



Grenada

## Taiwanese bank fails to attach ICSID award against Grenada

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A US court has blocked a state-owned Taiwanese bank from attaching the proceeds of an ICSID award rendered in favour of Grenada in a dispute with US oil tycoon Jack Grynberg.

In an order on 22 June, the US District Court for the Southern District of New York said the ICSID costs award, for US\$300,000, could not be used to satisfy part of a US\$22 million judgment in favour of Taiwan's Export-Import Bank against Grenada arising from loan defaults.

The award funds had not been "used for a commercial activity in the United States" and thus could not benefit from the commercial exception in the Foreign Sovereign Immunities Act, said **District Judge Harold Baer**.

Grenada won the award in late 2010 in the second of two arbitrations filed by Grynberg's RSM Production Corporation over an alleged breach of a petroleum exploration agreement. Using a fast-track dismissal procedure, a tribunal chaired by Canadian **J William Rowley QC** said the claim was "manifestly without legal merit" and ordered RSM to pay the state's legal fees and arbitration costs.

After RSM failed to pay, the state collected on the award in July last year via a court order against the bank accounts of the company's shareholders. But Ex-Im Bank, which has been seeking to collect on its US\$22 million judgment since 2007, immediately applied to attach the funds.

Judge Baer said the ICSID award funds had "not been disbursed for commercial or any other activity" because they had been immediately deposited with the court pending his decision. The Foreign Sovereign Immunities Act requires that the targeted assets are used for commercial activity at the time of the attempted attachment, not that they could or will be used for such purposes in the future, he noted – citing recent unsuccessful attachment bids by US hedge funds against Argentina.

Ex-Im Bank argued that the commercial exception applied because the arbitration that generated the funds arose from a commercial venture; Grenada had already used a portion of the funds to pay its Colorado counsel in connection with transferring the funds to the court; and the state intended to use the funds to pay its counsel in the arbitration, Freshfields Bruckhaus Deringer.

Judge Baer rejected all these arguments, holding that how the arbitration funds came into existence is "immaterial"; that minor reimbursements did not mean that the entire fund had been put to commercial use; and that the funds had not been legally designated for payment to Freshfields.

At the same time the judge lifted restraining notices that Ex-Im Bank had obtained against various airlines, cruise lines and shipping companies preventing them from paying taxes and other fees to Grenada's aviation, ports, water and waste management authorities. The restrained airlines had included American Airlines, Delta, British Airways and Virgin Atlantic – putting Grenada's international airport at risk of closure, according to local press reports.

Judge Baer held such funds immune from attachment under the act even if their recipients are (as Ex-Im Bank argued) "alter egos" of the state – because they "are used as a source of revenue for carrying out public functions in Grenada".

The bank is to appeal the decision before the US Court of Appeals for the Second Circuit. Counsel on both sides did not respond to a request for comment.

Ex-Im bank made four multimillion-dollar loans to Grenada in the 1990s at a time when the island afforded Taiwan diplomatic recognition. But in 2005 Grenada severed relations and switched its allegiance to China, which regards the Taiwanese government as illegitimate.

Earlier this year Caricom, a bloc of 15 Caribbean states, described the bank's use of restraining notices to extract payment from Grenada as a form of "economic strangulation".

RSM recently initiated its fifth ICSID claim, this time against the Caribbean island of St Lucia. The company seeks more than US\$200 million over the alleged breach of an agreement signed with St Lucian prime minister Kenny Anthony in 2000 that granted RSM offshore oil exploration rights in the island's northeastern Dauphin quarter. The claim comes a few months after Anthony was re-elected as prime minister after nine years in opposition.

The company has also brought claims against Cameroon and the Central African Republic at the centre.

United States District Court for the Southern District of New York

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