

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

TRANSGLOBAL GREEN ENERGY, LLC AND
TRANSGLOBAL GREEN PANAMA, S.A.
(Claimants)

-and -

REPUBLIC OF PANAMA
(Respondent)

(ICSID Case No. ARB/13/28)

AWARD

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 dispatch to the Parties: June 2, 2016

REPRESENTATION OF THE PARTIES

Representing Claimants:

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.
410 Pierce St.
Houston, TX 77002
United States of America

Representing Respondent:

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
601 Massachusetts Avenue, NW
Washington, D.C. 20001-3743

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

ASEP	<i>Ente Regulador de los Servicios Públicos</i>
BIT	Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments, signed on October 27, 1982, as amended on June 1, 2000.
Claimants' Memorial	Claimants' Memorial on the Merits, August 14, 2015.
C-	Claimants' Exhibit.
CL-	Claimants' Legal Authority.
ICSID, or the Centre	The International Centre for Settlement of Investment Disputes.
ICSID AFR	ICSID Administrative and Financial Regulations.
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965.
ICSID Rules, or Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings.
MOU	Memorandum of Understanding of December 17, 2010, between TGGE and Mr. Lisac.
PTA	Partnership and Transfer Agreement of September 30, 2011, between TGGE and Mr. Lisac.
Request or RFA	Request for Arbitration, September 19, 2013.
Respondent's Memorial	Respondent's Memorial on Jurisdiction, December 18, 2015.
R-	Respondent's Exhibit.

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RL- Respondent's Legal Authority.

TGGE Transglobal Green Energy, LLC, a company
incorporated under the laws of the State of Texas,
U.S.A., with its seat in Houston.

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments, signed on October 27, 1982, (the “BIT” or “Treaty”), as amended on June 1, 2000¹, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the “ICSID Convention”). The dispute relates to a hydro-electric power generation concession in Panama named “Bajo de Mina”.
2. 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 Panama, with its seat in Panama City (“TGGE Panama”).
3. Respondent is the Republic of Panama and is hereinafter referred to as “Panama” or the “Respondent.”
4. Claimants and the Respondent are hereinafter collectively referred to as the “Parties.” The Parties’ respective representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

5. On September 19, 2013, ICSID received a request for arbitration from Transglobal Green Energy, LLC and Transglobal Green Panama, S.A., then represented by King & Spalding LLP, against the Republic of Panama (the “Request” or “RFA”).

¹ Request for Arbitration, Exhibit C-18, Protocol between the Government of the United States of America and the Government of the Republic of Panama amending the treaty concerning the treatment and protection of investments of October 27, 1982, signed on June 1, 2000. As explained in the Letter of Transmittal from President Clinton to the Senate of September 12, 2000 (included in Exhibit C-18), the Protocol was needed to ensure that investors had access to ICSID arbitration following Panama’s 1996 accession to the ICSID Convention.

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6. On October 10, 2013, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
7. 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.
8. 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.
9. 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.
10. On February 20, 2014, the ICSID Secretariat requested an initial advance payment from the Parties of US\$400,000 (US\$200,000 each party).
11. 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.
12. By letter of April 4, 2014, the Tribunal noted that the Parties' outstanding advances had not been received by the Centre by the deadline of April 3, 2014, informed the Parties that in accordance with its directions of March 28, 2014, the First Session had been cancelled. The

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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.

13. By letter of April 14, 2014, the Secretary of the Tribunal noted 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 Regulation 14(3)(d) of ICSID Administrative and Financial Regulations ("ICSID AFR"), invited either party to pay the outstanding amount of US\$400,000 within 15 days (*i.e.*, by April 29, 2014).
14. 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).
15. 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, and the proceeding was resumed.
16. By letter of November 13, 2014, Respondent expressed 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" and requested the Tribunal to issue an order shifting the responsibility for all future advance costs payments 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".
17. By letter of November 25, 2014, Claimants objected to Respondent's request of November 13, 2014, and on November 26, 2014, Respondent responded to Claimants' letter of November 25, 2014, reiterating its request for the Tribunal to issue an order shifting the

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responsibility for all advance costs payments to Claimants, without prejudice to a final decision of the Tribunal as to the allocation of costs.

18. 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).
19. 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 (the "Cost-Shifting Request"); 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.
20. Late on February 18, 2015, Respondent filed preliminary objections pursuant to ICSID Arbitration Rule 41(5) ("Panama's Rule 41(5) Preliminary Objection").
21. 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. Present at the First Session was the Secretary of the Tribunal. In representation of the Parties were:

Attending on behalf of Claimants

Mr. David Weiss, King & Spalding LLP
Mr. Enrique Reyes, Transglobal Green Energy, LLC
Mr. Jeffrey Carlitz, Transglobal Green Energy, LLC

Attending on behalf of Respondent

Mr. Whitney Debevoise, Arnold & Porter LLP
Ms. Gaela K. Gehring Flores, Arnold & Porter LLP
Mr. Pedro Soto, Arnold & Porter LLP

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Ms. Natalia Giraldo-Carrillo, Arnold & Porter LLP

Ms. Laura Castro, Legal Director, Embassy of the Republic of Panama

Observing via video conference on behalf of Claimants

Mr. Roberto Aguirre Luzi, King & Spalding LLP

Mr. Don Stringham, CFO Transglobal Green Energy, LLC

Observing via video conference on behalf of Respondent

Ms. Betzy Castro, Jefa de Gabinete, Viceministerio de Economía, Ministerio de Economía y Finanzas

Mr. Roberto Meana, Director Ejecutivo, Autoridad de los Servicios Públicos

Ms. Noemi Tile, Directora Asesoría Legal, Autoridad de los Servicios Públicos

Mr. Victor Urrutia, Secretario Nacional de Energía

Mr. Aristides Valdonedo, Gerente de Metas, Ministerio de Economía y Finanzas

Ms. Mariel Núñez, Gerencia de Metas, Ministerio de Economía y Finanzas

22. During the First Session the Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural languages would be English, and that the place of the proceeding would be Washington, D.C. After considering the Parties' respective proposals on the number and sequence of pleadings, the Tribunal fixed a procedural calendar for the Parties' subsequent submissions. The Parties' agreement and the Tribunal's decisions were recorded in the Tribunal's Procedural Order No. 1 of March 17, 2015.
23. During the First Session, the Tribunal also heard oral arguments from each of the Parties on the Respondent's Cost-Shifting Request.
24. After the Parties' exchanged preliminary comments on the timing of Panama's Rule 41(5) Preliminary Objection, the Tribunal invited Claimants' observations on Panama's Rule 41(5) Preliminary Objection on February 20, 2015 Claimants submitted them on February

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24, 2015. At the invitation of the Tribunal, Respondent commented on those observations on February 27, 2015. The Tribunal authorized another round of submissions from Claimants and Respondent; they materialized on March 4, 2015 and March 9, 2015, respectively.

25. On March 4, 2015, the Tribunal issued its *Decision on the Respondent's Request for Shifting the Cost of the Arbitration*. In its Decision, the Tribunal first noted that 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) was undisputed by the Parties. The Tribunal then addressed the matters in dispute before the Tribunal: (i) the meaning of ICSID AFR 14(3)(d); (ii) the standard applicable to a request for shifting of costs; and (iii) the circumstances alleged by Respondent to justify such a request. As to the latter, the Tribunal observed that it had to balance the circumstances adduced by Respondent in its Cost-Shifting 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. The Tribunal found that the circumstances of the instant case differed substantially from those that faced the *RSM* tribunal², and did not justify an alteration of the balance struck between the Parties in AFR 14(3)(d). As a result, the Tribunal decided (i) to reject Respondent's request that the arbitration costs be shifted to Claimants; and (ii) 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 that Decision.
26. 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* (the "Tribunal's Rule 41(5) Decision"). The Tribunal addressed the three main issues arising from the Parties' arguments: (i) the meaning of the temporal conditions of Rule 41(5) and whether the Preliminary Objection complies with them; (ii) if this was not the case, whether the Tribunal should use its discretion under Rule 41(2) to consider the

² *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Security for Costs, August 13, 2014 (RL-001).

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Preliminary Objection at its own initiative; and (iii) if the Tribunal decided both of these issues in the negative, whether it should then strike the Preliminary Objection from the record or deem it to be a notification of jurisdictional objections and a request for bifurcation. The Tribunal decided: (i) that the two temporal conditions set forth in Rule 41(5), namely, that a preliminary objection needs to be filed within thirty days from the constitution of the Tribunal *and* before the First Session of the Tribunal, are cumulative and the Preliminary Objection did not meet the 30-day limit from the constitution of the Tribunal established under Rule 41(5); (ii) to deem the Preliminary Objection as a provisional notification of jurisdictional objections to be supplemented by Respondent with any further objections 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(1); (iii) to defer its decision on bifurcation until receipt of the Memorial on the Merits and Respondent's jurisdictional objections; and (iv) to issue Procedural Order No. 1 in accordance with this decision.

27. On March 17, 2015, the Tribunal issued its Procedural Order No. 1.
28. By letter of March 25, 2015, the Secretary of the Tribunal acknowledged receipt of a wire transfer from Respondent in the amount of US\$ 200,000, as payment of its share of the first advance originally requested in the Secretariat letter to the Parties of February 20, 2014.
29. By letter of May 11, 2015, Claimants asked the Tribunal to suspend this arbitration or, in the alternative, to grant Claimants an extension to file their Memorial on the Merits of at least 60 days beyond its deadline (120 days from the date of the Tribunal's Rule 41(5) Decision). At the invitation of the Tribunal to respond, Respondent opposed the request on May 15, 2015. By letter of May 18, 2015, the Tribunal, after considering the Parties' positions, and the ICSID Arbitration Rules, decided to deny Claimants' suspension request because Respondent opposed it and none of the instances that would permit the suspension of the proceeding under the ICSID Arbitration Rules apply to the current situation. The Tribunal, also denied Claimants' request for an extension of the time limit to submit their Memorial on the Merits, since the deadline was two months away.

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30. By letter of May 22, 2015, Mr. Roberto Aguirre Luzi of the law firm of King & Spalding advised the Tribunal and Claimants of King & Spalding's withdrawal as counsel for Claimants in this case, and that any future correspondence should be forwarded to TGGE's Managing Partner, Mr. Jeffery Carlitz.
31. By letter of June 1, 2015, Mr. Carlitz, on behalf of Claimants, after referring to King & Spalding's letter of May 22, 2015, informed the Tribunal that they were seeking new counsel to represent them. By letter of June 1, 2015, Respondent commented on this development.
32. By communication of June 3, 2015, the Tribunal informed the Parties (i) that it had taken note of Claimants' communication of June 1, 2015 regarding counsel; (ii) that the procedural timetable remained unaltered; and (iii) that, as a consequence, Claimants' Memorial on the Merits was due on July 15, 2015.
33. By letter of July 1, 2015, Claimants requested a 30-day extension of the deadline for the filing of their Memorial on the Merits. This was followed by observations from Respondent of July 7, 2015, and a response from Claimants of July 8, 2015.
34. By letter of July 8, 2015, the Tribunal (i) granted the extension requested by Claimants for filing their Memorial on the Merits by August 14, 2015; (ii) adjusted the deadline for Respondent's Counter-Memorial on the Merits, which at Respondent's request would then be due by December 18, 2015; and (iii) invited Claimants to confirm their counsel and to provide their contact details to opposing counsel by July 10, 2015.
35. On August 14, 2015, Claimants filed their Memorial on the Merits.
36. On December 18, 2015, Respondent filed the Memorial on Jurisdiction, a Request for Bifurcation, and a Request for Provisional Measures related to Security for Costs. Given the holiday period, the Tribunal invited Claimants' comments by January 6, 2016.
37. By letter of January 4, 2016, Claimants requested additional time to submit their responses to Respondent's Requests for Bifurcation and for Provisional Measures related to Security

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for Costs. On January 5, 2016, the Tribunal extended the deadline of January 6th by one week, to January 13, 2016.

38. On January 13, 2016, Claimants filed their response to Respondent's Requests for (i) Bifurcation and (ii) Provisional Measures related to Security for Costs of December 18, 2015.

39. On January 21, 2016, the Tribunal issued Procedural Order No. 2, concerning Respondent's Request for Bifurcation. In its Order the Tribunal 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.”

40. Also on January 21, 2016, the Tribunal issued a Decision on Respondent's Request for Provisional Measures Relating to Security for Costs. In its Decision, the Tribunal, after analysing the requirements of a request for provisional measures under Article 47 of the ICSID Convention and Arbitration Rule 39(1), found that although Respondent had specified in its request the right to be preserved (the right to claim reimbursement of its arbitration cost) and the measures to be recommended, “the measure requested is of doubtful need and urgency”. The Tribunal noted: “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.” For the above reasons, the Tribunal rejected Respondent's Request for Provisional Measures.

41. On March 16, 2016, Claimants requested the suspension of the proceeding (the “Suspension Request”).

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42. On March 19, 2016, the Tribunal reminded Claimants that, regardless of the Tribunal's eventual decision on the Suspension Request and in accordance with the Tribunal's Procedural Order No. 2 of January 21, 2016, Claimants had until March 21, 2016 to file their Counter-Memorial on Jurisdiction to the extent Claimants wished to supplement their submissions on jurisdiction already in the record of the proceeding.
43. On March 21, 2016, Claimants re-affirmed their request for suspension and Claimants did not file the Counter-Memorial on Jurisdiction.
44. On March 23, 2016, Respondent opposed the Suspension Request.
45. On March 25, 2016, the Tribunal issued Procedural Order No. 3 concerning Claimants' Suspension Request. The Tribunal recalled that on occasion of the first suspension request, the Tribunal had informed the Parties that "[n]o provision of the ICSID Convention or ICSID Arbitration Rules allows for the unilateral suspension of arbitral proceedings." The Tribunal decided:
 - a. To deny the Suspension Request.
 - b. That the Tribunal is ready to decide the Respondent's objections to its jurisdiction on the basis of the current written record.
 - c. To invite the Parties to inform the Tribunal by no later than April 4, 2016 whether they agree to limit the proceeding on jurisdiction to the written phase.
 - d. If the Parties do not agree to limit the proceeding on jurisdiction to the written phase, to consult with the Parties on potential dates for the hearing on Respondents' objections.
 - e. To reserve its position on the allocation of costs related to the Suspension Request."
46. By letters of April 4, 2016, each Party confirmed its agreement to limit the proceeding on jurisdiction to the written phase, without an oral hearing.
47. On April 16, 2016, the Tribunal (i) informed the Parties that, in accordance with their agreement, the Tribunal would proceed to decide Respondent's objections to its jurisdiction on the basis of the written record; and (ii) requested the Parties to file submissions on costs by May 3, 2016. On May 2, 2016, Claimants filed a Statement of Costs, and on May 3, 2016, Respondent filed a Submission on Costs.

48. On May 13, 2016, at the invitation of the Tribunal, each Party filed observations on the costs of the other.
49. On June 2, 2016, the Tribunal declared the proceeding closed in accordance with Arbitration Rule 38(1).

III. JURISDICTIONAL OBJECTIONS

A. Factual Background

50. On November 7, 2003, the *Ente Regulador de los Servicios Públicos* (“ASEP” in its current acronym) granted by Resolution JD-4324 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”)³. ASEP and Mr. Lisac in representation of La Mina entered into a 50-year concession contract on May 3, 2005 (the “Concession Contract”)⁴. On October 21, 2005, the Office of the Comptroller General of Panama ratified the Concession Contract.
51. The Concession Contract required that construction of the hydroelectric power plant (the “Project”) start within twelve months of the date of ratification by the Comptroller (Clause 5.1) and the power plant be completed and commence operations within 24 months (Clause 5.2). The State had the right to terminate the Concession Contract if the concessionaire failed to meet these deadlines (Clauses 26.1 and 26.2).⁵
52. On October 17, 2006, La Mina requested a six-month extension of the deadline to start construction. To grant the extension ASEP required evidence from the lenders that they were willing to finance the Project. La Mina did not provide the evidence requested. On December 20, 2006, ASEP issued Resolution AN No. 490 terminating the Concession

³ Memorial on the Merits, para. 11. Exhibit 033, Resolution JD-4324 of November 7, 2003 from the *Ente Regulador de Servicios Públicos*.

⁴ Exhibit C-1, Contract for the Concession for Hydroelectric Generation Bajo de Mina, May 3, 2015.

⁵ Exhibit C-1.

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Contract because of La Mina's failure to start construction within twelve months of the Concession Contract ratification⁶.

53. On January 2, 2007, La Mina filed before ASEP a request for reconsideration of Resolution AN No. 490. On January 22, 2007, ASEP issued Resolution AN No. 584 rejecting the request for reconsideration because there were no new elements that would justify revision of Resolution AN No. 490.⁷
54. On March 16, 2007, La Mina filed before the Third Chamber of the Supreme Court of Panama an appeal for administrative review and a petition for injunctive relief seeking to stay the implementation of Resolution AN No. 490. On November 6, 2007, the Third Chamber rejected the request for injunctive relief.
55. In parallel to the administrative review proceedings, ASEP opened a bidding process for the construction and operation of a hydroelectric power plant at Bajo de Mina. On May 10, 2007, ASEP conferred to CICSA (now Ideal Panama S.A. ("Ideal")), by Resolution AN No. 812, the exclusive right to obtain all necessary permits to enter into a concession contract with ASEP.
56. On March 12, 2008, ASEP granted to Ideal, by Resolution AN No. 1523, the concession rights to the Bajo de Mina hydropower plant. On March 27, 2008, ASEP entered into a concession contract with Ideal for the Bajo de Mina hydropower Project (the "Ideal Concession Contract"). The Comptroller General ratified it on April 11, 2008.
57. On August 18, 2010, an Order of the Third Chamber of the Supreme Court "recognized and approved a transfer of La Mina's interest in the litigation to Mr. Lisac."⁸
58. On November 11, 2010, the Third Chamber issued its judgment (the "Third Chamber Judgment") and declared: i) Resolutions AN No. 490 and AN No. 584 to be incorrect, ii) the Concession Contract to remain in force and any other concession cancelled, and iii) Mr.

⁶ Exhibit C-3, Resolution AN No. 490-ELEC, December 20, 2006.

⁷ Exhibit C-35, Resolution AN No. 584-ELEC, January 22, 2007.

⁸ RFA, para. 16.

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Lisac to be holder of the *crédito litigioso* (right to bring action) arising from these judicial proceedings.

59. On December 17, 2010, TGGE and Mr. Lisac signed the Memorandum of Understanding (“MOU”)⁹
60. On January 5, 2011, ASEP filed a request for clarification of the second holding of the Third Chamber Judgment. On January 12, 2011, the Third Chamber rejected this request.
61. On February 14, 2011, ASEP issued a resolution ordering that La Mina be registered in ASEP’s records as a power generating company and as party to the Concession Contract.
62. Six months later, on August 8, 2011, Mr. Lisac informed ASEP that La Mina had approached Ideal to negotiate the purchase of the land pertaining to the Concession and the improvements built by Ideal.
63. On September 30, 2011, TGGE and Mr. Lisac signed the Partnership and Transfer Agreement (“PTA”).
64. Incorporation of TGGE Panama on October 6, 2011.
65. 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.
66. On November 25, 2011, ASEP issued Resolution AN No. 4946 rejecting Mr. Gondola’s request for enforcement of the 2010 Judgment by means of the recognition of the Concession Contract’s assignment to TGGE Panama; ASEP’s approval for the assignment had not been requested by Mr. Lisac as mandated by law and the holder of the Concession continued to be La Mina.

⁹ Exhibit C-48, MOU between TGGE and Mr. Julio César Lisac.

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67. Mr. Gondola filed a request for reconsideration of this rejection, which ASEP denied on December 15, 2011 (Resolution AN No. 4995).
68. On December 29, 2011, Mr. Lisac sent a communication to ASEP requesting the direct transfer of the Concession to TGGE Panama. Because the documentation attached to the request was incomplete, ASEP requested further documentation on January 26, 2012, including the audited statements of TGGE Panama and evidence that TGGE Panama had the technical and financial capability to develop and operate the Project.
69. On January 31, 2012, the Cabinet issued Resolution No. 11 authorizing ASEP to proceed to the *rescate administrativo* of the Concession on grounds of urgent social interest as permitted under Clause 30 of the Concession Contract. To this effect, the Ministry of Economy and Finance and the Comptroller General selected three valuation experts. Their subsequent valuation Report concluded that La Mina was not entitled to compensation for the *rescate administrativo* because La Mina's liabilities to the State were greater than the sums expended.
70. On May 1, 2012, the Cabinet authorized ASEP to proceed with the *rescate administrativo* of the Concession. On May 3, 2012, ASEP declared the *rescate administrativo* of the Concession by Resolution AN No. 5296.
71. On May 9, 2012, La Mina filed a request for reconsideration seeking revocation of Resolution AN No. 5296. ASEP upheld this resolution absent new evidence to the contrary.
72. On June 8, 2012, ASEP restored the concession right of Ideal to the construction and operation of the Project.
73. On July 16, 2012, the La Mina power plant began commercial production of electricity.
74. Since then Mr. Lisac has initiated several judicial proceedings with the objective of recovering the Concession. The Tribunal will describe them in its consideration of the jurisdictional objections.

B. Respondents' Objections

75. Respondent submits that the Tribunal has no jurisdiction on five counts: (a) There is no investment under the BIT or the ICSID Convention, (b) Claimants have manipulated the international investment treaty system in order to create an international dispute over a pre-existing domestic dispute, (c) Claimants have waived their right to bring a dispute at ICSID, (d) their claim based on the Most-Favored Nation Clause is without merit, and (e) TGGE Panama is a domestically controlled entity.

(1) Respondent's Arguments

a. Absence of an Investment

76. Respondent argues that Claimants have made no investment under the BIT or the ICSID Convention. According to Respondent, Claimants fail to identify how their purported investments meet the jurisdictional requirements of the BIT. Respondent contends that the BIT does not extend to investments not yet made or not yet belonging to the investor. According to Respondent, the Claimants' activities were pre-investment activities: contacts with ASEP and negotiations with Ideal. These activities at most resulted in an attempt to acquire the rights to the Concession. The purported rights to the Concession of Claimants were in fact nothing more than projections, as shown by the terms of the Partnership and Transfer Agreement ("PTA")¹⁰ and the Claimants' own pleadings. The PTA did not effectuate the transfer of Mr. Lisac's purported concession rights to TGGE Panama; "it merely constituted an agreement with respect to efforts to be undertaken *in hopes of acquiring* the Concession."¹¹

77. Respondent further argues that Claimants do not own or control the rights to the Concession because it was not possible for Mr. Lisac to have transferred them. First, La Mina and not Mr. Lisac was the holder of the Concession, as recognized by ASEP and Panamanian

¹⁰ Exhibit C-007 and Exhibit R-007 (resubmitted version of C-007 to dispute the English translation submitted by Claimants), Partnership and Transfer or Rights Agreement Entered Into by Julio César Lisac Jiménez and TransGlobal Energy, LLC. [[hereinafter "PTA"]]

¹¹ Memorial on Jurisdiction, para. 156. Emphasis in the original.

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courts.¹² Second, the *crédito litigioso* could not give Mr. Lisac the power to transfer the Concession, only the ability to become the plaintiff party in La Mina's challenge to Resolution AN No. 490 of ASEP. A *crédito litigioso* is procedural in nature; it is a legal tool to create standing before an adjudicatory body.¹³ Third, at most, Mr. Lisac had the right to request the transfer of the Concession and, even if it would be assumed that he had the right to request the transfer on his own behalf instead of on behalf of La Mina, he needed the approval of ASEP for the transfer to be effective.¹⁴

78. According to Respondent, even if Mr. Lisac had the right to the Concession, this right was never vested in Claimants, and Claimants cannot assert claims that they may eventually come to own, but did not own at the time of the relevant State conduct. The PTA provides that the assignee is required to submit documentation to show its financial and technical capability. Respondent opposes the Claimants' argument to the effect that reference to Law 22 of 2006 was a mistake because it was enacted after the Concession; in fact, the same approval requirement can be found in Law 56 of 1995 applicable to the Concession. Respondent similarly opposes Claimants' argument that Article 21 of the Concession on liens permitted the transfer and only required the concessionaire to inform ASEP. Respondent explains that Article 21 concerns liens on the assets of the hydroelectric plant and not the Concession itself.¹⁵

79. Respondent points out that the PTA itself recognizes the need of approval for the transfer by ASEP and includes five more conditions for the transfer to be effective. Of these conditions only one has certainly been satisfied: the incorporation of TGGE Panama on October 6, 2011. No evidence has been provided as to the fulfillment of the other conditions.¹⁶

¹² Memorial on Jurisdiction, paras. 161-163.

¹³ *Id.* paras. 164-166.

¹⁴ *Id.* paras. 167-168.

¹⁵ *Id.* paras. 171-189.

¹⁶ Memorial on Jurisdiction, paras. 190-193.

80. Respondent disputes the assertion of Claimants that the PTA by itself constitutes the investment. Respondent explains that a contract is

“[A] vehicle for the legal rights and property rights contained therein—it does not necessarily represent ownership or control of an investment in the respondent State. As a result, such an agreement between two parties is not of itself an “investment;” rather only the rights contained therein may constitute an “investment” should they meet the definition of “investment” under the ICSID Convention and the relevant BIT”.¹⁷

According to Respondent, since the rights subject of the PTA are not themselves “investments” within the meaning of the ICSID Convention or the BIT, it follows that the PTA itself is not an investment.

81. Respondent reviews the various arguments advanced by Claimants to show that their investment qualifies as such under the BIT. Respondent notes that Claimants’ Memorial on the Merits abandons the allegation that their investment consisted of shares in TGGE Panama.¹⁸ Respondent moreover refers to the statement of Claimants’ counsel in the First Session that the PTA “entails claims to money, claims to performance having economic value, and they are associated with a concession regarding a hydroelectric power plant, which is a classic example of an investment.”¹⁹ For Respondent it is not clear to what monies Claimants purport to be entitled. The reference could be to the sum to be paid in consideration for the assignment of the rights under the Concession, but the only potential claims to money arising under the PTA are those that could be asserted by Mr. Lisac against TGGE.²⁰

82. Respondent also refers to Claimants’ assertion at the First Session that their investment consists of a contract regarding the right to use natural resources under Article I(d)(vi) of the BIT. Respondent rejects this assertion on the grounds that the PTA was only a private

¹⁷ *Id.* para. 194.

¹⁸ *Id.* paras. 202-203.

¹⁹ *Id.* quoted in para. 204.

²⁰ *Id.* para. 204.

agreement to transfer concession rights once certain conditions had been met, which never happened.²¹

83. Respondent explains that Claimants have articulated their claims as being appurtenant to the rights to the Concession and the PTA, and not to the Bajo de Mina hydroelectric Project itself. Respondent argues that Claimants have provided no evidence of any contribution to the acquisition of the rights to the Concession, of the duration of such hypothetical or the risks assumed, or how such rights might contribute to Panama's development.²²
84. As regards the PTA, Respondent argues that it does not meet any objective definition of investment under the ICSID Convention; it is only a vehicle for the rights contained in the contract. Furthermore, the capital commitments of TGGE in the MOU and the PTA are only agreements to make future payments; Claimants have failed to show how these commitments satisfy the criterion of an effective contribution to the host country's economy. According to Respondent, the ICSID Convention requires an actual investment, not only a planned or attempted investment.

b. Abuse of the International Investment Treaty System

85. Respondent contends that Claimants have wrongfully attempted to create artificial international jurisdiction over a domestic dispute. Respondent observes the pre-existing elements of Mr. Lisac's dispute with ASEP and the State, which arose when ASEP issued Resolution AN No. 490 terminating the La Mina Concession Contract: i) the Third Chamber reinstated La Mina as the holder of the Concession in its judgment of November 11, 2010; ii) Mr. Lisac filed a complaint on May 27, 2011, against ASEP's resolution of February 14, 2011, because it failed to cancel any concession of the Bajo de Mina plant granted to a third party and to recognize Mr. Lisac as the holder of the *crédito litigioso*; iii) on August 5, 2011, Mr. Lisac initiated before the Third Chamber an Administrative Action for Damages against ASEP and the State and requested as relief A) damages caused by the failure to execute the November 11, 2010 judgment, B) to declare the State liable, and C) to order the

²¹ Memorial on Jurisdiction, para. 207.

²² *Id.* paras. 225-216.

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State to compensate for lost profit until ASEP returned the Concession. Then, on September 30, 2011, Mr. Lisac entered into the PTA with TGGE with the stated purpose of “individually or jointly look for and obtaining mechanisms to enable the execution of the November 11, 2011 Judgment, and enable the partnership to acquire the concession rights, that is, THE PROJECT.”²³ In view of the foregoing, Respondent contends that “Mr. Lisac's introduction of a foreign investor into the ownership of a domestic project, at a time when the project was already embroiled in a domestic dispute—and for the *stated purpose* of seeking mechanisms to resolve such dispute—unquestionably amounts to an abuse of process on the part of the Claimants. It is therefore incumbent upon the Tribunal to decline jurisdiction over all claims in this arbitration.”²⁴

c. Waiver of the Right to Bring a Dispute at ICSID

86. Respondent refers to the rule of Article 26 of the ICSID Convention that consent to ICSID arbitration is exclusive to any other remedy. Respondent argues that ICSID tribunals have applied a subject matter test to determine whether this rule has been breached. Respondent points out that in this arbitration Claimants allege breach of the BIT by Panama because of its refusal to enforce the November 11, 2010, Judgment and the expropriation of the Concession as a means to circumvent it. Respondent adduces the numerous instances in which Mr. Lisac individually or jointly with TGGE Panama has tried to enforce this judgment in Panama. Respondent also refers to the fact that Mr. Lisac acts on behalf of TGGE Panama by virtue of the power of attorney conferred upon him by the Articles of Incorporation of that entity. Thus Mr. Lisac is the same party as Claimants when acting on behalf of the partnership.²⁵
87. Respondent concludes that Claimants, in their own capacity or acting through Mr. Lisac have already sought before domestic fora what they are seeking before ICSID and on the same fundamental basis. Therefore, “Claimants are not permitted to consent to ICSID

²³ Memorial on Jurisdiction, paras. 217-230.

²⁴ *Id.* para. 231. Emphasis in the original.

²⁵ *Id.* paras. 232-248.

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arbitration, as they have already chosen to take their matter to Panamanian regulatory authorities and various Panamanian courts.”²⁶

88. For these reasons, Respondent submits that Claimants are precluded by the fork-in-the-road clause of the BIT from pursuing their claims before ICSID. Respondent notes that some tribunals have narrowly interpreted the term “dispute” in fork-in-the-road clauses by requiring an identity of Parties, objects and causes of action of parallel proceedings. Respondent further notes that no tribunal that has applied the triple identity test has found the fork-in-the-road clause to have been triggered, thus depriving this clause of practical significance. Respondent rather argues in favor of applying the “fundamental basis” test applied by the tribunals in *Pantechniki* and *H&H Enterprises*. Otherwise the triple identity test would deprive Article VII(3)(a) of the BIT of its practical effect in violation of Article 31 of the Vienna Convention. The objective of Article VII(3)(a) is “undermined if Claimants are permitted to bring successive cases that, despite raising somewhat differing causes of action, are co-extensive and share the same ‘fundamental basis’ or ‘normative source’”.²⁷ Respondent thus submits that resolution of the domestic proceedings will require a ruling on the legality of the *Rescate Administrativo* of the Concession and the alleged refusal of the State to reinstate the Bajo de Mina Concession in accordance with the Third Chamber Judgment of 2010.²⁸

d. The Claim based on the Most-Favored-Nation Clause is without
Legal Merit

89. Respondent argues that Claimants have failed to allege facts that, even if proven, could meet the legal threshold of a MNF claim. According to Respondent, Claimants have not demonstrated that they were in a “like situation” with Ideal, that Respondent treated Ideal more favorably than Claimants, and that the treatment of Claimants by Respondent is

²⁶ Memorial on Jurisdiction, para. 248.

²⁷ *Id.* para. 256.

²⁸ *Id.* para. 259.

unrelated to a legitimate State interest. For these reasons, Respondent contends that the claim should be dismissed *in limine*.²⁹

e. TGGE Panama is Domestically Controlled

90. Respondent contends that, because Mr. Lisac, a Panamanian national, controls TGGE Panama, the Tribunal lacks jurisdiction over all claims in respect of TGGE Panama. Respondent refers to the objective set forth in the Preamble of the BIT to create favorable conditions for investment by nationals and companies of one Party in the territory of the other Party. Similarly, one of the key objectives of the ICSID Convention is to facilitate the settlement of disputes between States and foreign investors. Respondent disputes Claimants' assertion that TGGE Panama is controlled by TGGE simply because the latter owns 70% of the shares and Mr. Lisac owns only the remaining 30%. According to Respondent, Mr. Lisac effectively controls Transglobal Panama with nearly 90% of the voting rights.³⁰
91. Respondent explains that the share distribution alleged by Claimants is contingent on several conditions: i) payment of US\$50,000 by TGGE to Mr. Lisac; ii) TGGE Panama must be incorporated; and iii) the Board of Directors, presumably of TGGE Panama, must agree to the issuance of the share certificates. Respondent notes that there is no evidence that the first and third conditions have been met.³¹
92. Respondent further argues that, even if the share certificates had been distributed according to the terms of the MOU, the effective owner and controller of TGGE Panama is Mr. Lisac and not TGGE. Respondent explains that there are 10,000 shares of TGGE Panama outstanding. Of these shares, 6,650 were to be deposited in a trust, and have no voting rights, as agreed by the Parties to the MOU. They may be released from the Trust only after the raising of US\$205,000,000 for the acquisition of the power plant and the payment to Mr. Lisac of US\$20,000,000.³² Respondent notes that there is no evidence that these conditions

²⁹ Memorial on Jurisdiction, paras. 261-278..

³⁰ *Id.* paras. 279-295.

³¹ *Id.* paras. 296-298.

³² *Id.* para. 299.

have been satisfied. This means that Mr. Lisac owns 89.55% of the total voting shares – 3000 out of 3,350– and TGGE only the remaining 350. Respondent asserts that such a minority stake cannot meet the foreign control test under Article 25(2)(b) of the ICSID Convention.³³

93. In further support of its argument that Mr. Lisac is the real owner of TGGE Panama, Respondent points out that Mr. Lisac has acted on behalf and in representation of TGGE Panama in all TGGE Panama's formal requests before the Panamanian regulators. In addition, the PTA provides that “Lisac shall carry out all relevant and administrative formalities to -- jointly or individually -- obtain, by virtue of the execution of the 11 November 2010 Decision, the assignment of the Project concession to Transglobal Green Energy de Panama S.A. and the means to implement the Project.” The PTA also provides that “all activities approved by the partners of Transglobal Green Energy de Panama S.A. shall be executed by means of the power granted to Lisac.” This power is granted in the Certificate of Incorporation of TGGE Panama. Respondent concludes that all available evidence indicates that Mr. Lisac owns and controls TGGE Panama.³⁴

(2) Claimants’ Arguments

94. As already noted, Claimants did not avail itself of the opportunity of submitting a Counter-Memorial on Jurisdiction. Claimants’ arguments on jurisdictional objections are thus limited to those presented as part of their Memorial on the Merits where they addressed Respondent’s Preliminary Objections under Arbitration Rule 41(5). Respondent’s Jurisdictional Objections and Memorial on Jurisdiction did not pursue the objection based on the Annex of the BIT, which according to Respondent excludes investments in energy or hydroelectric power generation. While Claimants addressed this objection in their Memorial on the Merits, the Tribunal does not need to decide it.
95. According to Claimants, TGGE made an investment in Panama by signing the investment contract with Mr. Lisac by which the Parties agreed to create a special purpose company,

³³ Memorial on Jurisdiction, paras. 300-301.

³⁴ *Id.* paras. 302-303.

namely TGGE Panama.³⁵ In addition, TGGE agreed in the investment contract to reimburse to Mr. Lisac the funds that he had previously invested and to pay Mr. Lisac funds for, inter alia, obtaining the Concession (Articles 7 and 8 of the MOU).³⁶

96. Claimants argue that TGGE Panama made an investment by acquiring the Concession rights by contract with Mr. Lisac. According to Claimants, this is the case irrespective of whether ASEP recognized the assignment to TGGE; Mr. Lisac needed only to inform ASEP of the assignment, which he did. In any case, Claimants contend that the investment made by TGGE exists independently of the approval of the assignment by ASEP.
97. Claimants affirm that TGGE Panama is majority owned by TGGE because TGGE holds 70% of the shares. As to “foreign control” required by Article 25(2)(b) of the ICSID Convention, Claimants note that other ICSID tribunals have held that the concept of foreign control is flexible³⁷ or that a tribunal “may consider any approach based on the administration, voting rights, ownership of shares or any other reasonable theory for the purpose.”³⁸ Since “foreign control” is not defined in the ICSID Convention or the BIT, Claimants argue that foreign control should be interpreted in light of Panamanian law. Claimants refer to Executive Decree No. 22 of June 19, 1998, which defines “control” of a power generation or distribution company that holds a concession.³⁹ According to this decree, control is exercised when an individual or an entity owns directly or indirectly more than 50% of the shares, or has the right to appoint the majority of board members, or has the right to veto decisions of the board or of the shareholders, or has the right to appoint, remove or replace the manager, legal representative, president, secretary or treasurer, or has the power by itself or through third parties to bind the company by contract without need for such agreement or contract to be approved by the board or shareholders’ meeting.⁴⁰

³⁵ Claimants’ Memorial on the Merits, paras. 24-26.

³⁶ Exhibit C-48, MOU between TGGE and Mr. Julio César Lisac.

³⁷ *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, October 21 2005, paras. 280-281 (CL-6).

³⁸ Claimants’ Memorial, para. 108.

³⁹ *Id.* paras. 110-111. Exhibit CL-7.

⁴⁰ Claimants’ Memorial on the Merits, para. 111.

Claimants also refer to Article 50 of Panama's Company Act, which provides that the board of a company shall have absolute control and full management of the affairs of a company.⁴¹

98. Claimants recall that the contract between Mr. Lisac and TGGE stipulates that membership of the board is proportional to the percentage of shares of each Party, and that the PTA establishes that the board of TGGE Panama shall have five members, of which three are to be appointed by TGGE and two by Mr. Lisac. Claimants conclude that for purposes of the ICSID Convention and the BIT, TGGE Panama is under foreign control.⁴²
99. Claimants assert that TGGE and TGGE Panama have submitted the dispute only to this Tribunal and not to the Panamanian courts; hence, Claimants meet the requirements of Article VII(3) of the BIT.⁴³

(3) Analysis of the Tribunal

100. The Tribunal may choose to consider the objections to its jurisdiction in any particular order. The Tribunal will start by considering the objection based on abuse of the international investment treaty system by Claimants' allegedly wrongful attempt to create artificial international jurisdiction over a pre-existing domestic dispute. The Tribunal has chosen to consider this objection first, because the existence of abuse of process is a threshold issue that would bar the exercise of the Tribunal's jurisdiction even if jurisdiction existed.⁴⁴
101. The Tribunal notes at the outset that Claimants have ignored the issue of abuse of process altogether. Respondent first raised this issue in its Memorial on Jurisdiction. Thus, Claimants were not aware of it when they filed their Memorial on the Merits and yet they decided not to file a Counter-Memorial on Jurisdiction even after the Tribunal reminded Claimants that their second suspension request dated March 16, 2016 did not dispense them

⁴¹ *Id.* para. 112.

⁴² *Id.* paras. 114-116.

⁴³ *Id.* paras. 154-155.

⁴⁴ See *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, June 1, 2012, para. 2.10.

from having to meet the established deadline for such pleading.⁴⁵ Instead, in their letter of March 21, 2016, filed within a few days of the due date of the Counter-Memorial on Jurisdiction, Claimants, referring to their second suspension request, explained that

“the purpose of our entry into this arbitration to begin with was to have the Bajo de Mina concession in TGGE’s name, we felt it would not be in the best interest for TGGE to expend more money, time or resources in the arbitration at this moment since we believe the ruling will now be executed. Instead we consider that with this recent Supreme Court ruling by the plenum, we should then achieve justice in Panama through the contract we have with our Panamanian Partner. TGGE again requests a suspension of the proceedings from the Tribunal until the Supreme Court Plenary of Panama orders are executed or resolved in Panama. Upon execution we will terminate these proceedings.”⁴⁶

102. There is a line of consistent decisions of arbitral tribunals on objections to jurisdiction based on abuse of the investment treaty system. In *Phoenix* the tribunal stated:

“If it were accepted that the Tribunal has jurisdiction to decide Phoenix’s claim, then any pre-existing national dispute could be brought to an ICSID tribunal by a transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT. Such transfer from the domestic arena to the international scene would ipso facto constitute a “protected investment” – and the jurisdiction of BIT and ICSID tribunals would be virtually unlimited. It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs. It is indeed the Tribunal’s view that to accept jurisdiction in this case would go against the basic objectives underlying the ICSID Convention as well as those of bilateral investment treaties.”⁴⁷

103. To determine whether an abuse of rights has occurred, tribunals have considered all the circumstances of the case⁴⁸, including, for instance, the timing of the purported investment, the timing of the claim, the substance of the transaction, the true nature of the operation⁴⁹, and the degree of foreseeability of the governmental action at the time of restructuring.⁵⁰ For purposes of the analysis of this objection, the Tribunal will consider the timing of the

⁴⁵ Tribunal’s letter to Claimants dated March 19, 2016.

⁴⁶ Claimants’ letter to the Tribunal dated March 21, 2016.

⁴⁷ *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award (April 15, 2009), para. 144 [hereinafter *Phoenix v. Czech Republic*] (RL-035).

⁴⁸ *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, June 10, 2010, para. 177 (RL-038). *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, January 9, 2015, para. 193 [hereinafter *Renée Rose Levy v. Peru*] (RL-017).

⁴⁹ *Phoenix v. Czech Republic*, paras. 136-140 (RL-035).

⁵⁰ *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, February 8, 2013, paras. 194 and 197 (RL-040).

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alleged investment, the terms of the transaction in which it was to be effected, and some relevant incidents in the course of this proceeding. In so doing, the Tribunal will *pro tem* assume the validity of Claimants' factual assertions with respect to the merits.

104. The Tribunal first notes that the Third Chamber Judgment, dated November 11, 2010, had ordered the restitution to La Mina of the concession to construct, exploit, and maintain the La Mina power plant and left without effect the transfer of the *crédito litigioso* to any third party in contradiction with the Third Chamber Judgment.
105. TGGE signed the MOU on December 17, 2010, just over one month after the date of the Third Chamber Judgment. In the MOU Mr. Lisac undertook to supply TGGE all the documentation he had related to the Project. TGGE made the commitment to a complete due diligence in respect of all aspects of the Project with the objective of confirming the information previously provided by Mr. Lisac.⁵¹
106. The PTA was signed on September 30, 2011. During the intervening time, on February 14, 2011, ASEP registered La Mina Hydro-Power Corp. in the books of ASEP as an electric power generating company, because it had concluded with ASEP a Concession Contract for the construction, exploitation and maintenance of the hydroelectric power station known as Bajo de Mina.
107. Six months later, on August 8, 2011, Mr. Lisac addressed to ASEP a letter on behalf of La Mina in which Mr. Lisac explained that he had approached Ideal in order to purchase directly from it the buildings pertaining to the Concession and to pay for the improvements already made. Mr. Lisac warned ASEP that, if this approach did not succeed, they (Mr. Lisac used the plural) would have recourse to an enforcement action to which they were entitled by law as the concessionaires of La Mina.⁵²
108. This was the situation when Mr. Lisac and TGGE signed the PTA on September 30, 2011. The whereas clauses of the PTA recite that: (i) Ideal purchased land and the power plant at

⁵¹ Exhibit C-48, MOU, Article 6.

⁵² Exhibit C-6, Letter to ASEP dated August 8, 2011.

its final stage of construction (*Considerando* 1.5); (ii) the purpose of the PTA is for TGGE and Mr. Lisac to pay Ideal for the land and the construction (*Considerando* 1.5); (iii) the Third Chamber Judgment had been communicated to ASEP but the latter had not complied with it (*Considerando* 1.6); (iv) TGGE had undertaken to collaborate through TGGE Panama in the “*perfeccionamiento*” of the compliance with the Third Chamber Judgment (*Considerando* 7).

109. The object of the PTA was for TGGE and Mr. Lisac to establish TGGE Panama in order “to jointly or individually seek and obtain mechanisms that permit the execution of the Sentence of November 11, 2010 [...]”⁵³ The first obligation undertaken by TGGE in the PTA was to assist in the compliance with such judgment and in the administrative processes necessary for ASEP to approve TGGE Panama as the Concession holder.⁵⁴
110. The collaboration in the enforcement of the Third Chamber Judgment was a distinctive change from the terms of the MOU. The MOU set forth understandings limited to the execution and commercial operation of the Project, the setting up of a new special purpose company, and payments to be made to Mr. Lisac. The PTA reflected a new reality. By then, according to Claimants, ASEP had failed to comply with the Third Chamber Judgment and its enforcement takes a prominent place in the object of the PTA and the obligations of the Parties.
111. The voting arrangements in TGGE Panama and the principle of exclusive execution by Mr. Lisac of acts agreed by the shareholders provided in the PTA revealed Mr. Lisac’s intent to remain in *de facto* control of TGGE Panama irrespective of the percentage of shares held and at the same time to benefit from the foreign nationality of TGGE for the purpose of pursuing this arbitration. Thus the third whereas clause (*Considerando* 3) of the PTA specifies the percentage of shares of each shareholder in TGGE Panama, and then provides in mandatory terms that TGGE Panama shall deposit the share certificates of TGGE with a

⁵³ Exhibit C-007 and Exhibit R-007, PTA Clause 1. Translation of the Tribunal.

⁵⁴ Exhibit C-007 and Exhibit R-007, PTA Clause 2. A).

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trustee acceptable to both shareholders.⁵⁵ Furthermore, as long as the certificates are in deposit, TGGE shall not have the right to vote pertaining to these shares. The same provision records the Parties' understanding that all activities agreed by the shareholders of TGGE Panama shall be carried out by way of the power of attorney granted to Mr. Lisac.

112. The PTA provisions on the distribution of the proceeds of an eventual sale of the power plant or of receipt of compensation reflects the predominant role of Mr. Lisac disproportionate to his shareholding in TGGE Panama. TGGE and Mr. Lisac agreed to change the proportion of the percentages of the proceeds of a sale or of compensation to which they would otherwise be entitled. Mr. Lisac would receive 80% and TGGE 20% of such proceeds. TGGE and Mr. Lisac further agreed that to the extent that compensation would be received, the proceeds should be paid first in the trust constituted as part of the purposes of the PTA, which would forthwith disburse the funds to TGGE and Mr. Lisac in the proportion set forth above.⁵⁶ It is telling that the proportion to be received by TGGE would not take into account the substantial contribution TGGE undertook to make in the MOU and then in the PTA, and that there is no record of TGGE ever making any contribution other than the US\$50,000 paid to Mr. Lisac at the time of the signing of the PTA.

113. The procedural developments related to the pursuit by Mr. Lisac of the execution of the Third Chamber Judgment in Panama prompted Claimants twice to request the suspension

⁵⁵ The Annex to the PTA on “*Ejecución Financiera del MOU*” provides more detail on the distribution of shares of TGGE Panama: 3000 for Mr. Lisac, 350 for TGGE and 6650 for TGGE. These 6650 shares are the shares deposited with a trustee until certain financial conditions are met by TGGE. There is no record in this arbitration that such conditions were ever met.

⁵⁶ Exhibit C-007 and Exhibit R-007, PTA Clause 3, paragraph 2. It will be useful to transcribe the Spanish text of Clause 3.2 summarized above by the Tribunal:

“2) En el caso que se ofrezca el pago de una indemnización o un pago en concepto de venta o cesión, en favor de quien ostente los derechos sobre el Contrato de Concesión “DEL PROYECTO”, se variará la proporción de los porcentajes reconocidos a LOS ASOCIADOS y en ese caso será reconocida a favor de LISAC el 80% de la suma resultante de tal pago, y el porcentaje restante a TRANSGLOBAL, es decir el 20%.

En este punto, LOS ASOCIADOS acuerdan que en caso de realizarse el pago de una indemnización este se hará efectivo a favor de un Fideicomiso que LOS ASOCIADOS constituyen como parte de los propósitos de este Contrato. El Fideicomiso inmediatamente tendrá la obligación de desembolsar a favor de LISAC en la proporción de 80% y a favor de TRANSGLOBAL en la proporción de 20%.”

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of this arbitration. Both suspension requests reveal the intimate relationship of the ongoing court proceedings in Panama and this proceeding, and confirm the intent of Mr. Lisac to internationalize his domestic dispute with Panama. On April 21, 2015, the Third Chamber of the Supreme Court ordered the execution of its judgment of November 11, 2010. This prompted Claimants to attempt to justify their application for suspension by reference to Mr. Lisac's request to ASEP

“to confirm if intend [sic] to comply with this final judgment from Panama's highest court, and made himself available to collaborate in this process and are working with their local partner to make sure the concession is transferred in the most efficient manner.”

These developments are at the core of Claimants' treaty claims and affect the preparation of Claimants' case in this arbitration”.

114. On March 16, 2016, TGGE applied for suspension of the arbitration. TGGE explained that

“The Supreme Court has once again ordered the execution of its own judgment of 11 November 2010. As this would lead to the fulfillment of the contract between Mr. Lisac and TGGE, and the ability of TGGE to complete its investment, which is why this arbitration was started; TGGE respectfully requests a suspension of these proceedings until the first and most recent orders of the Supreme Court are executed or until the Panamanian state decides, once again, to illegally intervene.”⁵⁷

115. TGGE concluded:

“Accordingly, our request for temporary suspension of the arbitral procedure is based on the fact that there should be reasonable time granted to ensure *that the procedures provided for at the national level for the execution of the judgment of the Supreme Court and corresponding contractual rights, both of which have a direct impact on the process and result of this arbitration*, so that both the parties and the tribunal will be able to bring all their actions in this regard should it be necessary. Hopefully, the government of Panama will allow the unfettered execution of the judicial orders of the Supreme Court and *no further action will be necessary in this arbitration.*”⁵⁸

116. It follows from the preceding that Mr. Lisac inserted TGGE and TGGE Panama into the process of pursuing the execution of the Third Chamber Judgment at a time when it was clear that there was a problem with its implementation. Even if it were accepted that on December 17, 2010, when the MOU was signed, it had seemed likely that the implementation of the sentence would proceed without difficulty, this was not the case at

⁵⁷ Request for suspension of March 16, 2016, para. 10.

⁵⁸ Id. para. 20. Emphasis added by the Tribunal.

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the time of the signing of the PTA on September 30, 2011. By then, Mr. Lisac had threatened ASEP with enforcement action based on the Third Chamber Judgment.

117. If the Tribunal considers the administrative and judicial actions initiated by Mr. Lisac in his own name or in the name of La Mina following ASEP's termination of the Concession Contract on December 20, 2006, the timing of the intervention of TGGE and TGGE Panama into the dispute is even more telling. By that time Mr. Lisac had already pursued the domestic remedies at the Supreme Court level and now sought international remedies with Claimants' assistance.
118. For all of these reasons, the Tribunal upholds Respondent's objection to its jurisdiction on the ground of abuse by Claimants of the investment treaty system by attempting to create artificial international jurisdiction over a pre-existing domestic dispute.
119. The Tribunal needs not consider the remaining objections since their success or failure would be indifferent to the decisive consequence flowing from this finding.

IV. COSTS

A. **Positions of the Parties**

120. The Tribunal invited the Parties to file submissions on costs. Respondent filed a statement of fees and expenses in the amount of US\$2,393,355.05, and a detailed submission in support of its request for a full award of costs and fees, including attorneys' fees, and compound interest at LIBOR plus two percentage points per annum on the amount awarded. Claimants filed no submission and only provided a statement of fees and expenses in the amount of US\$802,587.68.
121. Respondent has pointed out that, in cases of abuse of the arbitral process, tribunals have found that an award of full costs is particularly appropriate even if Respondent did not prevail on every request it made to the Tribunal. Respondent argues that Claimants' manner of prosecuting this arbitration has unnecessarily complicated Panama's analysis of the claims, and complains that Claimants failed to provide translations of core documents,

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submitted discrepant documentary evidence, and filed two suspension requests in the knowledge that Respondent would oppose them.

122. The Tribunal gave the Parties the opportunity to comment on each other's filings. Claimants voiced no objection to Respondent's expenses and simply noted what it considered the unnecessary length of Respondent's submissions.
123. As regards the statement presented by Claimants, Respondent suggested that, in view of the amount claimed on account of the costs of the First Session (US\$626,712.34 out of a total of US\$802,587.68), if the Tribunal were inclined to grant such costs, it would be appropriate for the Tribunal to seek further clarification from Claimants regarding their calculation. Furthermore, Respondent has reiterated its request that, in addition of being granted a full cost award, the Tribunal order that "one hundred percent (100%) of any funds remaining in the administrative account for this case be refunded to Panama as partial credit against a cost award in Panama's favor."⁵⁹

B. Analysis of the Tribunal

124. Under Article 61(2) of the ICSID Convention the Tribunal has discretion to allocate costs between the Parties. In their statements of fees and expenses, as requested by the Tribunal, the Parties have broken down the total amount into categories reflecting the costs related to specific parts of the proceeding.
125. ICSID tribunals have used their discretion to divide the costs of the proceedings equally between the parties or to rule that costs follow the event. There are ample instances of either outcome. In the case of successful jurisdictional objections based on abuse of process, tribunals have tended to decide that claimants should bear the costs of the proceeding. As regards the attorneys' fees and expenses of claimants, the record is mixed. In *Phoenix*, the tribunal found the respondent's legal fees and expenses to be reasonable and decided that claimant should bear them.⁶⁰ On the other hand, the tribunal in *Renée Rose Levy* noted that

⁶⁰ *Phoenix v. Czech Republic*, para. 152 (RL-035).

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“the Claimants sought to minimize the costs of the proceedings, which is not the case of their opponent, as the disparity of the costs figures shows. In these circumstances, the Tribunal finds it fair that the Claimants pay to the Respondent the amount of USD 1,571,858.72, *i.e.*, the sum which they themselves considered necessary to present their case, as a contribution to the Respondent’s fees and expenses.”⁶¹

126. The starting point for the Tribunal in a case of abuse of process is that Claimants should bear the costs of the proceeding and attorneys’ fees and expenses of Respondent, provided that the latter are reasonable. This Tribunal, like the tribunal in *Renée Rose Levy*, does not believe that a finding of abuse of process precludes an assessment of the proportionality of fees and expenses claimed on both sides. The Tribunal accepts that the fits and starts of Claimants’ pleadings likely increased Respondent’s counsel costs. The Tribunal is also concerned about the cavalier attitude of Claimants as shown by the repeated requests for suspension of the proceeding even though counsel for Respondent had previously advised Claimants that Respondent would oppose the requests. Moreover, although the Tribunal, when rejecting the first suspension request, had called attention to the fact that no provision in the ICSID Convention or the Arbitration Rules would permit the Tribunal to suspend the proceeding upon a unilateral request by one party, Claimants nevertheless filed a second suspension request.

127. On the other hand, the Tribunal rejected Respondent’s Requests for Shifting the Costs of the Arbitration to Claimants and for Provisional Measures relating to Security for Costs. The Preliminary Objection to Jurisdiction under Arbitration Rule 41(5) was clearly out of time and therefore rejected as such by the Tribunal, but the Tribunal nonetheless accepted it as a notice of future jurisdictional objections. After taking all these circumstances into account, the Tribunal concludes that Claimants should bear the attorneys’ fees and expenses of Respondent except for those claimed by Respondent for:

⁶¹ *Renée Rose Levy v. Peru*, para. 202 (RL-017).

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- (i) the Request for Shifting the Costs of Arbitration to the Claimants (US\$98,902.85),
- (ii) Timeliness of Preliminary Objections Pursuant to Rule 41(5) (US\$74,075.00), and
- (iii) Request for Provisional Measures relating to Security for Costs (US\$10,844.50)].

Given the finding of abuse of process, the Tribunal considers that the amount awarded should bear interest compounded annually at LIBOR plus two percentage points per annum.

128. Respondent's further request that the Tribunal order that the remaining funds in the administrative account for this arbitration be paid to Respondent, as a partial payment of an award of costs, based on the general authority of the Tribunal under Article 61(2) of the ICSID Convention, Arbitration Rules 28 and 47(j), and Administrative and Financial Regulation 14(3)(d).
129. The Respondent has not referred to any instance in which an ICSID tribunal issued such an order, and the Tribunal is not aware of any. Arbitration Rule 28(1) concerns the apportionment of the fees and expenses of the Tribunal, and Arbitration Rule 28(2) obliges the parties to submit a statement of costs. Arbitration Rule 47(j) is part of the checklist of items to be included in the award. It reads: "any decision of the Tribunal regarding the cost of the proceeding." This cannot possibly mean that the Tribunal may make a decision beyond the authority conferred upon it by the Convention and the Arbitration Rules. Administrative and Financial Regulation 14(3)(d) concerns the payment of the advances by the Parties. None of these rules empower the Tribunal to order the disposition of funds remaining in the arbitration account as requested by Respondent. The advances made by the Parties have been made for the payment of the fees and expenses of the members of the Tribunal and the charges of the Secretariat in the proportion fixed in the request for the advances. Short of an agreement to that effect by the Party that advanced the funds concerned, the Tribunal has no authority to dispose of such funds for another purpose. More importantly, as stated in Article 61(2), the decision of the Tribunal as to the expenses of the

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Parties and the fees and expenses of the members of the Tribunal shall be part of the award. In the view of the Tribunal, for it to direct the Secretariat to disburse to Respondent the remaining funds in the arbitration account would be tantamount to ordering the Secretariat to effect a partial execution of the Award. The Tribunal has no authority to issue such an order; nor would the Secretariat have basis for implementing it.

V. DECISION

130. For the above reasons, the Tribunal has 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 (i) the costs of the arbitration, comprising the fees and expenses of the Tribunal members and ICSID's administrative fees and expenses, as determined by ICSID in the final financial statement of this case, and (ii) legal fees and expenses of Respondent in the amount of US\$2,209,532.70.
- iii) That Claimants shall pay post-award interest on the aggregate amount resulting from subparagraph ii) *supra*, 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 this case.
- v) To dismiss all other requests for relief.

Award

[signed]

Prof. Christoph Schreuer
Arbitrator
Date: May 20, 2016

[signed]

Prof. Jan Paulsson
Arbitrator
Date: May 24, 2016

[signed]

Dr. Andrés Rigo Sureda
President of the Tribunal
Date: May 31, 2016