent in support of its Request is funding of Claimants' arbitration costs by an unknown third party. Claimants have explained in their submission that currently they have no third party funding. At the First Session Claimants disclosed that they might have third party funding in the future. The Tribunal takes note of this eventuality.
46. Respondent has also argued that the claims are frivolous and manifestly without legal merit. It should be obvious that at this stage of the proceeding the Tribunal cannot judge the merits of Claimants' case. The Tribunal notes that, hours before the start of the First Session, Respondent filed an Objection Pursuant to ICSID Arbitration Rule 41(5). The Tribunal has invited Claimants' comments and will consider this Objection in due course after receiving them.

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47. The Tribunal has to balance the circumstances adduced by Respondent in the Request against Claimants' concerns that the shifting of costs at this very early stage may limit Claimants access to ICSID arbitration and create incentives for the defaulting party to make the proceedings unnecessarily expensive. On the whole, the Tribunal finds that the circumstances of the instant case differ substantially from the circumstances relied on by Respondent based on the decisions of the *RSM* tribunal, and do not justify to alter the balance between the parties established in AFR 14(3)(d).

DECISION

48. For the above reasons the Tribunal decides:
1. To reject Respondent's request to shift the arbitration costs to Claimants.
 2. To order Respondent to pay its portion of the advance payment in the amount of US\$200,000 requested by the Centre no later than 20 days after the date of this Decision.

[signed]

On behalf of the Tribunal
Andrés Rigo Sureda
President of the Tribunal
Date: March 4, 2015