

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Nations Energy Corporation, Electric Machinery Enterprises Inc., and
Jaime Jurado**

Applicants

v.

Republic of Panama

Respondent

(ICSID Case No. ARB/06/19)

Annulment Proceeding

Procedural Order No. 1

Allocation of the Costs of the Proceeding

Rendered by an *ad hoc* Committee composed of:

Mr. Stanimir A. Alexandrov, President

Mr. Jaime C. Irrázabal, Member

Mr. Enrique Gómez-Pinzón, Member

Secretary of the Committee:

Mr. Marco Tulio Montañés-Rumayor

Date: May 17, 2012

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I. PROCEDURAL HISTORY

1. On March 21, 2011, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received an Application for Annulment and a request for a stay of enforcement of the award rendered on November 24, 2010 in the arbitration proceeding of *Nations Energy, Inc. and others v. Republic of Panama* (ICSID Case No. ARB/06/19). The application and the request were brought by Nations Energy Corporation, Electric Machinery Enterprises Inc., and Mr. Jaime Jurado (the “Applicants”) against the Republic of Panama (the “Respondent” or “Panama”).
2. On April 1, 2011, the Centre registered the Application for Annulment pursuant to Arbitration Rule 50(2)(a). It also informed the parties of the provisional stay of enforcement of the award pursuant to Arbitration Rule 54(2).
3. On May 9, 2011, the *ad hoc* Committee was constituted in accordance with Arbitration Rule 52(2) as follows: Mr. Stanimir A. Alexandrov (Bulgarian), President; Mr. Jaime C. Irrarrázabal (Chilean); and Mr. Fernando Mantilla-Serrano (Colombian).
4. On May 12, 2011, Panama filed a Request for Provisional Measures pursuant to Article 47 of the Convention and Arbitration Rule 39.
5. On Saturday, May 14, 2011, the Applicants filed a Proposal for Disqualification of Mr. Mantilla-Serrano and Mr. Alexandrov. On May 16, 2011, the Centre informed the parties that the proceeding was suspended pursuant to Arbitration Rule 9(6).
6. On May 18, 2011, following the resignation of *ad hoc* Committee Member Fernando Mantilla-Serrano, the Centre notified the parties of a vacancy on the Committee. The proceeding remained suspended pursuant to Arbitration Rule 10(2).
7. On May 23, 2011, Panama filed observations on the Applicants’ Proposal for Disqualification.
8. On June 2, 2011, following the appointment of Mr. Enrique Gómez-Pinzón (Colombian) by the Chairman of the Administrative Council of ICSID, the *ad hoc* Committee was reconstituted.
9. On June 3, 2011, the Applicants filed a response to Panama’s Observations on the Proposal for Disqualification.

10. On that same date, the Centre informed the parties that, pursuant to Arbitration Rule 9(4), Mr. Jaime C. Irrarrázabal and Mr. Enrique Gómez-Pinzón (the “Two Members”) would consider and vote on the Applicants’ Proposal for Disqualification of Mr. Alexandrov.

11. Also on June 3, 2011, the Committee fixed the briefing calendar regarding the Proposal for Disqualification. In accordance with this timetable, Panama filed observations on the Applicants’ response on June 9, 2011. Mr. Alexandrov then furnished explanations pursuant to Arbitration Rule 9(3) on June 16, 2011. The parties submitted their final observations on June 24, 2011.

12. On September 7, 2011, the Two Members rejected the Proposal for Disqualification pursuant to Arbitration Rule 9(4). The proceeding resumed that day in accordance with Arbitration Rule 9(6).

13. On September 8, 2011, the Centre requested the Applicants to pay US\$ 200,000.00 pursuant to Administrative and Financial Regulation 14(3)(d) and (e).

14. On September 14, 2011, the *ad hoc* Committee fixed the time limits for the parties’ written submissions with respect to Panama’s Request for Provisional Measures. Accordingly, the Applicants filed their observations on Panama’s request on September 22, 2011. Panama then filed its response on September 29, 2011, and the Applicants filed their reply on October 6, 2011. The Committee subsequently informed the parties that it intended to allow them an opportunity to present oral arguments on Panama’s request during the first session scheduled for October 26, 2011.

15. On October 17, 2011, the Centre informed the parties that it had not received the requested advance payment from the Applicants. In accordance with Administrative and Financial Regulation 14(3)(d), the Centre invited either party to pay the outstanding balance.

16. On October 18, 2011, the Committee decided to cancel the first session and the hearing on the Request for Provisional Measures due to the lack of funds.

17. On November 9, 2011, the ICSID Secretary-General moved that the Committee stay the proceeding pursuant to Administrative and Financial Regulation 14(3)(d) and (e).

18. On November 21, 2011, the *ad hoc* Committee decided to stay the proceeding because of the non-payment of the required advances. The Committee also informed the parties that, in accordance with Arbitration Rule 54(2), the stay of enforcement of the award had been terminated automatically.

19. On April 26, 2012, the Centre informed the parties that if payment was not received by May 21, 2012, the Secretary-General would move that the *ad hoc* Committee discontinue the annulment proceeding pursuant to Administrative and Financial Regulation 14(3)(d) and (e).

II. DISCUSSION

20. Arbitration Rule 28, which, pursuant to Arbitration Rule 53, applies to this proceeding *mutatis mutandis*, provides as follows:

(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

[...]

21. Administrative and Financial Regulation 14(3) reads as follows:

(b) the Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or expenses of the members of any Commission, Tribunal or Committee, unless sufficient advance payments shall previously have been made;

[...]

(d) in connection with every conciliation proceeding, and in connection with every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention. All advances and charges shall be payable, at the place and in the currencies specified by the Secretary-General, as soon as a request for payment is made by him. If the amounts requested are not paid in full within 30 days, then the Secretary-General shall inform both parties of the default and give an opportunity to either of them to make the required payment. At any time 15 days after such information is sent by the Secretary-General, he may move that the Commission or Tribunal stay the proceeding, if by the date of such motion any part of the required payment is still outstanding. If any proceeding is stayed for non-payment for a consecutive period in excess of six months, the Secretary-General may, after notice to and as far as possible in consultation with the parties, move that the competent body discontinue the proceeding;

(e) in the event that an application for annulment of an award is registered, the above provisions of this Rule shall apply *mutatis mutandis*, except that the applicant shall be solely responsible for making the advance payments requested by the Secretary-General to cover expenses following the constitution of the Committee, and without prejudice to the right of the Committee in accordance with Article 52(4) of the Convention to decide how and by whom expenses incurred in connection with the annulment proceeding shall be paid.

22. It is clear from the above-mentioned provisions that the Committee has broad powers to rule on the costs of the proceeding. It “may . . . decide” “at any stage of the proceeding,” “with respect to any part of the proceeding,” “how and by whom expenses incurred in connection with the annulment proceeding shall be paid.” The Committee has decided to exercise the authority granted to it under Arbitration Rule 28 in view of the particular circumstances of this case.

23. Both parties made procedural requests requiring the pendency of the proceeding. The Applicants filed a Proposal for Disqualification. Panama submitted a Request for Provisional Measures. As described above, pursuant to these requests, the parties filed several rounds of written submissions which the Committee reviewed and considered. As a result, the members of the *ad hoc* Committee have incurred fees in the amount of US\$ 76,140.60, and the Centre has incurred expenses in the amount of US\$ 52,727.51, for a total of US\$ 128,868.11. That total amount is allocated as follows: (i) US\$ 31,087.50 for considering and deciding the Proposal for Disqualification; (ii) US\$ 45,053.10 for the review and consideration of the Request for Provisional Measures; and (iii) US\$ 52,727.51 for other matters relating to the proceeding.

24. First, the Committee holds that the Applicants must bear the costs of US\$ 31,087.50 incurred in connection with their proposal for disqualification. The proposal for disqualification failed and the *ad hoc* Committee sees no reason why the Applicants should not bear the ICSID costs and the fees of the Two Members of the *ad hoc* Committee in relation to this stage of the proceeding. Accordingly, the Applicants shall pay US\$ 31,087.50 to the Centre by May 31, 2012.

25. Second, the Committee finds that Panama must bear the costs associated with its Request for Provisional Measures. The Committee believes that Panama’s request, pursuant to Article 47 of the Convention and Arbitration Rule 39, was unnecessary and possibly beyond the scope of the Committee’s powers under Article 52. Panama could have simply requested the lifting of the stay of enforcement of the award pursuant to Arbitration Rule 54(2). Instead, Panama sought provisional measures under Article 47 of the ICSID Convention even though Article 52(4) of the Convention omits Article 47 from the list of Convention articles applicable to annulment proceedings. As a result, the *ad hoc* Committee had to spend significant time considering Panama’s request.

26. Moreover, Panama's own conduct arguably ran counter to its position regarding the urgency and necessity of provisional measures. Panama applied for provisional measures on May 12, 2011. Knowing that the Applicants had not made the advance payment, on October 14, 2011, Panama wrote to ICSID that it "was neither required nor prepared to make the requested payment" because, under Administrative and Financial Regulation 14(3)(e), the applicant in an annulment proceeding is solely responsible for making the advance payment. On October 17, 2011, the Committee reminded Panama that its request for provisional measures was still pending and invited either party to pay the outstanding balance in accordance with Administrative and Financial Regulation 14(3)(d). Panama did not take any action. Because it knew that the *ad hoc* Committee would not proceed to rule on the Request for Provisional Measures if neither party made the required advance payment, Panama's response was seemingly inconsistent with the arguments made in its Request for Provisional Measures regarding the urgency and necessity of such measures. Accordingly, Panama shall pay US\$ 45,053.10 to the Centre by May 31, 2012.

27. Finally, the Committee concludes that the Applicants must bear all other expenses incurred by the Centre. These expenses include, *inter alia*, the administrative charges pursuant to ICSID's Schedule of Fees, fees for the cancelled first session, and the Centre's mailing and shipping costs, in the total amount of US\$ 52,727.51.

28. The Applicants initiated this annulment proceeding but have refused to make the advance payments as required by Administrative and Financial Regulation 14(3)(e), which provides that an applicant in an annulment proceeding is solely responsible for making the advance payments until the *ad hoc* Committee decides on the allocation of costs.

29. In addition, the Applicants' conduct was not entirely transparent or straightforward. It was only on October 17, 2011 that the Applicants finally informed the Centre that "[f]or reasons that cannot be disclosed at this time . . . the requested expenses will be paid in the near future, but within the timeline allotted by the ICSID Administrative and Financial Regulations. Pursuant to ICSID Rules, we understand that this may result in the postponement of the First Session." This information was provided to the Committee on the eve of the first session and hearing on provisional measures. Had the Committee known that the Applicants did not intend to pay, the Committee could have suspended its work at an earlier date. Moreover, the Applicants' vague promise of payment at a future unspecified date resulted in further delays and additional costs.

30. Accordingly, the Applicants shall also pay US\$ 52,727.51 to the Centre by May 31, 2012.

31. The Applicants shall make their payment according to the details below:

| | |
|------------------------|-------------------------------------------------------|
| <i>Amount:</i> | US\$ 83,815.01 |
| <i>Account Holder:</i> | International Bank for Reconstruction and Development |
| <i>Account:</i> | IBRT A/C No. 2000192003489 |

Bank: Wachovia Bank N.A., New York
Reference: TF071672 – ICSID Case No. ARB/06/19(Annulment)–from Nations Energy Corporation, Electric Machinery Enterprises Inc. and Jaime Jurado
Swift Code: PNBPUS3NNYC.

32. Panama shall make its payment according to the details below:

Amount: US\$ 45,053.10
Account Holder: International Bank for Reconstruction and Development
Account: IBRT A/C No. 2000192003489
Bank: Wachovia Bank N.A., New York
Reference: TF071672 – ICSID Case No. ARB/06/19(Annulment)–from Panama
Swift Code: PNBPUS3NNYC

III. ORDER

33. For the above reasons, the *ad hoc* Committee makes the following order:

- a. The Applicants shall bear all costs relating to their Proposal for Disqualification, as well as all other expenses incurred by the Centre except as provided in (b) below. The total amount of such costs and expenses is US\$ 83,815.01 (US\$ 31,087.50 plus US\$ 52,727.51). The Applicants shall make that payment to ICSID by May 31, 2012.
- b. Panama shall bear the costs relating to its request for provisional measures. The total amount of such costs is US\$ 45,053.10. Panama shall make that payment to ICSID by May 31, 2012.



Stanimir A. Alexandrov

President

On behalf of the *ad hoc* Committee