

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 THE ADMISSIBILITY OF RESPONDENT'S PRELIMINARY
OBJECTION TO THE JURISDICTION OF THE TRIBUNAL
UNDER RULE 41(5) OF THE ARBITRATION RULES**

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 17, 2015

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Under Rule 41(5) of the Arbitration Rules

I. Background

1. Late on February 18, 2015 and just a few hours before the start of the First Session of the Tribunal on February 19, Respondent filed "Panama's Objection pursuant to ICSID Arbitration Rule 41(5)" (the "Objection"). The parties exchanged preliminary comments on the timing of the Objection. The Tribunal invited Claimants' observations on the Objection on February 20, 2015 and Claimants filed their observations on February 24, 2015. At the invitation of the Tribunal and in response to Claimants' observations, Respondent commented on February 27, 2015.
2. The Tribunal invited another round of submissions from Claimants and Respondent; they were received on March 4, 2015 and March 9, 2015, respectively.

II. The Parties' Arguments

3. In their February 24 letter, Claimants seek a preliminary ruling that Respondent's 41(5) submission be dismissed and its contents struck from the record on the ground that it was filed late. Claimants note that Rule 41(5) requires that preliminary objections be raised within 30 days of the date of the constitution of the Tribunal, which February 19, 2014.
4. As to the arguments made by Respondent during the First Session in support of the Objection's timeliness, Claimants say that Rule 41(5) requires that a preliminary objection comply with two temporal conditions: it should be received within 30 days of the Tribunal's constitution and be filed before the First Session. They argue first: "The evident purpose of the second condition is that if a tribunal intends to hold its first session before 30 days following its constitution, a party must file any Preliminary Objection before that session. Any other interpretation of Rule 41(5) would render the '30 day' condition ineffective."¹

¹ Claimants' letter dated February 24, 2015, p. 2.

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5. Second, the suspension of the proceeding is not a valid excuse for the late submission of the Objection since the deadline for filing the Objection expired more than five weeks earlier.
6. Third, there is no support in Rule 41(5) for Respondent's contention that it did not need to file its Objection until it paid the initial advance on costs. Claimants' assert that Respondent may not toll the time limits set forth in the Rules by refusing to pay their initial advance on costs.
7. Claimants conclude by stating that it would be more appropriate to address Respondent's Objection at the time discussed and foreseen in Draft Procedural Order No. 1.
8. In its letter of February 27, 2015, Respondent disputes Claimants' understanding of Rule 41(5). According to Respondent, Claimants read the phrase "at the earlier of" into the Rule and ignore the purpose and intent of Rule 41(5). Respondent argues that Rule 41(5) fits well with Rule 41(2), which authorizes the Tribunal at any stage of the proceedings and at its own initiative to consider whether the dispute is within the jurisdiction of the Centre. Respondent refers to Professor Schreuer's explanation that "This authority is designed to avoid awards that exceed the tribunal's powers ... if the parties fail to make jurisdictional objections *or file these outside time limits.*"²
9. According to Respondent, Rule 41(5) provides the most economical and efficient procedure for disposing of or narrowing Claimants' case. Respondent fails to understand why Claimants would not be amenable to a procedure that will save them costs since Panama has the right to file objections to jurisdiction under rule 41(1) and plans to do so if the Tribunal deems the Objection untimely.
10. Respondent further argues that the Tribunal has discretion under Rule 26 to extend deadlines in special circumstances. Respondent adduces as special circumstance the

² Quoted in p. 4, emphasis added by Respondent.

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financial frailty of Claimants and the thinness of their case. Respondent pleads that "the balance of harm or injury should the Tribunal decline to address the 41(5) Objection on timeliness grounds would be against Panama, which would be forced to defend against claims manifestly lacking a legal basis."³

11. Respondent contends that Claimants' request is futile because Claimants recognize that they will ultimately need to address Respondent's objections; in fact, if the Tribunal would grant Claimants' petition, it would only force Respondent to resubmit its objections and increase costs.
12. Respondent concludes by petitioning that the Tribunal dismiss Claimants' requests or in the alternative that "the Tribunal treat Panama's Rule 41(5) submission as its preliminary notice of jurisdictional objections and its request for bifurcation of these proceedings, without prejudice to any further jurisdictional objections Panama may, in accordance with Rule 41(1), raise after Claimants file their Memorial."⁴
13. In their letter of March 4 2015, Claimants reiterate that the expression "and in any event" between the two temporal conditions of Rule 41(5) requires compliance with both. In fact, the word "and" by itself would be sufficient, "'in any event' immediately after 'and' reinforces the point."⁵ Furthermore, they say, the "intent-and-purpose" arguments of Respondent do not support its interpretation of Rule 41(5).
14. Claimants point out that Respondent has provided no explanation as to why it failed to comply with the 30-day deadline. Claimants invoke Draft Procedural Order No. 1 and take the view that it defined an efficient process to deal with the jurisdictional issues. Claimants also point out that Respondent "failed to cite any authority where an ICSID tribunal allowed a belated 41(5) submission over the claimants' objections."⁶

³ Id. p. 7.

⁴ Id. p. 10.

⁵ Claimants' letter of March 4, 2015, p. 2.

⁶ Id. p. 3.

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15. Claimants argue that through the "thinness" argument Respondent in effect invites the Tribunal to breach due process, prejudice the merits and decide that Claimants' claims are "thin". Against the efficiency argument, Claimants argue that, if under Rule 41(5) the Tribunal would decide that the objections of Respondent are manifestly lacking in merit, then this finding would be without prejudice to the same objections being raised by Respondent as jurisdictional and merits arguments.
16. According to Claimants, it would not be wasteful for the Tribunal to address Respondent's objections under Rule 41(5) during the jurisdictional phase because Respondent and the Tribunal would by then benefit from Claimants' Merits Memorial, Respondent may bring all jurisdictional objections at one point in the process, and the Tribunal's decision would be dispositive.
17. Claimants conclude that a bifurcated jurisdictional phase exclusively based on the Request for Arbitration would reach dispositive conclusions before Claimants have not yet presented their full case.
18. Claimants request that the Tribunal reject Respondent's Objection, that Respondent's submissions and attached documents be struck from the record, and that the Tribunal proceed to finalize Procedural Order No. 1.
19. Respondent's letter of March 9, 2015 again disputes Claimants' arguments on the plain meaning of Rule 41(5). Respondent finds support for its position in the rationale of this rule as explained in the Working Paper of the Secretariat *Suggested Changes to the ICSID Rules and Regulations* (the "Working Paper"): "Rule 41(5) was designed so that the Tribunal could '**at an early stage of the proceeding** be asked on an expedited basis to dismiss all or part of claim on the merits.'"⁷
20. Respondent points out that Claimants do not address in a meaningful manner the Tribunal's duty to consider jurisdictional questions at any time of the proceeding and also at its own

⁷ Respondent's letter of March 9, 2015, p. 3. Emphasis added by Respondent.

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initiative. According to Respondent, Claimants' approach ignores the purpose of Rule 41(5) "as a means of testing the merits of claims as presented by the claimants themselves in the respective requests for arbitration, *before* the parties have to incur the expense and distraction of trying to flesh out and then defend claims manifestly without legal merit."⁸

21. According to Respondent, the efficiency issue is one of timing since both parties concede that the Tribunal needs to address the jurisdictional issues raised by Respondent. Furthermore, Claimants' argument is premised on an erroneous understanding of Rule 41(5), namely, that rulings under Rule 41(5) are not dispositive. Respondent explains that the purpose of the rule is to narrow or dispose of the claims at an early stage through the process provided by this rule, and that, if Respondent would prevail in each one of the issues raised by the Objection, the decision of the Tribunal would be dispositive of these issues without prejudice to the merits of the dispute.
22. To conclude, Respondent requests that the Tribunal accepts its Rule 41(5) Objection, that it sets out an schedule to resolve it or, in the alternative, that the Tribunal treat the Objection as a preliminary notice of jurisdictional objections and request for bifurcation.

III. Analysis of the Tribunal

23. The arguments of the parties raise three main issues: First, the meaning of the temporal conditions of Rule 41(5) and whether the Objection complies with them. Second, if this is not the case, whether the Tribunal should use its discretion under Rule 41(2) to consider the Objection at its own initiative. Third, if the Tribunal decides that both of these issues in the negative, whether it should then strike the Objection from the record or deem it to be a notification of jurisdictional objections and a request for bifurcation.

⁸ Id. p. 3. Emphasis in the original.

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(a) Compliance of the Objection with the Temporal Conditions of Rule 41(5)

24. For ease of reference the Tribunal reproduces below the disputed part of Rule 41(5):

"Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without merit [...]."

25. Respondent understands this clause to mean that a party has two options: either to file an objection within the 30 days after the constitution of the Tribunal or before the first session of the Tribunal whenever such session will take place. On the other hand, Claimants read this sentence to mean that an objection needs to be filed within 30 days of the constitution of the Tribunal and, in the event that the first session takes place before the 30 days, no later than the first session.

26. The Tribunal first notes that the two phrases are linked by the conjunctive preposition "and". It is used to connect words, phrases, sentences; adding one thing to another without modifying either. Does "in any event" when added to "and" convert the conjunctive preposition "and" in a disjunctive preposition "or"? This would be the effect attributed by Respondent to "in any event". The Tribunal does not see how the expression "in any event" can by its terms convert two cumulative conditions into alternatives. If this had been the intent of the drafters of Rule 41(5), they would plainly have used the more straightforward "or".

27. The sense of the clause becomes clearer if analyzed in context. The expression "and in any event" is part of a sentence that provides for an expedited procedure unless the parties had agreed otherwise. The interpretation alleged by Respondent permits an extension of the time limit in function of the first session, which may take place before 30 days or at a later date within 60 days from the constitution of a tribunal or even later if agreed by the parties. The sense of expediency in that case is lost. For this reason, if there were any doubt as to the plain meaning of the clause, the more expedient of the two options should be chosen.

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28. Turning now to the purpose and intent of the clause, the Respondent's interpretation seems to the Tribunal to be at cross-purposes with the intent of its introduction in the 2006 version of the Arbitration Rules. The purpose of the rule as shown by ICSID's Working Paper on which Respondent relies is precisely to avoid the situation now faced by the Tribunal. Even after discounting the period during which proceedings were suspended, the filing of the Objection on February 18, 2015, hours before the First Session, could hardly be considered "expedient."
29. The Tribunal concludes that the disputed sentence in Rule 41(5) means that the two temporal conditions are cumulative; a preliminary objection needs to be filed within thirty days from the constitution of the Tribunal *and* before the First Session of the Tribunal.⁹ The Request met the second condition but not the first.

(b) Should the Tribunal use its discretion under Rule 41(2)?

30. Respondent has recalled that, under Rule 41(2), the Tribunal may at its own initiative consider whether a claim is within the jurisdiction of the Centre and the competence of the Tribunal.
31. Claimants oppose the notion that the Tribunal should now consider the Objection on grounds of efficiency and due process since the Tribunal does not have at its disposal the Claimants' full articulation of their claim, but only the Request for Arbitration.
32. The Tribunal notes an element of misunderstanding in the arguments made by Claimants. They read the last sentence of Rule 41(5) as if a decision of the Tribunal rejecting the Objection would not be dispositive. This is not the Tribunal's understanding of Rule 41(5). In relevant part it reads as follows: "The decision of the Tribunal shall be without prejudice

⁹ This interpretation of Rule 41(5) is confirmed by the doctrine: "Whereas the filing of an objection to jurisdiction is to be made within the time limit for the filing of the counter-memorial, the summary procedure must be initiated within 30 days of the tribunal's constitution and before its first session." Comment on the Summary procedure of Rule 41(5) in C. Schreuer, *The ICSID Convention. A Commentary*. Second Edition (2010), p. 543.

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to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit." As the Tribunal understands it, a decision pursuant 41(5) rejecting an objection would be dispositive, but would not deprive Respondent of its right to raise objections under Rule 41(1) that are distinct from the objections already decided under Rule 41(5). This understanding is underscored by the purpose of Rule 41(5), which is to expedite the proceeding. To have two bites at the same apple, as Claimants have put it, would not be expedient but wasteful. Having clarified this point, the Tribunal turns to the argument of due process.

33. Rule 41(5) defines the process to be followed when a preliminary objection is made. As pointed out by Respondent, if it were not possible to respect due process because the objections are heard on the basis of a request for arbitration, then there would never be an opportunity to apply Rule 41(5).
34. These clarifications notwithstanding, the Tribunal is concerned about the efficiency of the proceeding. Respondent has reserved its right to raise other objections to the jurisdiction of the Tribunal besides the Objection, as it is entitled to do under Rule 41(1). The question here is not whether a preliminary objection will be addressed, but *when* it will be addressed. The Tribunal is concerned to add at its own initiative a new phase to the proceedings by considering the Objection at this stage when Respondent without any convincing explanation filed it late and intends to resubmit it together with additional objections. Evidently the Tribunal needs to deal with any objection Respondent may raise, and Rule 41(3) gives the Tribunal flexibility¹⁰ as to when to consider them. The circumstances in which the Objection has been filed and the procedural opportunities that exist for the Tribunal to consider Respondent's objections at a later stage of the proceeding do not justify the Tribunal's exercise of discretion under Rule 41(2) in the sense suggested by Respondent.

¹⁰ Modified in 2006 "to introduce some flexibility and make the suspension of the proceeding on the merits of the case, on the raising of a preliminary objection to jurisdiction, discretionary for the tribunal." Working Paper, p. 8.

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(c) Should the Tribunal strike from the record the Objection or should the Tribunal deem it to be a notification of jurisdictional objections and a request for bifurcation?

35. Claimants have requested that the Objection and attached documentation be struck from the record. For its part, Respondent petitions that the Tribunal consider the Objection as a notification of jurisdictional objections and a request for bifurcation.
36. From the perspective of the Tribunal, the proceeding will be most efficient if Respondent and the Tribunal have the benefit of Claimants' full Memorial and the Tribunal has an overview of all Respondent's objections before it decides on any possible bifurcation of the proceedings. As discussed at the First Session, if the Tribunal were to decide to bifurcate the proceeding, it would be inclined to limit pleadings to only one round.
37. The Tribunal has reached the conclusion that the Objection did not meet one of the conditions under Rule 41(5). Nonetheless it would be of no consequence to strike it from the record since Respondent intends to file the Objection again. Therefore, the Tribunal is prepared to accept the Objection as a notification of jurisdictional objections, without any further procedural consequences until the Respondent either makes supplementary jurisdictional objections or gives notice that no more will be forthcoming; this would exhaust all such objections of Respondent, which are of course to be filed as per Rule 41(1) at the latest on the due date of the Counter-Memorial.

DECISION

38. For the foregoing reasons the Tribunal has decided:

- 1) That the two temporal conditions set forth in Rule 41(5) are cumulative and the Objection does not meet the 30-day limit from the constitution of the Tribunal for filing a preliminary objection under Rule 41(5).
- 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(1).
- 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.

[signed]

On behalf of the Tribunal
Andrés Rigo Sureda
President of the Tribunal
Date: March 17, 2015