

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

In the third annulment proceeding between

TECO GUATEMALA HOLDINGS, LLC

Claimant

and

REPUBLIC OF GUATEMALA

Respondent

ICSID Case No. ARB/10/23

**ORDER OF THE *AD HOC* COMMITTEE TAKING NOTE OF THE
DISCONTINUANCE OF THE PROCEEDING**

Members of the Committee

Ms. Deva Villanúa, President of the *ad hoc* Committee
Prof. Lawrence Boo, Member of the *ad hoc* Committee
Prof. Doug Jones AO, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee

Ms. Mercedes Cordido-Freytes de Kurowski

Assistant to the ad hoc Committee

Mr. Felipe Aragón Barrero

Date of dispatch to the Parties: 24 January 2023

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Representing

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I. BACKGROUND

1. The case concerns a dispute between TECO Guatemala Holdings, LLC, a company organized under the laws of the State of Delaware, U.S. [**“TECO”** or **“Claimant”**] and the Republic of Guatemala [**“Guatemala”**, **“Respondent”** or **“Applicant”**], arising out of the alleged violation by the *Comisión Nacional de Energía Eléctrica* (Guatemala’s electricity regulator), of the regulatory framework governing the setting of the energy distribution tariffs of *Empresa Eléctrica de Guatemala, S.A.* [**“EEGSA”**], the country’s largest electricity distribution company, in which Claimant had an indirect share.
2. Guatemala and TECO are jointly denominated as the **“Parties”**.

A. The Original Arbitration and Previous Annulment Proceedings

3. On 20 October 2010, TECO submitted a Request for Arbitration in accordance with Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [**“ICSID Convention”**] invoking protection under Chapter 10 of the Dominican Republic-Central America Free Trade Agreement [**“DR-CAFTA”**], in force for the United States since 1 March 2006, and for Guatemala since 1 July 2006
4. On 19 December 2013, the arbitral tribunal presided by Mr. Alexis Mourre, and also comprising Prof. William W. Park and Dr. Claus von Wobeser [the **“Original Tribunal”**] rendered its Award [the **“Original Award”**], finding that Guatemala had breached its obligations to accord TECO Fair and Equitable Treatment under Article 10.5 of the DR-CAFTA. The Original Tribunal awarded USD 21.1 million in damages, plus interest, corresponding to TECO’s “historical losses” claim¹ [**“Historic Losses”**]; it dismissed Claimant’s USD 222 million “loss of value” claim [**“Loss of Value Claim”**]²; and it

¹ Original Award, paras. 724, 780.

² Original Award, paras. 743-761.

decided that Guatemala would have to pay the entirety of its costs and expenses and to pay USD 7.5 million corresponding to TECO’s legal costs and expenses.

5. On 18 April 2014, Guatemala filed an application to annul the Original Award [**“First Annulment Application”**] in its entirety. On that same date, TECO filed another annulment application seeking the partial annulment of the Original Award [**“Second Annulment Application”**]. On 5 April 2016, an ICSID *ad hoc* Committee presided by Prof. Bernard Hanotiau, and also comprising Ms. Tinuade Oyekunle and Prof. Dr. Klaus Sachs, as members, [the **“Original Committee”**] issued its Decision on Annulment [**“Original Annulment Decision”**] addressing the First and Second Annulment Applications. In the Original Annulment Decision, the Original Committee (i) rejected all grounds for annulment raised by Guatemala; and (ii) upheld two grounds for partial annulment raised by TECO and decided to annul the Original Award’s decision on damages for the Loss of Value Claim, the decision on interest on the Historic Loss and the decision on costs³. As a result, the Original Award was partially annulled.

B. The Resubmission Proceeding

6. On 23 September 2016, TECO resubmitted its claim following the partial annulment of the Original Award. The arbitral tribunal presided by Prof. Vaughan Lowe QC, appointed by Secretary-General pursuant to DR-CAFTA Article 10.19.3 and Article 37(2)(a) of the ICSID Convention; and also comprising Dr. Stanimir Alexandrov, appointed by the Claimant; and Prof. Brigitte Stern, appointed by the Respondent [the **“Resubmission Tribunal”**] rendered its award on 13 May 2020 [the **“Resubmission Award”**].
7. In the Resubmission Award, the majority of the Resubmission Tribunal awarded damages in the amount of USD 26.7 million corresponding to the Loss of Value Claim and USD 838,784 on interests on Historic Losses. The Resubmission Tribunal further ordered

³ Original Annulment Decision, para. 382.

Guatemala to pay interest on the amounts awarded, to bear its own costs and to reimburse 75% of the Claimant's costs⁴.

8. On 16 October 2020, at Claimant's request and after hearing Respondent's observations, the Resubmission Tribunal issued a Supplementary Decision [the "**Supplementary Decision**"], awarding interest to TECO on the costs it incurred in the Original Arbitration.

II. PROCEDURAL HISTORY

9. On 12 February 2021 Guatemala filed with ICSID an application for annulment of the Resubmission Award and the Supplementary Decision [**"Third Annulment Application"**], pursuant to Article 52 of the ICSID Convention and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings [**"ICSID Arbitration Rules"**]. With its application, Guatemala requested the stay of enforcement of the Resubmission Award and the Supplementary Decision pursuant to Article 52(5) of the ICSID Convention.
10. On 22 February 2021, the Secretary-General of ICSID registered the Third Annulment Application and notified the Parties that the enforcement of the Award was provisionally stayed pursuant to Arbitration Rule 54(2).
11. In the Third Application for Annulment Guatemala sought the annulment of the Resubmission Award and the Supplementary Decision on the following grounds: (i) the Resubmission Tribunal had not been properly constituted (Article 52(1)(a)); (ii) the Resubmission Tribunal had manifestly exceeded its powers (Article 52(1)(b)); (iii) there had been a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iv) the Resubmission Award failed to state the reasons on which it was based (Article 52(1)(e)).
12. On 31 March 2021, the Secretary-General notified the Parties of the constitution of the *ad hoc* Committee [the "**Committee**"] in accordance with Article 52(3) of the Convention and

⁴ Resubmission Award, para. 155.

Rule 52(2) of the ICSID Arbitration Rules. The Committee is composed of Ms. Deva Villanúa, a national of Spain, as President; Professor Doug Jones, a dual national of Australia and Ireland; and Prof. Lawrence Boo, a national of Singapore. The members of the Committee were respectively designated to the ICSID Panel of Arbitrators by Spain, Australia and Singapore.

13. On 12 May 2021, the Committee held a first session with the Parties by video conference.
14. On 17 May 2021, the Committee issued Procedural Order [“**PO**”] No. 1 which set out the procedural framework and the timetable for the annulment proceeding. It provided, *inter alia*, that the proceedings were to be conducted in accordance with ICSID Arbitration Rules in effect from 10 April 2006, except to the extent modified and/or supplemented by the DR-CAFTA; and that the procedural languages were English and Spanish. In addition, Section 25 of PO No. 1, stated that the Committee would issue an order confirming the continuation of the stay of the enforcement of the Resubmission Award and the Supplementary Decision until the Committee had rendered its Decision on Annulment.
15. On 17 May 2021, as requested by Guatemala and agreed by the Parties, the Committee issued a Decision on Stay of Enforcement, confirming the continuation of the stay of enforcement of the Resubmission Award and the Supplementary Decision, until the Committee had rendered its Decision on Annulment.
16. On 11 August 2021, Guatemala filed a request for the Committee to decide on the admissibility of new evidence that it intended to submit with its Memorial on Annulment. This was followed by observations from TECO of 17 August 2021 and a reply from Guatemala of 18 August 2021. On 23 August 2021, the Committee informed the Parties of its summary decision granting Guatemala’s request to submit new evidence with its Memorial on Annulment, which was followed by a fully motivated decision issued on 1 September 2021, recorded in PO No. 2.

17. On 25 August 2021, Guatemala filed a Memorial on Annulment, together with supporting exhibits and legal authorities, compiled in a consolidated list of exhibits and legal authorities.
18. On 2 December 2021, TECO filed a request for the Committee to decide on the admissibility of new evidence it intended to submit with its Counter-Memorial on Annulment, as supplemented on 3 December 2021. This was followed by observations from Guatemala of 6 December 2021. On 8 December 2021, the Committee informed the Parties of its summary decision partially granting TECO's request to submit new evidence with its Counter-Memorial, which was followed by a fully motivated decision issued on 15 December 2021, recorded in PO No. 3.
19. On 8 December 2021, TECO filed its Counter-Memorial on Annulment, together with supporting exhibits and legal authorities, compiled in a consolidated list of exhibits and legal authorities.
20. On 25 and 31 January 2022, Guatemala submitted two requests asking the Committee to order the exclusion of certain evidence presented by TECO with its Counter-Memorial on Annulment. These were followed by observations from TECO of 3 February 2022. On 11 February 2022, the Committee issued PO No. 4 addressing Guatemala's requests for the exclusion of evidence.
21. On 16 February 2022, Guatemala requested authorization to present new evidence and an extension of the deadline to file its Reply on Annulment. This was followed by observations from TECO of 18 February 2022. On 22 February 2022, the Committee informed the Parties of its summary decision granting Guatemala's request of 16 February 2022 and fixing new deadlines for the filing of Guatemala's Reply on Annulment and TECO's Rejoinder on Annulment. On 1 March 2022, the Committee issued a fully motivated decision, recorded in PO No. 5.

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22. On 7 March 2022, Guatemala filed its Reply on Annulment, together with supporting exhibits and legal authorities, compiled in a consolidated list of exhibits and legal authorities.
23. On 31 May 2022, TECO requested authorization to present new evidence with its Rejoinder on Annulment; and the next day, it submitted a petition asking for a two-day extension of the deadline to file the Rejoinder on Annulment. These were followed by observations from Guatemala of 1 and 2 June 2022. On 3 June 2022, the Committee issued PO No. 6 granting TECO’s request of 31 May 2022 and allowing an extension of the deadline for the filing of TECO’s Rejoinder on Annulment.
24. On 8 June 2022, TECO filed its Rejoinder on Annulment, together with supporting exhibits and legal authorities, compiled in a consolidated list of exhibits and legal authorities.
25. On 5 July 2022, the Committee held a pre-hearing organizational meeting with the Parties by video conference.
26. On 14 July 2022, the Committee issued PO No. 7 concerning the organization of the Hearing.
27. Pursuant to the procedural calendar agreed by the Parties, the Hearing on Annulment [the “**Hearing**”] took place between the 27 and 29 July 2022, at the facilities of the International Dispute Resolution Centre [“**IDRC**”] in London, with the arrangement for certain passive participants to join remotely by video conference.
28. Participating in the Hearing were:

COMMITTEE		
Ms. Deva Villanúa	President	In-Person
Prof. Doug Jones AO	Co-member	In-Person
Prof. Lawrence Boo	Co-member	In-Person

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ICSID		
Mercedes Cordido-Freytes de Kurowski	Secretary of the Committee	In-Person
Ms. Ivania Fernández	Paralegal	Remotely/ Washington, D.C
Dimitrios Georgios Kontogiannis	Intern	Remotely/ Greece

ASSISTANT TO THE COMMITTEE		
Mr. Felipe Aragón	Assistant to the Committee	In-Person

GUATEMALA		
<i>Counsel:</i>		
Dr. Ignacio Torterola	Counsel for the Republic of Guatemala	In person
Mr. Diego Gosis	Counsel for the Republic of Guatemala	In person
Mr. Quinn Smith	Counsel for the Republic of Guatemala	In person
Mr. Pablo Mori	Counsel for the Republic of Guatemala	In person
Mr. Carmine Pascuzzo	Counsel for the Republic of Guatemala	In person / [Guatemala's Room in IDRC]
Mr. Farhod Sharipov	Counsel for the Republic of Guatemala	In person / [Guatemala's Room in IDRC]
Ms. Fabiola Madrigal	Counsel for the Republic of Guatemala	In person / [Guatemala's Room in IDRC]
Mr. Nicolas González	Counsel for the Republic of Guatemala	In person
Ms. Katherine Sanoja	Counsel for the Republic of Guatemala	Remotely, Miami
Mr. José Angelo David	Counsel for the Republic of Guatemala	Remotely, Washington D.C.
Ms. Bethel Kassa	Counsel for the Republic of Guatemala	Remotely, Washington D.C.
<i>Party Representatives:</i>		
Lic. Wuelmer Gómez	Attorney General of the Republic of Guatemala	In person
Lic. Rita Castejón	Advisor to the Superior Office of the Attorney General's Office	Remotely, Guatemala
Lic. Cristián Rodríguez	Advisor to the Superior Office of the Attorney General's Office	Remotely, Guatemala
Lic. Lilian Nájera	Head of the International Affairs Unit of the Attorney General's Office	In person
Mr. Julio Santiz	Legal Professional of the Attorney General's Office	In person [R Room in IDRC]

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Mr. Mario Mérida	Legal Professional of the Attorney General's Office	Remotely, Guatemala
Mr. Andrés Puente	Legal Assistant of the Attorney General's Office	Remotely, Guatemala
Mr. Diego de León	Legal Assistant of the Attorney General's Office	Remotely, Guatemala
Lic. Janio Rosales	Minister of Economy	Remotely, Guatemala
Lic. Maria Luisa Flores	Vice Minister of Integration and Foreign Trade	Remotely, Guatemala
Lic. Victoria Meza	Director of Foreign Trade	Remotely, Guatemala
Ms. Karla Liquez	Legal Advisor, Foreign Trade	In person
Ms. Ivannia Ponce	Legal Advisor, Foreign Trade	Remotely, Guatemala
Ms. Tania Guzmán	Legal Advisor, Foreign Trade	Remotely, Guatemala

TECO		
<i>Counsel:</i>		
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Mr. Petr Polášek	Counsel for TECO	In-Person
Ms. Kristen M. Young	Counsel for TECO	In-Person
Ms. Poorvi Satija	Counsel for TECO	In-Person
Mr. Kit Chong Ng	Counsel for TECO	In-Person
<i>Party Representatives:</i>		
Mr. David Nicholson	TECO Energy, Inc., Vice President Legal, General Counsel and Chief Ethics and Compliance Officer	In-Person
Mr. Javi Cuebas	TECO Energy, Inc., Senior Corporate Counsel	In-Person
<i>Legal Assistant and Trainee:</i>		
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INTERPRETERS		
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Ms. Silvia Colla	English-Spanish Interpreter	In-Person
Ms. Anna Sophia Chapman	English-Spanish Interpreter	In-Person

COURT REPORTERS		
Mr. Trevor McGowan	English Court-Reporter	In-Person
Ms. Elizabeth Cicoria	Spanish Court-Reporter [DR-Steno]	In-Person
Ms. Marta Rinaldi	Spanish Court-Reporter	In-Person

	[DR-Steno]	
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29. On 19 August 2022, the Parties submitted their agreed corrections to the Hearing Transcripts.
30. On 12 September 2022, the Committee issued PO No. 8 concerning procedural issues, including among other things, a procedural calendar (i) for the Parties to submit two rounds of simultaneous answers and replies to the Committee’s questions posed during the Hearing [**“Committee’s Questions”**]; (ii) to seek leave, comment and decide on the admissibility of new legal authorities; and (iii) for the Parties’ respective Statements of Costs.
31. In accordance with PO No. 8, on 13 and 19 September 2022, the Parties submitted an agreed list of New Legal Authorities and New Responsive Legal Authorities, requesting leave from the Committee for their introduction into the record, which the Committee authorized on 20 September 2022.
32. On 25 October 2022, the Parties submitted a joint request for the Committee to authorize an extension of the deadlines to file (i) the first and second round of submissions on the Committee’s Questions; and (ii) simultaneous translations and Statements of Costs. On 26 October 2022, the Committee granted the extensions sought.
33. On 10 November 2022, at the Parties’ request, the Committee confirmed a further extension of deadlines of the procedural calendar.
34. On 23 November 2022, TECO informed the Committee that the Parties were in advanced stages of settlement discussions and had agreed to inform the Committee and seek a stay of the proceedings after the execution of documents, until satisfaction of the settlement, at which time a withdrawal would be sought. TECO also indicated that in light of a publication of an article by IA Reporter regarding the anticipated settlement, as a matter of courtesy, the Parties wanted to bring this to the Committee’s attention and hoped and expected to revert with a request for suspension soon. Guatemala confirmed this agreement by a subsequent email of the same date.

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35. On 24 November 2022, the Committee took note of the Parties’ communications of 23 November 2022 informing of their settlement discussions and of an eventual request for the suspension of the proceedings.
36. On 29 November 2022, Guatemala informed the Committee that, “following settlement negotiations, the Parties have agreed to suspend the proceedings and all pending time limits, which suspension shall last until December 22, 2022. The Parties respectfully request the Committee to accept the suspension agreed.” On that same date, TECO “confirm[ed] its agreement with Guatemala’s request for a suspension till 22 December 2022”.
37. On 30 November 2022, the Committee (i) acknowledged receipt of the Parties’ respective communications of 29 November 2022; (ii) took note of the Parties’ agreement, and suspended the proceeding and all pending time limits until 22 December 2022; and (iii) invited the Parties to inform the Committee by 19 December 2022, on how they wished to proceed.
38. On 19 December 2022, the Parties submitted a joint letter to the Committee, which states:
- “...Pursuant to ICSID Arbitration Rule 43(1), the Republic of Guatemala and TECO Guatemala Holdings, LLC jointly request the discontinuance of the proceedings in ICSID Case No. ARB/10/23.*
- The parties respectfully request that the Committee cease work on drafting its decision on annulment ...”.*
39. On 29 December 2022, the Committee noting that in their joint request for discontinuance of the proceedings the Parties did not request lifting the suspension of the enforcement of the Resubmission Award, invited the Parties to clarify their agreement on that issue.
40. On 11 January 2023, the Parties submitted a joint letter in such regard, stating:
- “On behalf of both the Republic of Guatemala (the “Republic,” or “Guatemala”), and TECO Guatemala Holdings LLC (“TECO”) (together, the “Parties”), and pursuant to the Committee’s inquiry sent via email on December 29, 2022, we hereby inform the Committee of the Parties’*

agreement and understanding that the discontinuance of the Third Annulment Proceeding would entail the lifting of the suspension on the enforcement of the award dated May 13, 2020 issued by the Resubmission Tribunal in ICSID Case No. ARB/10/23 (“Resubmission Award”).

As the Committee is aware, TECO and Guatemala have settled the dispute between them pursuant to a Settlement Agreement dated November 28, 2022 (the “Agreement”). The Agreement embodies the Parties’ decision to put an end to the controversies among them that gave rise to the Resubmission Award.

As such, notwithstanding the corresponding lifting of the suspension of the enforcement of the Resubmission Award, the Parties confirm that the conditions set forth in the Settlement Agreement have been satisfied and the Parties thus have definitively resolved the dispute between them. In light of the above, the Parties jointly reiterate their request for the discontinuance of the proceedings in accordance with Rule 43(1) of the ICSID Rules.”

41. ICSID Arbitration Rule 43(1) provides:

“If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding”.

42. ICSID Arbitration Rule 53 provides:

“The provisions of these Rules shall apply mutatis mutandis to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee”.

III. ORDER

43. THEREFORE, in accordance with the Parties' request, and pursuant to Rules 43(1) and 53 of the ICSID Arbitration Rules, the Committee hereby takes note of the discontinuance of the annulment proceeding.
44. In addition, the Committee also takes note of the Parties' agreement and understanding that the discontinuance of the Third Annulment Proceeding entails the lifting of the suspension on the enforcement of the Resubmission Award.
45. Once the costs of the annulment proceeding are paid, including the Committee's fees and expenses and the Centre's expenses and administrative charges, any remaining balance will be reimbursed to Guatemala.

[signed]

Ms. Deva Villanúa
President of the *ad hoc* Committee

[signed]

Prof. Lawrence Boo
Member of the *ad hoc* Committee

[signed]

Prof. Doug Jones AO
Member of the *ad hoc* Committee