

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)

PROCEDURAL ORDER NO. 2

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

January 21, 2016

Whereas,

1. On December 18, 2015, the Republic of Panama (“Respondent” or “Panama”) filed "Panama's Jurisdictional Objections and Memorial on Jurisdiction (the "Memorial on Jurisdiction")
2. Respondent requested that the Tribunal "Bifurcate the proceeding into a jurisdictional phase and suspend the merits of the proceeding in accordance with Rule 41(3)" (the "Bifurcation Request").
3. Respondent also requested that the Tribunal "Recommend the Provisional Measures that Panama requested in its Request for Provisional Measures Relating to Security for Costs of 18 December 2015 (the "Provisional Measures Request"), filed simultaneously with this Memorial on Jurisdiction".
4. On December 22, 2015, the Tribunal invited Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. (“Claimants”) to comment on both requests of Respondent no later than January 6, 2016.
5. 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".
6. On January 6, 2016, the Tribunal extended the time limit for Claimants to comment until January 13, 2016.
7. On January 13, 2013, Claimants opposed both requests. Claimants reject the need for bifurcation for the following reasons: (a) Claimants have already provided in "the Request for Arbitration and the Memorial on the Merits enough detailed and relevant documentation regarding the jurisdiction of the Tribunal to make a sound case against Panama"¹; and (b) the Bifurcation Request is "another way Panama is trying to lengthen this arbitration and add a tremendous amount of cost to these proceedings, which would favor Panama"².
8. The Tribunal will decide on the Provisional Measures Request separately.
9. The Tribunal notes that, in opposing the need for bifurcation, Claimants have reiterated their position on the jurisdiction of the Tribunal as set forth in their Request for Arbitration and Memorial on the Merits.

¹ TransGlobal Green Energy, LLC ("Transglobal") and TransGlobal Green Energy de Panama SA ("Transglobal Panama") *Reject the Need for Bifurcation*, para. 1.

² *Id.* para. 2.

10. The Tribunal recalls that, on February 18, 2015, Respondent raised preliminary objections under Rule 41(5) and that, on March 17, 2015, the Tribunal dismissed them as out of time in its Decision on the Admissibility of Respondent's Preliminary Objection to the Tribunal under Rule 41(5) of the ICSID Arbitration Rules. The Tribunal further decided:

"2) To deem the Objection as a provisional notification of jurisdictional objections to be supplemented with any further objections of Respondent as soon as feasible after receipt of Claimants' Memorial on the Merits and no later than the due date of the Counter-Memorial, as required by Rule 41(3).

3) To defer its decision on bifurcation until it has received the Memorial on the Merits and Respondent's jurisdictional objections are complete.

4) To issue Procedural Order No. 1 in accordance with this decision."

11. On April 9, 2015, the Tribunal issued Procedural Order No. 1 where in relevant part stated:

"The Tribunal, in principle, contemplates only one round of submissions on jurisdiction, however, upon receipt of Claimants' Counter-Memorial on Jurisdiction, the Tribunal will then decide whether a second round of pleadings is needed, and if so, shall fix the dates for their filing."

12. On August 14, 2015, Claimants filed their Memorial on the Merits. In the Memorial Claimants address generally ICSID jurisdiction requirements and the objections preliminarily raised by Respondent under Rule 41(5).

13. Under Article 41(2) of the ICSID Convention, the Tribunal shall consider any objection to the jurisdiction of the Centre or the competence of the Tribunal and "shall determine whether to deal with it as a preliminary question or join it to the merits of the dispute".

14. Arbitration Rule 41(3) provides that,

"Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits [...]"

15. According to these provisions, the Tribunal has discretion to decide the jurisdictional objections as a preliminary question and suspend the proceedings on the merits or to join the objections to the merits of the dispute.

Procedural Order No. 2

16. The choice of the Tribunal between deciding the objections to its jurisdiction as a preliminary question or as part of the merits is a matter of judicial economy and depends on how closely objections are linked to the merits of the dispute.
17. The Tribunal considers that *prima facie* the objections raised by Respondent are susceptible of decision on the basis of the submissions of the parties on the jurisdiction of the Tribunal.

For these reasons, the **Tribunal has decided:**

1. To determine the jurisdictional objections of Respondent as a preliminary question and, hence, to suspend the proceedings on the merits.
2. To fix a time limit of 60 days as of the date of this order for Claimants to file their Counter-Memorial on Jurisdiction to the extent Claimants wish to supplement their submissions on jurisdiction already in the record of the proceeding.
3. To confirm that, as provided in Procedural Order No. 1, the Tribunal will decide whether another round of submissions on jurisdiction is warranted after it has had the opportunity to review Claimants' Counter-Memorial on Jurisdiction.

On behalf of the Tribunal,

[signed]

Dr. Andrés Rigo Sureda
President of the Tribunal
Date: January 21, 2016